Corruption in Investment Treaty Arbitration
A Balanced Approach to Corruption Issues

Carsten Wendler

Preface

The idea for this dissertation was born during my LL.M. studies at NYU in 2008/2009 at an investment arbitration seminar led by Professor Robert Howse. At that time, the zero tolerance approach established in *World Duty Free v Kenya* was the dominant school for dealing with issues of corruption in investment arbitration. The broad concept of the balanced approach developed in my seminar thesis was then the basis for an article pubished with my estimeed colleague and friend Dr Andreas Kulick, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption."

With the aim of developing a well-researched and solid concept of the balanced approach, I decided to postpone my start as international arbitration practitioner at Freshfields Bruckhaus Deringer and dived into academic research. I found a great mentor in Professor Dr Peter-Heinz Mansel as supervisor for my dissertation. I am grateful for his constant support and guidance through the challenges and obstacles of this academic journey. He also encouraged me to expand my research as a visiting scholar in Berkeley and the Lauterpacht Centre in Cambridge. He also appreciated my decision to later combine my academic venture with my work as an international arbitration practitioner at Freshfields Bruckhaus Deringer.

The dissertation was submitted in mid 2015 and the research, including data, books, articles and cases, are as of the date of submission. The underlying arguments remain, however, valid. I am currently working on an updated book on the balanced approach to corruption issues in investment arbitration and decided to publish this dissertation via open access to encourage academic discussion.

Special thanks go to all the bright minds that I enjoyed discussing this topic with, including Professor James Crawford, Professor Dr Griebel as my second referee, Dr Andreas Kulick, Dr Llamzon Allysious, Cecily Rose and many others. I would also like to thank the future of arbitration practitioners who helped me reviewing the manuscript, including Samuel Trujillo, Maria Cristina Rosales del Prado, Domen Tursic, Olusola Odunsi, Mohamed Bouzagou Ouali, Jorge Gonzalez Calderon, and many more.

Finally, I am grateful for the unlimited support of my parents who have encouraged and supported me at every step of this long journey. This dissertation would, however, not have been possible without the caring support of my wonderful wife Maru, thank you so much.

April 2022

Carsten Wendler

CHAPTER ONE:
OVERVIEW ON CORRUPTION AND ITS CONSEQUENCES

A. Introduction

Corruption is a widespread phenomenon in international business transactions, including trade and investment,[1] and has commonly been labelled as the 'cancer of commerce'.[2] Corruption is a phenomenon that has plagued human society for thousands of years[3] and has been omnipresent[4] from time immemorial.[5] Nonetheless, it has only recently become prominent in investor-State disputes.

One reason for this current heightened awareness of corruption might lay in the recently formed global consensus against this problem evidenced in the various international instruments against corruption in the last decades.[6] Before, absurd and contradicting approaches ruled the international business world. While bribery of *domestic* public officials has for a long time been prohibited in most industrial countries, bribery of *foreign* public official was considered to be unavoidable and a necessary way of doing business. In various countries – despite the fact that corruption was generally seen as dubious – bribery of foreign public officials was not prohibited by law or was even subject to favourable tax exemptions.[7]

So far investment arbitration awards in which corruption was finally established and became decisive for the outcome of the case are scarce. In fact, as of the date

---

[1] This has been acknowledged in the Preamble of the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

[2] World Bank President James D. Wolfensohn used this term in his Annul Speech in 1997, see World Bank - Poverty Reduction and Economic Management, "Helping Countries Combat Corruption, The Role of the World Bank" (The World Bank, September 1997), 2. See also Karen Mills, "Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto," in *International Commercial Arbitration: Important Contemporary Questions*, ed. Albert Jan Van den Berg, vol. 11, ICCA Congress Series (Kluwer Law International, 2003), 288.

[3] John Noonan, *Bribes* (New York: Macmillan, 1984). Noonan starts his analysis with examples of corruption as far back in history as 3.000 B.C.

[4] Hilmar Raeschke-Kessler and Dorothee Gottwald, "Corruption," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford et al.: Oxford University Press, 2008), 584–616. Raeschke-Kessler and Gottwald begin their essay with "Corruption is omnipresent".

[5] An often-cited passage in the corruption literature to note that corruption is not only a modern day problem but has been recognised as a problem in the ancient world originated from an Indian writer named Kautilya (ca. 250 BC) in his Arthashastra:
"*Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least, a bit of the king's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out (while) taking money (for themselves)...*"

[6] See below at Chapter Two.

[7] An often-cited example in corruption literature is the example of Germany. Until the implementation of the OECD Anti-Bribery Convention in Germany in 1998, bribes paid to foreign public officials were tax deductible in Germany, see e.g. OECD Country Report Germany on the implementation of the OECD Anti-Bribery Convention, available under http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2386529.pdf.

of this study, i.e. 2015, there is no published case where the investor was successful in proving that corrupt acts of the host State impaired its investment. As of 2015, there have been two investment arbitration cases, in which tribunals have dismissed the case based on investor corruption. In *World Duty Free v Kenya*,[8] for instance, the investor itself had admitted having bribed the former President of Kenya in order to obtain the investment. In the view of the tribunal, the corrupt act of the investor violated *inter alia* international public policy.[9] In the case of *Metal Tech v Uzbekistan*,[10] the tribunal became suspicious due to a dubious consultancy agreement and was finally convinced that the investor had bribed public officials in order to make the investment. Based on the violation of local anti-corruption legislation, the tribunal dismissed the case for lack of jurisdiction based on the 'in accordance with host State law' clause in the underlying bilateral investment treaty.[11]

Hence, in both cases the investor lost the entire protection granted by investment law due to the fact that it was involved in corruption. The outcome is not surprising at first glance. The repugnance that corruption causes will lead to the notion that an investor with unclean hands forfeits its right to be heard by an international investment tribunal. This or a similar notion will most certainly be the general first thought when somebody is confronted with the topic of corruption in international investment law. However, many questions remain unanswered.

The question of how to deal with corruption in international investment arbitration has received much attention in scholarship and arbitral practice in the last years. In fact, during the years of research of this study the publications and conferences on this topic have steadily increased.[12] While this development might have a multitude of reasons, public awareness is most likely also influenced by big

[8] *World Duty Free Company Limited v the Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 6 October 2006 (hereinafter: "*World Duty Free v Kenya*, Award").
[9] *World Duty Free v Kenya*, Award, para 157. See also discussion below at Chapter Three B.III.1, p 102 et seq.
[10] *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 (hereinafter: "*Metal-Tech v Uzbekistan*, Award").
[11] *Metal-Tech v Uzbekistan*, Award, paras 372-373. See discussion of *Metal-Tech v Uzbekistan* below at Chapter Seven A, p 241 et seq.
[12] To name just a few conferences see e.g. "*To Protect or not to Protect: Is there Non-protected Investment?*", 50 Years of Bilateral Investment Treaties Conference 2009, Taking Stock and a Look to the Future, 1-3 December 2009, Frankfurt, Germany; "*Corruption: How should tribunals deal with evidence of corruption in the making of an investment or the securing of government permits?*", Conference on International Investment Arbitration, 20 January 2010, Singapore; "*Investments tainted by Corruption: Consequences for the Arbitral Process*", Düsseldorf International Arbitration Conference: Manipulation and Arbitration, 28 September 2012; "*How to deal with corruption allegations in international arbitration*", GAR Live Paris, 15 November 2013; "*Corruption, money laundering and compliance from an international arbitration perspective*", 12th Petersberg Arbitration Days, 21-22 February 2014, Bonn, Germany; ICCA Congress (Miami 2014), Session "*Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse*", for an overview of the session see Elizabeth Karanja, "Report on the Session Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse," in *Legitimacy: Myths, Realities, Challenges*, ed. Albert Jan Van den Berg, vol. 18, ICCA Congress Series (Kluwer Law International, 2015), 439–50.

scandals, which caught public attention. With regard to corruption in general, a recent event with significant impact is the Siemens scandal.

The repercussions that corruption might have on investment arbitration proceedings was shown by the recent action taken by Siemens in *Siemens v Argentina*,[13] where Siemens waived rights under an arbitral award against Argentina[14], after the latter requested a revision of that arbitral award in light of recent evidence of alleged bribes paid by Siemens.

However, the years since the scandal have also shown what conduct can be expected by an investor in order to overcome the mischief caused by its corrupt conduct. Siemens had allegedly, between 2000 to 2006, bribed worldwide in an amount over EUR 1.3 billion and paid over EUR 2.5 billion in penalties and internal investigations in order to settle the issue. At the same time, Siemens implemented strict compliance mechanism with a competent compliance team watching over the conduct of the firm. The success of such efforts can be illustrated by the example that in May 2011 Siemens' compliance team collaborated with the prosecutor's office in Munich in order to disclose new corrupt practices of Siemens employees when doing business with Kuwait.[15] By working side by side with the officials, the company ensured not to be held responsible for such misconduct.

The objective of this study is to examine the specific legal implications of corruption in investment treaty arbitration. In order to find the right approach to an issue as delicate as corruption, we will start at point zero. The line of reasoning would lose much of its arguments if the general moral disgust against this phenomenon were to be adopted without asking the question why corruption should be rejected and tackled. Thus, this study begins by examining the impact corruption has on all the different issues relevant in the investment landscape – matters constituting the core of the purpose and objective of investment treaty arbitration.[16] We will have a look, for instance, at the effect corruption has on foreign direct investment and economic growth, on development and poverty – all general concerns comprising the *raison d'être* for international investment law in the first place.

Subsequently, the approaches taken by the international community against corruption will be highlighted in order to show the international consensus that corruption needs to be tackled.[17] Besides giving an overview of the international

[13] *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (hereinafter: "*Siemens v Argentina*, Award").
[14] Under the *Siemens v Argentina* award, Argentina was ordered to pay USD 217 million in compensation for breach of the Germany-Argentina BIT. Argentina had long maintained that arbitrators should have explored allegations of bribery.
[15] Joe Palazzolo, "Siemens Compliance Program Made The Catch, Company Says," *The Wall Street Journal*, June 10, 2011; Daniel Schäfer, "Siemens Uncovers Bribery Case at Kuwait Unit," *Financial Times*, June 10, 2011.
[16] See below at C.
[17] See below at Chapter Two.

instruments against corruption on a global and regional level,[18] this study will also point at the significant contributions of international organisations[19] and civil society[20] to the global fight against corruption. Starting from this global consensus and following the approach of not merely taking general notions on corruption as granted, this study analyses and develops the legal basis to argue that corruption in fact violates transnational public policy being the public policy concept of the international community.[21] Such transnational public policy forms part of the international law that constitutes *inter alia* the applicable law to international treaty arbitration. Against the background that corruption violates transnational public policy and that transnational public policy is also applicable to investment treaty arbitration, the currently discussed issue in scholarship and by investment treaty tribunals about the potential conflicts between EU law and the investment treaty provisions is of no relevance to the corruption focus of this study.[22]

Transnational public policy also provides the basis to the question of how an arbitrator should deal with an issue as delicate as corruption.[23] While former tribunals seem to have avoided touching issues of corruption, there might be room to argue for a duty to not turn a blind eye to this topic.[24]

After developing the basis of this study in Chapter One to Chapter Four, a detailed analysis follows on the legal implications of corruption in investment treaty arbitration in Chapter Five to Chapter Nine. The initial question crucial to any corruption issue will be whether the corrupt act may be attributable to the host State.[25] This topic is highly disputed and has so far not received sufficient attention in scholarship or arbitral practice. Main emphasis will then be given to the different stages of an investment arbitration proceeding where corruption allegations might be relevant. In this context, we will analyse the unsolved issue of whether corrupt practices by a host State might amount to a cause of action for an investor.[26] In addition, particular attention will be paid to the corruption defence of a host State and its potential concerns for jurisdiction, admissibility or the merits.[27] Having in mind the inherent difficulty of proving allegations of corruption, this study will examine the question of burden of proof and standard of proof as well as how to deal with the limited evidence available to the tribunals.[28]

Finally, the study concludes by establishing a tailor-made approach to corruption in investment treaty arbitration: the *balanced approach*.[29] In the first decades of

[18] See below at Chapter Two B.
[19] See below at Chapter Two C.
[20] See below at Chapter Two D.
[21] See below at Chapter Three.
[22] See below at Chapter Three A.III.1
[23] See below at Chapter Four.
[24] See below at Chapter Four C.III.
[25] See below at Chapter Five.
[26] See below at Chapter Six.
[27] See below at Chapter Seven.
[28] See below at Chapter Eight.
[29] See below at Chapter Nine.

evolution of investment treaty arbitration, most attention was paid to the obligations borne by the host State. The phenomenon of corruption breaks with this one-sided approach of focusing on the investor's rights and host State's obligations. In fact, when dealing with corruption it becomes more apparent than ever that the relationship is two-sided. Duties and obligations lay on both parties; at the same time both parties have rights emerging out of their relationship based on the international investment agreement (***IIA***), which may be a bilateral investment treaty (***BIT***) or a multilateral investment treaty (***MIT***). An investor may only claim a breach of protection standard by the host State when obeying the relevant treaty obligations itself. At the same time, a host State may not invoke corruption of the investor as a defence when being itself involved in such illicit conduct. Thus, the approach to corruption will lead to the challenge of finding a balance between the rights and duties of both parties.

At this point, it must be emphasised that this study does not take any side in the dispute between an investor and a host State. The outcome of the research is not meant to benefit or penalise either of the parties to the investment treaty arbitration.[30] The underlying idea of this study is that containment and elimination of corruption is beneficial to and in the best interest of all parties involved in international investment. Thus, one basis of this study is the notion that the law must develop wisely and be applied judiciously, and not be driven by mere intuition. This is especially applicable when dealing with a delicate issue such as corruption. It is important to approach corruption in a legally justifiable and reasonable manner – to the benefit of all parties involved and affected, thus including the public.

B. Scope of the study

Before analysing the effects corruption has on investment related issues, it is important to emphasise the broad subject matter of corruption which concerns many different areas of research as for instance political, social, economic and legal studies. Due to the complexity of this topic it seems pertinent to state the sources and authorities used as the basis of this study (see below at **I.**) and to provide a clear understanding of the limited concept of corruption used in this analysis (see below at **II.**). Finally, a definition of corruption suitable for the purposes of this study will be presented (see below at **III.**).

I. Sources and authorities

Corruption is not only a legal issue, but rather an interdisciplinary concern. The impact of corruption and the search for an effective strategy to contain corruption

[30] In the past it has been noted that scholarship and arbitrators of industrial nations might be more investor biased while the ones with background from the developing world might be more in favour of host States. These kinds of airy speculations cannot be treated seriously for our purposes and deserve no further comment.

concerns many different fields of study. Thus, an effective approach to deal with corruption has to take *inter alia* social, economic, legal, philosophical, development and policy considerations into account. In this context it is important to clarify that this study does not claim to produce a solution to corruption, which would in any case be a utopian attempt and doomed to fail. However, notions developed in the mentioned fields of study shall be considered or to some extent borrowed whenever appropriate or necessary for legal reasoning and argumentation.

As the basis of this analysis, approaches taken by investment tribunals dealing with corruption will be considered and critically examined. In this context it is important to note that in investment treaty arbitration there is no *de jure* regime of *stare decisis*.[31] Arbitral awards are not binding on future arbitral tribunals. However, with the focus on contributing to the harmonious development of investment treaty arbitration, arbitral tribunals have closely considered the approaches taken by other tribunals as persuasive authorities.[32] Reference to previous awards has in fact become an integral part of the tribunals' reasoning in investment treaty arbitration.[33] Thus, it has been argued that a sort of *de facto* case

[31] See e.g. Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?," *Arbitration International* 23, no. 3 (2007): 368; Judith Gill, "Is There a Special Role for Precedent in Investment Arbitration?," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 88; Lucy Reed, "The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 95. For a general discussion on precedents in investment treaty arbitration see also Marc Bungenberg and Catharine Titi, "Precedents in International Investment Law," in *International Investment Law*, ed. Marc Bungenberg et al., 1st ed. (Baden-Baden: Nomos, 2015), 1505–16; Jan Paulsson, "The Role of Precedent in Investment Arbitration," in *Arbitration under International Investment Agreements - A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford: Oxford University Press, 2010), 699–718; Andrés Rigo Sureda, "Precedent in Investment Treaty Arbitration," in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, ed. Christina Binder et al. (Oxford: Oxford University Press, 2009), 830–42.

[32] See e.g. *Metal-Tech v Uzbekistan*, Award, para 116 ("*The Tribunal's view is that it is not bound by previous decisions of ICSID or other arbitral tribunals. At the same time, it is of the opinion that it should pay due regard to earlier decisions of international tribunals. The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it has a duty to follow solutions established in a series of consistent cases comparable to the case at hand, but subject, of course, to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet 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.*"); *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007 (hereinafter: *Saipem v Bangladesh*, Decision on Jurisdiction), para 67; *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (hereinafter: *El Paso v Argentina*, Decision on Jurisdiction), para 39. See also J. Romesh Weeramantry, "The Future Role of Past Awards in Investment Arbitration," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 111–24.

[33] Ibid., 113. For a statistical overview on the references made by investment treaty tribunals see Jeffery P. Commission, "Precedent in Investment Treaty Arbitration - A Citation Analysis of a Developing Jurisprudence," *Journal of International Arbitration* 24, no. 2 (2007): 148 et seq. Note that investment treaty tribunals have frequently referred to decisions of the Permanent Court of International Justice, International Court of Justice, European Court of Justice, European Court of Human Rights, Iran-United States Claims Tribunal, World Trade Organization jurisprudence, *ad*

law or *jurisprudence constant* exists in investment treaty arbitration,[34] which however is still in progress and at present contains contradictory approaches and outcomes on certain issues.[35] Against this background, while an arbitral tribunal is not bound by any precedent, it will at least deal with the arguments presented by other tribunals and only depart from them for good reasons and with a reasonable explanation.[36] From this follows that special focus of this study is on the approaches towards corruption taken by arbitral tribunals in investment treaty arbitration.

However, since this topic is relatively novel for investment arbitration, it would be unsatisfactory to limit the investigation and the focus to the current practise of international investment tribunals. In order to give a comprehensive study of corruption, different principles from distinct fields of law – such as public international law, private international law or commercial arbitration – have to be considered, balanced, and applied when appropriate.

II. Concept of corruption

Corruption is a wide term and exists in various forms, including bribery, extortion, fraud, embezzlement, and undue influence. Discussions on a comprehensive and uniform definition have been ongoing for decades both among scholars and at negotiations of multilateral agreements against corruption.[37] However, a uniform understanding of what corruption is has not been established so far.[38] One reason might be that the term itself is polyvalent and changeable as corruption is an evolving concept. Furthermore, it means different things to different cultures or social groups.[39] In addition, corruption has many different faces in endless

---

hoc arbitrations, and domestic court decisions, see Weeramantry, "The Future Role of Past Awards in Investment Arbitration," 118 et seq.

[34] Reed, "The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management."

[35] Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?," 373.

[36] See Zachary Douglas, "Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 109. Douglas emphasises that while equal cases should be treated alike, a tribunal is not urged to follow previous decisions it finds incorrect. See also Bungenberg and Titi, "Precedents in International Investment Law," 1516. ("*Maybe one has to live with short-term uncertainty, in favour of longer term stability and better acceptance of the system, where solutions are adopted because they are convincing, rather than because one tribunal happened to decide one way or another.*").

[37] The latest discussion on what definition to adopt for a multilateral instrument was at the negotiations for the United Nations Convention against Corruption. Finally, no consensus could be reached and the convention failed to provide a comprehensive definition. The convention rather lists all acts that fall within its scope.

[38] See Michael Joachim Bonell and Olaf Meyer, "The Impact of Corruption on International Commercial Contracts – General Report," in *The Impact of Corruption on International Commercial Contracts*, ed. Michael Joachim Bonell and Olaf Meyer (Heidelberg: Springer, 2015), 5.

[39] Michael Johnston, "Keeping the Answers, Changing the Questions: Corruption Definitions Revisited," in *Dimensionen Politischer Korruption - Beiträge Zum Stand Der Internationalen Forschung*, 1st ed. (Wiesbaden: VS, Verlag für Sozialwissenschaften, 2005), 61–76. Johnston

different situations, which makes it impractical to capture the concept in one definition. It rather depends on the focus of the study or the aim of the legal instrument, i.e. the specific context.

For the purposes of this study, the focus is limited to one specific form of corruption, rather than all possible appearances of such phenomenon. This study focuses on the corrupt practices found in investor-State disputes at the international investment scene. Thus, in order to scrutinise corruption in international investment law, it is essential to determine a specific definition of corruption for this purpose. In order to do so, it is first necessary to identify the different corrupt practices encountered in the investment landscape and then determine which conducts shall be considered within the scope of corruption covered in this study.

1. General types of corruption

There are three main areas where corrupt practices occur at the interface between international investors and host States. First, corruption might emerge in the direct relation between the investor and the government and public officials (see below at **a)**). Second, there might be a business relationship between the investor and intermediaries, which deal with the government and public officials on behalf of the investor (see below at **b)**). Third, corruption might also occur on a private commercial setting without the involvement of the host State (see below at **c)**).

a) Transnational bribery of State officials

The most common form of corruption is the intentional offering, promising or giving of undue pecuniary or other advantage to a foreign public official in order to obtain a benefit in relation to the investment,[40] i.e. the bribery of public officials. Sometimes a distinction is made between high level or grand corruption and low level or petty corruption. Grand corruption refers to the corrupt practices involving the high-level public officials of a host State. This form of corruption is often used in order to gain government contracts. Petty corruption is the characterisation of corrupt practices on a day-to-day basis when dealing with low-level public officials. This type often seeks to encourage public officials to speed up the process of issuing or processing necessary documents and permits.

In the investment setting, both types of corruption can be used for different objectives. The following overview of corrupt practices is not meant to be in any way comprehensive and exhaustive. It shall just give a sense of the forms of

argues that due to the political origins and normative nature of the concept, any definition focusing on the classifying behavior as corrupt will be unsatisfying.

[40] See Article 1 (1) *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* of 1997.

corruption[41] that are used in international investment when dealing with public officials.

(1) Government contracts and public procurement

Bribes might be paid to government officials to influence their choice of contracting party with regard to an investment.[42] This involves public procurement kickbacks, which are payments to public officials in order to gain publicly tendered contracts. Besides paying bribes to win a contract, firms might try to be granted benevolent contract terms. As already mentioned, this form belongs to grand corruption.

(2) Regulatory

Bribes might be paid for obtaining business licences and permits to operate the project targeted by the investment.[43] Moreover, corrupt practices may be used to alter the results of inspections of construction sites and buildings, the regulation of environmental hazards, and workplace safety.

(3) Facilitation payments

This type of corruption refers to low-level corruption where money is paid to local public officials in order to accelerate bureaucratic procedures.

(4) Taxes and Customs Duties

Bribes might also be paid to public tax officials to reduce the amount of taxes or other fees collected by the government.

(5) Judicial system

Corruption might also be used to change the outcome of legal proceedings.[44] In many host countries the judicial system is infiltrated by corruption, a reason why investors reject to rely on domestic courts in the first place and prefer trusting international tribunals to decide their legal disputes with the host State.

---

[41] See also World Bank - Poverty Reduction and Economic Management, "Helping Countries Combat Corruption, The Role of the World Bank," 9. The following categories are based on the examples provided therein.

[42] See e.g. *World Duty Free v Kenya* concerning bribery of the former President of Kenya in order to obtain a concession for two duty free stores in two Kenyan airports. See also *Metal-Tech v Uzbekistan*, where the investor bribed State officials to obtain the approval to invest in a joint venture concerning the production of molybdenum products.

[43] See e.g. *Metalclad Corp v United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000 (hereinafter: "*Metalclad v Mexico*"), where allegations of bribery were made in connection with the operation of a hazardous waste landfill. Note that the tribunal refrained from addressing the allegations in the award.

[44] See e.g. *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005 (hereinafter: "*Lucchetti v Peru*, Award") where the Chilean investor had bribed Peruvian judges in order to obtain a favourable decision in Peruvian courts.

(6) State capture corruption

Unlawful private payments might also be made in order to influence the formation of laws, regulations or decrees by public institutions. Thus, investors might attempt to induce the legislature to adopt investor friendly laws. A delicate and still unsolved issue is investor contribution to political parties and campaigns. State capture corruption is also a form of grand corruption.

b) Influence peddling through intermediaries

Another frequent practice is the so-called 'influence peddling' through intermediaries, where an investor offers undue advantages to intermediaries in order to utilise their influence in the government in a manner that benefits their investments.[45] In the international environment, these intermediaries are often disguised as consulting firms.[46] This method to deal with governments is not *per se* prohibited or immoral in most countries. However, the intermediaries often exercise undue influences and use corrupt practices to achieve the desired investor friendly outcome. In fact, the structure of intermediaries is often used in international business and investment when entering into corrupt practices.[47]

c) Corruption in private commercial settings

In addition, corruption also occurs in strictly private commercial settings, where officers of private enterprises are targeted to profit from an investment contract, for example by becoming subcontractors. While this practice is criminalised in Germany,[48] an international consensus of criminalising bribery in the private sector has not been reached. This is evidenced by the fact that while the *Criminal Law Convention on Corruption* of the Council of Europe appeals for criminalising such conduct in the member States,[49] such provision is not mandatory for the member States and reservations are possible.[50]

---

[45] This setting was the basis for the well-known ICC Award of Judge Gunnar Lagergren in *Claimant Mr X (Argentina) v Company A (Argentina)*, ICC Case No. 1110 of 1963, Arbitration International, 1994, Vol. 10, No. 3, 282 (hereinafter: ICC Case No. 1110).
Note that there is no international consensus whether influence peddling shall be treated as illegal. See Hilmar Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects," in *Arbitrating Foreign Investment Disputes*, ed. Norbert Horn and Stefan Kröll (The Hague et al.: Kluwer Law International, 2004), 472. Such practice is prohibited, for example, in France. See Matthias Scherer, "Circumstantial Evidence in Corruption Cases Before International Arbitration Tribunals," *International Arbitration Law Review* 5, no. 2 (2002): 30.

[46] Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects," 472.

[47] Note that the World Bank, for instance, has established consultant guidelines for projects that are financed by the Bank in order to ensure that no corruption is involved when dealing with intermediaries, see below at Chapter Two C.I.

[48] Section 299 of the German Criminal Code.

[49] Articles 7 and 8, *Criminal Law Convention on Corruption*, Council of Europe, ETS no. 173, 1999.

[50] Article 37 of the *Criminal Law Convention on Corruption.*

2. Concept of corruption for this analysis

For the purpose of tailoring the concept of corruption to the specific objectives of this study, it is important to note that a genuine characteristic of investor-State disputes is the interaction between private and public actors. The focus is therefore on those corrupt acts that influence the direct relationship between both the investor and the host State. Corruption of public officials most certainly falls within such parameter. The question of who shall be considered a public official has not yet been finally solved at a scholarly or international level. However, this study endorses a broad scope and considers as public official any person with any kind of authority in connection with the investment that can be attributed to the host State or to any of its functions.

This broad view is also applied when dealing with the issue of intermediaries. This model frequently used in the world of international business and investment has to be included in the analysis. It would amount to a total lack of contact to the business and investment reality to turn a blind eye on this commonly used business practice. However, it must be clarified that the focus of this study is not on the legal relationship between the investor and the intermediary. The legal issues arising out of that business relationship do not fall within the scope of investor-State disputes but are rather subject to international commercial arbitration. For this study, the intermediary might be seen as agent of the investor, for which reason the corrupt practice committed on behalf of the investor is attributable to the investor. In such case the corrupt acts of the intermediaries have implications on the relationship between the investor and the host State. Under those circumstances, the fact that the investor used the intermediary to unduly influence the decision-making process of the host State will be deemed investor corruption under this study.

Without any doubt, corruption in the private sector should also be condemned in the international business world as it distorts fair competition. But again, the disputes arising out of private-to-private corruption will also be subject to international commercial arbitration. The fact that an investor has committed acts of corruption in the private sector might to some extent be indirectly of interest for a dispute between the investor and the host State, since it may amount to a violation of local laws of the host State. However, such question is not directly concerned with the direct relationship between the investor and the host State due to the corrupt act. In addition, there is no international consensus on criminalising corruption in the private sector. Thus, corruption in the private commercial setting does not fall within the scope of this study.

Moreover, the focus of this study is on treaty-based investment arbitration. While many corruption cases have been dealt with in international commercial arbitration, this study starts from the premise that a significant difference exists between the legal issues that arise from corruption in international commercial arbitration and investment treaty arbitration. The underlying idea of this study is

that investment treaty arbitration is a genuine field of law.[51] While the influence by international commercial arbitration cannot be denied, the solution found to corruption issues does not automatically fit to the treaty-based Investor-State setting of investment arbitration.

Finally, corruption may also occur at the stage of arbitrating the investment dispute before the arbitral tribunal. While there is no published case of bribery of an arbitrator sitting in an investment treaty arbitration tribunal, such situation may, at least in theory, be possible.[52] For instance, pursuant to Article 52 of the ICSID Convention corruption on the part of a member of the tribunal constitutes a ground for annulment.[53] Since this study focuses on corruption in connection with the implementation and operation of the investment and on the legal relationship between the investor and the public official, the question of how to deal with corrupt arbitrators falls outside of its scope.

III. Definition of corruption

At the outset it must be noted that a general definition encompassing all forms of corruption does not exist. While different disciplines deal with corruption, they also focus on different aspects of this phenomenon. There is no universally accepted definition of corruption that can be used as the basis of this study. Thus, we start with an overview of the most common definitions of corruption (see below at **1.**) in order to suggest a definition for the purpose of this study and investment treaty arbitration (see below at **2.**).

1. Overview of existing definitions

The most common definition of corruption is "*the abuse or misuse of public office for private gain*",[54] which touches the central element of corruption.[55] Such abuse

[51] For a brief overview of the main differences between international commercial arbitration and investment treaty arbitration see Chapter Four C.I.1.

[52] Note that the arbitrators sitting in investment treaty tribunals are generally well-known and respected professionals.

[53] Article 52 of the ICSID Convention reads:

"(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: […]

(c) that there was corruption on the part of a member of the Tribunal; [...]."

[54] See World Bank - Poverty Reduction and Economic Management, "Helping Countries Combat Corruption, The Role of the World Bank," 8. This definition has been adopted by, among others, the UN Global Program against Corruption, the International Monetary Fund, the Commission to the Council of Europe, the European Parliament, the European Economic and Social Committee, the OECD and Transparency International. This definition or slight variations are also commonly used by commentators, see e.g. Selcuk Akcay, "Corruption and Human Development," *Cato Journal* 26, no. 1 (2006): 29; Susan Rose-Ackerman, "Corruption and Democracy," *Proceedings of the Annual Meeting of the American Society of International Law* 90 (1996): 83; Daniel Treisman, "The Causes of Corruption: A Cross-National Study," *Journal of Public Economics* 76, no. 3 (June 2000): 399–457; Daniel Kaufmann, "Corruption: The Facts," *Foreign Policy*, no. 107 (Summer 1997): 114; Pierre-Guillaume Méon and Khalid Sekkat, "Does Corruption Grease or Sand the Wheels of Growth?," *Public Choice* 122, no. 1/2 (January 2005): 77; Jakob Svensson, "Eight Questions about Corruption," *Journal of Economic Perspectives* 19, no. 3 (2005): 20; Peter Egger

or misuse of a public office is in fact a deviation from moral and legal standards,[56] which occurs when an official accepts, solicits, or extorts a bribe. Usually, the instrument of corruption is bribery, however, as seen above, there are many different forms of how undue influence can be exercised or how personal gain can be obtained.

Also focusing on the misuse of public power, Nye defined corruption in 1967 as "*behavior that deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains*".[57] Shleifer and Vishny described corruption in their often-cited essay of 1993 as "*sale by government officials of government property for personal gain*".[58] Similarly, in some studies corruption is used as a synonym for "*corrupt political rent seeking*".[59] In this context, Blackburn, Bose and Haque define corruption as "*the abuse of authority by bureaucratic officials who exploit their powers of discretion, delegated to them by the government, to further their own interests by engaging in illegal, or unauthorisied* [sic]*, rent-seeking activities*".[60]

All these examples focus on the act of the public official, i.e. the demand side of corruption, by reflecting the misuse of public authority of the corrupt official. Other commentators have focused on the supply side of corruption. Rose Ackerman's characterisation of corruption, for instance, is "*an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of payoffs*".[61] Also focusing on the supply side, Sayed tailored the definition of corruption to the specific situation in international commercial arbitration. He defines corruption as "*actions of transfer of money or anything of value to foreign public officials, either directly or indirectly, to obtain favorable public decisions in*

---

and Hannes Winner, "Evidence on Corruption as an Incentive for Foreign Direct Investment," *European Journal of Political Economy* 21, no. 4 (2005): 932; Wayne Sandholtz and William Koetzle, "Accounting for Corruption: Economic Structure, Democracy, and Trade," *International Studies Quarterly* 44, no. 1 (2000): 35.

[55] See Bert Denolf, "The Impact of Corruption on Foreign Direct Investment," *The Journal of World Investment and Trade* 9, no. 3 (2008): 250.

[56] Jana Kunicová, "Democratic Institutions and Corruption: Incentives and Constraints in Politics," in *International Handbook on the Economics of Corruption* (Cheltenham, UK: Edward Elgar Publishing Limited, 2006), 142.

[57] J. S. Nye, "Corruption and Political Development: A Cost-Benefit Analysis," *The American Political Science Review* 61, no. 2 (June 1967): 419.

[58] Andrei Shleifer and Robert W. Vishny, "Corruption," *The Quarterly Journal of Economics* 108, no. 3 (August 1993): 599.

[59] See Jana Kunicová and Susanne Rose-Ackerman, "Electoral Rules and Constitutional Structures as Constraints on Corruption," *British Journal of Political Science* 35, no. 04 (2005): 573–606. Johann Graf Lambsdorff, "Corruption and Rent-Seeking," *Public Choice* 113, no. 1 (October 1, 2002): 97–125.

[60] Keith Blackburn, Niloy Bose, and M. Emranul Haque, "The Incidence and Persistence of Corruption in Economic Development," Discussion Paper (Centre for Growth & Business Cycle Research - University of Manchester, 2003), 2.

[61] See e.g. Susan Rose-Ackerman, "When Is Corruption Harmful," in *Political Corruption: Concepts & Contexts*, ed. Arnold J Heidenheimer and Michael Johnston, third (New Brunswick: Transaction Publishers, 2002), 353.

the course of international trade".[62] Similarly, in the international arbitration context, the following definition of corruption was recently suggested:

> "Corruption refers to any action of transferring something of value, including money, to a public official, for his or her benefit, in order that the official acts or refrains from acting in the exercise of his or her official duties."[63]

Against the background that corruption is a two-sided act, other commentators have sought to take both the demand side and the supply side of corruption into consideration for the purposes of defining corruption. Such general definition was suggested by Macrae in 1982 who sees corruption as an arrangement that involves "*a private exchange between two parties (the 'demander' and the 'supplier'), which (1) has an influence on the allocation of resources either immediately or in the future, and (2) involves the use or abuse of public or collective responsibility for private ends*".[64] Tailored to the investor-State situation, the 'demander' is the public official and the 'supplier' the foreign investor. In the international arbitration context such holistic approach was also taken by Denolf who defines corruption as

> "the solicitation, offer or acceptance of any kind of unlawful payment in interactions between public employees and foreign direct investors for the purpose of gaining an improper advantage in the conduct of international business".[65]

2. Investor-State disputes tailored definition of corruption

The commonly used definition of 'misuse of public office for private gain' holds the core element of corruption but is not comprehensive enough to solve the specific challenges raised by corruption in the investment arbitration setting. In this context, it is essential to pay credit to the fact that both parties of the dispute are involved in the practice at issue. A suitable definition tailored to corruption in investment arbitration was presented by Haugeneder and Liebscher:

> "Corruption is a transaction between a natural or legal person and any person who performs a public service function in any branch of

[62] Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (The Hague et al.: Kluwer Law International, 2004), xxiii.
[63] Carolyn B. Lamm, Hansel T. Pham, and Rahim Moloo, "Fraud and Corruption in International Arbitration," in *Liber Amicorum Bernardo Cremades* (Madrid: La Ley, 2010), 699.
[64] J. Macrae, "Underdevelopment and the Economics of Corruption: A Game Theory Approach," *World Development* 10, no. 8 (1982): 679.
[65] Denolf, "The Impact of Corruption on Foreign Direct Investment," 251. Denolf pursues a definition of corruption that fits the FDI context, i.e. he seeks to include any form of corruption that could influence the foreign direct investor's investment decision. Denolf's point of view differs from the perspective applied in this study. The definition of corruption as starting point of the analysis in regard to investor-State disputes does not depend on the perspective of an investor for its investment decision, but from the objective and neutral angle of the investment law system pursuing a just outcome of the investment controversy.

> government which involves a direct or indirect exchange or an offer to exchange any kind of benefit in return for an act or omission to act by a person performing a public service function."[66]

In his recent work on corruption in investment arbitration Llamzon sought a definition, which emphasised that corruption "*does real damage to the welfare of the polity*" and used the following working definition of corruption:

> "Corruption is the knowing application or refusal to apply laws in a manner that benefits private demands at the expense of public needs."[67]

Using the current definitions as basis and tailoring the main notions to the above presented scope of this study, the definition of corruption used in this study contains the following elements:

First, for our purposes the definition of corruption needs to encompass the relevant corrupt acts of both the corrupt investor and the corrupt public official (see below at **(1)**). It is also important to note that the benefit that is exchanged is for private gain rather than for the public, but it does not need to be unlawful *per se* (see below at **(2)**). Moreover, as described above this study deals only with the relationship between investors and host States; corruption in the private sector and the corrupt relationship between investors and intermediaries are not part of this study (see below at **(3)**). Furthermore, a corrupt act such as bribery may be committed by the investor or the public official directly, but may also be performed through intermediaries. In practice, corrupt investors may mostly channel bribes through consultants and corrupt public officials may act through family members or business associates (see below at **(4)**). In addition, the part which holds all other elements together and which makes them to an unlawful and corrupt act is the goal of obtaining (from the perspective of the investor) or the promise of providing (from the perspective of the public official) an unlawful advantage.[68] For our purposes the advantage sought needs to be in connection with the investment (see below at **(5)**). Finally, what makes corruption so detrimental to development is its damaging effect on the public needs (see below at **(6)**).

Against this background the definition of corruption used in this study is:

(1) the solicitation, extortion, offer or acceptance of

(2) any kind of unlawful or lawful private benefits

(3) in the interaction between public officials and investors,

(4) either directly or indirectly,

---

[66] Florian Haugeneder and Christoph Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," in *Austrian Arbitration Yearbook 2009*, ed. Christian Klausegger et al. (C.H. Beck, 2009), 539.

[67] Aloysius P. Llamzon, *Corruption in International Investment Arbitration* (Oxford: Oxford University Press, 2014), 22.

[68] Note that the solicitation, offer or acceptance of money without any causal link to an official act providing an unlawful advantage does not fall under the definition of corruption of this study.

(5) with the objective of obtaining or providing an advantage in connection with the investment

(6) at the expense of public needs.

C. Consequences of corruption

Before analysing how to deal with corruption in investment treaty arbitration it is essential to understand the impact corruption has on those matters that are fundamental to the investment treaty regime. Scholars and tribunals have in fact pointed at the detrimental effects of corruption as starting point of their analyses. Cremades for instance names the effects of corruption on economic development, political stability and the rule of law as main reasons for the anti-corruption instruments and policies.[69] The tribunal in *F-W Oil Interests v Trinidad and Tobago* for instance highlighted the "*dire and pernicious effects that corruption has been shown to have on economic development*" and stressed that one of the main objectives of IIAs and the World Bank is economic development.[70]

With regard to the investment landscape, it is self-evident that bribery increases transaction costs, which might influence the investor's decision to invest, since the investor has to account for the means used for bribery. Moreover, many investment arbitration cases will deal with public infrastructure projects, where higher transaction costs will finally be priced in and borne by the public – the taxpayer.[71] Furthermore, in projects concerning basic services for the public, the negative effects will hit the public also as user of the services,[72] who will end up paying more for water, electricity, telecommunications, toll roads, airport fees, and many more due to the lack of competition.[73]

However, the argumentation in this study is not built on only the global condemnation of corruption without raising the question of the specific consequences of corruption on international investment related issues.[74] Against

[69] Bernardo M. Cremades, "Corruption and Investment Arbitration," in *Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen et al. (Paris: ICC Publishing, 2005), 203. See also Bernardo M. Cremades and David J. A. Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," in *Arbitration, Money Laundering, Corruption and Fraud*, ed. Kristine Karsten and Andrew Berkeley (Paris: ICC Publishing, 2003), 77. Cremades and Cairns identify the "*pernicious macro-economic effects, including the distortion of competition and securities markets and help to perpetuate the power of corrupt regimes in developing countries, and so indirectly contribute to retarded economic development and human rights abuses*".

[70] *F-W Oil Interests, Inc. V Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 (hereinafter: "*F-W Oil v Trinidad y Tobago*"), para 212.

[71] Karen Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," *International Arbitration Law Review* 5, no. 4 (2002): 126.

[72] Ibid.

[73] Ibid.

[74] Note that from a legal philosophy perspective the condemnation of corruption may find its basis on the balancing of the negative and the positive effects of corruption. A similar approach is taken

the background that one main objective of investment protection is to foster economic development by promoting foreign investment,[75] the effect corruption has on foreign trade and investment in particular, as well as on economics, society and development in general will be most relevant for this study. For the purpose of a more comprehensive illustration and overview, the implications of corruption will be broken down into different categories, which are neither mutually exclusive, nor exhaustive. In fact, the different effects have most certainly a significant influence on each other.

This being said, the following subsection will show that corruption has a negative impact on many factors that concern the investment treaty regime. In particular, corruption has negative effects on economic growth (see below at **I.**), development (see below at **II.**), and finally on foreign investment (see below at **III.**).

I. Impact on economic growth

A considerable amount of research in both economics and political science has focused on the implications for efficiency and welfare. There are mainly two opinions. On the one hand scholars have found a positive effect of corruption on economic growth (see below at **1.**), on the other hand scholars argue that such positive effect is merely of a limited and short-term nature and that corruption has a detrimental effect on economic growth (see below at **2.**).

1. Corruption has a positive effect on economic growth

Some scholars have argued that corruption increases economic efficiency and serves as a deregulating mechanism.[76] At the end of the sixties, a political scientist

---

by the principle of utility, which focuses on the tendency of augmenting or diminishing the happiness of the party in question to decide whether to approve or disapprove an action. See e.g. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford ;New York: Clarendon Press; Oxford University Press, 1996).

[75] As evidenced in the preamble of most IIA, see e.g. German Model BIT (2008) ("[...] *recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations* [...]"); US Model BIT (2012) ("*Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties* [...]"); Canada Model BIT (2004) ("*Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development* [...]"). See also Norbert Horn, "Arbitration and the Protection of Foreign Investment: Concepts and Means," in *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects*, ed. Norbert Horn and Stefan Kröll (Kluwer Law International, 2004), 6–7. ("*The driving force behind this development is the beneficial economic effects expected from the cross-border transfer of economic resources and the fact that such transfer can only be promoted when the confidence of foreign investors is won through adequate protection. BITs are designed to 'encourage and create favourable conditions for investors of the other Contracting Party to make investment in its territory'*.").

[76] See Nathaniel H Leff, "Economic Development Through Bureaucratic Corruption," *American Behavioral Scientist* 8, no. 3 (1964): 8–14; Colin Leys, "What Is the Problem About Corruption,"

named Huntington created the notion that "*in terms of economic growth, a rigid over-centralized dishonest bureaucracy is better than a rigid over-centralized honest bureaucracy*".[77] The basis of such notion is the argument that corruption is a means to "*grease the wheel of commerce*" by stimulating the slow-moving bureaucracies in developing countries to speed up.[78] In this context, it is argued that bribes increase incentives of public officials to work harder and to reduce administrative obstacles and delays.[79] In other words, in the presence of a rigid regulation and an inefficient bureaucracy, corruption may increase bureaucratic efficiency by accelerating the decision-making process and cutting the considerable time needed to process permits and paperwork.[80] The general idea behind this theory is that corruption creates the opportunity to overcome the strict regulatory framework and may be considered a useful substitute for a weak rule of law. Thus, from this point of view it appears that corruption could be beneficial for certain transactions that would otherwise not take place. This theory contends that corruption may have positive, economically expansionary effects in nations with weak institutions, both short and long-term.[81]

Moreover, it is argued that in a system based on bribery for allocating licences and government contracts, the participant able to win the contest will be the most efficient firm as only that firm can afford to pay the highest bribe.[82] Besides, it has been considered that corrupt tax collectors are encouraged and motivated to

---

The Journal of Modern African Studies 3, no. 2 (1965): 215–30; Samuel P Huntington, *Political Order in Changing Societies*, 2. print. (New Haven: Yale University Press, 1969).

[77] Huntington, *Political Order in Changing Societies*, 69.

[78] See Denolf, "The Impact of Corruption on Foreign Direct Investment," 254., citing: Robert K. Merton, *Social Theory and Social Structure*, 1968 enlarged ed (Free Press, 1968).

[79] Simcha B Werner, "The Development of Political Corruption in Israel," in *Political Corruption: A Handbook*, ed. Arnold Heidenheimer, Michael Johnston, and Victor T LeVine (New Brunswick: Transaction Publishers, 1989), 251.

[80] See Nathaniel H Leff, "Economic Development Through Bureaucratic Corruption," in *Political Corruption: A Handbook*, ed. Arnold J Heidenheimer, Michael Johnston, and Victor T LeVine (New Brunswick: Transaction Publishers, 1989), 396 et seq.; Pranab Bardhan, "Corruption and Development: A Review of Issues," *Journal of Economic Literature* 35, no. 3 (1997): 1322.

[81] Douglas A. Houston, "Can Corruption Ever Improve an Economy?," *Cato Journal* 27, no. 3 (2007): 329. Houston divides corrupt actions into two categories: economic restrictive and economic expansionary actions. His analysis suggests that in most stable nations the negative effects of corruption outweigh the positive, while nations with weak governance show positive effects of corruption. Houston presents also the argument that some corrupt behavior may "act as catalyst for positive economic reform". In his opinion bribery or the engagement in illegal markets might pressure the government to improve the law. He even argues that the respect for bad law (citizen's reluctance to engage in corrupt practice) could strengthen the government's failed position.
A recently published study examined corruption in Georgia from 1960 to 1971 based on anecdotal evidence and personal experience and argued that rent-seeking behaviour led to a efficient-enhancing black market in the communistic Georgia. The study concluded that corruption is an important efficiency-enhancing incentive, see Daniel Levy, "Price Adjustment under the Table: Evidence on Efficiency-Enhancing Corruption," *European Journal of Political Economy* 23, no. 2 (June 2007): 444.

[82] See Francis T Lui, "An Equilibrium Queuing Model of Bribery," *Journal of Political Economy*, Journal of Political Economy, 93, no. 4 (1985): 760–81.

increase their collection efforts in order to enlarge their own portion of the tax receipts.[83] This incentive is argued to raise overall tax revenues.

2. Corruption has a detrimental effect on economic growth

It must be noted that the above-mentioned theories were developed at a time when no reliable data on corruption was available. Researchers, at that time, had to rely on anecdotal evidence collected from country-specific studies.[84] This only changed in the early 1990s, when a number of international organisations made reliable cross-country data widely available.[85] This new data gave rise to more empirical literature established on the basis of more recent, more systematic, and more persuasive evidence.[86] The main findings of these studies show an opposite – a negative – relationship between corruption and growth. In fact, at present there is little support to the 'grease the wheel' theory.[87]

First of all, the 'grease the wheel' theory takes only the short-term and singular benefits into consideration and neglects the impact on the economic system as a whole. The mere existence of singular cases where individual bribes enhance overall efficiency seems no valid argument to tolerate corruption. In addition, the former theories took the distortion created by corruption as given and neglected the fact that in most cases distortion and corruption are linked and often are caused by the same circumstances and factors.[88]

A recent empirical study suggests that the correlation between corruption and economic growth remains consistently negative in countries where regulations are intense and burdensome.[89] Another study shows that the negative impact of corruption on economic growth is even bigger in countries with a weak rule of law and an inefficient government.[90] These findings contradict the notion that corruption generates growth by creating escape roads to heavy and cumbersome

[83] See Sheetal K. Chand and Karl O. Moene, "Controlling Fiscal Corruption," *World Development* 27, no. 7 (1999): 1129–40. This study argues that a 'virtuous circle' must be created in order to provide incentives to fiscal officials to raise tax revenues.
[84] Blackburn, Bose, and Haque, "The Incidence and Persistence of Corruption in Economic Development," 2.
[85] Important international organisations are, for instance, the Business International Corporation, Political Risk Services Incorporated and Transparency International.
[86] Blackburn, Bose, and Haque, "The Incidence and Persistence of Corruption in Economic Development," 2.
[87] Paolo Mauro, "Corruption and Growth," *Quarterly Journal of Economics* 110, no. 3 (1995): 696. For a general overview on the discussion regarding the "grease the wheel" hypothesis see Shang-Jin Wei, "Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?," World Bank Policy Research Working Paper, (1999). Shang-Jin Wei, "Corruption in Economic Transition and Development: Grease or Sand?," Draft for the UNECE Spring Seminar in Geneva on May 7 2001, (2001). Daniel Kaufman and Shang-Jin Wei, "Does 'Grease Money' Speed Up the Wheels of Commerce?," NBER Working Paper 7093 (Cambridge: National Bureau of Economic Research, April 1999). Méon and Sekkat, "Does Corruption Grease or Sand the Wheels of Growth?"
[88] Svensson, "Eight Questions about Corruption," 36.
[89] Mauro, "Corruption and Growth," 683.
[90] Méon and Sekkat, "Does Corruption Grease or Sand the Wheels of Growth?," 91.

bureaucratic regulations. The World Bank estimated that widespread corruption may lower a country's economic growth rate by 0.5% to 1%.[91] This results from the market inefficiency that is passed to the local public, harming local economy.[92] Thus, it can be concluded that various studies created overwhelming arguments for a significant negative relationship between corruption and economic growth.[93] The main findings will be identified below.

a) Corruption lowers efficiency and productivity

One conclusion drawn from the empirical data is that corruption in fact decreases economic efficiency and therefore has a detrimental impact on productivity. The reasons for such negative effect are explained below.

(1) Rent-seeking public officials create obstacles – delays and red tape

In theory, a good argument against the 'grease the wheel' theory is that public officials seeking illegal gains could purposely slow down the administrative process to increase the need for bribery.[94] Bribes would have to be used as incentive payments for corrupt public officials. Rather than accelerating the general process, corruption may give dishonest officials reasons to delay the course of action in the first place.[95] Thus, in order to extract bribes, corrupt officials might take advantage of the host State's regulatory system by creating new regulatory obstacles and increasing the burden on foreign investors.[96] Indeed, many public officials in corrupt societies have an enormous degree of discretion over the creation, proliferation and interpretation of regulations, which they can turn into rent-seeking mechanisms.[97] In other words, the distortions that corruption is supposed to circumvent might be established and maintained by the corrupt officials due to their corruption potential.[98] In the short term and in singular cases, corruption might help to overcome cumbersome regulations. However, in the long run, corruption creates incentives to produce more obstacles, which leads to inefficiency and delays.[99]

An empirical study undermines this theoretical argument and shows the positive relationship between the bribes that firms have to pay and the effective chicanery

---

[91] See Amy Cummings and Ellen Hayes, "Taming the Risk of Project Finance, Part One: Corruption and Legislative Reform," *International Financial Law Review* 20 (2001): 28.
[92] Evan P Lestelle, "Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction, The," *Tulane Law Review* 83 (2009 2008): 544.
[93] See Mauro, "Corruption and Growth."
[94] Susan Rose-Ackerman, *Corruption and Government* (Cambridge et al.: Cambridge University Press, 1999), 1–230.
[95] Christian Ahlin and Pinaki Bose, "Bribery, Inefficiency, and Bureaucratic Delay," *Journal of Development Economics* 84, no. 1 (September 2007): 466.
[96] Andrei Shleifer and Robert W. Vishny, "Politicians and Firms," *Quarterly Journal of Economics* 109, no. 4 (1994): 995–1025.
[97] Kaufmann, "Corruption: The Facts," 116.
[98] Toke S. Aidt, "Corruption, Institutions, and Economic Development," *Oxford Review of Economic Policy* 25, no. 2 (June 1, 2009): 274.
[99] See Ahlin and Bose, "Bribery, Inefficiency, and Bureaucratic Delay."

they encounter in equilibrium.[100] Thus, even though singular bribe paying firms can profit from their corrupt actions, the harassment on the business community as a whole will increase.

(2) Corruption leads to inefficient government contracting

As mentioned above, some scholars see bribery of public officials for government procurement contracts or concessions as a sort of competitive bidding where the most efficient investor wins.[101] Pursuant to this view the winning bidder would have to be the one with the lowest costs or the highest expected gains. However, this view is deficient as it lacks to consider other important factors of corruption. Most notably it fails to take into account whether the investor is scrupulous. Corruption not necessarily favours the most efficient bidder, but the one with the least scruples to engage in illegal transactions and unfair practices.[102]

Moreover, the size, structure and complexity of public projects may be artificially boosted on rent-seeking grounds in order to extract higher payoffs instead of relying on an efficiency parameter.

(3) Inefficiency due to distortion in allocation of talent

In an economy where rent-seeking creates more opportunities than productive work performance, corruption might lead to a distorted allocation of talent. Talented and well-educated individuals may prefer to engage in rent-seeking rather than in honest and productive work,[103] which may also cause inefficiency and have adverse effects on the country's economic growth.[104]

b) Corruption causes unpredictability, uncertainty and raises transaction costs

Corruption increases the unpredictability of costs, since public officials could tailor the requested amount on the investor's willingness and ability to pay, resulting in additional negotiations with the public officials.[105] On top, the illegality of bribery forces the participants to spend additional resources to conceal the illegal circumstances of the transaction.

Keeping corruption secret increases costs in an unpredictable way.[106] In order to camouflage the illegal transaction sophisticated structures of shell companies or

---

[100] Kaufman and Wei, "Does 'Grease Money' Speed Up the Wheels of Commerce?," 15.
[101] See above at **C.I.1**.
[102] Susan Rose-Ackerman, "The Political Economy of Corruption," in *Corruption and the Global Economy*, ed. Kimberly Ann Elliott (Washington, D.C.: Institute for International Economics, 1997), 42.
[103] See Kevin M. Murphy, Andrei Shleifer, and Robert W. Vishny, "The Allocation of Talent: Implications for Growth," *The Quarterly Journal of Economics* 106, no. 2 (May 1991): 503–30.
[104] Paolo Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis," in *Corruption and the Global Economy*, ed. Kimberly Ann Elliott (Washington D.C.: Institute for International Economics, 1997), 87.
[105] Kaufman and Wei, "Does 'Grease Money' Speed Up the Wheels of Commerce?"
[106] See Rose-Ackerman, "The Political Economy of Corruption," 41.

other costly efforts may be required. Moreover, no information on the amounts of paid bribes will be widely available.[107] There will be no guidelines on how to calculate necessary expenses. This again results in additional negotiations on the final amount of the bribe. Hence, corruption contributes to uncertain business-making and an unpleasant investment climate.

c) Corruption lowers government revenues

In a normal corruption setting, the requested service will be granted to the candidate with the highest willingness and ability to pay. The amount of the paid bribe will reflect the price paid in an efficient market. That amount is in theory equal to the price that the same investor would have been able and willing to pay directly to the host State. Thus, in a non-corrupt situation, the amount of the bribe would have been made available to the State's treasury. The bribe, however, is withheld from public revenue.[108] Moreover, due to the illegality of corruption, bribes are most likely channelled through offshore accounts, leading to a sort of capital flight. Furthermore, due to the secrecy of corrupt transactions, the bribes will not be traceable by tax authorities, which will in turn lead to a significant reduction of the host State's tax revenues.[109] In addition, since a corrupt investor may seek to recover the bribe by artificially inflating the transaction, the mentioned revenue export will also directly affect the host State's citizens.[110] In this context, the public is not only deprived of the amount paid as bribe, but also of the economic benefit of the bargain, which would have existed without the corrupt act.[111]

At the same time, government revenues are diminished due to corrupt tax collectors who collude with businesses and investors to decrease their tax burden.[112] The same occurs in connection with customs and tariff payments. As a result, the government is deprived of important and necessary revenue while the distribution of the amounts collected may most likely be unfair. In spite of these

---

[107] Rose-Ackerman, *Corruption and Government*, 12.
[108] See Ibid.
[109] Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis," 87.
[110] Rose-Ackerman, "The Political Economy of Corruption," 44. Rose-Ackerman emphasises that only in a perfect market would the incoming funds from the international investor compensate for the escaped corrupt payments. However, such perfect market is not likely to exist where the knowledge of local conditions is very valuable.
[111] See Ibid., 41. Rose-Ackerman points out that corruption reduces the income of a State through deals in which corrupt public officials take bribes in return for *assuring* high profits.
[112] Rose-Ackerman, *Corruption and Government*, 19. Rose-Ackerman refers to a study from 1997, which estimated that if the losses caused by corruption could be cut in half, the tax to Gross Domestic Product (GDP) ratio would improve from 13.6 to over 15 per cent. See also Rick Stapenhurst and Shahrzad Sedigh, "Introduction: An Overview of the Costs of Corruption and Strategies to Deal with It," in *Curbing Corruption: Toward a Model for Building National Integrity*, EDI Development Studies (Washington D.C.: The World Bank, 1999), 3. For a general overview to fiscal corruption and the negative effects on sustained development see Odd-Helge Fjeldstad and Bertil Tungodden, "Fiscal Corruption: A Vice or a Virtue?," *World Development* 31, no. 8 (2003): 1459–67.

findings, it has been argued that corruption of tax collectors can be efficient as long as the government keeps the factual authority to impose generally binding revenue conditions.[113] However, this argument is flawed, since corruption in tax collection creates an arbitrary and unfair pattern of payments. The amount of taxes and bribes that a taxpayer has to pay is not limited by the underlying tax rules, but only by the corrupt tax collector's leverage, since she or he[114] has the discretion to generate tax liabilities.[115]

d) Corruption distorts the decision-making process

Corruption also distorts the entire decision-making process connected with public investment projects, since such projects may rather be chosen for their bribe-generating capacity than for their productivity and necessity.[116] The special rate of return for those types of projects loses its weight as an important criterion for the selection of the specific project. In fact, cost benefit analysis and productivity become irrelevant for the decision of corrupt public officials.

e) Corruption reduces the quality of investment

Corruption also has a detrimental effect on the quality of investments. While competition creates incentives for creativity and results in an increase in quality and a decrease in prices, corruption deters such competition and consequently annuls the need for quality and innovation. The one who wins the public procurement or the concession is not the investor with best quality or most competitive prices, but the one prepared to pay the highest bribe. In order to compensate for the extra costs of corruption, the bribe-payer may be forced to provide an investment with less quality.

This notion is supported by empirical data, which shows that a corrupt system of public procurement allocation might result in inferior public infrastructure and services.[117] In addition, a study suggests that high corruption might reduce the productivity of public investment resulting in a reduced quality of infrastructure.[118] At the same time, the type and nature of the infrastructure might change through corruption. Corrupt public officials might encourage expensive infrastructure projects, where their possibility and leverage to extract bribes is greater than in minor infrastructure projects, which nonetheless might be more important for the general public.

---

[113] See Frank Flatters and W Bentley Macleod, "Administrative Corruption and Taxation," *International Tax and Public Finance* 2, no. 3 (1995): 414.
[114] Hereinafter this study will - merely for purposes of simplification - use the she/her pronouns when referring to the arbitrator, which shall also include all other forms.
[115] Rose-Ackerman, *Corruption and Government*, 16.
[116] Vito Tanzi and Hamid R. Davoodi, "Corruption, Public Investment, and Growth," IMF Working Paper (International Monetary Fund, October 1997), 8.
[117] Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis," 87.
[118] Tanzi and Davoodi, "Corruption, Public Investment, and Growth," 18.

f) Factors influencing corruption - economic growth relationship

A general answer on whether corruption slows down, or speeds up economic growth does not seem satisfactory to understand the implications it has on the investment world. There are various factors that have an influence on the specific degree of impact that corruption has on the State's economy. In fact, the correlation between corruption and poor economic performance is not absolute.[119] Recent studies came to the conclusion that some distinctions had to be made with regards to corruption and its specific implications. According to one study the effect of corruption depends on the country's rule of law.[120] Corruption has a definite negative effect on economic growth in countries with sound institutions and a firm rule of law, while it might have a limited enhancing effect in countries with a weak rule of law.[121] The latter result is not surprising; it just supports the proposition that many corrupt activities substitute for missing or bad law. However, this result cannot be misunderstood as proof of a general positive effect of corruption on economic growth. It rather shows one of the reasons why corrupt practices are rampant in international trade and investment. In other words, it shows that a bad rule of law is an incentive for corruption.

Another study points at the link between the economic freedom and the economic performance of a country.[122] According to this study, corruption in particular hinders economic growth in countries with low economic freedom (i.e. limited economic choice), while it might have a limited enhancing effect on economic growth in countries with high economic freedom.[123] Similarly, another empirical study emphasises the correlation of corruption with many other characteristics of the host country such as the quality of institutions, lack of competition, and cultural values.[124]

All these studies show that corruption is a complex phenomenon with effects on myriad factors important for foreign investors. Comparing the limited short-term benefits of corruption, i.e. creating a method to override rigid regulations, with the long-term detriments, i.e. slowing down the economy, creating unpredictable costs and creating a shadow economy beyond any tax responsibility, reveals a preponderant negative effect on economic growth.

II. Impact on development and society

In general, it can be noted that investors have two ways to compensate for the reduction of profits resulting from the payment of bribes, both of which affect the host State's population. The additional costs caused by the arrangements made by

[119] Rose-Ackerman, *Corruption and Government*, 4.
[120] See Houston, "Can Corruption Ever Improve an Economy?"
[121] Ibid., 326.
[122] Mushfiq us Swaleheen and Dean Stansel, "Economic Freedom, Corruption, and Growth," *Cato Journal* 27, no. 3 (2007): 343–58.
[123] Ibid., 343.
[124] Ali Al-Sadig, "The Effect of Corruption on FDI Inflows," *Cato Journal* 29, no. 2 (2009): 272.

the investor in lieu of corrupt practices are either passed on to the consumers in the form of higher end prices, or the investor may decrease production and operation costs, which then results in inferior quality. Both ways, the cost burden is on the consuming population.[125] In addition, corruption has further negative consequences on the host State's population by affecting its development.

1. Misallocation of public resources and aid

One serious concern is that corruption might lead to a misallocation of public resources. Decisions on what public project to pursue might not be taken based on objective criteria like public benefits and the amount of public burden involved, but rather on what undertaking may provide the best opportunity for rent-seeking. Hence, it has been found that corruption encourages excessive public infrastructure investment.[126] Since the exact market value of bridges, roads or missiles is difficult to determine, such projects create easier and more profitable opportunities to levy bribes.[127] This leads to a negative effect on development initiatives by distorting decision-making, budgeting and implementation processes.[128] By abusing entrusted power for private gain, corruption leads to a diversion of public resources into private hands.[129]

The diversion of funds to big infrastructure projects with high rent-seeking opportunities for public officials might also reduce the effectiveness of international development aid.[130] Aid flows are directed to finance unproductive public undertakings instead of funding essential and development-crucial projects.

2. Impact on health and education

Corruption leads to a governmental reduction of expenditure on education and health, as suggested by empirical data.[131] The explanation points at the above-mentioned rent-seeking attitude of public officials. Simply put, programmes for

[125] Note that in case of inferior quality the price paid by the consumer is not the appropriate price and is thus also too high.
[126] Rose-Ackerman, *Corruption and Government*, 3, 38. See also Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis." Mauro shows that while government expenditures on health and education have a negative relationship with corruption, neither defence nor transportation expenditures show any significant relationship with corruption. This result is consistent with the notion that corruption might lead to high capital expenditures (even though it is no evidence for it).
[127] Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis," 88. Mauro calls attention to the fact that not only a high overall expenditure and investment are necessary for development and growth, but also the quality, level and type of spending are also relevant.
[128] Transparency International, "Poverty and Corruption," Working Paper, (March 2008), 2.
[129] Ibid.
[130] Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis," 87.
[131] See Paolo Mauro, "Corruption and the Composition of Government Expenditure," *Journal of Public Economics* 69, no. 2 (June 1998): 263–79. Mauro, "The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis," 93.

education and health offer less opportunity to extract bribes and are therefore less attractive to corrupt officials. They will most likely prefer to support unproductive public investment, where it is easier and more lucrative to levy bribes. The result is that corrupt governments generate too many not essential projects instead of supporting those more seriously required by the public.

This goes hand in hand with a report of the International Monetary Fund (***IMF***) that shows the two effects of corruption on health care and education.[132] First, it might increase the costs of these essential services, and second, it might lower the quality of these services.[133] The result is that corruption raises child and infant mortality rates, has an adverse effect on the percentage of low-birthweight babies, and increases dropout rates in primary school.[134] Correspondingly, empirical data suggests that corruption furthers education and income inequality and generally reduces the level of social spending.[135]

At the same time, as mentioned above, corrupt officials deprive the government of revenues necessary to improve education and health. Thus, not only the programmes of government spending are misdirected to corruption-intensive sectors, but the resources to spend in social spending are also diminished. The lost revenue from custom duties and tax might be a considerable part of the overall gross domestic product (***GDP***). That portion might be a significant percentage with detrimental effect on the governmental spending power.[136] The price is paid by the general public in form of reduced services.

3. Environment

Corruption itself is not environmentally destructive, but as it is also used to overcome regulatory burdens for businesses, it has an indirect link to

[132] Sanjeev Gupta, Hamid Davoodi, and Erwin Tiongson, "Corruption and the Provision of Health Care and Education Services," IMF Working Paper (International Monetary Fund, June 2000).
[133] The general negative effect of corruption of increasing costs and lowering quality has already been mentioned above at C.I.2.b) and C.I.2.e).
[134] Gupta, Davoodi, and Tiongson, "Corruption and the Provision of Health Care and Education Services," 24 f. In particular, the empirical analysis revealed that child mortality rates in countries with a high corruption level are approximately 1/3 higher than in countries with a low level of corruption; infant mortality rates and the percentage of low-birthweight babies are about twice as high, and school dropout rates are five times higher. See also Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobatón, "Governance Matters," Policy Research Working Paper (World Bank, October 1999). Note that this World Bank study does not examine corruption separately, but focuses on governance in general, and comes to the conclusion that bad governance has a strong adverse effect on infant mortality, literacy and per capita income.
[135] Sanjeev Gupta, Hamid R. Davoodi, and Rosa Alonso-Terme, "Does Corruption Affect Income Inequality and Poverty?," Working Paper (International Monetary Fund, 1998), 29. See also Theo Eicher, Cecilia García-Peñalosa, and Tanguy van Ypersele, "Education, Corruption, and the Distribution of Income," *Journal of Economic Growth* 14, no. 3 (September 2009): 205.
[136] See Rose-Ackerman, *Corruption and Government*, 19. Rose-Ackerman refers to Gambia in the early nineties, where the lost revenue from customs duties and income tax due to corruption was 8 to 9 percent of the GDP, which is six to seven times the country's spending on health.

environmental sustainability.[137] Bribes may be aimed at having public officials turn a blind eye on environmental requirements or even on environmental violations. Thus, the poor governance caused by corruption might result in bad policy formulation, inadequate management and ineffective enforcement in connection with the environmental framework in place.

A similar situation occurs with regard to dangerous work conditions and inferior quality of services or products, where poor law enforcement of corrupt public officials results in detrimental effects on the working population and consumers.

4. Sustainable development and poverty

Against the background that a significant number of foreign investments are public utility projects, such as electricity, water, oil and gas supply, the price increase caused by corruption to these services is detrimental to the basic needs of the host State's population.[138] Moreover, due to the detrimental effect on economic growth there is a nexus between corruption and poverty.[139] In this context it must be noted that corruption is not only a cause, but also a consequence of poverty.

Poverty reflects not only a certain low-income situation, but characterises a series of different factors, including access to essential services such as health care, education and sanitation, and further includes basic civil rights, empowerment and human development.[140] On the one hand, corruption is a constant obstacle hindering the necessary political, economic and social changes needed to improve the poor conditions of the population. On the other hand, poverty might result in even more corruption due to low institutional quality and the desperate situation of the poor population. The negative relationship between corruption and development is therefore a two-way causal relationship constituting a vicious circle of widespread corruption and poverty.[141] Poor countries might in fact be caught in a trap where corruption leads to more corruption and discourages honest investment.[142] In such corrupt investment environment the most important

---

[137] For a general overview of the link between corruption and environment see Richard Damania, Per G. Fredriksson, and John A. List, "Trade Liberalization, Corruption, and Environmental Policy Formation: Theory and Evidence," *Journal of Environmental Economics and Management* 46, no. 3 (November 2003): 490–512; Ramón López and and Siddhartha Mitra, "Corruption, Pollution, and the Kuznets Environment Curve," *Journal of Environmental Economics and Management* 40, no. 2 (September 2000): 137–50; Stephen Morse, "Is Corruption Bad for Environmental Sustainability? A Cross-National Analysis," *Ecology and Society* 11, no. 1 (2006): 22; Heinz Welsch, "Corruption, Growth, and the Environment: A Cross-Country Analysis," *Environment and Development Economics* 9, no. 5 (2004): 663–93.

[138] In the *Global Corruption Report 2008* Transparency International emphasises the severe impact corruption has on the water supply for the poor. www.transparency.org/publications/publications/subject/(topic)/17.

[139] Mauro, "Corruption and Growth," 706.

[140] See Amartya Kumar Sen, *Development as Freedom* (Oxford: Oxford Univ. Press, 2001).

[141] Blackburn, Bose, and Haque, "The Incidence and Persistence of Corruption in Economic Development," 19.

[142] Rose-Ackerman, *Corruption and Government*, 3.

comparative advantage becomes the willingness and the ability to pay the highest bribe. The lesser scruples, the higher the probability of investment.

All these singular effects of corruption lead to an indirect negative effect on human development.[143] This is supported by empirical data suggesting that higher corruption levels lower human development.[144] In fact, a recent empirical analysis shows a negative correlation between corruption and genuine wealth *per capita*.[145] This is another piece in the line of reasoning that shows the detrimental effect of corruption on sustainable development.[146]

5. Corruption and democracy

With the previously discussed detrimental effects on the population, it becomes apparent that corruption also decreases government credibility,[147] leading to a legitimacy deficit.[148] In fact, citizens will doubt suspicious decision-making and believe that governmental decisions are for sale to the highest bidder.[149] Corruption is therefore perceived as a significant obstacle to democracy.[150] This view in scholarship has proven true in recent history. One of the main reasons often stated for the recent and current public protests, demonstrations and civil uprisings around the world is the populations' despair against the political corruption of their rulers.[151]

In addition, the beneficiaries of a corrupt system will impede any reform plans in order not to lose their special advantage to extract bribes.[152] Thus corruption also undermines changes and reform, as also evidenced by the recent reactions and

[143] See Akcay, "Corruption and Human Development," 29. This study uses corruption data from 63 countries.
[144] Ibid., 46.
[145] Aidt, "Corruption, Institutions, and Economic Development," 272. This study failed to produce convincing evidence to show a negative effect of corruption on the average growth rate of GDP per capita. However, focusing on development and not only on economic growth it is important to clarify that human development is about sustainable improvements in human welfare. For this reason, this study argues that genuine wealth per capita and not GDP per capita is the right measurement.
[146] Ibid., 288.
[147] See Julie B Nesbit, "Transnational Bribery of Foreign Officials: A New Treat to the Future of Democracy," *Vanderbilt Journal of Transnational Law* 31 (1998): 1282.
[148] Angel Ricardo Oquendo, "Corruption and Legitimation Crisis in Latin America," *Connecticut Journal of International Law* 14 (1999): 485.
[149] Rose-Ackerman, "The Political Economy of Corruption," 45.
[150] Michael Johnston, "Corruption and Democratic Consolidation" (Democracy and Corruption, Princeton University, 1999).
[151] Mohammad Fadel, "Public Corruption and the Egyptian Revolution of January 25: Can Emerging International Anti-Corruption Norms Assist Egypt Recover Misappropriated Public Funds?," *Harvard International Law Journal* 52 (Online) (2011): 292–300; Jack A. Goldstone, "Understanding the Revolutions of 2011 - Weakness and Resilience in Middle Eastern Autocracies," *Foreign Affairs* 90, no. 3 (2011): 8–16; Duncan Green, "What Caused the Revolution in Egypt?," *The Guardian*, February 17, 2011, http://www.theguardian.com/global-development/poverty-matters/2011/feb/17/what-caused-egyptian-revolution.
[152] Rose-Ackerman, *Corruption and Government*, 23.

conduct of corrupt rulers failing to voluntarily listen to the requests of the public.[153]

III. Impact on investment – foreign direct investment

The above-mentioned findings show the effects of corruption on the host States, i.e. corruption as a domestic problem. Moving away from the economic development issue, in this sub-section we analyse the direct effects of corruption on international trade and investment with special focus on foreign direct investment (***FDI***). As a starting point we need to briefly identify the relevant determinants for a foreign investor to make its investment decision. Basically, the fewer barriers an investor has to face in a host State, the more attractive that country becomes for the investor. The overall investment climate consists of several elements e.g. trade costs and tariffs, fiscal incentives, quality of infrastructure, transportation costs and economic stability.[154] However, the investor's decision to invest is also influenced by factors such as education, wages, crime, investment index, climate and quality of privatisation.[155]

1. Corruption decreases foreign direct investment in general

Having these factors in mind, in the sixties it was suggested that corruption could increase the investment rate by enabling investors to control the unpredictable behaviour of the host State.[156] Corruption has been perceived as an insurance for the investors — that the government will refrain from harmfully intervening with their investment. Empirical evidence suggests the opposite. As supported by many economic studies dealing with the different effects and impacts of corruption on FDI, corruption is now generally seen as a barrier to FDI.

It is suggested that corruption has a negative effect on aggregate investment flows.[157] Evidence has been reported that corruption in a host State does depress inward FDI in a significantly negative way.[158] In fact, the negative effect of

---

[153] See e.g. Goldstone, "Understanding the Revolutions of 2011 - Weakness and Resilience in Middle Eastern Autocracies."

[154] These determinants are considered "traditional", see Denolf, "The Impact of Corruption on Foreign Direct Investment," 256.

[155] Denolf refers to these factors as "less-traditional" FDI determinants, see Ibid., 256.

[156] Leff, "Economic Development Through Bureaucratic Corruption," 1989, 396.

[157] Mauro, "Corruption and Growth," 684. Mauro concluded the first study to prove the detrimental effect of corruption on FDI and thus on economic growth. The set of data included 30 country risk factors for 57 countries for the period between 1971 and 1979, and 56 country risk factors for 68 countries for the period between 1980 and 1983. See also Aminur Rahman, Gregory Kisunko, and Kapil Kapoor, "Estimating the Effects of Corruption - Implications for Bangladesh," Policy Research Working Paper (Washington D.C.: World Bank, November 2000). This study examined the relationship between corruption and growth, domestic and foreign investment for the period between 1991 and 1997. See also Mohsin Habib and Leon Zurawicki, "Corruption and Foreign Direct Investment," *Journal of International Business Studies* 33, no. 2 (2002): 291–307. See also Méon and Sekkat, "Does Corruption Grease or Sand the Wheels of Growth?"

[158] Shang-Jin Wei, "How Taxing Is Corruption on International Investors?," *Review of Economics and Statistics* 82, no. 1 (2000): 2. This study covers bilateral investment from twelve source

corruption can be compared to that of the host State's tax on foreign investment. In a benchmark estimation, a rise of the corruption level from that of Singapore[159] to that of Mexico[160] would have the same negative effect on inward FDI, increasing the tax rate by fifty per cent.[161] That drastic effect might result from the fact that corruption is not transparent and creates uncertainty.[162] Investors might avoid corruption because it is risky, costly and difficult to manage.[163] In fact, according to Transparency International, 20 to 25 per cent of an investment can amount to corruption.[164] Moreover, corruption might also discourage and deter new investors because of moral scruples and fear of punishment. At the same time, public officials may prefer to deal with insiders to avoid disclosure.[165]

Generally speaking, a weak rule of law and an inefficient government might increase the negative effect of corruption on investment.[166] Since FDI involves a certain amount of irreversible fixed investment, investment is sensitive to the investors' perception of public policies and property rights. Thus, the general quality of the government is significant for FDI inflows. A country with a high corruption rate represents the opposite of a good government, as corruption is a sign of institutional weakness.[167] In conclusion, corruption creates an efficiency, distribution and moral problem for foreign investors and discourages FDI.[168]

2. Factors influencing corruption – relationship with FDI

An empirical analysis of Swedish multinational corporations suggests that corruption impacts distinct types of FDI differently and thus makes a distinction between horizontal and vertical FDI.[169] Horizontal FDI is made to obtain better

countries to 45 host countries. For the negative effect of corruption on international trade see Moiz A. Shirazi, "The Impact of Corruption on International Trade," *Denver Journal of International Law and Policy* 40 (2012): 435–46.

[159] Singapore is with a Corruption Perception Index (CPI) of 86 (2013) one of the countries with least corruption. CPI is launched yearly by Transparency International on a scale of 0 (highly corrupt) to 100 (very clean).

[160] Mexico has a low CPI of 34 (2013) and is with Bolivia, Gabon and Argentina at the 106th position of 175 ranked countries in 2013.

[161] Wei, "How Taxing Is Corruption on International Investors?," 5.

[162] Ibid., 1–10.

[163] Habib and Zurawicki, "Corruption and Foreign Direct Investment," 303.

[164] See www.transparency.org, with publications on corruption.

[165] See "The 'Perverse Effects' of Political Corruption," *Political Studies* 45, no. 3 (1997): 528 et seq.

[166] Méon and Sekkat, "Does Corruption Grease or Sand the Wheels of Growth?," 91.

[167] See Akcay, "Corruption and Human Development," 29.; Rose-Ackerman calls corruption "*a synonym that something has gone wrong in the management of the state*". Rose-Ackerman, *Corruption and Government*, 9.

[168] Rose-Ackerman, *Corruption and Government*, 3.

[169] See Katariina Nilsson Hakkala, Pehr-Johan Norbäck, and Helena Svaleryd, "Asymmetric Effects of Corruption on FDI: Evidence from Swedish Multinational Firms," *Review of Economics and Statistics* 90, no. 4 (November 1, 2008): 627–42. This study uses data of Swedish multinational firms in manufacturing industries, which has been collected from a questionnaire sent to all Swedish multinationals every 4 years since 1970. Sweden is ranked as one of the least corrupt countries by Transparency International, see Transparency International, *Global Corruption Report 2009: Corruption in the Private Sector* (Cambridge: Cambridge University Press, 2009), 397.

market access to local markets of the host State. In contrast, vertical FDI is aimed at gaining access to low production costs in order to export the final goods to markets outside the host State. This study confirms the notion that corruption affects the probability that a firm chooses to invest. However, as soon as the firm decides to invest, corruption does not influence the size of affiliate activities.[170] In addition, horizontal investments are to a larger extent hampered by corruption than vertical investments.[171] The suggested explanation is that producing and selling in the same country (horizontal FDI) results in a greater involvement in the host State which generates more costs than just exporting the production to other markets (vertical FDI).

Empirical evidence also shows a negative relationship between corruption and FDI due to the difference in corruption levels between the home and the host State.[172] A reason might be that different corruption levels lead to planning and operation pitfalls and increased efforts. It has also been found that larger firms are less adversely affected by corruption than smaller or midsize firms.[173] Thus, the effect of corruption on FDI may also depend on the size of the investor. This might be explained by the investor's bargaining power. Public officials demand fewer bribes from firms with greater bargaining strength.[174] This results from certain firm characteristics that enable large enterprises to reject bribery demands or to be able to pay such bribes. Firm-specific factors leading to a more powerful bargaining position are, besides the size of the firms, the size of the relevant investment and the research and development intensity of the investor.[175]

However, there are countries with weak institutions and high corruption levels that nonetheless attract a significant amount of FDI. This phenomenon runs counter to the general perception that corruption decreases the attractiveness for foreign investors. The most notable example is China, which receives more foreign capital in the form of FDI than any other country. However, there is evidence that the economic growth generated in the past in China is responsible for the attraction of foreign investors regardless of the low quality of the institutions.[176] This potential of profit allures FDI despite the appraisals of corruption and bad government. Another explanation might be that the institutional deficiencies in China deter local

[170] Hakkala, Norbäck, and Svaleryd, "Asymmetric Effects of Corruption on FDI: Evidence from Swedish Multinational Firms," 627.
[171] Ibid., 639.
[172] Habib and Zurawicki, "Corruption and Foreign Direct Investment," 303.
[173] Jakob Svensson, "Who Must Pay Bribes and How Much?," *Quarterly Journal of Economics* 118, no. 1 (2003): 207–30. This study used data from the 1998 Ugandan enterprise survey initiated by the World Bank. Bribery data was collected from 176 out of 243 sampled firms investing and operating in Uganda.
[174] Ibid., 208.
[175] See Hakkala, Norbäck, and Svaleryd, "Asymmetric Effects of Corruption on FDI: Evidence from Swedish Multinational Firms," 638.
[176] Joseph P.H. Fan et al., "Does 'Good Government' Draw Foreign Capital? Explaining China's Exceptional Foreign Direct Investment Inflow," World Bank Policy Research Working Paper (World Bank, April 2007), 2.

firms to a much larger extent than foreign enterprises.[177] In other words, China might protect foreign firms better than local entrepreneurs, which gives foreign investors an advantage and creates incentives to invest despite corruption and bad government.

This leads to the notion that China would attract even more FDI, if it had higher quality of government and less corruption, respectively.[178] The fact that inward FDI flows disproportionally into provinces with less corrupt governments supports this theory.[179] Additionally, a recent study shows that corruption perceptions are likely to be influenced by the economic performance of the country being evaluated.[180]

3. Corruption as isolated factor

It must be noted that all above mentioned studies showing a negative effect of corruption on FDI have not applied corruption as an isolated circumstance, which is independent from the remaining FDI determinants. Hence, a recent study has examined the question of how corruption influences FDI inflows in the case of "controlling for other determinants"[181] of FDI locations.[182] This study comes also to the expected conclusion that corruption deters foreign investors.[183] However, as the study controls for the host State's institutional quality, the negative impact of corruption disappears.[184] This result might at first glance seem unexpected as it might lead to the wrong conclusion that corruption levels in the host State do not decrease FDI inflows.[185] It must however be interpreted as an indication of the importance of the quality of institutions for the decision making of foreign investors.[186]

From this follows that corruption as an isolated determinant of FDI may play a less important role than one might think. In fact, it has been suggested that other factors are far more important and determinative for an investor than corruption.[187] Compared to other economic variables such as relevant tax rates, market size,

---

[177] Ibid., 3.
[178] Ibid., 2.; Rose-Ackerman, *Corruption and Government*, 3.
[179] Fan et al., "Does 'Good Government' Draw Foreign Capital? Explaining China's Exceptional Foreign Direct Investment Inflow," 26.
[180] Aidt, "Corruption, Institutions, and Economic Development," 272.
[181] The expression "controlling" is to be understood in the meaning as used in economic analysis, which means that in a system with many variables the "controlled" one are kept constant.
[182] Al-Sadig, "The Effect of Corruption on FDI Inflows." This study employed data of 117 countries over the period between 1984 and 2004, introducing different economic methods, different panel data sets, and a wide set of control variables.
[183] Ibid., 289.
[184] Ibid., 289.
[185] Ibid.
[186] Ibid.
[187] Selcuk Akcay, "Is Corruption an Obstacle for Foreign Direct Investors in Developing Countries?," *Economic Review* 12, no. 2 (2001): 27–34. This analysis is based on cross-country data of 52 developing countries.

openness of the economy and wages, corruption as an isolated determinant seems to impact FDI in a less dramatic manner.[188]

Despite these limited findings it must be acknowledged that the deterrent effect corruption has on FDI results from the negative influence it has over each of the other determinants. In any case, even though the direct isolated effect of corruption on foreign direct investment may be questioned, corruption most certainly has an impact on other investment related issues such as economic growth, development, stability and predictability of the legal framework, rule of law and the institutional quality of a host State. For the purpose of this analysis, it is sufficient that a negative relationship between corruption and FDI has been demonstrated. Whether the negative relationship is direct or indirect, whether as isolated determinant or dependent determinant — that is of no relevance to our objectives.

Finally, it must be noted that the question whether the latest cases of corruption and the harsh approach of recent investment tribunals have an impact on FDI is of major interest. Investors must not only fear criminal sanctions but also a total loss of investment protection due to an involvement in corruption. However, this issue has not yet been examined and empirical data is so far not available.

IV. Conclusion

This study parts from the premise that it is essential to understand the negative effect corruption has on all factors that are of relevance for foreign investment and investment arbitration. While corruption might be used as an instrument to speed up specific cumbersome processes, to help the investor to successfully perform its investment and in some circumstances to even make the investment possible, the overall effect of corruption is detrimental.

It has been shown that corruption creates major economic and social problems to the host State. It slows down economic growth, leads to a misallocation of resources and might increase poverty. It shall be recalled that the reason investment treaties protect foreign investment is based on the notion that it promotes economic development[189] and increases prosperity[190] in the participating States. Thus, the impact of corruption on the economic development is of utmost importance for investment law. Likewise, it has been demonstrated that corruption has negative implications on the investor's decision and thus represents an obstacle to foreign investment.

This brief overview does not seek to provide an answer to the ongoing discussions in the academic and research literature in social, political and economic science as well as business ethics. The main objective is to call attention to each possible effect corruption might have on trade, investment and society in order to draw the

[188] Ibid.
[189] See preamble of the U.S. Model BIT (2012).
[190] See preamble of the Chinese Model BIT (2003); France Model BIT (2006); Germany Model BIT (2008); United Kingdom Model BIT (2005).

big picture. The perception of corruption has changed from a social problem to a concern for all areas, recognised as a threat to all social, political and economic systems. In conclusion, corruption is detrimental to everybody.[191]

[191] See Jeremy P Carver, "Combating Corruption: The Emergence of New International Law," *International Law FORUM Du Droit International* 5 (2003): 123. Carver concludes his short contribution with "Corruption is 'bad business' for everyone!"

CHAPTER TWO:
THE INTERNATIONAL FIGHT AGAINST CORRUPTION

A. Introduction

In order to develop an adequate and reasonable approach to corruption in investor-State disputes it is crucial to be aware of the approach taken by the various actors at the international level to combat corruption. After having analysed the detrimental effects of corruption on the international community in Chapter One, at this stage the focus is on the measures taken to fight corruption at international and regional levels. The aim of this Chapter is to give a brief overview of the main approaches adopted by the different international players to serve as basis for the subsequent analysis conducted in this study. Most notably, the multitude of measures, programmes and policies show the uniform consensus among the international community that corruption must be condemned and tackled.

The degree of attention attributed to combating corruption has increased in the last decades. In the past, bribes were seen as the ordinary course of action in international business transactions, illustrated by the fact that many developed countries had provisions in place to deduct them as ordinary expenses of doing business abroad. That perception started to change in the 1970s. It was however not until the 1990s that the international community adopted the cause of fighting corruption on a multilateral level. The initial focus was on the criminalisation of active bribery of foreign officials, i.e. on the supply side of the problem. Proving inefficient and ineffective, the international fight against corruption adopted a holistic approach and nowadays tackles both supply side and demand side of corruption.[192] Thus, the efforts include the promotion of transparency and good governance as well as the criminalisation of extortion and solicitation of bribes by public officials.

The general change of perception that corruption had to be fought against is influenced by various events, has myriad reasons and cannot be narrowed down to just a few.[193] One influence might have been the general transformation of the international business world in the 1990s. The Cold War had ended, and many countries of the former Eastern block became trading partners to the rest of the world. In addition, the World Trade Organization was established in 1994 and increased the access of the developed countries to the developing world. Thus, the trade distorting effect of corruption might have been more perceptible than before. While the change of perception might have had many more reasons, it is clear that the new approach to corruption paved the way for the adoption of several

[192] Note that the use of the terms "supply side" and "demand side" has been criticised by commentators as both seek and receive benefits, see e.g. Llamzon, *Corruption in International Investment Arbitration*, 68.

[193] For reasons why the degree of attention might have increased see Vito Tanzi, "Corruption Around the World: Causes, Consequences, Scope, and Cures," *Staff Papers - International Monetary Fund* 45, no. 4 (December 1998): 559–94.

international anti-corruption initiatives and measures including legally binding international anti-corruption instruments.

This overview is not meant to be conclusive or exhaustive. It is also not innovative, but rather a collection of the main pillars of what is herein referred to as 'the international fight against corruption' in order to provide a foundation for this study. One important part of such international approach is the implementation of regional and global international instruments against corruption (see below at **B.**). Moreover, international organisations and international institutions included the fight against corruption into their agendas (see below at **C.**) Finally, business organisations and civil society alike have assumed the significant role of joining the international course of action (see below at **D.**).

B. International Instruments against Corruption

The various international instruments against corruption form the basic element of the international fight against corruption. It must be borne in mind that the international instruments only bind States and are not mandatory law directly applicable by the tribunals in investment treaty arbitration. This being said, they nonetheless have a strong influence on the general perception of how to deal with a topic as delicate as corruption. In fact, investment tribunals have referred to these international instruments to infer that an international consensus regarding corruption has developed.[194] In addition, since international investment law is not an isolated field of law, but rather an integrated part of international law, the measures taken under international law against corruption are of utmost relevance.

The global fight started unilaterally in the United States in the late 1970s (see below at **I.**). After some obstacles, multilateral anti-corruption conventions were implemented at global (see below at **II.**) and regional levels (see below at **III.**). Finally, domestic anti-corruption laws have also contributed to the fight against corruption (see below at **IV.**).

I. The Start of the Fight: The Foreign Corrupt Practices Act 1977

The *Foreign Corrupt Practices Act* (***FCPA***) was the first legal instrument of a developed country to prohibit bribery of public officials of another country in order to procure business abroad. We will briefly highlight the main events that led to the enactment of the FCPA in the United States in the 1970s (see below at **1.**), before giving a brief overview of the relevant provisions of the FCPA (see below at **2.**).

[194] See *World Duty Free v Kenya*. The tribunal held that claims based on contracts obtained by corruption cannot be upheld and referred to a transnational public policy by pointing to the international conventions against corruption.

1. The road to the FCPA

The fight against corruption of foreign public officials, to some extent, has its roots in a scandal in the early 1970s: the Watergate Scandal.[195] The Watergate investigations revealed questionable practices of high U.S. public officials and business representatives. The original task of the investigation was to disclose the role of major U.S. corporations in the financing of U.S. political campaigns. However, these investigations uncovered U.S. corporate involvement in doubtful payments to foreign public officials and in particular the Lockheed Scandal.[196] The unveiling of a network of entanglement involving major corporations and public officials all over the world generated a general international public awareness and led to more investigations around the globe.[197] As a consequence, corruption in international business transactions was brought to the 'spotlight' for the first time at an international level.[198]

The Securities and Exchange Commission (***SEC***) played a major role in the general corruption investigations. In the opinion of the SEC, bribery of foreign state officials could also amount to a violation of U.S. securities laws. The SEC was concerned with the establishment of secret slush funds for dubious payments abroad, since companies kept accounts off-the-records and created false invoices to hide such expenditures, all of which violated the requirement under U.S. securities laws for public companies to file accurate financial statements.[199] Thus, the focus

[195] It is often said that the Lockheed Scandal led to the enactment of the FCPA, see Carver, "Combating Corruption." However, the Watergate Scandal revealed the involvement of U.S. multinational companies in a worldwide net of bribery, which later led to the corruption investigations of the 1970s, in which the Lockheed Scandal was disclosed. For a general overview on the enactment history of the FCPA see Alejandro Posadas, "Combating Corruption under International Law," *Duke Journal of Comparative and International Law* 10 (2000): 348–360. For a brief summary of the events leading to the enactment of the FCPA see Paul D Carrington, "Enforcing International Corrupt Practices Law," *Michigan Journal of International Law* 32 (2010): 132–133.

[196] In July 1973, Watergate Special Prosecutor Archibald Cox requested voluntary disclosures of any company that had made dubious or illegal payments to the 1972 U.S. Presidential campaign. The information submitted to Cox revealed that multinational companies had not only made illegal payments to the U.S. political campaigns, but had created a concealed global network of channels to contribute to foreign governments and foreign officials, see Posadas, "Combating Corruption under International Law," 348 et seq.

[197] In fact, the investigations of U.S. Congress and other federal agencies had consequences in countries as diverse as Honduras, Japan, Costa Rica, Italy, Bolivia, and the Netherlands. The Lockheed Scandal became one of the most publicised corruption scandals of the seventies and led to political crises in the Netherlands and Japan. The Dutch investigations came to the conclusion that Lockheed had paid approximately one million dollars to Prince Bernhard of the Netherlands, which led to his forced resignation from his military and political posts and his position as first president of the World Wildlife Fund. In Japan, the Prime Minister Kakuei Tanaka was forced to resign when it was alleged that Lockheed had made illicit payments of around USD 25 million to high-ranking Japanese government officials. For a general overview on the domestic investigation against Lockheed see Noonan, *Bribes*, 656–663. For a brief overview on the international consequences of the Lockheed Scandal see Ibid., 663–670.

[198] Posadas, "Combating Corruption under International Law," 348.

[199] It has been argued that the real impetus for adopting the FCPA came from concerns of the SEC that reliance of quoted companies on major international contracts induced by bribes might lead to unacceptable share price volatility. See Carver, "Combating Corruption," 119.

of the investigation was the concealment of the corrupt payments, which included falsifications of documents and misrepresentations to the shareholders in order to cover the tracks of the real practices abroad.[200]

In 1975, the SEC commenced official investigations against major U.S. companies.[201] Since federal law did not prohibit paying bribes to foreign officials, the SEC prosecution was based on the failure to disclose 'material' transactions in violation of the U.S. securities laws. These prosecutions gave incentives for corporations to participate in the voluntary disclosure programme launched by the SEC.[202] As a result of the findings of the investigation, the SEC report to the U.S. Senate suggested to enact legislation against illicit payments to foreign public officials.[203] The public hearings of the U.S. Congress revealed more details of the scandals and the U.S. Congress finally decided to criminalise foreign bribery.[204] On 19 December 1977, the FCPA was signed into law.[205]

2. FCPA – overview and analysis

The act has two components. First, it makes bribery of foreign officials a crime; and second, it establishes special accounting requirements in order to eradicate accounting falsification to conceal corrupt payments.[206] The following analysis focuses on the provisions regarding the criminalisation of bribery of foreign officials.

---

[200] Wallace Timmeny, "Overview of the FCPA, An," *Syracuse Journal of International Law and Commerce* 9 (1982): 236.

[201] The SEC investigations were brought against, among others, Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation, Ashland Oil, Inc., and United Brands Corporation. While the first four investigations were initiated on the results of the Watergate investigations, the proceedings against United Brands Co. arose from another event. On 3 February 1975, Eli M. Black, the Chairman, committed suicide by throwing himself out of the 22nd floor of a New York building. The SEC found out that Black had approved the USD 2.5 million payment to a senior representative of the Honduran government in order to repeal a recently enacted tax on bananas. In 1978, the company pled guilty to conspiring to pay USD 2.5 million to the former Honduran minister of economy, Abraham Bennaton Ramos. See Noonan, *Bribes*, 656. For the investigations in general see Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the U.S. Senate, Banking Housing and Urban Affairs Committee, May 12, 1976, International Legal Materials (I.L.M.), 1976, 620-633; also available under http://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.

[202] Approximately 500 U.S. companies admitted having made dubious payments to foreign officials. See Ibid., 674.

[203] Posadas, "Combating Corruption under International Law," 357 et seq.

[204] Ibid., 358.

[205] Note that President Jimmy Carter signed the FCPA after no opposition in the Senate or Congress.

[206] The influence of the SEC can be seen in the fact that a major part of the FCPA is establishing new accounting obligations to obtain more transparency in the capital markets. In fact, the FCPA amended the Securities and Exchange Act of 1934. For a brief overview on the amendments made to date see Bruce W. Klaw, "A New Strategy for Preventing Bribery and Extortion in International Business Transactions," *Harvard Journal on Legislation* 49 (2012): 315–319.

The FCPA was amended twice.[207] In 1988, the first amendment mitigated the impact on the competitiveness of U.S. corporations in doing international business.[208] U.S. companies had been complaining about being disadvantaged as against European and Japanese competitors who had no restriction on bribery. The second amendment was to adopt the negotiated obligations under the International Anti-Bribery Convention of the OECD.[209]

a) Scope of the FCPA

Under the FCPA, a corrupt practice is basically any offer, authorisation of payment, or payment of anything of value to foreign officials. Originally, the FCPA covered any officer or employee of a foreign government or any department, agency, or instrumentality thereof, including officials of public enterprises and judges.[210] Through the second amendment in 1998, the scope of the definition of foreign official was extended. Now, any officer or employee of a public international organisation, or any person acting in an official capacity for or on behalf of such organisation falls within the scope of the FCPA.[211] In addition, the FCPA prohibits promises or payments of anything of value to foreign political candidates and political parties.[212]

The offer of payment or the payment itself must be made with the objective to influence any act or decision of the foreign official in her official capacity. This includes the inducement of the foreign official to act or to refrain from acting in violation of her lawful duty in order to secure improper advantage, or to induce the recipient to influence the decisions of governments or instrumentalities.[213]

The FCPA also prohibits using intermediaries to channel bribes. Thus, promises and payments made to any person with the knowledge that a portion or all of the money will be offered or promised or given to any official in exchange of an unlawful advantage are also forbidden.[214] In this context, it must be noted that the use of intermediaries as such is not prohibited in general, but only when the promises or payments are performed with the knowledge that the proceeds should be passed on to foreign officials.[215]

---

[207] For an overview on the amendments see Ibid., 311–315.
[208] The measures were enacted as part of the Omnibus Trade and Competitiveness Act of 1988. The amendment in 1988 introduced the possibility of payments regarding "routine governmental payments". See below at B.I.2.b).
[209] The amendment came through the International Anti-Bribery and Fair Competition Act of 1998. For a discussion on the OECD Anti-Bribery Convention see below at B.II.1.
[210] 15 U.S.C. §78dd-1 (f)(1); 78dd-2 (h)(2).
[211] 15 U.S.C. §§78dd-1 (a)(1)-(2), 78dd-2 (a)(1)-(2).
[212] 15 U.S.C. §§78dd-1 (a)(2); 78dd-2 (a)(2). This prohibition had already been included in the original act of 1977, since attention to corruption was brought by the Watergate Scandal involving questionable payments to political parties and campaigns.
[213] 15 U.S.C. §78dd-1 (a), 78dd-2 (a), 78dd-3 (a).
[214] 15 U.S.C. §78dd-1 (a)(3); 78dd-2 (a)(3).
[215] "Knowledge" is not only established by positive knowledge, but also by deliberate disregard or wilful blindness. See Lay-person's guide to FCPA, Foreign Corrupt Practices Antibribery Provisions, A Resource Guide to the U.S. Foreign Corrupt Practices Act (sec.gov).

Originally, jurisdiction was only asserted when at least certain actions pursued for the furtherance of a bribe were committed within the territory of the United States.[216] Thus, the original version of the FCPA did not grant the authority to prosecute corrupt practices committed entirely outside of the U.S., even by U.S. citizens. In addition, the perpetrator had to be U.S. national, citizen or resident. These limitations on jurisdiction were eliminated with the second amendment in 1998.[217] Now, the United States has jurisdiction over offences committed in whole or in part within the territory of the U.S., regardless of the nationality of the perpetrator.[218] In addition, the amendment introduced an additional jurisdictional base for offences committed abroad by U.S. nationals and businesses.[219]

Under the FCPA, criminal fines, civil sanctions and other government actions may apply. Persons or firms found in violation of the FCPA might be barred from doing business with the federal government or rendered ineligible to receive export licences. In addition, a private cause of action might be brought under the Racketeer Influenced and Corrupt Organizations Act (***RICO***), i.e. a competitor might bring an action alleging that the bribery caused the defendant to win a foreign contract and has caused damages to the plaintiff.[220]

All in all, the FCPA focuses merely on sanctioning the supply side of corruption. It criminalises the payment of bribes to foreign officials to obtain business, but fails to address the problem from the receiving or even soliciting end, i.e. the corrupt public officials. The scope of the FCPA is limited due to the fact that it is a domestic measure of the United States without authority outside of its jurisdiction. The narrow approach has proven ineffective and inefficient to curb corruption in international business and has been subject to criticism.[221]

b) Exceptions and affirmative defences

As mentioned before, the 1988 amendment sought to eliminate or mitigate the harsh impact that the FCPA had on the competitiveness of U.S. companies in doing business abroad. Hence, the Omnibus Trade and Competitiveness Act of

---

[216] Sayed, *Corruption in International Trade and Commercial Arbitration*, 205.
[217] 15 U.S.C. §78dd as amended by International Anti-Bribery and Fair Competition Act of 1998.
[218] 15 U.S.C. §78dd-1. Note that one provision on jurisdiction criticised by commentators is Article 4, which places a limitation on the exercise of extraterritorial jurisdiction if the domestic law of the State with a territorial nexus to the crime mandates exclusive jurisdiction. See Lestelle, "Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction, The," 540.
[219] 15 U.S.C. §78dd-1 (g), 78dd-2 (i).
[220] See Lay-person's guide to FCPA, Foreign Corrupt Practices Antibribery Provisions, A Resource Guide to the U.S. Foreign Corrupt Practices Act (sec.gov). For a brief overview on recent examples of sanctions under the FCPA see Carrington, "Enforcing International Corrupt Practices Law," 134–139.
[221] For an overview of the shortcomings of the FCPA and a thorough analysis of the mere supply side approach of the FCPA see Klaw, "A New Strategy for Preventing Bribery and Extortion in International Business Transactions." Klaw suggests a more holistic approach. Among others, Klaw argues that the FCPA should authorise the prosecution of corrupt foreign officials, if their home governments are unwilling or unable to so, see Ibid., 361–368.

1988 introduced an exception and two affirmative defences to the FCPA. The exception established that the FCPA does not apply to payments to foreign government officials for 'routine governmental action'.[222] As a consequence, any facilitating or expediting payments made to foreign officials in order to secure the performance of a routine governmental action falls outside of the scope of the FCPA. Examples of such routine governmental actions are obtaining permits, licences or other official documents, processing governmental papers, providing police protection or actions of similar nature.[223] However, the FCPA makes clear that such routine actions do not include any decision by a foreign official whether to grant new business opportunities or to continue already existing businesses.[224]

The first affirmative defence covers foreign payments that are "*lawful under the written laws and regulations of the foreign officials' country*".[225] The second affirmative defence concerns reasonable bona fide expenditures that are directly related to the "*promotion, demonstration or explanation of products or services*".[226]

II. Anti-corruption measures on global level

Two decades after the enactment of the FCPA, the capital exporting countries concluded the first multilateral anti-corruption convention on a global level (see below at **1.**), some time after that the international community entered into the United Nation Convention against Corruption (see below at **2.**).

1. Organization for Economic Cooperation and Development

In 1997, under the pressure of the United States, the Organization for Economic Cooperation and Development (***OECD***) passed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (***Anti-Bribery Convention***). It was the first over-regional multilateral agreement addressing transnational bribery.[227] Its contribution to the global fight against corruption can be evidenced by the long road that led to its signing (see below at

[222] 15 U.S.C. §§78dd-1 (b), 78dd-2 (b). This exception is commonly known as the "grease payment" exception.
[223] 15 U.S.C. §§78dd-1 (f)(3)(A); 78dd-2 (h)(4)(A).
[224] 15 U.S.C. §§78dd-1 (f)(3)(B); 78dd-2 (h)(4)(B). *"The term 'routine governmental action' does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party."* For a critical analysis of this exception see Alexandros Zervos, "Amending the Foreign Corrupt Practices Act: Repealing the Exemption for Routine Government Action Payments," *Penn State International Law Review* 25 (2007 2006): 251.
[225] 15 U.S.C. §78dd-1 (c)(1); 78dd-2 (c)(1).
[226] 15 U.S.C. §78dd-1 (c)(2); 78dd-2 (c)(2). The introduction of these defences has been criticised in the literature. See Bartley A Brennan, "Foreign Corrupt Practices Act Amendments of 1998: Death of a Law, The," *North Carolina Journal of International Law and Commercial Regulation* 15 (1990): 229.
[227] The Inter-American Convention Against Corruption, which was signed before the Anti-Bribery Convention (29 March 1996), was a regional international instrument against corruption.

a)) and an overview of the provisions banning bribery of foreign State officials (see below at **b)**).

a) Road to the Anti-Bribery Convention

The OECD consists of 36 member countries, which are all industrialised and capital exporting countries. Collectively, the member countries are the producers of two-thirds of the world's goods and services.[228] As early as 1976, the United States started an international campaign to persuade the rest of the world to conclude a multilateral agreement to combat international bribery.[229] The efforts were unsuccessful and finally abandoned due to opposition of developing countries.[230] Under the on-going pressure of the United States based transnational companies, which saw themselves in a disadvantage position compared to companies of other countries not bound by the FCPA, the U.S. Congress amended the FCPA in 1988.[231] The U.S. Government saw itself compelled to take action and to increase its efforts to reach a multilateral solution. Since at that time negotiations on global level appeared to be unpromising, the U.S. Government increased the pressure on its trading partners at the OECD.[232] This led to discussions at the OECD in 1989 on combating illicit payments in international transactions.[233] The OECD established various committees to analyse the different facets of corruption.

Against this background, commentators have argued that the mainspring of the Anti-Bribery Convention appears to be the distorting effect of international competitive conditions caused by international bribery.[234] According to such

[228] The OECD was founded in 1961 with the goal of helping its member countries to achieve sustainable economic growth and to raise the quality of living while maintaining financial stability.
[229] For a general overview on the U.S. approach to fighting corruption on a multilateral level see David A Gantz, "Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus," *Northwestern Journal of International Law & Business* 18 (1998 1997): 465 et seq.; Peter W. Schroth, "The United States and the International Bribery Conventions," *The American Journal of Comparative Law* 50 (Autumn 2002): 593–622; Lisa Harriman Randall, "Multilateralization of the Foreign Corrupt Practices Act," *Minnesota Journal of Global Trade* 6 (1997): 657.
[230] For the discussion about the negotiations regarding the U.N. Convention Against Corruption see below at B.II.2.a).
[231] See above at B.I.2.
[232] The U.S. Government had earlier, at the end of the 1970s and beginning of the 1980s, pushed negotiations on the U.N. platform to adopt a multilateral agreement against corruption. These efforts remained unsuccessful due to opposition of developing countries.
[233] Henry H Rossbacher and Tracy W Young, "Foreign Corrupt Practices Act within the American Response to Domestic Corruption, The," *Dickinson Journal of International Law* 15 (1997 1996): 527. However, it should be noted that the U.S. Government initiated the discussions at OECD level, but did not adopt an aggressive policy in this regard until President Clinton took office in 1993. During his presidency, the State Department made the fight against international corruption a top policy priority. See Posadas, "Combating Corruption under International Law," 376.
[234] Lestelle, "Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction, The," 543.

critical view, the main objective of the convention was to create a levelled playing field for companies of the signatories competing for business abroad.[235]

In 1994, the OECD adopted the "Recommendations on Bribery in International Business Transactions."[236] These recommendations instructed member countries to 'take effective measures' to fight bribery in international business transactions. They also introduced a review mechanism to follow the steps that had been taken by member countries to implement these recommended measures. Lacking any binding character, the effect was limited. Germany and France still offered bribe tax-deductibility to their corporations.[237] As a result of such on-going practice, the OECD announced a recommendation to prohibit the tax deductibility of bribes to foreign public officials in 1996.[238] Despite such recommendation, Germany[239] and France[240] remained unwilling to deal with bribery in international business transactions without assurance that all other exporting countries were obliged to criminalise transnational corruption. Their concern of imposing on their companies a competitive disadvantage was too burdensome. In the meantime, countries such as Belgium, Norway and the Netherlands had already taken legislative steps to criminalise bribery of foreign officials.[241]

In 1997, the OECD revised the recommendations of 1994 (***Revised Recommendations***) and added requirements concerning the standards for adequate accounting, external audit and internal company control.[242] In addition, the recommendations emphasised that an international convention criminalising bribery would be the necessary legal instrument to fight corruption and included a resolution to pursue treaty negotiations.[243] Finally, at the end of 1997, only six

---

[235] Lisa Miller, "No More This for That: The Effect of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," *Cardozo Journal of International and Comparative Law* 8 (2000): 140.

[236] Recommendation C (94)75/Final, adopted by the OECD Council at its 829th Session on May 27, 1994.

[237] Austria, Belgium, Denmark, Iceland, Netherlands, Norway, and Portugal also still had tax deductibility provisions in place before the OECD Recommendation of 1996. See Update on tax legislation on the tax treatment of bribes to foreign public oficials in countries parties to the OECD Anti-Bribery Convention (June 2011).

[238] OECD, "The Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials," 1996, C(96)27/Final. The Recommendations called upon member countries "*which do not disallow the deductibility of bribes to foreign officials*" to "*re-examine such treatment with the intention of denying this deductibility*".

[239] Germany adopted new legislation on 24 March 1999 denying the tax deductibility of bribes.

[240] France passed legislation denying the tax deductibility of bribes to foreign public officials on 29 December 1997.

[241] See Report by the OECD Committee on International Investment and Multinational Enterprises (CIME) to the OECD Council at the Ministerial Level, dated May 26, 1997: Review of the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalization of Bribery of Foreign Public Officials.

[242] See Recommendation of the Council on Combating Bribery in International Business Transactions C(97)123/FINAL, adopted by the OECD Council on May 23, 1997.

[243] The 1997 Recommendation states that the OECD:
"*DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter*."

months after the Council adopted the Revised Recommendations, the time was right for the first international convention against transnational corruption. On 21 November 1997, the OECD member countries signed the Anti-Bribery Convention. The convention became effective on 15 February 1999[244] and is open to signature by any country.[245]

b) OECD Anti-Bribery Convention - overview

The preamble of the Anti-Bribery Convention emphasises the problems that corruption causes on international business and on good governance

> "[…] bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions; […]"[246]

The Anti-Bribery Convention requires the implementation of national legislation to establish as a criminal offence the intentional offering, promising or giving of undue pecuniary or other advantages to a foreign public official.[247] In this regard, this convention pays deference to the existing laws of the foreign official's country, for which reason a payment is not an offence if the laws of the foreign official's country require or permit the payment.[248] In order to secure effectiveness, the Anti-Bribery Convention calls for broad jurisdiction. Each member country shall ensure that its laws establish also jurisdiction for its nationals for offences committed abroad and for non-nationals, when the offence was committed in its territory in whole or in part.[249]

In addition, this convention provides for legal assistance and cooperation among the parties[250] and introduces a process of mutual review, which is intended to be

---

[244] Article 15 of the OECD Convention provides that the Convention will enter into force sixty days after five of the ten largest exporting countries deposit their legal instruments of acceptance, approval, or ratification.

[245] As of February 2014, the OECD Anti-Bribery Convention has been ratified by its 34 member States and by 6 non-member States (Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa).

[246] See Preamble of the Anti-Bribery Convention.

[247] Article 1.1 reads:

"*Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business*."

For a general overview on the OECD Anti-Bribery Convention see: *Consultation Paper – Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption*, OECD Working Group on Bribery in International Business Transactions, January 2008.

[248] See Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997.

[249] Article 4 of the Anti Bribery Convention.

[250] Articles 9 and 10 of the Anti Bribery Convention.

both critical and collaborative.[251] Thus, member State's performance is supervised critically by other members, and then disclosed. The national authorities are encouraged to work at an international level, which is supposed to lead to an improvement of the multiple national techniques. An exchange of experience and resources shall also expand the capacity on a national level.[252]

While the Anti-Bribery Convention constituted an important early step in the international fight against corruption, it falls short from capturing the whole problem of corruption. The convention attacks only active corruption. It focuses merely on the supply side and does not contain any provisions on penalisation of corrupt public officials. Thus, it refrains from addressing the problem of passive corruption at all. Most certainly, this is a reflection of the OECD's nature as an association of capital exporting countries. Nevertheless, bribery of public officials within the OECD is definitely a problem, which should not be neglected. Moreover, the above-mentioned exception that a payment to a foreign official does not constitute an offence if the relevant act is permitted by the governing legislation or case law of the foreign public official's country may create a loophole. Another weakness of the Anti-Bribery Convention is that it only includes payments or other advantages that goes directly to foreign officials, but it does not condemn payments to friends, relatives and business partners of foreign officials and thus indirectly to them.[253] Furthermore, bribes given to foreign officials of political parties or candidates for public office are not included. Finally, small facilitation payments are not criminalised either; a fact heavily criticised by commentators.[254]

Despite such shortcomings, the OECD continues to play an active role in combating bribery in international business transactions and has an important domestic influence on the fight against corruption.[255] Besides combating the 'supply side' of bribery and the tax deductibility of bribes, the OECD has established different programmes to prevent bribery through export credits,[256] to promote responsible business conduct,[257] to prevent corruption in the public sector,[258] and to improve governance through development assistance.[259] Recently,

---

[251] Article 12 of the Anti Bribery Convention.
[252] Carver, "Combating Corruption," 120.
[253] Theodore Moran, *Combating Corrupt Payments in Foreign Investment Concessions Closing the Loopholes, Extending the Tools* (Washington, D.C.: Center for Global Development, 2008), 2. Posadas, "Combating Corruption under International Law," 381.
[254] See Denolf, "The Impact of Corruption on Foreign Direct Investment," 250.
[255] For the domestic influence of the Anti-Bribery Convention and the OECD, see Cecile Rose, *International Anti-Corruption Norms - Their Creation and Influence on Domestic Legal System* (Oxford: Oxford University Press, 2015), 59-95.
[256] 2006 OECD Recommendation on Bribery and Officially Supported Export Credits, adopted by the OECD Council on 14 December 2006, TD/ECG(2006)24.
[257] *The OECD Guidelines for Multinational Enterprises* are a comprehensive instrument for corporate responsibility multilaterally agreed by governments. The Guidelines are part of the *1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises*, which has been reviewed in 1979, 1982, 1984, 1991 and 2000.
[258] The OECD also promotes good governance in the public sector to prevent 'demand side'-corruption and has adopted three Recommendations: The 1998 OECD Recommendation on

the OECD published recommendations to improve tax measures for fighting corruption.[260]

2. United Nations

The most recent and comprehensive multilateral instrument against corruption was adopted by the General Assembly of the United Nations in October 2003: the *United Nations Convention Against Corruption* (***UNCAC***). The UNCAC has been signed and ratified by 140 countries and is effective as of 14 December 2005.[261] Also the road to the signing of the UNCAC was long and full of obstacles. The fight against corruption under the auspices of the United Nations had many struggles and came often to a deadlock before the signing of the convention (see below at **a)**). The comprehensive provisions against demand- and supply-side corruption constitute an important progress for the international fight against corruption (see below at **b)**).

a) Road to UNCAC

The difficult and long road to the UNCAC started as early as 1974, when the United Nations Economic and Social Council (***ECOSOC***) examined the impact of the business practices of multinational corporations on developing countries. In May of the same year, the group published its report and emphasised for the first time the international need for anti-corruption measures on the side of the host countries and called for the home countries to assist by adopting measures against bribery committed abroad by their nationals.[262] The report also suggested establishing a U.N. commission with the objective of dealing with the problems caused by multinational corporations. That commission was founded in December 1974 and worked on a code of conduct for transnational corporations.

Improving Ethical Conduct in the Public Service, adopted by the OECD Council on 23 April 1998; the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Sector; the 2008 OECD Recommendation on Enhancing Integrity in Public Procurement, C(2008)105.

[259] The OECD's Principle for Donor Action in Anti-Corruption, December 8, 2006, DCD/DAC(2006)40/REV1.

[260] 2009 OECD Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the OECD Council on 25 May 2009, C(2009)64.

[261] See United Nations Office on Drugs & Crime, United Nations Convention Against Corruption, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

[262] U.N., ECOSOC, Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, U.N. Document E/5500/Add.1 (Part 1) of May 24, 1974, printed in: I.L.M. 13 (1974), 800. Part 1, Chapter I. Impact on Development, c) General Policies:

"[…] *Vigorous anti-corruption measures should be introduced by all Governments. Host countries, both developed and developing, should examine carefully the possibilities of corruptive practices in granting special permissions or concessions to multinational corporations. In particular, multinational corporations should not be allowed to give direct or indirect gratuities to office holders of host Governments and trade unions. Home countries could assist in this regard by strict measures against bribery committed by their nationals elsewhere. International efforts for exchange of experiences in the harmonization of anti-corruption provisions would also help*."

In May 1979, the *Ad Hoc* Intergovernmental Working Group on the Problem of Corrupt Practices published the Draft International Agreement on Illicit Payments, which incorporated many provisions of the FCPA.[263] The draft dealt with both sides of corruption — demand and supply side. The definition of public officials was broad and included any person holding a legislative, administrative, judicial or military office.[264] The introduction of corporate responsibility and liability, which was included for the first time in an international instrument,[265] and its broad provisions about extraterritorial jurisdiction were controversial.[266] The negotiations stalled and the draft was never transformed into an international agreement as the clash between the developing countries, which had support of the Eastern Block, and the developed countries became insurmountable. The U.S. efforts to advance the process were unsuccessful. The so-called group of 77, the leading voice of the developing countries, demanded the adoption of the code of conduct for multinational corporations in order to support the draft. However, a consensus on the code of conduct for transnational corporations could never be reached.[267] Finally, the draft of an international instrument against transnational bribery was abandoned. Some attempts of the U.S. to resurrect it in the early 1980s were not fruitful.

The time seemed not right for an international agreement against corruption.[268] It took over a decade until the General Assembly suggested to the ECOSOC in December 1995 to restart with the efforts to negotiate the old draft.[269] A year later, the General Assembly adopted the U.N. Declaration against Corruption and Bribery in International Commercial Transactions.[270] That declaration was not binding. The State parties merely 'committed themselves' to take action individually and through international and regional organisations to combat corruption.

In September 2000, the U.N. held a Millennium Summit where 189 States committed to pursue a world where elimination of poverty and establishment of sustained development have the highest priority. The fight against corruption was

---

[263] For a comparison between the Draft and the FCPA see Margaret Helen Young, "Comparison of the Foreign Corrupt Practices Act and the Draft International Agreement on Illicit Payments, A," *Vanderbilt Journal of Transnational Law* 13 (1980): 795.

[264] Chapter III, Art. 2(a).

[265] See Ioannis Androulakis, *Die Globalisierung Der Korruptionsbekämpfung: Eine Untersuchung Zur Entstehung, Zum Inhalt Und Zu Den Auswirkungen Des Internationalen Korruptionsstrafrechts*, 1st ed. (Baden-Baden: Nomos, 2007), 199.

[266] David R Slade, "Foreign Corrupt Payments: Enforcing a Multilateral Agreement," *Harvard International Law Journal* 22 (1981): 148 et seq.

[267] The negotiations about the code of conduct for transnational corporations came to an unsuccessful and definite end in 1992.

[268] It is noteworthy that most developed countries showed to some extent reluctance in joining the United States as they were allegedly concerned with losing the comparative advantages of companies domiciled in their jurisdiction and operating on an international level.

[269] U.N., General Assembly, Resolution 50/106, 20 December 1995, §6, U.N. Doc. A/RES/50/106 (1996), Yearbook of the UN 49 (1995), 834 (835).

[270] United Nations Declaration against Corruption and Bribery in International Commercial Transactions, 16 December 1996, A/RES/51/191.

not part of the eight millennium development goals.[271] However, as shown in Chapter One, corruption has a direct adverse effect on poverty and poor development and therefore falls indirectly under the millennium development goals.

In the meantime, the U.N. was finishing its first multilateral instrument to address some issues of corruption, the United Nations Convention against Transnational Organized Crime 2000 (***UNTOC***)[272] adopted on 15 November 2000 and signed a month later in Palermo.[273] A year later, the General Assembly decided to develop an international legal instrument with the primary focus on corruption and independent from the UNTOC. Hence, in February 2001, an *ad hoc* committee restarted the efforts of adopting a broad and effective international legal instrument against corruption with a comprehensive and multidisciplinary approach. After seven negotiating sessions, the *ad hoc* committee agreed on the final version of the UNCAC, which was adopted by the General Assembly on 31 October 2003 and opened for signature at the Conference held in Merida, Mexico on 9 December 2003.

Some of the major U.N. contributions to the fight against corruption in addition to the two conventions include: the Manual on Practical Measures against Corruption 1990,[274] the Basic Principles on the Role of Lawyers, 1990,[275] the International Code of Conduct for Public Officials, 1996,[276] and the Declaration on Crime and Public Security, 1996.[277]

b) UNCAC – overview[278]

The preamble of the UNCAC emphasises the severe problems corruption causes for society, democracy and sustainable development as a basic concern for the international community

> "[c]oncerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law, […]"

[271] The Millennium Development Goals include: eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, combat HIV/AIDS, malaria, and other diseases, ensure environmental sustainability, develop a global partnership for development.
[272] U.N., General Assembly, Resolution 55/25, UN Convention against Transnational Organized Crime, U.N. Doc. A/RES/55/25 (2000), 15 November 2000, I.L.M. 40 (2001), 335.
[273] The UNTOC entered into force on 29 September 2003 after the deposition of 40 ratification instruments.
[274] The Manual deals with the most common problems when dealing with corruption.
[275] General Assembly, Resolution 45/121 of 14 December 1990.
[276] General Assembly, Resolution on Action against Corruption, Resolution 51/59, 12 December 1996.
[277] General Assembly, Resolution 51/60, 12 December 1996.
[278] For a critical overview on the UNCAC see R. Rajesh Babu, "The United Nations Convention Against Corruption: A Critical Overview," *Available at SSRN: http://ssrn.com/abstract=891898*, 2006; Philippa Webb, "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?," *J Int Economic Law* 8, no. 1 (2005): 191–229.

The main achievement of the UNCAC is the extensive international participation and the broad consensus of signatory States.[279] As opposed to the only regional or otherwise limited efforts that existed before, with the UNCAC, the fight against corruption has in fact gone global. The big challenge was to take the many facets of corruption into account and to establish a framework to unify international legislation on this field.[280] In addition, the convention had to address the fundamental limitations due to inevitable cultural, social, political and legal differences and had to deal with the distinct levels of economic development of the over 100 State parties.

The UNCAC rests on four pillars: prevention, criminalisation, international cooperation and asset recovery.[281] The Convention does not provide a general definition of corruption. It rather adopts a descriptive approach by listing each single form of corruption, which falls under its scope. Thus, the UNCAC gives only definitions of some of the main types of corruption. Emphasis is placed on the preventive measures.[282] The Convention calls for the implementation of effective anti-corruption policies[283] and for the creation of organisations to deal with the problem of corruption.[284] State parties are required to adopt measures to ensure the integrity, transparency and accountability among civil servants[285] and to establish codes of conduct.[286] Furthermore, the Convention addresses preventive measures regarding the private sector, such as enhancing accounting and auditing standards, creating codes of conduct and preventing the misuse of procedures regulating private entities.[287]

Another major focus of the UNCAC is the criminalisation of corrupt acts. The UNCAC requires the State parties to criminalise, among other things, public and private bribery, both from the supply and demand side. Hence, Article 15 (a) refers to active bribery of *national* public officials, while Article 15 (b) relates to passive bribery of *national* public officials. Article 16, which deals with bribery of *foreign* public officials, is structured similarly where (a) refers to active and (b) to passive bribery. However, criminalisation of passive bribery of foreign public officials is not mandatory; the State parties are only obliged to 'consider' adopting such measure. The same is true for many other provisions. Article 21 referring to bribery in the private sector imposes no obligation on the signatory countries, but is merely a recommendation. The Convention also only recommends but does not

[279] With 140 signatory States the participation embraces more than 2/3 of worldwide recognised States.
[280] Antonio Argandoña, "The United Nations Convention Against Corruption and Its Impact on International Companies," *Journal of Business Ethics* 74, no. 4 (2007): 485.
[281] Article 1, see also Babu, "The United Nations Convention Against Corruption: A Critical Overview," 8.
[282] Chapter II, Articles 5-14 of the UNCAC.
[283] Chapter II, Article 5 of the UNCAC.
[284] Chapter II, Article 6 of the UNCAC.
[285] Chapter II, Article 7 of the UNCAC.
[286] Chapter II, Article 8 of the UNCAC.
[287] Chapter II, Article 12 of the UNCAC.

require the criminalisation of illicit enrichment,[288] trading of influence[289] and embezzlement in the private sector,[290] while criminalisation of embezzlement by public officials is mandatory.[291] In addition, a consensus could not be reached to include the bribery of political parties or illicit contribution to political campaigns.[292] The parties shall only 'consider' adopting regulations to enhance transparency in the funding of political campaigns.[293]

An example for the intended far-reaching scope of this convention is the mandatory obligation on States in Article 34 to take measures to address the legal consequences of corruption. It mentions examples such as the rescission of contracts or the withdrawal of concessions. However, explicit guidelines are not provided. The scope that this provision shall have in the domestic legislation depends on the decision of the State parties.

In order to promote international cooperation in the efforts to combat corruption, the UNCAC contains provisions on *inter alia* extradition,[294] mutual legal assistance,[295] joint investigation,[296] technical assistance[297] and information exchange.[298] Another fundamental principle established in the Convention is the right to asset recovery set out in Chapter V.

A major shortcoming of the Convention is the lack of an efficient monitoring and surveillance mechanism.[299] In fact, there is no measure to penalise a State that does not comply with its obligations. However, unlike the OECD Anti-Bribery Convention, the UNCAC provides no exception to active bribery neither for small facilitation payments nor for corrupt acts permitted or required by the laws of the foreign public official's country.

III. Anti-corruption measures on regional level

Major improvements in the multilateral campaign against corruption have also been made on a regional level. Several regional international organisations have adopted instruments against corruption. First, the achievements made by the Organization of American States will be addressed (see below at **1.**), then the work

[288] Chapter III, Article 20 of the UNCAC.
[289] Chapter III, Article 18 of the UNCAC.
[290] Chapter III, Article 22 of the UNCAC.
[291] Chapter III, Article 17 of the UNCAC.
[292] While the U.S. supported the criminalisation of bribery of political parties during the OECD negotiations, the opposite was true for the negotiations at the United Nations. Here, the U.S. was opposed to such provision.
[293] Chapter II, Article 7.3 of the UNCAC.
[294] Chapter IV, Article 43 of the UNCAC.
[295] Chapter IV, Article 46 of the UNCAC.
[296] Chapter IV, Article 49 of the UNCAC.
[297] Chapter IV, Article 60 of the UNCAC.
[298] Chapter IV, Article 61 of the UNCAC.
[299] For a critical review of the UNCAC see Webb, "The United Nations Convention Against Corruption." For a detailed analysis of the limitations of the UNCAC, see Cecile Rose, *International Anti-Corruption Norms - Their Creation and Influence on Domestic Legal Systems*, (Oxford: Oxford University Press, 2015) 97-132.

of the Council of Europe (see below at **2.**) and of the European Union will be highlighted (see below at **3.**). The brief overview on regional accomplishments finishes with a short outline of the progress made by the African Union (see below at **4.**).

1. Organization of American States

On 29 March 1996, the Organization of American States (***OAS***)[300] adopted and opened for signature the *Inter-American Convention Against Corruption* (***IACAC***),[301] which entered into force on 6 March 1997.[302] This convention was the first multilateral legal instrument against corruption, which recognised the international reach of corruption and the need to promote and facilitate the cooperation between States in order to fight it.[303] It represents the regional consensus that corruption in the public sector has to be prevented, criminalised and investigated.

The Inter-American development started in 1994, when the OAS decided to address corruption and bribery at the Miami Summit. The member States acknowledged the threat posed by corruption and committed to fighting the endemic problem of Latin America. The OAS countries recognised corruption as a peril to development and democracy.[304]

The objective of the IACAC can be described as twofold: first, it provides guidance to State parties on the applicable measures and mechanisms to combat corruption; second, it promotes cooperation among the State parties to achieve the goal of eradicating corruption.[305] In order to achieve this goal, the IACAC addresses both the demand and the supply side of bribery. The main focus is however on the corruption problem within the administration of the States. Thus, while bribery of foreign public officials is also targeted,[306] the convention is

---

[300] The OAS is composed of 35 Member States. In 1962, a resolution excluded the Government of Cuba from its participation in the Inter-American system. On 3 June 2009, the Resolution AG/RES.2438 (XXXiX-O/09) was adopted by the Ministers of Foreign Affairs of the Americas, which resolved that the Resolution of 1962 excluding Cuba ceases to have effect. This is the result of a process of dialogue at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS.

[301] Inter-American Convention against Corruption, AG/RES. 1398 (XXVI-O/96).

[302] Pursuant to Article XXV of the treaty, the IACAC entered into force on the thirtieth day following the date of deposit of the second instrument of ratification. Paraguay and Bolivia were the first signatories to ratify the convention. As of today, 33 countries have ratified the Inter-American Convention. Barbados is the only signatory that has not ratified the IACAC. Cuba is not a signatory to the Convention.

[303] Note that the OECD Anti-Bribery Convention was signed at the end of 1997.

[304] "*Effective democracy requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions.*" Summit of Americas: Declaration of Principles and Plan of Actions, 34 I.L.M. 808 (1995).

[305] Articles XIV, XV and XVI of the IACAC, which are mandatory.

[306] Active corruption is addressed in Article VIII, which reads:
"*Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government*

mostly aimed at promoting a structural reform in the laws and institutions of its signatories to increase the integrity of government.[307]

The IACAC encompasses a broad range of corrupt acts.[308] Refraining from providing a general definition of corruption, it lists a number of 'acts of corruption' that must be criminalised.[309] At the same time, the scope of the Convention comprises public officials "at any level of its hierarchy".[310] It however does not include any provision regarding political party officials or candidates to public offices.

This convention also prohibits illicit enrichment of public officials.[311] Illicit enrichment occurs when the public official is unable to reasonably explain the increase in his or her assets compared to normal income.[312] This assumes that the burden of proof shifts to the public official to provide explanation and justification for this increase. Commentators have questioned such approach since it might contradict the principle of presumption of innocence.[313] However, the imposition of penalties for corrupt offences is left to the discretion of the State parties.[314]

The State parties are required to extend jurisdiction to transnational bribery committed by their nationals or residents, even when it is committed extraterritorially.[315] From this follows that due to extraterritorial jurisdiction based on the principle of nationality, a court of a State party can prosecute a national for bribery of a foreign official even when the act occurs outside of the country. Moreover, the IACAC also strengthens cooperation among the State parties. It creates a network to facilitate evidence gathering and establishes the required legal framework to effectively enforce anti-corruption legislation.[316] In addition, four

---

official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that officials public function."

[307] Article III of the IACAC lays down preventive measures and principles to reduce the incidence of corruption. However, State parties are only required to "consider the applicability" of those preventive measures. Thus, the implementation of preventive measures is discretionary. Article III must be understood as a guideline of measures.

[308] See Article VI of the IACAC. This provision has a broad scope as it places legal responsibility not only on principal actors, but also on co-participators, accomplices, instigators or accessories after the fact. However, the list is not exhaustive because it contains a broad clause that allows members to criminalise other corrupt related practices through mutual assistance agreements (Article VI (2) of the IACAC.)

[309] Article VI of the IACAC.

[310] See Article I of the IACAC.

[311] Article IX of the IACAC.

[312] Article IX of the IACAC. An illicit enrichment is defined as a "*significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions*".

[313] Giorleny D Altamirano, "Impact of the Inter-American Convention against Corruption, The," *University of Miami Inter-American Law Review* 38 (2007 2006): 504.

[314] Article V (2) of the IACAC.

[315] Article V in combination with Article VIII of the IACAC.

[316] Article XIV of the IACAC requires member States to provide mutual assistance and technical cooperation in preventive, investigative, and enforcement efforts, according to their domestic laws. Article XV provides broad assistance among the members to recover property. Article XVI of the IACAC establishes that refusal to provide assistance may not be based on the bank secrecy laws.

years after the IACAC became effective, the Follow-up Mechanism on Implementation of the Inter-American Convention Against Corruption was established to supervise the implementation of measures adopted by the signatory State parties.[317]

Aside from the IACAC, the OAS continues its efforts to combat corruption. In 2004, the OAS adopted the *Declaration of Quito on Social Development and Democracy, and the Impact of Corruption* where the member States emphasised that corruption remains a serious obstacle to the social development and reaffirmed their commitment and pledge to combat corruption.[318] The OAS declared 2006 as the "International Year of the Fight against Corruption".[319]

2. Council of Europe

Under the auspices of the Council of Europe[320] two regional anti-corruption conventions were adopted in 1999. The first is the *Criminal Law Convention on Corruption*, which was signed in Strasbourg on 27 January 1999 and entered into force on 1 July 2002.[321] The second is the *Civil Law Convention on Corruption*, signed in Strasbourg on 4 November 1999 and became effective on 1 November 1999.[322]

The first steps towards signing the two conventions started in 1994 at a Conference of the European Ministers of Justice in Malta, where corruption was acknowledged as a 'disease' and a threat to the stability of democratic institutions.[323] The Council set up a Multidisciplinary Group on Corruption to prepare a comprehensive programme of action against corruption,[324] whose work was the basis for a number of measures taken by the Committee of Ministers in the following months. In November 1997, the Committee of Ministers adopted a resolution on Twenty Guiding Principles against Corruption.[325] After almost two years of negotiation

---

[317] OAS, *Follow-up Mechanism on Implementation of the Inter-American Convention Against Corruption*, AG/RES. 1784 (XXXI-O/01) (5 June 2001).
[318] OAS, AG/DEC. 36 (XXXIV-O/04) (8 June 2004).
[319] OAS, AG/RES. 2071 (XXXV-O/05) (7 June 2005).
[320] The Council of Europe is an intergovernmental organisation with 47 Member States across Europe to establish cooperation among the European nations to solve the major social, economic and cultural problems concerning the European society. Its main objective is to protect human rights, democracy, and the rule of law. (Third Summit of Heads of State and Government of the Council of Europe in Warsaw on 16-17 May 2005).
[321] European Treaty Series (ETS), No. 173. To enter into force 14 ratifications instruments had to be deposited. The number of 14 ratifications appears high. However, this requirement results from the notion of establishing a parallel criminalisation of transnational bribery among the signatories. As of today, 45 States have ratified the Criminal Law Convention.
[322] ETS, No. 174. As of December 2009, 33 States have ratified the Civil Law Convention on Corruption.
[323] See Council of Europe, Explanatory Report to Civil Law Convention (ETS No. 174), http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm.
[324] GMC was created under the direction of the European Committee on Crime Problems (***CDPC***) and the European Committee on Legal Co-operation (***CDCJ***) and established the fight against corruption as one of the main priorities of the Council of Europe.
[325] Resolution (97) 24 on Twenty Guiding Principles against Corruption.

and consultation, the path was paved for the two European conventions on corruption.

The Council of Europe pursues a three-pronged approach to combating corruption: (i) drafting of European rules and standards, (ii) monitoring their compliance and (iii) providing assistance to countries and regions through technical co-operation programmes. The responsibility to monitor the legal instruments relating to corruption lies on the *Group of States against Corruption*, also known as GRECO.[326]

Moreover, the Council adopted the *Recommendation on Codes of Conduct for Public Officials* in 2000,[327] and in 2003, it promulgated the *Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns*.[328] The commitment of the Council of Europe to combat corruption continues today.

a) The Criminal Law Convention on Corruption

The *Criminal Law Convention on Corruption* has a holistic approach and uses the advancement of the IACAC, and the OECD Anti-Bribery Convention adopted two years earlier in order to improve and broaden the scope of the criminalisation of bribery. Thus, the Criminal Law Convention is further reaching and to some extent more complete than the prior anti-bribery instruments. This convention does not only focus on transnational bribery of public officials or on the corruption within the government and administration, but also seeks to address all cases of international corruption including corruption on the private side and the so-called trading in influence. The innovations brought by this convention are however challenged by the large number of reservation possibilities, which hampers the enforcement of the new obligations to criminalise almost all corrupt practices. The options of reservation for States appear to reflect the trade-off between providing a broad and far reaching anti-corruption instrument on the one hand, and enabling the largest possible amount of ratifications of this convention on the other hand.[329]

---

[326] GRECO was founded in 1999 and consists of 46 members (45 European states and the United States of America). For a general overview on the first evaluation round of GRECO see: Albin Eser and Michael Kubiciel, *Institutions against Corruption a Comparative Study of the National Anti-Corruption Strategies Reflected by GRECOś First Evaluation Round*, 1st ed. (Baden-Baden: Nomos, 2005).

[327] Council of Europe, Recommendation on Codes of Conduct for Public Officials (Recommendation No. R (2000) 10).

[328] Council of Europe, Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Recommendation Rec(2003) 4).

[329] The Explanatory Report to the Criminal Law Convention on Corruption states in paragraph 142: "*The Article 37 contains, in its paragraphs 1 and 2, for a large number of reservation possibilities. This stems from the fact the present Convention is an ambitious document, which provides for the criminalisation of a broad range of corruption offences, including some which are relatively new to many States. In addition, it provides for far reaching rules on grounds of jurisdiction. It seemed, therefore, appropriate to the drafters of the Convention to include reservation possibilities that may allow future Contracting Parties to bring their anti-corruption legislation progressively in line with the requirements of the Convention. Furthermore, these reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Contracting Parties to preserve some of*

In particular, the Criminal Law Convention requires State parties to criminalise both 'active'[330] and 'passive'[331] corruption of domestic[332] and foreign[333] public officials, as well as 'trading in influence'[334]. The convention also covers the bribery of members of domestic[335] and foreign[336] public assemblies, members of international parliamentary assemblies,[337] officials of international organisations[338] and officials of international courts.[339] The convention also introduces provisions that oblige the State parties to implement legislation to criminalise active[340] and passive[341] corruption in the private sector.[342] However, the above-mentioned reservation option also applies to the provisions concerning bribery in the private sector.

---

their fundamental legal concepts. Of course, it appeared necessary to strike a balance between, on the one hand, the interest of Contracting Parties to enjoy as much flexibility as possible in the process of adapting to conventional obligations with the need, on the other hand, to ensure the progressive implementation of this instrument."

[330] Article 2 of the Criminal Law Convention on Corruption:
"*Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, fro himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions."*

[331] Article 3 of the Criminal Law Convention on Corruption:
"*…the request or receipt by any of its public officials*…"

[332] See Article 4 of the Criminal Law Convention on Corruption.

[333] Article 5 of the Criminal Law Convention on Corruption:
"*Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving a public official of any other State*."

[334] Article 12 of the Criminal Law Convention on Corruption:
"*Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result*."

[335] Article 4 of the Criminal Law Convention on Corruption.

[336] Article 6 of the Criminal Law Convention on Corruption.

[337] Article 6 of the Criminal Law Convention on Corruption.

[338] Article 9 of the Criminal Law Convention on Corruption

[339] Article 11 of the Criminal Law Convention on Corruption.

[340] Article 7 of the Criminal Law Convention on Corruption:
"*Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties*."

[341] Article 8 of the Criminal Law Convention on Corruption reads similar as Article 7 with the focus on the demand side:
"*…the request or receipt*…"

[342] The Criminal Law Convention is the first international instrument to address corruption in the private sector.

An Additional Protocol to the Criminal Law Convention on Corruption[343] – signed on 15 May 2003 and effective as of 1 February 2005[344] – introduced four additional recipients. Now, the State parties are required to criminalise active and passive bribery of domestic[345] and foreign arbitrators[346], and of domestic[347] and foreign jurors.[348] The Protocol offers a definition of an arbitrator to establish a minimum standard, but leaves further definitions open to the arbitration laws of the State parties.[349] In order to fall under the scope of the Protocol an arbitration agreement must be established under the arbitration rules of the State parties.[350]

The Criminal Law Convention contains also provisions to promote the international cooperation in mutual assistance[351] and exchange of information.[352] In addition, it establishes the requirement to criminalise accounting offences in order to disguise bribery.[353]

b) The Civil Law Convention on Corruption

The Civil Law Convention on Corruption is the first attempt to establish rules and regulations at an international level for civil law consequences of corruption and seeks to provide civil remedies to all aggrieved parties from acts of corruption.[354] One goal of this Convention is to oblige the State parties to provide effective remedies, including compensation for damages.[355] Such damages may be of material and non-pecuniary nature, as well as lost profits.[356] Moreover, an important provision is the requirement for the State parties to explicitly include in their internal laws that any contract or clause thereof providing for corruption, shall be null and void.[357] Further, the Convention requires State parties to allow all parties to a contract whose consent has been undermined by an act of corruption to address the relevant national court for "*the contract to be declared void, notwithstanding their right to claim for damages*".[358] Hence, the Convention takes the position that a contract *of* corruption is void *ab initio*, while a contract procured by corruption is voidable.

---

[343] Additional Protocol to the Criminal Law Convention on Corruption, CETS No. 191.
[344] The Protocol entered into force after the deposition of five instruments of ratification. As of today, 25 State parties have ratified the Protocol.
[345] Articles 2 and 3 to the Additional Protocol.
[346] Article 4 to the Additional Protocol.
[347] Article 5 to the Additional Protocol.
[348] Article 6 to the Additional Protocol.
[349] Article 1.1 to the Additional Protocol.
[350] Article 1.2 to the Additional Protocol.
[351] Article 26, Criminal Law Convention.
[352] See Articles 28-31, Criminal Law Convention.
[353] Article 14, Criminal Law Convention.
[354] Those victims may be States, losing bidders, a *bona fide* firm, whose officers entered into corrupt practices, or shareholder or employers of bribing firms. For a brief overview on the Civil Law Convention on Corruption see Wolfgang Rau, "The Council of Europe's Civil Law Convention on Corruption," in *The Civil Law Consequences of Corruption*, ed. Olaf Meyer (Nomos, 2009), 21–30.
[355] Article 1 of the Civil Law Convention on Corruption.
[356] Article 3 of the Civil Law Convention on Corruption.
[357] Article 8.1 of the Civil Law Convention on Corruption.
[358] Article 8.2 of the Civil Law Convention on Corruption.

In addition, the Civil Law Convention calls for international cooperation regarding the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments.[359]

3. European Union

In 1997, the European Union (***EU***) adopted the *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States* (***EU Convention against Corruption***).[360] On the basis of this convention, each Member State is required to take the necessary measures to criminalise active and passive corruption of officials of the EU or of Member States of the EU. This convention is narrow in scope as it is only directed against bribery of European officials or officials of member States, and does not address bribery of foreign officials outside of the EU or bribery in the private sector.

The European Commission estimates the cost of corruption in the EU per year to amount to approximately EUR 120 billion, which is almost the annual budget of the EU.[361] In fact, the results of the latest Eurobarometer survey carried out in 2013 show that 76% of the Europeans believe that corruption is widespread in their country, and 26% of the Europeans consider that they are personally affected by corruption in their daily lives.[362] The two main concerns within the EU are that the implementation of the anti-corruption instruments and measures remains uneven among the Member States and that enforcement of the anti-corruption framework "*is often insufficient in practice*".[363] Thus, in order to enhance the anti-corruption framework, the EU recently introduced anti-corruption reports to monitor the Member States' efforts and measures taken in the fight against corruption, which will be published every two years.[364] While these reports are supposed to create additional impetus for Member States to engage in the fight against corruption, they are also aimed at identifying the particular shortcomings of the current

[359] Article 13 of the Civil Law Convention on Corruption.
[360] Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States (EU Corruption Convention), 26 May 1997, 37 I.L.M. 12; OJ 1997 C 195. The Convention entered into force on 28 September 2005.
[361] European Commission, Communication from the European Commission to the European Parliament, Council and the European Economic and Social Committee, Fighting Corruption in the EU, 6 June 2011, COM(2011) 308 final, 3.
[362] European Commission, Report from the European Commission to the Council and the European Parliament, EU Anti-Corruption Report, 3 February 2014, Com(2014) 38 final, 6 ("The countries where respondents are most likely to think corruption is widespread are Greece (99%), Italy (97%), Lithuania, Spain and the Czech Republic (95% in each)").
[363] European Commission, Communication from the European Commission to the European Parliament, Council and the European Economic and Social Committee, Fighting Corruption in the EU, 6 June 2011, COM(2011) 308 final, 4 and 8 et seq.
[364] European Commission, Communication from the European Commission to the European Parliament, Council and the European Economic and Social Committee, Fighting Corruption in the EU, 6 June 2011, COM(2011) 308 final, 6.

measures in place to "*provide for sound preparation of future EU policy actions*".[365]

4. African Union

In 2003, the African Union (***AU***), which replaced the Organization of African Unity (***OUA***) in 2000,[366] adopted the *Convention on Preventing and Combating Corruption* (***AU Convention***).[367] As most African States rank low on the various corruption indices and the African continent is haunted by poverty, this event was an important step towards social and economic development in Africa.[368] Corruption is and remains a serious problem for Africa.[369]

The overall structure of the AU Convention is similar to the one of the Inter-American Convention against Corruption. It fails to define corruption and rather lists various acts of corruption to which the AU Convention applies.[370] The scope of the AU Convention encompasses not only bribery of public officials, but also of "*any other person*".[371] Both active[372] and passive[373] corruption are addressed. In

---

[365] European Commission, Communication from the European Commission to the European Parliament, Council and the European Economic and Social Committee, Fighting Corruption in the EU, 6 June 2011, COM(2011) 308 final, 6.

[366] The Constitutive Act of the African Union was adopted on 11 July 11 2000 in Lome, Togo, and entered into force on 26 May 2001.

[367] Convention on Preventing and Combating Corruption, adopted on 11 July 2003 and entered into force on 5 August 2006. To date 43 countries out of the 53 member States have signed the Convention and 34 States have ratified it. For a general and critical overview on the AU Convention see Nsongurua J Udombana, "Fighting Corruption Seriously - Africa's Anti-Corruption Convention," *Singapore Journal of International & Comparative Law* 7 (2003): 447; Kolawole Olaniyan, "African Union Convention on Preventing and Combating Corruption: A Critical Appraisal," *African Human Rights Law Journal* 4 (2004): 74; Peter W. Schroth, "The African Union Convention on Preventing and Combating Corruption," *Journal of African Law* 49, no. 01 (2005): 24–38. The AU Convention was not the first attempt to combat corruption in Africa. In August 2001, the Southern African Development Community (***SADC***) adopted the SADC Protocol Against Corruption, tabled for signature on 14 August 2001 and entered into force on 6 July 2005, 30 days after its ratification by two thirds of the SADC membership.

[368] The Preamble of the AU Convention states:

"[…] *to foster the promotion of economic, social, and political rights* [...] *acknowledging that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent*."

[369] For corruption in Africa see Udombana, "Fighting Corruption Seriously - Africa's Anti-Corruption Convention," 449 et seq. See also Global Corruption Report 2013, Transparency International.

[370] Article 4 of the AU Convention.

[371] However, the term "any other person" is not defined in the AU Convention. It is not clear whether only private persons or also organisations fall within its scope.

[372]Article 4.1 (b) of the AU Convention:

"*This Convention is applicable to* […] *the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions*."

[373] Article 4.1 (a) of the AU Convention: "*This Convention is applicable to* […] *the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions*."

addition, acts of corruption under this convention include acts or omissions by government officials or any other person for the purpose of obtaining bribes,[374] the fraudulent diversion of State property,[375] the use or concealment of proceeds derived from any of the acts referred to in the AU Convention,[376] and any participation or collaboration in any of the enumerated acts.[377] Furthermore, all State parties are required to criminalise illicit enrichment, which is defined as the "*significant increase in assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income*".[378]

The AU Convention also calls for adopting measures to prevent and combat corruption in the private sector[379]– a vague wording without specific requirements. Moreover, the convention addresses laundering of proceeds of corruption[380] and contains safeguards to ensure due process and guarantee the rights to a fair trial.[381] A State party may make reservations to any provision as long as they are "*not incompatible with the objects and purposes of* [the] *Convention*".[382]

In order to follow up on the adoption and application of the anti-corruption measures, the AU Convention establishes the Advisory Board on Corruption.[383] One effort of the Advisory Board on Corruption is the Regional Anti-Corruption Programme for Africa 2011 – 2016 in order to improve governance in Africa.

IV. Anti-corruption measures on State level

Against the background that the international instruments against corruption create the obligation among their signatories to implement the measures undertaken in the respective conventions, most States across the world have anti-corruption laws in place. One of the newest and most far-reaching anti-corruption laws was recently implemented in the United Kingdom (see below at **1.**), while many other States have also strict anti-corruption laws in place (see below at **2.**).

1. UK Bribery Act 2010

One of the strictest domestic legislations on transnational bribery is the Bribery Act 2010 enacted by the United Kingdom (***UK Bribery Act***). The UK Bribery Act

[374] Article 4 (c) of the AU Convention.
[375] Article 4 (d) of the AU Convention.
[376] Article 4 (h) of the AU Convention.
[377] Article 4 (i) of the AU Convention.
[378] The definition of "illicit enrichment" is stated in Article 1 of the AU Convention, the requirement to criminalise such act is established in Article 8. This provision has been criticised in the literature as it runs counter to the fundamental right of the presumption of innocence. However, Article 8 provides that the requirement to make illicit enrichment a crime is subject to the provisions of domestic law. The full scope of this provision is not clear yet, discussion remains vivid. See Schroth, "The African Union Convention on Preventing and Combating Corruption," 28 et seq.
[379] Article 11 of the AU Convention.
[380] Article 6 of the AU Convention, Laundering of the Proceeds of Corruption.
[381] Article 14 of the AU Convention, Minimum Guarantees of a Fair Trial.
[382] Article 24.1 of the AU Convention.
[383] Article 22 of the AU Convention.

was introduced to address the requirements of the OECD Anti-Bribery Convention and considerably enhance UK anti-corruption law. The UK Bribery Act covers active[384] and passive[385] corruption of public foreign officials[386] as well as corruption in the private sector[387].

One of the most significant accomplishments of the UK Bribery Act is the introduction of a strict liability offence for companies failing to have adequate procedures in place to prevent bribery.[388] In fact, the UK Bribery Act shifts the burden of proof to the relevant company, which has to prove that it had implemented adequate procedures to prevent the corrupt act.[389] The UK Bribery Act does not provide for specific requirements under 'adequate procedures', however the Ministry of Justice of the United Kingdom has published guidelines with six principles: (i) proportionate procedures, (ii) top-level commitment, (iii) risk assessment, (iv) due diligence, (v) communication (including training), and (vi) monitoring and review.[390]

Moreover, the UK Bribery Act establishes broad jurisdiction with extra-territorial effect. It covers corrupt acts of UK companies operating abroad and foreign companies where a part of the offence was committed within the territory of the UK.[391] The corporate offence of failing to prevent corruption is even broader, since it covers all 'relevant commercial organisations'.[392] According to Section 7 (5) of the UK Bribery Act, this term includes bodies incorporated under the laws of the UK and any other corporate body "*which carries on a business, or part of a business, in any part of the United Kingdom*".[393] While the Act fails to define the

[384] Section 1 of the UK Bribery Act.
[385] Section 2 of the UK Bribery Act.
[386] Section 6 of the UK Bribery Act. Note that the definition of 'public foreign official' is broad and includes *inter alia* officials of international organisations.
[387] See Sections 3 and 4 of the UK Bribery Act.
[388] Section 7 of the UK Bribery Act.
[389] See Section 7 (1) and (2) of the UK Bribery Act:
"A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
(a) to obtain or retain business for C, or
(b) to obtain or retain an advantage in the conduct of business for C.
(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct." (Emphasis added).
[390] The Bribery Act 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, available under https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
Note that Transparency International UK offers a comprehensive guide for companies to comply with the UK Bribery Act requirements, Guidance on Adequate Procedures under the UK Bribery Act 2010, Transparency International 2010, available under http://www.transparency.org.uk/our-work/bribery-act/adequate-procedures.
[391] Section 12 of the UK Bribery Act. Under Section 12 (1) of the UK Bribery Act, the Act applies to offences where any act or omission which forms part of the offence takes place in the United Kingdom. Pursuant to Section 12 (2)-(4) of the UK Bribery Act, offences committed outside of the territory of the United Kingdom fall within the scope of the Act, if the person has a 'close connection with the United Kingdom'.
[392] Section 7 (1) of the UK Bribery Act.
[393] Section 7 (5) of the UK Bribery Act.

concrete requirements, it seems that it might be sufficient that the company has a representative office in the UK.

The UK Bribery Act has immense implications on companies around the world. In particular, since it is stricter than the FCPA, internationally operating companies will have to enhance their anti-corruption compliance programmes to the new requirements.[394] One main difference is that in contrast to the FCPA, the UK Bribery Act does not permit an exception for facilitation payments.[395] Commentators have stressed the importance the UK Bribery Act has in the global approach to prevent foreign bribery through strengthening accountability[396] and suggested that the FCPA should also introduce an 'adequate procedure' defence in order to promote compliance programmes.[397]

2. Other domestic anti-bribery laws

At this stage of the study it shall suffice to acknowledge that various States have implemented anti-corruption laws, criminalising foreign bribery. For instance, all parties of the OECD Convention have passed laws making foreign bribery a crime.[398]

---

[394] A full comparison of the anti-corruption provisions in the FCPA and the UK Bribery Act is available on page 12 of the Guidance on Adequate Procedures under the UK Bribery Act 2010, Transparency International 2010, available under http://www.transparency.org.uk/our-work/bribery-act/adequate-procedures.

[395] For a detailed comparison between the FCPA and the UK Bribery Act see e.g. Samer Korker and Margaret Ryznar, "Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing," *Missouri Law Review* 76, no. 2 (2011): 415–53; Sharifa G. Hunter, "A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business," *ILSA Journal of International and Comparative Law* 18, no. 1 (2011): 89–113.

[396] Jon Jordan, "Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend towards Greater Accountability in the Prevention of Foreign Bribery," *NYU Journal of Law & Business* 7 (2011 2010): 845–71.

[397] Jon Jordan, "Adequate Procedures Defense under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act, The," *Stanford Journal of Law, Business & Finance* 17, no. 1 (2011): 25–66.

[398] For example: Argentina on 1 November 1999; Australia on 17 December 1999; Austria on 1 October 1998; Belgium on 3 April 1999; Brazil on 11 June 2002; Bulgaria on 29 January 1999; Canada on 14 February 1999; Chile on 8 October 2002; Colombia on 29 November 2011; Czech Republic on 9 June 1999; Denmark on 1 May 2000; Estonia on 1 July 2004; Finland on 1 January 1999; France on 29 September 2000; Germany on 15 February 1999; Greece on 1 December 1998; Hungary on 1 March 1999; Iceland 30 December 1998; Ireland on 26 November 2001; Israel on 21 July 2008; Italy on 26 October 2008; Japan on 15 February 1999; Korea on 15 February 1999; Luxembourg on 11 February 2001; Mexico on 18 May 1999; Netherlands on 1 February 2001; New Zealand on 3 May 2001; Norway on 1 January 1999; Poland on 4 February 2001; Portugal on 9 June 2001; Russia on 25 May 2011; Slovak Republic on 1 November 1999; Slovenia on 23 January 1999; South Africa on 27 April 2004; Spain on 2 February 2000; Sweden on 1 July 1999; Switzerland on 30 July 2000; Turkey on 11 January 2003; United Kingdom on 10 November 1998, United States on 10 November 1998; see OECD Country reports on implementing of the OECD Anti-Bribery Convention, available under http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm.

C. The Role of other International Organisations and Institutions

In addition to the crucial role international instruments against corruption play in the international fight against corruption, the active approach taken by international organisations and international financial institutions has been significant for the efficiency and effectiveness of the international efforts to tackle corruption. Among others, the measures adopted by the World Bank (see below at **I.**) and international development banks (see below at **II.**) as well as the International Monetary Fund (see below at **III.**) are worth mentioning at this stage. Moreover, the World Trade Organisation has only recently addressed corruption for the first time in a multilateral agreement (see below at **IV.**).

I. World Bank

The World Bank's efforts to fight corruption started in 1996, when the then-World Bank President James D. Wolfensohn addressed for the first time the issue of corruption in the annual meeting of the World Bank and the International Monetary Fund. He created the expression 'cancer of corruption' and introduced a number of initiatives to combat corruption.[399] The most quoted estimated global cost of corruption per year is the World Bank Institute's estimate of USD 1 trillion.[400] Since 1996, the World Bank has supported more than 600 anti-corruption programmes and governance initiatives developed by its member countries.[401]

The World Bank, as the leading development bank in the world sees in corruption one of the greatest obstacles to reduce poverty. Its anti-corruption strategy builds on five key elements: (i) increasing political accountability, (ii) strengthening civil society participation, (iii) creating a competitive private sector, (iv) institutional restraints on power, and (v) improving public sector management.[402] One of its significant priorities is on fostering institutions to contain corruption. In this context, the World Bank provides support to implement economic reforms and for institutional reforms.

Anti-corruption measures also play a major role in the World Bank's financed projects. The World Bank's Procurement[403] and Consultant[404] Guidelines include

---

[399] See World Bank - Poverty Reduction and Economic Management, "Helping Countries Combat Corruption, The Role of the World Bank." For an early analysis of how the World Bank should address corruption see Susan Rose-Ackerman, "The Role of the World Bank in Controlling Corruption," *Law and Policy in International Business* 29 (1997): 93–114.

[400] See Finance & Development, September 2005 - Back to Basics - 10 Myths About Governance and Corruption (imf.org).

[401] See e.g. World Bank Takes Further Step in Anti-Corruption Fight: Bank Initiates Annual Report Detailing Investigations.

[402] See e.g. "Anticorruption in Transition - A Contribution to the Policy Debate" (The World Bank, 2000), 39 et seq.

[403] World Bank Guidelines: Procurement under IBRD Loans and IDA Credits, §1.14(a), May 2004, revised October 2006.

fraud and corruption provisions. A violation of such rules might be sanctioned with the annulment of credits, rejection of projects and exclusion of corrupt individuals or corporations from further dealing with the World Bank.[405] A list of the currently banned firms, which due to a violation of the fraud and corruption provisions of the Procurement and Consultants Guidelines are ineligible to be awarded a World Bank-financed contract, is available on the home page of the World Bank.[406]

A significant contribution to the combat against corruption is the wide range of research in the field of corruption that the World Bank has provided and supervised, especially with regard to the impact it has on social and economic development.[407]

II. International Development Banks

Aside from the efforts adopted by the World Bank to fight corruption, all other development banks have implemented anti-corruption policies in order to combat corruption inside the institution as well as in funded projects. In fact, international financial institutions have established the International Financial Institutions Task Force in 2006 in order to unify and combine their efforts "*to fight corruption and prevent it from undermining the effectiveness of their work*".[408] Generally, international development banks will pay special attention to a strict pre-investment screening, have reporting tools in place, engage in investigations and impose sanctions, as well as promote a transparent internal management system.[409]

---

[404] World Bank Guidelines: Selection and Employment of Consultants by World Bank Borrowers, §1.22(a), May 2004, revised October 2006.

[405] For a case study see Courtney Hostetler, "Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects," *Yale Human Rights & Development Law Journal* 14 (2011): 231–72.

[406] www.worldbank.org. On the debarment due to corruption see Sope Williams, "The Debarment of Corrupt Contractors from World Bank-Financed Contracts," *Public Contract Law Journal* 36, no. 3 (2007): 277–306.

[407] The World Bank has supervised a number of working papers on corruption, which are all available at www.worldbank.org.

[408] *International Financial Institutions Anti-Corruption Task Force*, September 2006, available under http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37018601 The members of the task force are: African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank Group, International Monetary Fund, inter-American Development Bank Group and the World Bank Group. One important tool under such agreement is that sanctions against corrupt firms will be mutually recognised by the other development banks.

[409] See e.g. *Integrity and Anti-corruption Report 2012*, European Bank for Reconstruction and Development, March 2013. available under http://www.ebrd.com/downloads/integrity/ACReport12.pdf; *Integrity and Anti-Corruption Progress Report*, African Development Bank , 20 October 2011, available under http://www.afdb.org/en/documents/document/integrity-and-anti-corruption-progress-report-24900/; Report Concerning the Anti-Corruption Framework of The Inter-American Development Bank, 21 November 2008, http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1824265.

III. International Monetary Fund

The International Monetary Fund,[410] dedicated to promote international monetary cooperation and exchange rate stability as well as to provide resources to members with payment difficulties, started its offensive approach against corruption at the same time as the World Bank. In the annual meeting of the World Bank and the IMF in 1996, the IMF Managing Director Michel Camdessus announced the new IMF approach on good governance, including the fight against corruption.[411] The IMF acknowledged that many of the causes of corruption are economic in nature, and so are its consequences. The first step to increase the focus on governance and anti-corruption was the adoption of a Guidance Note in 1997 entitled *The Role of the IMF in Governance Issues.*[412] In 1999, the IMF adopted the *Code of Good Practice on Transparency in Monetary and Financial Policies: Declaration of Principles.*[413]

One means against corruption is the review process of a country's economy known as "Article IV Consultations", through which the IMF provides policy advice. The IMF provides also technical advice in regard to legal frameworks to tackle corruption. In addition, transparency and accountability became part of the conditionality requirements of IMF-supported programmes. Thus, it attaches conditions to its loans, aimed at economic liberalisation and implicitly to a reduction of corruption. In this context, the IMF reviews the economic policies of the borrower, when it seeks financial support from the IMF.[414] At the same time, the IMF has established strong measures to ensure the integrity of its own organisation.[415]

---

[410] The IMF was founded in July 1944 at Bretton Woods, New Hampshire, and has currently 188 member countries.

[411] IMF Survey: Ministers Update Global Growth Strategy, Agree on Interim ESAF Financing, October 14, 1996, available at www.imf.org.

[412] *The Role of the IMF in Governance Issues*, 25 July 1997.

[413] IMF, Code of Good Practice on Transparency in Monetary and Financial Policies: Declaration of Principles, adopted on 26 September 1999, available at http://www.imf.org/external/np/mae/mft/Code/index.htm.

[414] One example for the strict conditionality is the case of Kenya. On 30 June 1997, the IMF suspended its enhanced structural adjustment facility (***ESAF***) programme to Kenya because of poor governance and corruption in the public sector. See James Thuo Gathii, "Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya," *Connecticut Journal of International Law* 14 (1999): 408. An opposite example is the case of Uganda. In April 1997, the IMF and the World Bank rewarded Uganda's reform efforts to achieve sustaining reduction in corruption and approved Uganda as the first country eligible to benefit from the Highly Indebted Poor Countries (HIPC) programme. See Kimberly Ann Elliott, "Problem of Corruption: A Tale of Two Countries, The," *Northwestern Journal of International Law & Business* 18 (1998 1997): 530.

[415] The IMF has adopted a Code of Conduct for Staff on 31 July 1998, and a Code of Conduct for Members of the Executive Board on 14 July 2000, revised on 12 December 2003. Besides, the IMF implemented extensive financial disclosure requirements and established the position of the Ethics Officer, who supervises the compliance of the internal rules and regulations.

IV. The World Trade Organization

The World Trade Organization (***WTO***) with its global membership including developed, developing, and emerging countries, with its main focus on global trade, and with its effective enforcement mechanism has been considered the ideal platform for a multilateral agreement against transnational bribery.[416] For many years the WTO failed to take action and remained an observer of the measures taken in the international fight against corruption.[417] Only recently the WTO made an important step forward in dealing with this issue and implemented the revised Government Procurement Agreement (***GPA***), which also introduces anti-corruption measures.[418]

The original version of the GPA was already negotiated in the Uruguay Round, focusing on two aspects: market access provisions and procedures governing the publication of laws and criteria for selecting bidders. However, the agreement was not mandatory and was only signed by the States of the OECD, i.e. the industrialised countries. The developing countries in turn objected to the market access provisions since they had concerns about opening their government procurement to foreigners.[419] Against the background that the former version of the GPA did not directly deal with corruption, the WTO established a working group to elaborate on a transparency agreement in government procurement. However, negotiations to adopt such agreement had been blocked for many years by opposing developing countries.[420] The WTO Ministerial Conferences in Doha 2001, in Cancun 2003, in Hong Kong 2005 and in Geneva 2009 have not brought any change to the deadlock situation.

On 15 December 2011, the parties to the GPA agreed to a significant revision of the GPA,[421] which was confirmed by its formal adoption on 30 March 2012.[422] The

---

[416] Philip M Nichols, "Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority," *New York University Journal of International Law and Politics* 28 (1996 1995): 765 et seq.

[417] For a critical overview of the measures taken by the WTO in the past to fight corruption see Krista Nadakavukaren Schefer, "Corruption and the WTO Legal System," *Journal of World Trade* 43, no. 4 (2009): 737–70.

[418] World Trade Organization Committee on Government Procurement, Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, GPA/133. Apr. 2, 2012. Available under http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

[419] For a closer look on the negotiations of the GPA see Eleanor Roberts Lewis, "LPIB Roundtable on Global Corruption - Remarks," *Law and Policy in International Business* 31 (2000 1999): 210.

[420] For a discussion on the arguments of the developing countries see Philip M Nichols, "Outlawing Transnational Bribery through the World Trade Organization," *Law and Policy in International Business* 28 (1997 1996): 364 et seq. For an analysis of the political and institutional reasons for a failure to adopt an anti-corruption instrument at WTO level see KW Abbott, "Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption," *J Int Economic Law* 4, no. 2 (2001): 275–96.

[421] See http://www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm. The WTO sees it as "historic deal".

[422] World Trade Organization Committee on Government Procurement, Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement,

revised GPA is the first legal instrument of the WTO to directly address corruption in international trade.[423] The preamble now stresses the "*importance of* [among others] *avoiding corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption*". The direct reference to the UNCAC in the preamble will most likely have a significant influence in the interpretation of the GPA.[424] In this context, the far-reaching provisions of the UNCAC, in particular in public procurement will serve as guiding principles for the WTO framework.[425] Moreover, Article IV 4 (c) of the GPA provides for the implementation of a procurement framework that prevents corruption.[426] The WTO has therefore created an obligation for States to avoid corruption in their procurement structure, and also take the necessary action to prevent it.

D. Civil Society and Business Organisations

An important role in the international fight against corruption has been assumed by civil society and in particular non-governmental organisations (***NGOs***) aimed at curbing corruption. Special mention needs to be made to the work of Transparency International for its independent research and expertise on this field (see below at **I.**). At the same time various initiatives at the business level have been introduced to deal with the supply side problems of corruption. One representative example of such efforts is the work of the International Chamber of Commerce (see below at **II.**).

I. Transparency International

In 1993, a group of former World Bank executives led by Peter Eigen founded the NGO Transparency International (***TI***) with headquarters in Berlin.[427] Its objective is to fight corruption and to promote transparency in business and financial transactions worldwide. It supports with high impetus the legal initiatives at the international, regional, and national levels. As of today, the global network of TI includes more than 90 locally established national chapters.

GPA/133. Apr. 2, 2012. Available under http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

[423] Krista Nadakavukaren Schefer, "Will the WTO Finally Tackle Corruption in Public Purchasing? The Revised Agreement on Government Procurement," *Insights - American Society of International Law* 17, no. 11 (2013).

[424] See Ibid.

[425] Ibid.

[426] Article IV 4 reads:

"A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

(a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;

(b) avoids conflicts of interest; and

(c) prevents corrupt practices." (Emphasis added).

[427] For a general overview of the early work of TI see Hongying Wang and James N Rosenau, "Transparency International and Corruption as an Issue of Global Governance," *Global Governance* 7 (2001): 25.

In addition, TI has developed several tools to foster the global combat against corruption, including measuring instruments such as the Corruption Perception Index (***CPI***), the Bribe Payer's Index (***BPI***), and the Global Corruption Barometer (***GCB***). In order to prevent corruption in public contracting, TI created the Integrity Pact (***IP***), which consists of a process that includes an agreement between the government and all bidders for a public contract.[428] Another often used tool are the Business Principles for Countering Bribery, which provide a framework for companies to develop comprehensive anti-bribery programmes in order to deal with the challenge and risk posed by bribery.[429] Finally, TI offers an internet-based database with information, research papers, and the complete publications of the TI.[430]

II. International Chamber of Commerce

The Paris-based International Chamber of Commerce (***ICC***)[431] may be the most influential private initiative on the field of combating corruption in the international business world. As early as March 1976, the ICC reacted to the bribery scandals and created a blue ribbon commission to examine the issue of questionable payments in international business transactions. A year later, the commission issued a report proposing guidelines for proper conduct of private and public agents in international trade.[432] Unfortunately, the propositions were not accepted and the ICC work was stalled for many years.[433]

The rising global interest in dealing with the corruption problem in the 1990s led to the implementation of a new ICC *ad hoc* commission in 1994 to review the former report of 1977.[434] As a result, in 1996, the ICC amended its rules and standards for international business, calling for efforts to combat bribery.[435] New amendments

[428] The agreement contains rights and obligations to the effect that neither side will pay, offer, demand or accept bribes. The IP also provides a monitoring system.
[429] Business Principles for Countering Bribery – A Multi-Stakeholder Initiative Led by Transparency International, 3rd Edition, 2013, Transparency International.
Available at: 2013 Business principles for countering bribery.
[430] See Transparency International.org
[431] The ICC is a global organisation with 84 national committees and over 7,500 members in over 130 countries. The ICC movement against corruption has a major impact on the international business world.
[432] The commission was headed by the British international lawyer Lord Shawcross and issued its report "Extortion and Bribery in Business Transactions" in 1977. The report called for action on three different levels: (1) an international treaty against illicit payments to foreign officials; (2) measures on domestic level; (3) business self-regulation through a code of conduct, whereas violations had to be controlled by an ICC panel. See also Fritz F. Heinman, "Combating International Corruption: The Role of the Business Community," in *Corruption and the Global Economy*, 1997, 150.
[433] Heinman, "Combating International Corruption: The Role of the Business Community."
[434] Francois Vincke, "How Effective Is the Business Community in Combating Corruption," *American Society of International Law Proceedings* 91 (1997): 102. Vincke supervised and directed the review of the ICC Report on Corruption of 1977.
[435] ICC, 1996 Revisions to the ICC Rules of Conduct on Extortion and Bribery in International Business Transactions, Report adopted by the Executive Board at its 83rd Session on 26 March 1996; I.L.M. 35 (1996), 1306

followed in 1999, 2005 and most recently in 2011 in order to reflect the newest developments in the international fight against corruption and to keep up with the fast changing necessities of the business world.[436]

The ICC continues to encourage self-regulation in confronting issues of extortion and bribery[437] and provides business input into international initiatives to flight corruption, such as the United Nations Convention against Corruption,[438] the OECD initiative to fight private-to-private corruption,[439] and the World Bank engagement with the private sector in the fight against corruption.[440] In addition, the ICC publishes anti-corruption literature such as the *Fighting Corruption – International Corporate Integrity Handbook*[441] and the collection of contributions on the interchange of corruption and international arbitration *Arbitration, Money Laundering, Corruption and Fraud.*[442]

E. Concluding Remarks

This Chapter identified the main efforts taken by the international community to deal with corruption. The brief overview shows that the threat of corruption and its detrimental impact on the matters that are most important to the international community have awaken the different international actors on different levels. Having started with the criminalisation of bribery of foreign public officials, the international fight against corruption has broadened its scope and finally adopted a holistic approach by tackling both the supply and demand sides of corruption.

At the same time, international organisations have started to prioritise anti-corruption programmes and policies. While the World Bank, the IMF and other international financial institutions have included corruption issues into the conditionality requirements for their programmes, they have commenced to tackle corruption on institutional and governmental levels and also offer support to countries implementing reforms to deal with corruption. Most recently the WTO

---

[436] The most recent version of ICC Rules on Combating Corruption, 2011, are available at ICC Rules on Combating Corruption - ICC - International Chamber of Commerce (iccwbo.org).

[437] See e.g. RESIST, Resisting Extortion and Solicitation in International Transactions, A Company Tool for Employee Training, available at Resisting Extortion and Solicitation in International Transactions (RESIST) - ICC - International Chamber of Commerce (iccwbo.org).

[438] E.g. the ICC made recommendations at the U.N. Anti-Corruption Conference held in Nusa Dua, Indonesia. *Statement by the Global Business Community to the Second Conference of the States Parties to the United Nations Convention against Corruption, Nusa Dua, Indonesia*, 28 January – 1 February 2008. For further information see: Business Objectives for UNCAC, Nusa Dua, Indonesia - ICC - International Chamber of Commerce (iccwbo.org).

[439] See Recommendations by the International Chamber of Commerce on further provisions to be adopted to prevent and prohibit private-to-private corruption, 13 September 2006, available at: Memorandum to OECD working group (iccwbo.org).

[440] See Letter from ICC Secretary General Guy Sebban to World Bank President Paul Wolfowitz on the fight against corruption, 22 October 2006, where Sebban offers the ICC expertise to assist the World Bank in its initiative; available at: Paul Wolfowitz 22 October 2006 letter (iccwbo.org).

[441] Fighting Corruption-International Corporate Integrity Handbook, ICC Publication No. 678, 2008 Edition, Fritz Heimann and Francois Vincke (ed.).

[442] Kristine Karsten and Andrew Berkeley, eds., *Arbitration, Money Laundering, Corruption and Fraud* (Paris: ICC Publishing, 2003).

has joined the international fight against corruption and addresses corruption in its multilateral agreement on procurement.

Moreover, the international business community has also assumed responsibility and promotes self-regulation among its members and imposes strict anti-corruption rules on itself. Finally, civil society plays an important part in the international fight against corruption, which is led by the dedicated work of TI.

In conclusion, the approach adopted by the international community is far from being uniform and streamlined. It rather shows that the fight against corruption requires more than unilateral actions aimed at single issues of the omnipresent problem of corruption. It calls for an approach that takes all peculiarities of this phenomenon into consideration and creates an incentive for all involved parties to implement strong measures to prevent and prosecute corruption.[443]

[443] In this context it is worth mentioning the conclusion reached by Wouters, Ryngaert and Cloots that "[m]*ore lenient sentencing for companies with a strong internal prevention and detection system may provide additional incentives to establish such internal mechanisms*", Jan Wouters, Cedric Ryngaert, and Ann Sofie Cloots, "International Legal Framework against Corruption: Achievements and Challenges, The," *Melbourne Journal of International Law* 14 (2013): 280.

CHAPTER THREE: CORRUPTION AND PUBLIC POLICY

One central notion concerning corruption in general is that it violates public policy. It appears only consequent that various ICSID tribunals have based their decisions on this contemptuous character of corruption and public policy concerns. The tribunal in *EDF v Romania*, for instance, held that a "*request for a bribe by a State agency is* […] *a violation of international public policy*".[444] The tribunal seems to have found its conclusion obvious since it did not provide further explanation for either its concrete findings or the general concept of international public policy.[445] Similarly, the tribunal in *Wena v Egypt* at the beginning of this millennium noted that corruption is "*contrary to international bones mores*", without further examination.[446] It was only the tribunal in the seminal case of *World Duty Free v Kenya* that thoroughly assessed the impact of corruption on public policy. It found bribery to be "*contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy*".[447] The tribunal based its conclusion on the decisions of arbitral tribunals and courts as well as on the general consensus on fighting corruption on the international level confirmed in the various international conventions.[448]

At first sight the conception that corruption violates public policy seems apparent. However, an arbitral tribunal may not only base its decision on a general notion or common perception. Proof is required to establish the objective existence of such notion.[449] What exactly do we understand under public policy? What meaning does this concept have in international investment arbitration and why exactly does corruption violate it? We approach these questions by first providing an overview on the concepts of public policy in general and in international commercial arbitration in order to develop a concept of public policy relevant for the purposes of this study (see below at **A.**). Based on such concept, we will analyse whether and why corruption violates the relevant public policy concept in investment treaty arbitration (see below at **B.**).

---

[444] *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award and Dissenting Opinion, 8 October 2009 (hereinafter: "*EDF v Romania*"), para 221.

[445] Note that the tribunal finally came to the conclusion that corruption could not be proven, for which reason a thorough discussion of international public policy was not essential.

[446] *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (hereinafter: "*Wena v Egypt*, Award"), para 111. The tribunal referred to *inter alia* Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," in *Comparative Arbitration Practice and Public Policy in Arbitration*, ed. Pieter Sanders, vol. 3, ICCA Congress Series (Kluwer Law International, 1987), 276 et seq.

[447] *World Duty Free v Kenya*, Award, para 157.

[448] See *World Duty Free v Kenya*, Award, paras 142-157.

[449] Note that the tribunal in *World Duty Free* was not satisfied with merely relying on the general findings of former tribunals that corruption violates universal values, but called for a cautious approach and a careful examination of the respective transnational public policy rule, see *World Duty Free v Kenya*, Award, para 141.

A. Public policy in general

A general characteristic of public policy is its vagueness.[450] Commentators often contend that some sort of mystery surrounds this concept[451] and that it is difficult to define[452]. The concept of public policy is neither strict nor is its content fixed and stable. Its character is rather relative[453] since first, public policy depends on the

[450] See e.g. the often cited notion that the "*uncertainty and ambiguity as to its actual content is one of the essential characteristics of public policy*", Julian D.M. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Dobbs Ferry, New York: Oceana Publications, 1978), 531. E.g. cited in Martin Hunter and Gui Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," *Journal of World Investment* 4, no. 3 (2003): 367; Alan Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," in *International Arbitration 2006 Back to Basics?*, ed. Albert Jan Van den Berg, vol. 13, ICCA Congress Series (Kluwer Law International, 2006), 871 et seq.
Note that the uncertainty and unpredictability resulting from the vague concept of public policy led the International Law Association to work on this topic with the goal to harmonise the approach to public policy and the enforcement of arbitral awards around the world. The results of the six-year study were summarised and published in International Law Association, Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference 2002.

[451] See Bernard Hanotiau and Olivier Caprasse, "Public Policy in International Commercial Arbitration," in *Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention in Practice*, ed. Emmanuel Gaillard and Domenico Di Pietro (Cameron May, 2008), 788. The concept of public policy has also been characterised as having a "*nebulous nature*", see Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford; New York: Oxford University Press, 2009), 615. An often cited notion about public policy was given by Justice Burrough in 1824: "*Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when others points fail.*" *Richardson v Mellish*, 2 Bing. 229 (1824) at 303, reprinted in [1824-1834] ALL ER Rep. 258. Cited in W. Michael Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," in *International Arbitration 2006 Back to Basics?*, ed. Albert Jan Van den Berg, vol. 13, ICCA Congress Series (Kluwer Law International, 2006), 849; Marie Louise Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," *Annals FLB - Belgrade Law Review* LVII, no. 3 (2009): 116; Audley Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?," *Transnational Dispute Management* I, no. 1 (February 2004); Blackaby et al., *Redfern and Hunter on International Arbitration*, 616; Gary B. Born, *International Commercial Arbitration*, 2nd ed. (The Hague: Kluwer Law International, 2014), 2693; Loukas A. Mistelis, "'Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards," *International Law FORUM Du Droit International* 2, no. 4 (2000): 248; Anil Changaroth, "International Arbitration - A Consensus on Public Policy Defences?," *Asian International Arbitration Journal* 4, no. 2 (2008): 143. Also cited in International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000, p. 35.

[452] See e.g. Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 707; Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 788; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 118; James D. Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," *Chinese Journal of International Law* 8, no. 1 (2009): 90. See also International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000, 4. Note that the term public policy is used in the New York Convention and in the UNCITRAL Model Law, however, no definition is given.

[453] Lalive used the formula of 'relativity of public policy', see Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 262 et seq.

conception of a particular legal community,[454] and second, such conception may change over time.[455] Thus, public policy may also be described as being flexible and open for development.[456]

Although no definition with universal validity exists, many expressions have been introduced to describe and explain this vague concept.[457] In a prominent international arbitration treatise public policy is described as "*fundamental conception of justice*".[458] In other words, public policy comprises the "*fundamental notions of a particular legal system*".[459] In a more descriptive way, "*public policy is a reflection of the fundamental principles of a given society in its moral, religious, economic, political and legal environment*".[460] Another often cited wording is that under public policy fall the "*most basic notions of morality and justice*".[461]

Whether we refer to principles, notions, conceptions, or reflections, whether we describe them as being fundamental, essential or basic, all these different wordings point at the same direction: under public policy we understand the undisputed moral and legal notions of a particular legal system which may not be disregarded under any circumstances since they are fundamental for its well-being.[462]

---

[454] Karl-Heinz Böckstiegel, "Public Policy and Arbitrability," in *Comparative Arbitration Practice and Public Policy in Arbitration*, ed. Pieter Sanders, vol. 3, ICCA Congress Series (New York: Kluwer Law International, 1987), 179; Karl-Heinz Böckstiegel, "Public Policy as a Limit to Arbitration and Its Enforcement," vol. Special Issue 2008 The New York Convention - 50 Years (11th IBA International Arbitration Day and United Nations New York Convention Day "The New York Convention: 50 Years," New York: IBA Journal of Dispute Resolution, 2008), 123 et seq. See also Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 532. ("*Naturally public policy differs according to the character and structure of the State or community to which it appertains* […]").

[455] Böckstiegel, "Public Policy and Arbitrability," 179. See also Dirk Otto and Omaia Elwan, "Article V(2)," in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, ed. Herbert Kronke et al. (The Hague: Kluwer Law International, 2010), 367.

[456] Böckstiegel, "Public Policy and Arbitrability," 179; Böckstiegel, "Public Policy as a Limit to Arbitration and Its Enforcement"; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 118.

[457] Note that these definitions of public policy have been made by national courts, arbitral tribunals or scholars in different situations and circumstances, thus representing different approaches to public policy. Nevertheless, it is believed that these formulations are nevertheless helpful to grasp what public policy means in its generality.

[458] Emmanuel Gaillard and John Savage, eds., *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 863.

[459] Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 789.

[460] Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 367. See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 707.

[461] *Parsons & Wittemore Overseas Co. v Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974)*, I Y.B. Commercial Arbitration 205 (1976). Note that the Court of Appeals for the Second Circuit dealt with enforcement of a foreign arbitral award and framed public policy as the enforcement-State's most fundamental values.

[462] Note that this is rather a different wording to explain what we may understand under public policy rather than providing another attempt of defining it. See also Julian D.M. Lew, Loukas A. Mistelis, and Stefan Michael Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 422. ("*Every legal system, national and international, has*

Public policy plays a role in many different fields of law, for instance, in private international law as a bar to the application of foreign law.[463] In international arbitration public policy constitutes the limit to the parties' autonomy.[464] It overrules any parties' agreement, rule or decision violating the fundamental values or interests of the respective legal system.[465] In order to establish the concept of public policy relevant for our purposes, an overview of the different concepts of public policy in general is provided (see below at **I.**). Then the concept of public policy in international commercial arbitration is presented (see below at **II.**), before analysing the relevant concept of public policy in investment treaty arbitration (see below at **III.**).

I. The different concepts of public policy

As a starting point for the analysis of how corruption may affect the public policy concerns in investment treaty arbitration, it is pertinent to understand the different concepts of public policy in international arbitration. In fact many different terms deal with public policy concerns, but all of them have a slightly different meaning. While public policy and *ordre public* are often used interchangeably,[466] which is also appropriate for our purposes,[467] we will briefly explain the meaning of domestic or national public policy (see below at **1.**), *lois de police* or mandatory rules (see below at **2.**), international public policy (see below at **3.**), and transnational or truly international public policy (see below at **4.**).[468]

---

certain immutable moral and ethical standards that cannot generally be ignored or avoided by a different choice of law.").

[463] Jacob Dolinger, "World Public Policy: Real International Public Policy in the Conflict of Laws," *Texas International Law Journal* 17 (1982): 167 et seq. ("*It has a barrier effect, a rejecting role*."). See instead of many Franco Mosconi, "Exception to the Operation of Choice of Law Rules," in *Collected Courses of the Hague Academy of International Law*, vol. 1989– V (Dordrecht et al.: Martinus Nijhoff Publishers, 1990), 23 et seq.; Jan Kropholler, *Internationales Privatrecht*, 6th ed. (Tübingen: Mohr Siebeck, 2006), 244 et seq.

[464] Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 787.

[465] Pierre Mayer, "Effect of International Public Policy in International Arbitration," in *Pervasive Problems in International Arbitration*, ed. Loukas A. Mistelis and Julian D.M. Lew (Alphen aan den Rijn et al.: Kluwer Law International, 2006), 63.

[466] See e.g. Böckstiegel, "Public Policy and Arbitrability," 179.

[467] Note that it is argued that the term public policy in the sense of the common law understanding is narrower than the concept of *ordre public* in the civil law system. May this be as it is, for our purposes such difference is of no further relevance.

[468] Note that the concept of regional public policy is also sometimes discussed in the literature and comprises public policy considerations that are common within a region. See e.g. Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," 88. For regional transnational rules in general see Emmanuel Gaillard, "Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules," in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ed. Albert Jan van den Berg, vol. 7, ICCA Congress Series (Kluwer Law International, 1996), 588 et seq.

1. Domestic or national public policy

National public policy encompasses the fundamental rules of each State, which are of utmost importance for the State's society and its well-being.[469] Since public policy is comprised by the moral concept of a certain legal community,[470] national public policy is the judgment of a State about what is essential for its own society.[471] It is thus an instrument by each State to ensure that no foreign law, rule or principle shakes the State's own foundation to the core. In the words of Professor Böckstiegel "*public policy remains one of the last resorts to protect what is considered by states as their specific national sacrosanct taboos and interests*".[472] In the context of international arbitration, domestic public policy describes the national public policy concerns applied to merely domestic disputes.[473]

2. *Lois de police* or mandatory rules

In addition, public policy may not be understood as a synonym to *lois de police* or mandatory rules. Surely, both share the characteristic of having a mandatory application, however public policy demands additional requirements.[474]

Lois de police or mandatory rules[475] share similarities with public policy since they are also aimed at protecting vital interests of a State and have mandatory character.[476] Both concepts will prevent the strict application of the chosen law by the parties.[477] However, while public policy has a corrective function with regard

[469] See e.g. Catherine Kessedjian, "Transnational Public Policy," in *International Arbitration 2006: Back to Basics?*, ed. Albert Jan Van den Berg, vol. 13, ICCA Congress Series (Kluwer Law International, 2007), 859.
[470] Böckstiegel, "Public Policy and Arbitrability," 179; Böckstiegel, "Public Policy as a Limit to Arbitration and Its Enforcement." ("*Public policy is dependent on the judgment of the respective legal community.*")
[471] Note that domestic public policy does not protect the interests of individuals or groups, but only of the society of a State as a whole, see Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," 86.
[472] Böckstiegel, "Public Policy as a Limit to Arbitration and Its Enforcement." Note that the expression 'sacrosanct' with regard to public policy has become common. See e.g. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 532. ("[…] *public policy* […] *covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception*.").
[473] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 259; Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," 86.
[474] Böckstiegel, "Public Policy and Arbitrability," 183.
[475] Note that *lois de police* and mandatory rules describe the same concept which originates from a private international law concept applied in the continental legal systems.
[476] For a detailed analysis of *lois de police* or mandatory rules in international arbitration see Pierre Mayer, "Mandatory Rules of Law in International Arbitration," *Arbitration International* 2, no. 4 (1986): 274–93.
[477] See e.g. Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 847.

to the applicable law, *lois de police* rules are applied immediately without need of applying conventional conflicts of law methods to determine the applicable law.[478]

The concrete relationship between *lois de police* and public policy is disputed. Some commentators argue that a violation of *lois de police* would also amount to a breach of public policy, since in the view of the affected State the protected interests will always be essential.[479] Other commentators contend that a violation of *lois de police* will not form part of the public policy exceptions, unless a fundamental principle is in danger.[480] Undisputed is however that the application of mandatory rules is not allowed to violate international or transnational public policy.[481]

For the purposes of this study it is sufficient to note that the national prohibition of corruption will form part of *lois de police* in each State.[482] Since such prohibition is aimed at protecting the vital social and economic interest of the State, it is also a fundamental principle of the State. Thus, the prohibition of corruption may be protected by both concepts.[483] In the context of arbitration *lois de police* like national public policy will however only relate to the national perception of a State and only become relevant as part of the applicable law.

3. International public policy

The expression 'international public policy' is used inconsistently and heterogeneously in international arbitration. The term is somewhat confusing[484] since the word 'international' leads to the misleading assumption that such public

[478] Thomas G. Guedj, "The Theory of the Lois de Police, A Functional Trend In Continental Private International Law - A Comparative Analysis With Modern American Theories," *The American Journal of Comparative Law* 39 (1991): 665 et seq.; Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 792.

[479] E.g. Mayer, "Mandatory Rules of Law in International Arbitration," 275. International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000, p. 17 et seq.; Christophe Seraglini, *Lois de Police et Justice Arbitrale Internationale* (Paris: Dalloz, 2001), 157.

[480] See e.g. Pierre Lalive and Emmanuel Gaillard, "Le Nouveau Droit de L'arbitrage International En Suisse," *Journal Du Droit International* 116, no. 4 (1989): 954.

[481] Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 848; Born, *International Commercial Arbitration*, 2719.

[482] See Alexis Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," *Arbitration International* 22, no. 1 (2006): 100. Domestic criminal law prohibiting corruption is a mandatory rule for the arbitrator. It goes without saying that the arbitrator in her function of adjudicator of the international business dispute has only the power to draw civil law consequences from the rule of criminal law.

[483] The ILA noted that corruption in particular may fall into various categories. See International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000, 15. Note that the ILA understands mandatory laws as a sub-category of the broad concept of public policy. See also Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 851.

[484] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 259.

policy must be linked to international law rather than domestic law.[485] In fact, sometimes, international public policy is used to describe public policy considerations that are part of public international law,[486] or that have international or universal validity.[487] In international arbitration it is mostly used with a different meaning, which is the meaning it has under private international law.[488]

In international arbitration, international public policy is the public policy seen through the lenses of a particular legal system applied to an international situation.[489] Such international circumstance is mostly given when a domestic legal system has to decide about the recognition and enforcement of any foreign law, judgment or arbitral award.[490] In other words, it is the public policy concerns of a specific legal system applied to international relations, and not the national public policy concept applied to purely domestic relations.[491] International public policy is thus not an internationally – beyond boundaries – applicable concept of public policy, it is rather the public policy applied to an international setting, but nevertheless bound to the particular legal order.[492] Thus, international public policy is still "*State-made law*".[493]

---

[485] See Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 378.

[486] See e.g. Mayer, "Effect of International Public Policy in International Arbitration," 61. Note that Mistelis distinguishes 'public international public policy' from 'international public policy' and 'transnational public policy', Mistelis, "'Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards," 251.

[487] See e.g. Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration"; Richard Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," *The Journal of World Investment* 4, no. 2 (2003): 239–50; Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration"; Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud"; Bernardo M. Cremades and David J. A. Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," in *Handbook on International Arbitration and ADR*, 2nd ed. (Huntington, New York: JurisNet, 2010), 35–48; Born, *International Commercial Arbitration*, 2716 et seq.

[488] See also International Law Association, Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference 2002, para 11 ("*In these Recommendations, the expression 'international public policy' is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award.*").

[489] See e.g. International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000. ("[…] *in practice* [international public policy] *is no more than public policy as applied to foreign awards and its content and application remains subjective to each State*."). See also Otto and Elwan, "Article V(2)," 366. ("[…] *'international public policy' or 'ordre public international' is that which affects the essential principles governing the administration of justice in that country and is essential to the moral, political, or economic order of such country*"). Emphasis added. See also Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 120 et seq.; Kessedjian, "Transnational Public Policy," 859 et seq.

[490] Michael Pryles, "Reflections on Transnational Public Policy," *Journal of International Arbitration* 24, no. 1 (2007): 3.

[491] See Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 790.

[492] See also International Law Association, Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference 2002, para 11 ("*It is not to be understood, in these Recommendations, as*

The source of the specific public policy rule might nevertheless be international such as an international convention, but the application of such rule or provision is domestic, even though the respective situation might have an international character. Thus, the 'international' provision will be applied under domestic law, either because the provision is directly applicable or because it has been incorporated into the domestic legal system.[494]

In conclusion international public policy, with the meaning mostly used in international arbitration, refers to the core[495] of the fundamental principles and values of a specific legal community applied to disputes with international implications. Since such considerations depend on the judgment of the particular legal system, international public policy can be very different around the world.[496] Moreover, the scope of international public policy will most certainly be narrower than national public policy.[497]

4. Transnational or truly international public policy

The term transnational public policy refers to fundamental principles commonly recognised by the international community and applied throughout the world.[498] Transnational public policy is based on a common consensus among all nations and resembles the commonly shared values of the international community.[499]

---

referring to a public policy which is common to many States (which is better referred to as 'transnational public policy') or to public policy which is part of public international law.")

[493] Kessedjian, "Transnational Public Policy," 859; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 122.

[494] Kessedjian, "Transnational Public Policy," 859 et seq.

[495] Note that Lalive called it "*a kind of 'hard core' of legal or moral values*" of a given community. See Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 264.

[496] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 720. ("*There are as many shades of international public policy as there are national attitudes towards arbitration*.").

[497] Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 789 et seq. ("[…] *most legal systems consider that the scope of public policy must be further restricted in the international sphere*"). See Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?" Sheppard gives an overview of the restricted approach of many jurisdictions to international public policy in connection with the enforcement of foreign awards. See International Law Association, Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference 2002, para 11; Pryles, "Reflections on Transnational Public Policy," 3; Otto and Elwan, "Article V(2)," 366; Troy L. Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards Under the New York Convention," *Journal of International Arbitration* 24, no. 1 (2007): 9–24.

[498] See Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 368. See Born, *International Commercial Arbitration*, 2716. ("[…] *fundamental principles of law that are considered to be common among developed legal systems, and to have mandatory application, regardless of what the parties have agreed*.").

[499] Jean-Baptiste Racine, *L'arbitrage Commercial International et L'ordre Public* (Paris: L.G.D.J., 1999), 460. ("[…] *les deux notions, ordre public transnational ou ordre public réellement international se rejoignent, car ells correspondent a l'idée que l'ordre public contient des principes communément admis par l'ensemble des nations.*"). See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration." ("*It is a collection of universal standards, shared norms, and general principles that are widely accepted by the international community.*").

This concept has also been referred to as 'international public policy' by commentators[500] and by investment tribunals.[501] However, since the term international public policy has already been characterised and given a different meaning by international arbitration (although mostly international commercial arbitration), it is essential to maintain a clear cut between the two terminologies to avoid confusion. In order to emphasise the difference to the domestic approach of international public policy, Pierre Lalive labelled this transnational concept as 'truly international' public policy in his seminal report presented and published a quarter of a century ago.[502] Accordingly, transnational public policy can be explained as public policy where its source and its content are 'truly international'.[503]

Transnational public policy and truly international public policy are mostly used interchangeably. However, a few commentators have stressed that both concepts must be distinguished.[504] So far, a satisfactory clear distinction between both terms does not exist. According to these commentators, truly international public policy is the concept of public policy, which is part of public international law (e.g. embargo by UN Security Council), while transnational public policy is a set of legal principles detached from any national legal system,[505] or any legal system at all, including international law.[506] Pursuant to this approach the set of principles

---

[500] See e.g. Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration"; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators"; Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration"; Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud"; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators"; Born, *International Commercial Arbitration*, 2716 et seq.

[501] See e.g. *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (hereinafter: "*Inceysa v El Salvador*, Award"); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (hereinafter: "*Plama v Bulgaria*, Award"); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (hereinafter: "*Rumeli v Kazakhstan*, Award"). Note that the tribunal in *World Duty Free* used both terms, but also explained the different meanings in international arbitration. For the public policy concept with universal character, it actually referred to transnational public policy, see *World Duty Free v Kenya*, Award, para 157.

[502] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration"; Pierre Lalive, "Ordre Public Transnational (or Réellement International) et Arbitrage International," *Revue de l'Arbitrage*, 1986, 329 et seq. The term 'truly international' public policy has been criticised in the literature, see Kessedjian, "Transnational Public Policy," 860. Note that the terms 'truly international public policy' and 'transnational public policy' have been distinguished, see Mayer, "Effect of International Public Policy in International Arbitration," 62; Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," 85 et seq. For our purpose it is sufficient that both concepts have truly international sources and content, and rather than depending on the judgment of a certain State have universal character.

[503] Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 794.

[504] Mayer, "Effect of International Public Policy in International Arbitration"; Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," 87 et seq.

[505] Mayer, "Effect of International Public Policy in International Arbitration," 62.

[506] Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy"; David J. A. Cairns, "Transnational Public Policy and the Internal Law of State Parties," *Transnational Dispute Management* 6, no. 1 (March 2009).

covered by transnational public policy would merely refer to detached bodies of law, such as the law of international merchants, also called *lex mercatoria*.[507] This distinction may have its *raison d'être* in international commercial arbitration where (i) public international law plays a minor role and where (ii) for many years the existence and application of *lex mercatoria* constituted a hot topic.

On the other hand, the focus of this analysis lies on investment treaty arbitration. For the purposes of this study truly international public policy shall have the meaning of transnational public policy and vice versa. In order to pinpoint the specific scope of this concept of public policy as used in this study, its essential characteristics will be presented.

a) Transnational

In the words of a prominent scholar 'transnational law' is "*all law which regulates actions or events that transcend national frontiers*".[508] Using this approach we may describe the concept of transnational public policy as public policy importing concerns that are not constrained to any national or unilateral perception, but that rather transcend the domestic limits and national boundaries.[509] Hence, this

[507] The concept of *lex mercatoria* or New Law Merchant was mainly introduced by Berthold Goldman and his disciples Philippe Kahn, Philippe Fouchard and Jean Stoufflet in the 1960s. The notion behind *lex mercatoria* is that the international business community is governed by a set of rules independent from the national legal systems. Whether those transnational rules really exist, whether they amount to a genuine legal order, whether an arbitrator may resort to these rules other than those of a given legal system, as well as the sources and the content remain disputed ever since. For a brief overview on *lex mercatoria* and its relevance on international arbitration see Blackaby et al., *Redfern and Hunter on International Arbitration*, 217 et seq.; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 801 et seq.; Berthold Goldman, "The Applicable Law: General Principles of Law - Lex Mercatoria," in *Contemporary Problems in International Arbitration*, ed. Julian D.M. Lew (Dordrecht et al.: Martinus Nijhoff Publishers, 1987), 113–25. For a thorough analysis of *lex mercatoria* see Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria*, 2nd ed. (Alphen aan den Rijn et al.: Kluwer Law International, 2010). See also Gaillard, "Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules," 572; Emmanuel Gaillard, "Transitional Law: A Legal System or a Method of Decision Making?," *Arbitration International* 17, no. 1 (2001): especially 62 et seq. Gaillard prefers the expression of transnational rules or general principles of international commercial law, rather than *lex mercatoria*. He understands the concept of *lex mercatoria* as a method of decision-making. In his view it consists of a comparative law analysis to find and apply the most widely accepted rule for the legal question at issue. For a critical view on *lex mercatoria* see Michael John Mustill, "The New Lex Mercatoria: The First Twenty-Five Years," *Arbitration International* 4, no. 2 (1988): 86–119; Mayer, "Effect of International Public Policy in International Arbitration." Mayer denies *lex mercatoria* the character of being a legal system. He disputes that a society of international merchants even exists, and does not accept the notion that transnational public policy emanates from that society.
Note also that various attempts to codify the content of *lex mercatoria* have been made: e.g. UNIDROIT Principles of International Commercial Contracts, available under www.unidroit.org; Lando Principles on European Contract Law (PECL), CENTRAL List of Principles. The CENTRAL List of Principles (Transnational Law Database & Bibliography Tldb) was replaced by the TransLex Principles available under www.trans-lex.org.

[508] Judge Jessup as cited in Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 871. For an early concept of 'transnational law' see Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956). For transnational law in international commerce see Klaus Peter Berger, *The Practice of Transnational Law* (Kluwer Law International, 2001).

[509] See Pryles, "Reflections on Transnational Public Policy," 3.

conception of public policy may also be described as 'supra-national' public policy.[510] While the term international may refer to a relation 'among or between nations', the term transnational underlines the scope of this concept to be 'beyond nations'.[511] In conclusion, transnational public policy is detached from any legal system[512] and has universal character.[513]

b) Consensus

In order to embody universal authority, a principle must be perceived by the international community as being essential[514] and as having universal validity.[515] Thus, for a principle to reach that level, the consensus among the nations is required.[516] This does not mean that the standard must unanimously be followed by each and every single State, it is rather sufficient – but also crucial – that a certain principle or rule is accepted by a great majority of nations.[517] Thus, only the

---

[510] Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 378; Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," 87 et seq.

[511] Fernando Mantilla-Serrano, "Towards a Transnational Procedural Public Policy," *Arbitration International* 20, no. 4 (2004): 335.

[512] Mayer, "Effect of International Public Policy in International Arbitration," 62; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 122.

[513] See also Kessedjian, "Transnational Public Policy," 862. See also Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 122. ("[…] *the most fundamental universal norms and values known to most legal orders and communities* […]"). Emphasis added. See also Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?" ("*By the term 'transnational public policy', I mean those principles that represent an international consensus as to universal standards and accepted norms of conduct that must always apply.*"). Emphasis added.

[514] See Sayed, *Corruption in International Trade and Commercial Arbitration*, 287 et seq.

[515] This notion is borrowed from customary international law and its relevant State practice and *opinio juris* requirements. In other words, the principles amounting to transnational public policy must not only be applied across the world, but there must also exist the global awareness that they are universally applicable.

[516] Mantilla-Serrano, "Towards a Transnational Procedural Public Policy," 335; Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 707.

[517] See Kessedjian, "Transnational Public Policy," 861. ("[…] *transnational public policy is composed of mandatory norms which may be imposed on actors in the market* […] *because they have been widely accepted by different societies around the world.*"), emphasis added. See Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 707. ("*It is a collection of universal standards, shared norms, and general principles that are widely accepted by the international community.*"), emphasis added. See Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 863. ("[…] *it is going too far to insist that a rule must be adopted in all jurisdictions worldwide for it to be considered as reflecting the requirements of a genuinely international public policy. The condemnation of racial discrimination, corruption, or drug trafficking need not be absolutely unanimous for it to reflect a universal moral standard.*"), emphasis added. Note that unanimity is not required for the formation of transnational rules in general, see e.g. Gaillard, "Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules," 586 et seq.
See also Mantilla-Serrano, "Towards a Transnational Procedural Public Policy," 335 et seq. Note that Mantilla-Serrano made this general statement with regard to transnational procedural public policy.

"*common core*"[518] of fundamental principles or "*the common denominators in values and standards*"[519] of the international community amount to transnational public policy considerations.

c) More than just a juxtaposition of public policy of different jurisdictions

It has been argued that since one condition of transnational public policy is that the relevant principle is widely accepted around the world, it would follow that such rule is reflected in the domestic public policy of most states.[520] This notion will be true in most cases, however, it is important to understand such consensus among the nations as being directed to universally and generally accepted considerations of public policy and not merely as a juxtaposition of similar international public policy norms among different countries. Surely, the starting point of '*ordre public véritablement international*' are fundamental notions which are common to different legal systems,[521] however, the concept of transnational public policy as suggested in this study goes a step further, it goes beyond the realm of States. More than just a mirror image of the consensus among different countries about certain public policy issues in their own jurisdictions, transnational public policy is a consensus among the international community on public policy issues concerning the international sphere. The emphasis is that the fundamental principles and values shall be seen as universal. It may be described as the public policy of the international community,[522] which reflects the consensus among the different jurisdictions on general principles of law.[523] Following this approach, it has also been identified as world public policy and described as "*the common interest of mankind*".[524] Transnational public policy as used for our analysis shall thus mean *universal* public policy.

---

[518] The expression 'common core' was borrowed from Cairns, "Transnational Public Policy and the Internal Law of State Parties." However, for Cairns transnational public policy is *the 'common core' of the international public policy of many states*". Note that this is different than the common core of public policy considerations of the international society.

[519] Böckstiegel, "Public Policy and Arbitrability," 180. ("*Insofar as there is a regional or international community or legal system, only its common denominators in values and standards can be the basis for its eventual public policy, and they may obviously differ from those of the individual member states.*").

[520] Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 708.

[521] See Philippe Fouchard, *L'arbitrage Commercial International* (Paris: Dalloz, 1965), 398 et seq.

[522] Hermann Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), 17. For Mosler "[t]*he public order of the international community* […] *consists of principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force*", Ibid., 17 et seq.

[523] Berthold Goldman, "Les Conflits de Lois Dans L'arbitrage International de Droit Privé," in *Collected Courses of the Hague Academy of International Law*, vol. 109 (Martinus Nijhoff Publishers, 1963), 437.

[524] Dolinger, "World Public Policy: Real International Public Policy in the Conflict of Laws," 172. ("*The third public policy is the one that establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of individual nations.*").

Since this approach detaches itself from any connection, perception or viewpoint of a certain legal system, it leads to the likelihood that transnational public policy considerations may run counter to the individual interests of nations.[525] First, because the main focus of transnational public policy are the interests of the international community rather than those of singular States. Second, because a unanimous consensus is not required to establish transnational authority of a principle – isolated dissenting national legal systems among the international community may always exist.

d) Sources and content

As mentioned above, the sources of transnational public policy are truly international and the content has universal character. Such sources may be manifold. The Committee on International Commercial Arbitration of the ILA summarised the sources of transnational public policy as "*fundamental rules of natural law, principles of universal justice, jus cogens of public international law, and the general principles of morality accepted by what are referred to as 'civilised nations'*".[526] Important for our analysis is that the fundamental notions of morality and justice from public international law constitute a significant part of transnational public policy. Transnational public policy is not a synonym for public policy under public international law, since it may not be limited to its sources or by the applicability of public international law, but by its very nature transnational public policy comprises the principles that public international law considers fundamental.[527] The sources of international law laid down in Article 38(1) of the Statute of the International Court of Justice (***ICJ***) will thus be of significant importance for transnational public policy.

The content of transnational public policy has been described as "*internationally and commonly recognized shared values of morality*",[528] human dignity and fundamental principles,[529] which all are essential for the well-being of our

---

Dolinger explains the difference between consensus of different countries on public policy and the international public policy of the international community with the example of homicide and genocide. The first crime is against the public policy of each country around the world, while only the latter one is a threat to world peace and the world society.

[525] See e.g. Böckstiegel, "Public Policy and Arbitrability," 180; Dolinger, "World Public Policy: Real International Public Policy in the Conflict of Laws," 172.

[526] International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000, p. 6 et seq. See also Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"; Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 369. See also Cairns, "Transnational Public Policy and the Internal Law of State Parties." Cairns emphasises that transnational public policy "*by its very nature also reflects fundamental principles of public international law*".

[527] Cairns, "Transnational Public Policy and the Internal Law of State Parties."

[528] Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 378.

[529] Kessedjian, "Transnational Public Policy," 869.

society.[530] Such fundamental principles may comprise a wide area of values such as economic, legal, moral, political and social values.[531] International crimes such as terrorism, genocide, piracy, slavery, drug trafficking and trafficking of human organs are regarded as violations of the universal values of the international society and consequently amount to a breach of transnational public policy.[532] It is noteworthy that transnational public policy may consist of procedural or substantive rules.[533]

5. Conclusion

From the terminology perspective it would appear comprehensive to use the term international public policy to describe a universal concept of public policy. However, since in international arbitration this expression is mostly used with the meaning of the public policy approach of a particular legal system to an international situation, it would lead to misunderstanding and confusion to also use this term to express the public policy concerns relevant in international investment arbitration. Principles and notions with universal character and fundamental to the well-being of the international society will be comprised by the term transnational public policy.

Most certainly, there is an overlap between the different types of public policy.[534] The various concepts may reach the same conclusion that a certain activity is to be banned in the respective areas of application. This may especially be the case with corruption, where most national legal orders and thus also the domestic approach of international public policy will ban corruption.[535] However, the mere fact that the different approaches may come to similar results and cover the same activities, does not allow us to ignore the differences in point of references and application. The main goals of national public policy and international public policy are to

[530] Kessedjian gets to the heart of the essential character of transnational public policy by stating that "*our society would be tantamount to a nightmare*" without such fundamental principles, Ibid.
[531] Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 707.
[532] For a list of activities considered to violate transnational public policy see International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000, See also Mayer, "Effect of International Public Policy in International Arbitration," 63.
[533] Kessedjian, "Transnational Public Policy," 866 et seq.; Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 874 et seq.; Pryles, "Reflections on Transnational Public Policy," 4; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 123 et seq.; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 240; Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 376. For an overview on transnational procedural public policy see Mantilla-Serrano, "Towards a Transnational Procedural Public Policy."
[534] See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 708; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 123 et seq.
[535] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 315. Lalive argues that most fundamental values expressed by transnational public policy are most likely already incorporated by the domestic legal systems.

preserve the integrity of the particular legal system, while transnational public policy is more concerned with the well-being of the international society. This said, international public policy will indeed consider international concerns and show deference to them, but at the end it will always put the concerns of the particular legal system first.[536] Thus, the differences between international public policy and transnational public policy may not be overlooked and a clear cut between the approaches must be kept.[537]

Generally speaking, international public policy is narrower than national public policy,[538] while transnational public policy might often be narrower than international public policy.[539]

II. Public policy and its relevance in international commercial arbitration

Although this study is based on the assumption that international investment arbitration has a *sui generis* character, which is different from international commercial arbitration, there may nonetheless be an overlap, for which reason notions developed in commercial arbitration may also – in particular cases – be applicable to investment arbitration. Thus, the relevance of public policy in international commercial arbitration may serve as a starting point to the following analysis. Note that public policy in international commercial arbitration corresponds mainly to the concept of international public policy (see below at **1.**). However, the concept of transnational public policy in international commercial arbitration is gaining ground (see below at **2.**).

1. International public policy and international commercial arbitration

Generally speaking, in international commercial arbitration international public policy may amount to a limit to party autonomy. It may already be relevant at the

---

[536] Ibid., 314. Lalive rightly describes international public policy as having an almost selfish character: "[…] *there can be no total identity or assimilation between the two kinds of "public policies", inasmuch as the State international public policy inevitably retains a particular or even selfish character, at least in part. Similarly, the fundamental values and interests of a given State can hardly coincide fully with the values and fundamental interests of the international community, just as the national concept of "international public policy" cannot be identified with that of transnational public policy*."

[537] See e.g. Kessedjian, "Transnational Public Policy," 859. Kessedjian acknowledges that in an ideal world the various concepts of public policy should not differ from each other, however, for now they are different. ("*Ideally, in a world where all fundamental values of human dignity and well-being were to be achieved universally, the three notions should not be different. But in our world, they are still different and will remain so for a long time.*").

[538] Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"; Albert Jan Van den Berg, "Grounds for Refusal of Enforcement - Public Policy - Distinction Domestic/International," ed. Albert Jan Van den Berg, *Yearbook Commercial Arbitration 1996* XXI (1997): 502; Pryles, "Reflections on Transnational Public Policy," 3.

[539] Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 368.

jurisdictional stage and lead to a lack of arbitrability.[540] The main question is whether the parties can authorise the arbitral tribunal to decide over the subject matter of the dispute.[541]

In connection with the applicable law in international arbitration, the adopted public policy principle is borrowed from private international law. It bars the application of foreign rules of law designated to govern the case under a conflict of law rule when they run counter to the basic policy of the forum.[542] Thus, international public policy holds the function of a watchdog over the party autonomy and the party chosen applicable law. In case that the application of the party agreed law would offend international public policy, party autonomy would be overruled.[543] Note again that such concept of public policy is only applicable to an international arbitration when the conflict of laws analysis determines so.[544]

Another important function of international public policy in international arbitration is to bar the recognition and enforcement of foreign arbitral awards that violate fundamental principles and rules of the enforcing State.[545] At this stage international public policy is not applied by the arbitrators, but by the national courts. The New York Convention in Article V(2)(b) states:[546]

---

[540] Böckstiegel, "Public Policy and Arbitrability"; Loukas A. Mistelis, "Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues," in *Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention in Practice*, ed. Emmanuel Gaillard and Domenico Di Pietro (London: Cameron May, 2008), 573–94; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 187 et seq. For arbitrability issues relating to corruption see e.g. Ibid., 213 et seq.; Mistelis, "Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues," 588 et seq.

[541] Böckstiegel, "Public Policy and Arbitrability," 178.

[542] See e.g. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 422 et seq.; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 860 et seq.

[543] Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 243 et seq. ("[…] *party autonomy is trumped by the 'higher good' of international public policy*"). See also Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 422; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 860 et seq.

[544] Kessedjian, "Transnational Public Policy," 860.

[545] See e.g. Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 787; Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy"; Born, *International Commercial Arbitration*, 3647 et seq. See also International Law Association, Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference 2002, ("*The expression 'international public policy' is used in these Recommendations to designate the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)*.")

[546] For an overview on the public policy exception at the enforcement stage see Born, *International Commercial Arbitration*, 3647 et seq.For a thorough analysis of public policy under the New York Convention see Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration"; Otto and Elwan, "Article V(2)." For a brief overview of other international conventions mentioning 'public policy' see Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"

> "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: […]
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country."[547]

The same concept of international public policy is used in Article 36 of the UNCITRAL Model Law stating the grounds for refusing the recognition and enforcement of foreign awards. Note that the term public policy is neither defined in the New York Convention nor in the UNCITRAL Model Law. In the context of recognition and enforcement of arbitral awards international public policy may be described as the public policy applied by the domestic legal system to foreign awards rather than domestic awards.[548]

International public policy also plays a role at the setting aside proceedings.[549] A national court of the place of arbitration may set aside an arbitral award when it finds it in conflict with the international public policy of its legal system.[550] This public policy ground is codified in Article 34(2)(b)(ii) of the UNCITRAL Model Law.[551]

2. Transnational public policy and international commercial arbitration

Ever since Pierre Lalive introduced the concept of transnational public policy to international arbitration over two decades ago,[552] it remained controversial. Earlier, Goldman had started to consider *ordre public réelement international* in connection with *lex mercatoria.* He argued that the most fundamental principles of the *lex mercatoria* would be a bar to the application of municipal law.[553] Thus, transnational public policy in international commercial arbitration is often linked to *lex mercatoria*.[554] Nowadays, it is more and more contended that transnational public policy considerations must also be contemplated in international commercial arbitration.

---

[547] Article V(2)(b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) – the New York Convention. Emphasis added.
[548] Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"
[549] See e.g. Blackaby et al., *Redfern and Hunter on International Arbitration,* 614 et seq.; Born, *International Commercial Arbitration,* 3312 et seq.
[550] See e.g. Blackaby et al., *Redfern and Hunter on International Arbitration*, 614 et seq.
[551] Article 34(2)(b)(ii) of the UNCITRAL Model Law reads as follows:
"*Article 34 Application for setting aside as exclusive recourse against arbitral award*
(2) An arbitral award may be set aside by the court specified [by the relevant country] *only if:*
(b) the courts finds that:
(ii) the award is in conflict with the public policy of this State." Emphasis added.
[552] See Lalive, "Transnational (or Truly International) Public Policy and International Arbitration"; Lalive, "Ordre Public Transnational (or Réellement International) et Arbitrage International."
[553] Berthold Goldman, "La Lex Mercatoria Dans Les Contrats et L'arbitrage International: Réalite et Perspectives," *Journal Du Droit International* 106 (1979): 483.
[554] See e.g. Sayed, *Corruption in International Trade and Commercial Arbitration*, 278 et seq. Sayed starts his analysis of transnational public policy with *lex mercatoria*.

At the outset, we have to differentiate between transnational public policy applied by arbitrators and by national courts. Generally speaking, contrary to national courts, arbitrators are not restricted by a specific legal system (see below at **a)**). National courts, on the other hand, are to some extent bound to apply their own concept of public policy (see below at **b)**).

a) Transnational public policy applied by international arbitrators

Many commentators accept the application of transnational public policy by international arbitrators to disregard the governing law in international arbitration.[555] The basic argument is that the arbitrators do not belong to any particular legal system and may thus apply their own concept of public policy.[556] Moreover, it is argued that the concept of transnational public policy is implicitly accepted by the parties when entering the arbitration agreement and may thus overrule the applicable law chosen by the parties.[557] In addition, it is contended that since transnational public policy reflects considerations of domestic and international public policy, such concerns would also be relevant for the enforceability of foreign awards.[558] The failure to apply transnational public policy in the arbitration would thus create the likelihood or even the threat that the award will not be enforceable or even be invalidated on national public policy grounds.[559] Most certainly, the arbitral tribunal has the duty to render an award enforceable at law.[560] Since the arbitral tribunal may not assess beforehand under which jurisdiction enforcement might be sought, it must assume to be enforced in any jurisdiction. However, this does not lead to a prophylactical application by the tribunal of each single international public policy of every potential jurisdiction

---

[555] Kessedjian, "Transnational Public Policy"; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators"; Lalive, "Transnational (or Truly International) Public Policy and International Arbitration"; Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration"; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 855 et seq. and 955; Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 116.

[556] Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 795; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 855 and 955.

[557] Cairns, "Transnational Public Policy and the Internal Law of State Parties." ("*Transnational public policy therefore joins the terms of the contract between the parties, trade usages, and perhaps lex mercatoria, as part of the applicable law in the arbitration that in certain circumstances will prevail over the applicable national law(s) expressly chosen by the parties.*").

[558] Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 708 et seq.

[559] Ibid., 709; Mayer, "Effect of International Public Policy in International Arbitration," 66; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 851. See also Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy," 115.("[…] [truly international public policy] *has a significant practical effect of making awards more transportable, in that this practice increases the likelihood that enforcement courts will not have a problem with the ultimate award that they did not have a hand in creating, thus making enforcement more likely.*").

[560] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 67 et seq.; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 709; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 861 et seq. Gaillard and Savage contend that arbitrators cannot disregard 'fundamental' and 'universal requirements of justice'.

where the award may be enforced, since such task is not included in its scope of duty and would most certainly be impossible. The application of transnational public policy as common denominator of the most fundamental notions, however, would secure a minimum standard of enforceability around the world.

Some scholars recommend a restrained approach to transnational public policy in international commercial arbitration.[561] The vagueness of the concept of transnational public policy has often been criticised as an obstacle for its application by arbitral tribunals.[562] The element of discretion is said to lead to more uncertainty.[563] In addition, it has been noted that this concept provides a platform for the arbitrators to impose their values on the parties.[564]

Especially in cases involving corruption, it is argued that there is no need to apply the concept of transnational public policy to international commercial arbitration since all national legal systems will prohibit bribery of public officials as a violation of their fundamental values.[565] Moreover, it is said that international public policy at the enforcement stage will be a sufficient safeguard to protect any public policy concerns violated by corrupt practices, which again makes the

---

[561] Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 872; Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 852 fn. 2; Pryles, "Reflections on Transnational Public Policy"; Born, *International Commercial Arbitration*, 2718. Pryles even suggests "*extreme caution*" before overriding the applicable law on the basis of transnational public policy. See Pryles, "Reflections on Transnational Public Policy," 7. See also Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy." Note that Fry does not challenge the application of transnational public policy by arbitrators in international commercial arbitration. Fry's critical view on the application of transnational public policy is only aimed at the enforcement of arbitral awards by national courts.

[562] Pryles, "Reflections on Transnational Public Policy," 4. ("[…] *vague, loose or uncertain criteria*."). See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 708. See also Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 856.("[…] *does international commercial arbitration really need such a slippery and malleable concept in order to protect its virtue?*").

[563] Pryles, "Reflections on Transnational Public Policy," 6.

[564] See Mayer, "Effect of International Public Policy in International Arbitration," 65 et seq. Note that Mayer is an advocate of the concept of the moral rule based on the notion that a decision taken by an arbitrator depends on her subjective will. In his view transnational public policy is a set of legal principles that neither are binding nor are based on a legal system. Transnational public policy is not imposed on the arbitrator, he merely has the moral duty to defend those principles that are considered sacrosanct to the majority of States. For the moral rule see e.g. Pierre Mayer, "La Règle Morale Dans L'arbitrage International," in *Etudes Offertes à Pierre Bellet* (Paris: Litec, 1991), 379–93. The concept of moral rule inspired Sayed to compare a universal moral rule with transnational public policy, see Sayed, *Corruption in International Trade and Commercial Arbitration*, 286 et seq. In Sayed's view there is homology between the universal moral rule and transnational public policy, since a dialectical interaction between objective values and personal beliefs exists. The Arbitrator's personal beliefs will have an influence on the perception of what is fundamental. In his words "[w]*hat starts as a venture to search for objective overriding principles, moves across a process of justification of personal beliefs acquired by outside influence, to produce a proclamation that such beliefs are objectively overriding".* Note that Sayed sees transnational public policy rather as a process than a rule. Pursuant this notion the arbitrator does not only passively apply an objective rule, but she or he forms it through "*his or her perception of values, and reaction to the given situation*".

[565] Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 856; Pryles, "Reflections on Transnational Public Policy," 6.

reference to transnational public policy inapposite.[566] Redfern concurs that particularly in corruption cases it is inappropriate to refer to transnational public policy, however, with a slightly different argument.[567] In his view, transnational public policy is not only not required, but it is *inter alia* also not clear, identifiable and detailed enough to solve the corruption concerns at issue in international commercial arbitration.[568] Although the prohibition of corruption is considered universally accepted, such notion is not precise enough and the tribunal will have to resort to national law in order to solve the specific corruption issues.[569]

Reisman advocates for a careful examination whether transnational public policy may trump the national law meant to govern the dispute.[570] From the standpoint of a public international lawyer he is sceptical of borrowing notions from public international law without demanding in commercial arbitration the same strict requirements. Hence, he sees the danger that an international arbitrator may elevate a soft international law to be part of transnational public policy and promote it to be directly effective.[571] This would amount to giving it a binding character, which that particular soft law does not have under public international law. Moreover, Reisman emphasises that under international law caution is applied to the whole concept of challenging agreements due to a higher cause such as *jus cogens*.[572] Finally, while customary international law provides for a strict test (State practice and *opinio juris*), any similar requirements are missing in international commercial arbitration.[573]

A final concern is that the concept of transnational public policy is said not to be just applicable for itself in international commercial arbitration. Its application must be based on a specific authority. Thus, it has been contended that a "[g]*eneralized reference by arbitrators to 'transnational public policy', without reference to particular national rules and an acceptable choice of law framework for their application, risks appearing an easy way out and a substitute for rigorous analysis*".[574] If the relevant public policy concern is confirmed by customary

[566] Pryles, "Reflections on Transnational Public Policy," 6.
[567] Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 873.
[568] Ibid.
[569] Ibid., 874. See also Mayer, "Effect of International Public Policy in International Arbitration," 68. Mayer argues that in corruption cases transnational public policy should only be applied in clear cases. However, in cases where corruption is difficult to establish, the vague concept of transnational public policy is of little help, for which reason national laws with its technical rules should be applied.
[570] Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 854. Note that Reisman uses the term 'international public policy', however, he means universal principles which are encompassed in this contribution under the terminology of 'transnational public policy'.
[571] Ibid., 854 et seq.
[572] Ibid., 855.
[573] Ibid., 855 et seq.
[574] Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 873. Note that he does not have this concern when the dispute is decided *ex aequo et bono*. See Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 851.

international law or by a treaty and the governing national law incorporates international law, then such public policy consideration may be applicable.[575] However, in this case the transnational public policy applied would not be part of a separate body of law but part of the applicable law.[576]

b) Transnational public policy applied by national courts

For national courts applying public policy at the enforcement stage or at setting aside proceedings, the circumstances are different than for an arbitral tribunal. Most commentators agree that courts will apply their own international public policy when deciding over the fate of international awards.[577] This does not mean that courts may not or will not consider universal values and principles for their decisions,[578] however a direct application of transnational public policy by national courts without any restrictions resulting from the public policy approach of its relevant legal system seems unlikely.[579]

c) Conclusion

Transnational public policy needs to be applied with caution in international commercial arbitration. There is no automatism or mechanical process when it comes to applying universal values. In fact, a public policy consideration may only amount to transnational public policy when there exists global consensus on the fundamental value and the universal validity of such notion. This may work as the test, which Reisman is missing at the international commercial arbitration setting. While a careful application is always appropriate, the need for caution does not mean that the concept itself must fail.[580]

Moreover, even if we deny the courts the obligation to decide upon transnational public policy on the enforcement of an award, the argument that the arbitrators should ensure that no universal value is violated remains valid. Despite the above-explained difference between international public policy and transnational public

---

[575] Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 856.
[576] Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 872 et seq.
[577] Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 796; Born, *International Commercial Arbitration*, 3657 et seq. For an overview of the different approaches taken by national courts on public policy at the enforcement stage see Changaroth, "International Arbitration - A Consensus on Public Policy Defences?" Note that some commentators vehemently argue against an application of transnational public policy by enforcement courts. See Fry, "Désordre Public International under the New York Convention: Wither Truly International Public Policy."
[578] Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 796; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 955; Seraglini, *Lois de Police et Justice Arbitrale Internationale*, 154.
[579] Unlikely does not mean impossible. The Swiss Federal Tribunal has several times applied the universal concept of public policy detached from the national approach of the Swiss legal system, see the often cited case of Swiss Fed. Trib, 30 December 1994, XXI Yearbook of Commercial Arbitration 172 (1996).
[580] Note that Kessedjian also calls for self-restraint of the arbitrator, although she is an advocate for the application of transnational public policy in international commercial arbitration.

policy, the universality of a principle makes it very probable that it would also run counter international public policy of most legal systems. In order to make sure that the arbitral award is enforceable in most legal systems of the international community, the arbitrator is well advised to protect the universal values and principles by applying transnational public policy.

III. Public policy and its relevance in international investment arbitration

The arguable cautious approach to transnational public policy in international commercial arbitration cannot be transferred to treaty based international investment arbitration. Even commentators disapproving to a certain extent the application of universal values to international commercial arbitration, clarify that their doubts are not relevant to international investment arbitration where public international law and the general principles of law play a leading role.[581] In the words of Redfern

> "[c]onsiderations of transnational public policy may very well have an important role to play in arbitrations involving states […]; and this is even more likely in the new, growth-industry of international investment arbitrations, where references to public international law, to governmental policies and decrees, to the general principles of law and so forth are likely to be commonplace."[582]

In addition, the often-criticised vagueness of transnational public policy is no argument to deny its application in international investment arbitration. International law offers adequate tools and practice to deal with indefinite or abstract legal concepts, which need to be specified on a case-by-case basis. Especially international investment arbitration is familiar with vague concepts such as fair and equitable treatment, which need to be interpreted and determined before applying them to the facts. The fact that the content of transnational public policy is not fixed and stable is no reason to avoid the concept as a whole. It is rather an additional challenge for international investment arbitration.

---

[581] Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 872; Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 852 fn. 2.

[582] Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 872. See also Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 852 fn.2. ("*Certainly international investment law, if it looks to public policy, should look to international public policy* [with the meaning of transnational public policy], *if it is admissible. The law applied in investment arbitration is authentically international and not national as in commercial arbitration. Insofar as this arbitration continues to be more public and to experiment with being more open to outside participation, through, for example, amicus participation, the information and policy preferences of stakeholders other than the immediate parties to the dispute are increasingly brought to the attention of an investment tribunal. Moreover, the increasing practice of publishing international investment arbitral awards necessarily produces a body of jurisprudence which is available to parties and subsequent tribunals and can be evaluated on its merits by the college of international lawyers and only then given some precedential persuasion.*")

This being said, in order to analyse the role transnational public policy plays in international investment arbitration[583] it must be determined if it is applicable in the first place. Thus, it seems necessary to start with a short overview of the applicable law in international treaty arbitration (see below at **1.**) as basis for the question to what extent transnational public policy is applicable to international investment arbitration (see below at **2.**). Then the current approach of international investment arbitral tribunals to transnational public policy will be analysed (see below at **3.**), before turning to the views by commentators in this regard (see below at **4.**).

1. Overview of applicable law in investment treaty arbitration

The starting point for the applicable law in international treaty arbitration is the IIA, which forms the basis of the dispute and which constitutes a first source of law with its treaty provisions and substantive protection standards. In their capacity as international treaties the IIAs are governed by international law.[584] Moreover, IIAs generally contain a choice of law clause,[585] which will mostly name both international law and domestic law as applicable law. Since in principle both international law and municipal law are applicable, the nature of the applicable law in treaty-based investment disputes has been described as 'hybrid' by tribunals and scholars.[586]

Where the choice of law clause in the IIA provides for international law as applicable law to the investment treaty dispute,[587] the wording of such reference may differ significantly, such as 'rules of international law', 'principles of international law', 'public international law' or 'customary international law'.[588]

---

[583] Note that the present Chapter is dedicated to the general transnational public policy concept relevant for corruption cases in investment treaty arbitration. The concrete application will be analysed in Chapter Six (Corruption as violation of the investment protection standards) and Chapter Seven (Corruption as a defence of the host State).

[584] See e.g. Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International, 2009), 77. See also Article 2(1)(a) of the Vienna Convention on the Law of Treaties, 23 May 1969, entered into force on 27 January 1980, United Nations Treaty Series, Vol. 1155, 331 (hereinafter: "Vienna Convention on the Law of Treaties"):
"[...] *'treaty' means an international agreement concluded between States in written form and governed by international law* […]."

[585] Some commentators argue that these IIA provisions are not choice fo law rules *stricto senso*, since they merely confirm that the tribunal has the power to apply the different legal sources to the dispute, see e.g. Zachary Douglas, *The International Law of Investment Claims*, First (Cambridge et. al.: Cambridge University Press, 2009), 43 et seq.

[586] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 86. For an overview on the role of municipal law in investment disputes see Ibid., 92 et seq. For an overview of the role of international law in investment disputes see Ibid., 98 et seq.

[587] See e.g. Energy Charter Treaty, Art. 26(6) ("*A tribunal* […] *shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*."); NAFTA, Chapter 11, Article 1131 ("*1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*.").

[588] For an overview on the different types of choice of law clauses in IIAs see Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 79–83. Newcombe and

Despite the different wordings, all these different references to specific notions of international law have however been found to refer to all sources of international law.[589]

Tribunals have also found international law applicable, where the relevant IIA did not contain a provision on the applicable law. In *AAPL v Sri Lanka*, for instance, where the relevant IIA was silent on the applicable law, the tribunal referred to the BIT as primary source, but found that it did not amount to a "*self-contained closed legal system*", for which reason customary international law as well as domestic law was also applicable.[590]

In case an international investment arbitration falls under the auspices of the ICSID Convention, Article 42(1) becomes also relevant for determining the applicable law. Article 42(1) of the ICSID Convention provides that unless the parties have agreed explicitly to the contrary, both the law of the host State and the rules of international law are applicable to the investment dispute. The provision reads:

> "Article 42
>
> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[591]

Much has been written and discussed about the exact meaning of this provision and about the relationship between the law of the host State and international law.[592] For instance, in the early years of international investment arbitration, it was argued that international law would only have a supplemental and corrective function to fill in the gaps in the host State's law or to overrule colliding domestic

---

Paradell divided the choice of law clauses contained in IIAs into six different types, which all in one way or the other provide for the application of *inter alia* international law for the investment dispute. Most choice of law clauses name the IIA and international law as sources of law governing the dispute. Various choice of law clauses add further sources of applicable law, such as the law of the host State, the investment contract, or any other specific agreement between the parties of the dispute or the contracting parties of the IIA.

[589] Ibid., 80.

[590] *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (hereinafter: "*AAPL v Sri Lanka*, Final Award"), para 20. See also *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 (hereinafter: "*Kardassopoulos v Georgia*, Award"), paras 221-223.

[591] Articel 42 of the ICSID Convention, emphasis added.

[592] For an overview of Article 42(1) of the ICSID Convention see Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge et al.: Cambridge University Press, 2012), 11 et seq. For an overview of the applicable law to certain issues in investment disputes see Douglas, *The International Law of Investment Claims*, 39 et seq. See also Emmanuel Gaillard and Yas Banifatemi, "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process," *ICSID Review - Foreign Investment Law Journal* 18 (2003): 375–411.

law.[593] At present, many tribunals have confirmed that under Article 42(1), second sentence, both domestic law and international law are equally applicable, while international law will prevail in case of conflict.[594] For our purposes of this study, it is sufficient to note that also under the auspices of ICSID an investment dispute must be solved under the threshold of international law and domestic law.

In principle, the substantive protection standards contained in the IIA and thus the issues of liability will be primarily governed by the IIA itself and international law.[595] The term international law – under Article 42(1) of the ICSID Convention or under the choice of law clause in the IIA – is to be understood with the meaning illustrated in Article 38(1) of the Statute of the ICJ.[596] Article 38(1) refers to international conventions, international custom, general principles of law recognised by civilised nations, judicial decisions and scholarly opinions.[597]

---

[593] See e.g. *Amco Asia Corporation et al. v The Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986 (hereinafter: *Amco v Indonesia*, Annulment"), para 20 ("*It seems to* the ad hoc *Committee worth noting that Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where rules of the applicable domestic law are in collision with such norms.*").

[594] See e.g. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (hereinafter: "*LG&E v Argentina*, Decision on Liability"), para 94; *Duke Energy International Peru Investments No. 1, Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, (hereinafter: "*Duke v Peru*, Decision on Jurisdiction"), para 162. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edition (Oxford et al.: Oxford University Press, 2012), 288–293.

[595] See e.g. *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (hereinafter: "*Total v Argentina*, Decision on Liability"), para 40; *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 (hereinafter: "*Alpha v Ukraine*, Award"), para 233. For the notion that the IIA and international law are the applicable law to the issue of liability in investment disputes see Douglas, *The International Law of Investment Claims*, 81 et seq.; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 98 et seq.

[596] See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965. para 40:
"*The term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes*."

[597] Article 38(1) of the Statue of the International Court of Justice reads as follows:
"*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
b. *international custom, as evidence of a general practice accepted as law;*
c. *the general principles of law recognized by civilized nations;*
d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*."

Note that commentators have also argued that under the phrase 'rules of international law' of Article 42(1) of the ICSID Convention would also fall *lex mercatoria,* see Goldman, "The Applicable Law: General Principles of Law - Lex Mercatoria," 122.

As mentioned above, domestic law is also applicable to international investment arbitration[598] and may play a significant role for the determination of technical issues, such as the question whether the investor is a national of the home State[599] or a company is effectively established in the home State.[600] Moreover, since the investment will generally constitute a bundle of rights over tangibles or intangibles, the question of whether such property exists and is valid will also be a question of municipal law.[601] The question whether such property rights also amount to an investment protected under the IIA is, however, governed by international law.[602] In addition, where a claim is based on contractual rights, the applicable law is the law governing the contract.[603]

The applicability of municipal law also includes – as explicitly mentioned by Article 42(1) of the ICSID Convention – its rules of private international law.[604] So far, the applicability of the conflicts of law rules of a host State has not played any notable role in investment treaty cases. Commentators have, however, addressed the question in theory. Douglas presents the example where the investment

[598] The tribunal in *TECO v Guatemala* summarised this notion in clear words for disputes under the auspices of ICSID, *TECO Guatemala Holdings LLC v The Republic of Guatemala*, ICSID Case No. ARB/1017, Award, 19 December 2013 (hereinafter: "*TECO v Guatemala*, Award"), para 469 ("*Article 42(1) of the ICSID Convention is very clear in that international tribunals can and must apply the laws of the host State to the questions in dispute that are submitted to such law*".).

[599] Note that while the natural person's nationality is determined on the basis of municipal law, in case of conflict with principles of international law, the latter prevails, Monique Sasson, *Substantive Law in Investment Treaty Arbitration* (Alphen aan den Rijn et al.: Kluwer Law International, 2010), 64; Douglas, *The International Law of Investment Claims*, 289 et seq.

[600] See e.g. Douglas, *The International Law of Investment Claims*, 78 et seq.

[601] See e.g. *Libananco Holdings Co. Limited v Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 (hereinafter: „*Libananco v Turkey*, Award"), paras 385-389, where the tribunal analysed the validity of the transfer of ownership of the shares at issue under Turkish law. Note that the tribunal also examined "*notifications, filings and other legal procedures required under Cypriot law*" in order to evaluate the validity of the transfer of a Cypriot company at issue, *Libananco v Turkey*, Award, para 433. See also *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (hereinafter: "*Gold Reserve v Venezuela*, Award"), para 535 ("*Venezuelan law may be relevant for establishing the rights Venezuela recognises as belonging to Claimant*.").
See also Sasson, *Substantive Law in Investment Treaty Arbitration*, 65–96; Douglas, *The International Law of Investment Claims*, 52 et seq.; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 92 et seq.

[602] See e.g. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (hereinafter: "*Teinver v Argentina*, Decision on Jurisdiction"), para 227. See also Sasson, *Substantive Law in Investment Treaty Arbitration*, 49 et seq.; Douglas, *The International Law of Investment Claims*, 72 et seq.

[603] See e.g. *Bosh International, Inc. and B & P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012 (hereinafter: "Bosh v Ukraine, Award"), para 113; *Azpetrol International Holding B.V.; Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award, 8 September 2009 (hereinafter: "*Azpetrol v Azerbaijan*, Award"), para 49, where the tribunal applied English law "*to determine whether there was a contract and, if so, on what terms*". See also Douglas, *The International Law of Investment Claims*, 90 et seq.; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 94. For an overview of the relevance of municipal law for contratual rights in connection with the umbrella clause see Sasson, *Substantive Law in Investment Treaty Arbitration*, 173–194.

[604] Douglas, *The International Law of Investment Claims*, 54 et seq.

constitutes a debt.[605] In such case the existence and validity of the debt would depend upon the law that the private international law rules of the host State deem applicable, be it the law at the domicile of the debtor or the creditor.[606]

The hybrid nature of the applicable law in international treaty arbitration may lead to conflicts between the different applicable laws. Recently, the conflicts between European Law (***EU law***) and the rights granted under the IIAs became a hot topic in investment treaty arbitration. EU law may also be applicable to investment treaty disputes since it is (i) part of international law governing the international obligations of the EU Member States and (ii) part of the internal legal order of the EU Member State and thus applicable as part of the municipal law.[607] The potential consequences of the applicability of EU law to investment treaty disputes were summarised by the tribunal in *Eureko v Slovak Republic*

> "[w]hatever legal consequences may result from the application of EU law, those consequences must be applied by this Tribunal within the framework of the rules of international law and not in disregard of those rules. Those consequences may operate in a number of distinct ways. For example, EU law may affect the capacity of a State to consent to an international treaty, or may affect the performance of obligations under the treaty, or may be part of the law applicable to determine the scope of obligations under the treaty, or may affect the manner in which disputes arising under the treaty must be settled and the jurisdiction of tribunals established outside the EU legal order".[608]

Micula v Romania is an example where the international obligations under the applicable laws conflicted. Prior to joining the EU, Romania had promised incentives and tax exemptions to Swedish investors, which where in violation of EU State aid law and which Romania had to revoke in order to access the EU. Romania's international obligation under the relevant BIT of keeping the incentives in place was thus contrary to its obligation under EU Law to revoke them. The tribunal took Romania's EU Law obligations into consideration as a factual matrix and found that the revocation of the incentives was – in light of their inconsistency with EU Law – reasonable.[609] Nonetheless, the tribunal held that the

---

[605] Ibid., 55.
[606] Ibid.
[607] See e.g. *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (hereinafter: "*AES v Hungary*, Award"), para 7.6.6; *European American Investment Bank AG v The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 (hereinafter: "*Euram v Slovak Republic*, Award on Jurisdiction"), paras 69-73; *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (hereinafter: "*Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability"), paras 4.118-4.126.
[608] *Eureko B.V. v Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (hereinafter: "*Eureko v Slovak Republic*, Award on Jurisdiction"), para 229.
[609] *Micula v Romania*, Award, paras 825 et seq.

revocation of the incentives violated the legitimate expectations of the investors.[610] In making this finding, the tribunal considered EU State aid law not applicable at the moment of the revocation and consequently held that there was no conflict of treaties.[611] Thus, the tribunal refrained from analysing which law would have prevailed in case of a conflict.

The issue of hierarchy of EU Law and international law is an ongoing dispute and has so far not been settled. In *Electrabel v Hungary*, the tribunal found that the international obligations at issue under EU Law and the Energy Charter Treaty (***ECT***) where in this specific case not conflicting. Nonetheless, the tribunal assessed the hierarchy of both legal orders and found that "in case of any material inconsistency" "EU Law would prevail over the ECT".[612]

The potential conflict between EU law and the international obligations under the relevant IIA or international law is, however, not relevant for the present question whether transnational public policy is applicable to investment treaty arbitration. In particular, since the active involvement of the EU Member States in the global fight against corruption and their participation in the international instruments against corruption on global as well as European level (as analysed in Chapter Two) show that the transnational public policy concept regarding corruption is the same for both legal orders. Thus, focusing on corruption issues in investment treaty arbitration the potential conflicts between the applicable laws are not part of the scope of this study.

2. Applicability of transnational public policy to international investment arbitration

At the outset it is important to note that neither the ICSID Convention nor the ICSID Arbitration Rules contain an explicit or general public policy provision. Even Article 52 stating the grounds for annulment of ICSID awards does not contain any specific reference to the concept of public policy. Rather the annulment provisions state specific grounds for annulment from which at least corruption on side of a member of the tribunal[613] and serious departure from a fundamental rule of procedure[614] would most likely be considered as also representing notions of transnational public policy. Moreover, IIAs generally also fail to provide any reference to public policy.

However, in investment treaty arbitration transnational public policy may be applicable on the basis that international law, at least *inter alia*, governs the dispute. As mentioned above, international law comprises the sources named in

[610] *Micula v Romania*, Award, para 717.
[611] *Micula v Romania*, Award, para 319. Romania has started annulment proceedings based *inter alia* on the tribunal's failure to apply the applicable law (EU State aid law).
[612] *Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability, para 4.191.
[613] Article 52(1)(c) of the ICSID Convention.
[614] Article 52(1)(d) of the ICSID Convention.

Article 38(1) of the Statute of the ICJ. These sources form the basis of the sources of transnational public policy.[615] As mentioned already, the term transnational public policy is not a mere synonym for public policy under public international law; however, in the function of comprising the most fundamental principles and rules of the international society, transnational public policy actually represents the most essential core of what international law seeks to protect. Transnational public policy in the sense as presented in this study, and when applied in investment arbitration, stems from international law.[616] Hence, the sources of international law are the basis for the assessment of the content of transnational public policy.[617] From this follows that in treaty based investment disputes, transnational public policy is part of the applicable international law and thus part of the applicable law.[618] In conclusion, arbitral tribunals have to take the fundamental interests guarded by international law described as transnational public policy into consideration for their decisions.[619]

The applicability of transnational public policy has also been favoured from a policy perspective. Contrary to international commercial arbitration where arguments have been made that public policy concerns may always be examined by courts at the enforcement stage or at setting aside proceedings, in ICSID investment arbitration the only stage where public policy may be ensured is at the arbitral proceedings.[620] This is because in connection with ICSID awards there is no room for challenging the enforcement of awards under the New York Convention, since ICSID awards are enforceable without having to resort to national courts.[621] This is different for investment treaty arbitration awards under other arbitration rules, such as UNCITRAL rules or the rules of the Stockholm Chamber of Commerce (***SCC***), where the enforcement of the awards may still be challenged at the relevant national courts under international public policy grounds. The same is true for setting aside proceedings.[622] Thus, in the realm of

---

[615] See above at A.I.4.d).

[616] Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 711. In their words transnational public policy "*is tacitly incorporated through acknowledgment by all four sources of international law*".

[617] Note that a widespread consensus in many jurisdictions may lead to a rule of customary international law that reflects a concern of transnational public policy, see Ibid.

[618] See Ibid., 709.

[619] See e.g. Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration," 378. See also Ibid., 369. The authors state that the arbitral tribunal "*cannot ignore the fundamental interests protected by international law*". See Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 711.

[620] See also Cremades, "Corruption and Investment Arbitration," 213.

[621] Article 53(1) of the ICSID Convention:
"*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention*."

[622] See e.g. the setting aside proceedings at the Federal Court of Canada in the matter of S.*D. Myers, Inc. and the United Mexican States.* Note that the relevant Article 34(2)(b)(ii) is the same as the relevant provision in the UNCITRAL Model Law. Justice Kelen held that "'[p]*ublic policy' does not refer to the political position or an international position of Canada but refers to*

ICSID arbitration, the only instance where transnational public policy can be observed is the arbitration proceedings.

3. ICSID case law on transnational public policy

One of the first ICSID cases where public policy played a role for the outcome of the case was *Inceysa v El Salvador*.[623] The tribunal faced serious fraudulent behaviour on side of the investor in connection with the investment and concluded that rights obtained by fraud may not be recognised or enforced due to its violation of international public policy.[624] The tribunal's decision shows how the universal concept of public policy may be relevant to the jurisdiction of the tribunal. It deduced the applicability of this type of public policy from the 'in accordance with the host State law' clause,[625] and found that such clause was a manifestation of international public policy.[626] Generally, the 'in accordance with the host State law' clause only excludes the protection of investment made in violation of *internal* laws; however, since the constitution of El Salvador incorporates international treaties as national laws, the tribunal applied the IIA directly in order to determine whether the investment was made in accordance with the law of the host State.[627] After analysing the choice of law clause of the IIA, which provided *inter alia* for general principles of international law, the tribunal referred to Article 38 of the Statute of the ICJ to conclude that general principles of law recognised by civilised nations were a source of international law.[628]

Consequently, the tribunal applied 'international public policy' as general principle of law. Since general principles of law are such general rules, which pursuant to international consensus have universal character, the approach taken by the tribunal to public policy was in fact the one we have identified above as transnational public policy.[629] When defining the applied concept of public policy, the tribunal combined

---

'fundamental notions and principles of justice'." *The Attorney General of Canada and S.D. Myers, Inc. and United Mexican States*, Federal Court of Canada, Reasons for Order (2004 FC 38), 13 January 2004, para 55.
See also the setting aside proceedings of the NAFTA case of *Metalclad v United Mexican States*, where the Supreme Court of British Columbia held that a conflict with public policy was not established. *The United Mexican States v Metalclad Corporation*, 2001 BCSC 664, 2 May 2001, Judgment given by Hon. Mr Justice D.F. Tysoe.

[623] Note that the tribunal used the term international public policy rather than transnational public policy.

[624] *Inceysa v El Salvador*, Award, paras 245-252. The tribunal in *Phoenix v Czech Republic* quoted this finding of *Inceysa v El Salvador*, however the case dealt with the international principle of good faith rather than specifically with international public policy, see *Phoenix Action, Ltd. v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (hereinafter: "*Phoenix v Czech Republic*, Award"), paras 111-113. *Inceysa* was also referred to in the dissenting opinion of Prof. Cremades in *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Bernardo M. Cremades, 19 July 2007 (hereinafter: "*Fraport v Philippines*, Dissenting Opinion Bernardo Cremades"), para 40.

[625] *Inceysa v El Salvador*, Award, paras 246. Note that the basic question of the tribunal was whether the investment was covered by the limited consent given by El Salvador.

[626] *Inceysa v El Salvador*, Award, paras 246.

[627] *Inceysa v El Salvador*, Award, paras 219-220.

[628] *Inceysa v El Salvador*, Award, paras 222-229.

[629] In fact, the explanation given by the tribunal of what would amount to general principles of law is similar to the definition of transnational public policy provided above and both coincide at least

the domestic approach linked to the fundamental principles of a particular State with the function of transnational public policy by stating that "[i]*nternational public policy consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it*".[630] The tribunal emphasised that one essential part of public policy was the respect for the law, which in its view was breached by the fraudulent behaviour of the investor.[631] In order to clarify that it did not only refer to the public policy of El Salvador, but also to the transnational concept, the tribunal emphasised that such respect for the law would be a crucial part of public policy "*in any civilized country*".[632]

In *World Duty Free v Kenya*, the tribunal – being confronted with corrupt practices by the investor – explained the transnational concept of public policy as the "*international consensus as to universal standards and accepted norms of conduct that must be applied to all fora*".[633] As mentioned earlier, this case was the first ICSID case where the dismissal was based on the violation of international public policy due to the corrupt behaviour of the investor.[634] The tribunal in *Niko v Bangladesh* refers to the findings of *World Duty Free v Kenya* and concludes that "*the prohibition of bribery forms part of international public policy*".[635] While in *Metal-Tech v Uzbekistan* the host State argued that the claim lacked jurisdiction and was inadmissible due to a "*violation of international public policy and transnational principles*", the tribunal refrained from addressing these issues since it had already concluded that it lacked jurisdiction on the basis of a breach of the 'in accordance with host State law' clause.[636]

---

in the universal character of the relevant notion: "[the general principles of law] *have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based.*" *Inceysa v El Salvador*, Award, para 227.

[630] *Inceysa v El Salvador*, Award, para 245. Note that the tribunal based this notion on the concept of international public policy used in private international law.

[631] *Inceysa v El Salvador*, Award, paras 248 et seq.

[632] *Inceysa v El Salvador*, Award, paras 248.

[633] *World Duty Free v Kenya*, Award, para 139. Note that the public policy approach taken by the tribunal in *World Duty Free v Kenya* was cited in many subsequent awards. See e.g. *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 40; *Plama v Bulgaria*, Award, para 142.

[634] For a more detailed analysis of the case see below.

[635] *Niko Resources (Bangladesh) Ltd. v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013 (hereinafter: "*Niko v Bangladesh*, Decision on Jurisdiction"), paras 432-433. Note that the tribunal emphasised that it was not aware of any contrary position, for which reason it refrained from analysing the matter itself.

[636] *Metal-Tech v Uzbekistan*, Award, para 374. In *Rumeli v Kazakhstan* the tribunal also refrained from addressing the issue of international public policy raised by the host State arguing that the investor engaged in a systematic and worldwide fraud, see *Rumeli v Kazakhstan*, Award, paras 236-240. Since the tribunal found no proof for the alleged fraud, it merely stated that it found no evidence for a violation of international public policy without further addressing the issue.

In *Plama v Bulgaria*, the tribunal found that the deliberate failure to inform the host State of the material change of the composition of a consortium amounted to fraud,[637] and finally also constituted a violation of the international concept of public policy. The dispute was brought under the ECT, which does not contain any provision similar to the 'in accordance with the host State law' clause. By reference to the introductory note of the ECT,[638] the tribunal found ECT protection nevertheless only provided for investments made in accordance with law.[639] Similarly to the tribunal in *Inceysa v El Salvador*, the tribunal pointed at the choice of law clause of the IIA and the consequential applicability of international law to determine the legality of the investment.[640] After referring to *Inceysa v El Salvador* and to *World Duty Free v Kenya*, the tribunal stated that the basic notion of international public policy is "*that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal*".[641]

4. Scholarship on transnational public policy in international investment arbitration

Commentaries to transnational public policy are fewer with regard to investment arbitration than to commercial arbitration. Due to the fact that international law will at least *inter alia* govern the investment dispute, there are no concerns in the literature about the general application of fundamental rules with universal character to investment treaty arbitration.[642] The commentaries rather address the different forms of application of such concept in investment treaty arbitration.[643]

In international investment arbitration transnational public policy may have a corrective function to the applicable law or even constitute the applicable law as part of international law.[644] Transnational public policy has been found relevant for issues such as State responsibility, for the different substantial protection standards, compensation and procedural principles such as the burden of proof.[645]

---

[637] *Plama v Bulgaria*, Award, paras 134-135. At the end, the consortium did not consist – as originally planned – of two experienced companies, but merely of an individual investor without the necessary financial capacity and managerial experience required to operate the designated business of a refinery.

[638] The cited introductory note to the ECT reads as follows: "*The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues* […]." Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, 14.

[639] *Plama v Bulgaria*, Award, para 139.

[640] *Plama v Bulgaria*, Award, para 140.

[641] *Plama v Bulgaria*, Award, para 143.

[642] Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 872; Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 852 fn.2. Note that both see the application of transnational public policy in international commercial arbitration critically, but favour its application in international investment arbitration.

[643] Hunter and Conde E Silva, "Transnational Public Policy and Its Application in Investment Arbitration."

[644] Ibid., 372.

[645] Ibid., 373 et seq.

In this context, in investment treaty arbitration transnational public policy may be relevant to the jurisdiction, the admissibility, or the merits.[646]

5. Conclusion

The relevant concept in investment treaty arbitration is transnational public policy comprising the most fundamental notions of our international community, which have universal character. Especially in investment treaty arbitration where international law and the general principles of law play a leading role, the universal concept of public policy has to be observed. Actually, transnational public policy represents the most essential core of what international law protects. Recent ICSID case law shows that arbitral tribunals have become willing to base their decisions on this universal concept of public policy. The common view in scholarship also militates in favour of the application of transnational public policy in investment treaty arbitration. In conclusion, arbitral tribunals have to include the fundamental notions of the international community reflected under the term transnational public policy in their decision-making process.

B. Corruption and transnational public policy in international investment arbitration

Corruption is often used as general example for an activity that violates public policy in all its forms – domestic public policy, international public policy and transnational public policy.[647] For instance, in its Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, the International Law Association enumerated corruption together with drug trafficking, smuggling and terrorism as an example of a violation of transnational public policy.[648] Besides, in the views of many commentators an international consensus has developed leading to the notion that corruption is a violation of transnational public policy.[649]

As explained at the outset of this analysis, we cannot just take such notion for granted. The vagueness of the concept of public policy invites to formulate its

[646] See e.g. Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration," *ICSID Review - Foreign Investment Law Journal* 29, no. 1 (2014): 155–86.

[647] Note that during the discussions concerning the UNCITRAL Model Law it was agreed on that corruption and bribery would fall under the term of public policy. UN Doc. A/40/17, para 297 and 303. The following statement was given concerning Article 34(2)(b)(ii), but applies also to Article 36(1)(b)(ii):
"*It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside*."

[648] International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, London Conference 2000, 7.

[649] See e.g. Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 706. For a detailed reference to the scholarly opinion that corruption violates transnational public policy see fn. 704.

content too easily, without real proof.[650] In the words of the tribunal in *World Duty Free v Kenya* "[t]*ribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards*".[651] Thus, an analysis of the different attitudes towards corruption at the international level is required in order to evaluate the existence of a wide consensus among the international community that corruption violates transnational public policy. This analysis starts with a brief overview of the international instruments against corruption (see below at **I.**) and the approaches taken by international organisations (see below at **II.**). Subsequently, the view taken in investment treaty arbitration case law (see below at **III.**) and by scholars and commentators (see below at **IV.**) on corruption as violation of transnational public policy are analysed. As basis for our analysis we will consider the purpose and objectives of investment treaty arbitration (see below at **V.**) as well as the fact that corruption is still widespread, which is an indication of contradictory behaviour (see below at **VI.**), before concluding this sub-chapter (see below at **VII.**).

I. International instruments against corruption

As presented in Chapter Two many international instruments have been implemented on the regional[652] and worldwide[653] level since the end of the nineties, leading to a uniform international effort to tackle corruption on the international level.[654] At this stage only a brief overview of the international instruments against corruption as one element of establishing transnational public policy is given.[655]

The first major achievement in the international fight against corruption was the OECD Anti-Bribery Convention, which imposed the obligation on the signatories

[650] Stephan Wilske and Martin Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues," in *The Future of Investment Arbitration*, ed. Catherine A. Rogers and Roger P. Alford (Oxford et al.: Oxford University Press, 2009), 265. ("*In fact, public policy is not only difficult to ascertain, there is also always a certain danger that someone simply 'makes it up'.*"). See also Richard Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," in *International Commercial Arbitration: Important Contemporary Questions*, ed. Albert Jan Van den Berg, vol. 11, ICCA Congress Series (Kluwer Law International, 2003), 279. Kreindler calls on the arbitrators to not impose their own code of ethics to the parties.

[651] *World Duty Free v Kenya*, Award, para 141. See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 707. ("*Consensus for the existence of rules of transnational public policy derives from the convergence of national laws, international conventions, arbitral case law and scholarly commentary*.").

[652] See above Chapter Two B.III.

[653] See above Chapter Two B.II.

[654] In the words of Mark Pieth: "*A plethora of initiatives has been taken to outlaw bribery*." Mark Pieth, "Transnational Commercial Bribery: Challenge to Arbitration," in *Arbitration, Money Laundering, Corruption and Fraud*, ed. Kristine Karsten and Berkeley (ICC Publishing, 2003), 41.

[655] For a detailed analysis of the international instruments against corruption see Chapter Two B.

to criminalise bribery of foreign public officials in their national legislation.[656] The convention focuses on the supply side of corruption in international business and comprises, with its 40 signatories, the more industrialised part of the world. The most comprehensive and universal international instrument is the United Nations Convention Against Corruption. This convention also requires the signatories to establish corruption as a criminal offence,[657] but includes more corrupt practices than bribery of foreign public officials.[658] With its 140 signatories it establishes an extensive participation of nations around the world in the fight against corruption and represents a broad consensus among members of the international community. In the Preamble the State Parties to the Convention emphasise the "*threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law*". This makes clear that the signatories – representing the majority of States around the world – agree on the deteriorative effect corruption has on the fundamental values and the essential principles for the well-being of the international community.[659]

It has been contended that the international conventions condemning corruption were built "*on widespread domestic prohibition*".[660] This notion needs further elaboration. We have to make a distinction between bribery of national public officials and foreign public officials.[661] It is true that bribery of national officials has for a long time been banned under the domestic law of most jurisdictions. However, bribery of foreign public officials was disregarded for a long time. Many jurisdictions only criminalised bribery of foreign public officials due to the international pressure created by the international instruments.[662] Behind this approach was the fact that no country was willing to jeopardise the competitiveness of their national companies operating abroad, for which reason corrupt practices in international business were only criminalised on the national level after all states had agreed to do so on the international level first. Germany,

---

[656] See Article 1.1 OECD Anti-Bribery Convention.

[657] Note that the United Nations Convention Against Corruption and all other international conventions against corruption only establish the obligation on the signatories to criminalise transnational bribery under domestic law. The international conventions do not codify a rule that is directly applicable by the arbitral tribunal. However, the conventions reflect the current approach taken at international level in the fight against corruption and the coordination of the implemented measures on international and national level.

[658] E.g. embezzlement by public officials, Article 17.

[659] Note that the international condemnation of corruption becomes also apparent via Article 50 of the 1969 Vienna Convention on the Law of the Treaties under which a State is not bound by a treaty if it was obtained by corruption.

[660] Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 712.

[661] This makes also clear the important distinction between international public policy and transnational public policy. International public policy looks through the lenses of the domestic jurisdiction with regard to international situations and circumstances, while transnational public policy looks through universal and common principles among the world community.

[662] The United States pressed ahead at the end of the seventies with the FCPA. It took, however, another two decades until the sufficient consensus among the international community was established to move forward and ban bribery of foreign public officials around the world. See Chapter Two.

for instance, only criminalised such conduct in light of the OECD Anti-Bribery Convention and eliminated the possibility of tax deductibility of bribes paid abroad. The UK Anti-Bribery Act, to give another example, was only enacted to comply with the guidelines of the OECD Anti-Bribery Convention.[663] Thus, although an important step against corruption was taken at the national level, it cannot be said that the international conventions were based on the domestic prohibition of bribery of foreign public officials.

Another issue requires elaboration. Doubts have been raised that international conventions in force may play a role in shaping the content of transnational public policy, since positive international law provisions would be already part of the national approach to international public policy.[664] However, in the case of corruption this view has no influence on our analysis. The international conventions do not provide for directly applicable rules in investment arbitration, but merely oblige the parties to the convention to criminalise transnational bribery of public officials and to take the appropriate actions.

In conclusion, important for our purposes is that the various international conventions against corruption are evidence of the vast majority view among the international community that corruption runs counter to fundamental values and principles.[665] This broad consensus around the world that has developed to ban corruption in international business, leads to the affirmation that corruption violates transnational public policy.[666]

II. International organisations

The international consensus is also evidenced by the efforts taken by international organisations against corruption. In fact, for a long time they have shaped the international approach towards corruption. As shown in Chapter Two, it took a while until an international consensus among States could be achieved to not only

---

[663] For more details on the UK Bribery Act see above Chapter Two B.II.1.a).

[664] Kessedjian, "Transnational Public Policy," 866. In Kessedjian's view, a convention directly applicable by itself or because it has been incorporated into the national legal system is part of international public policy, see Ibid., 859 et seq.

[665] Note that unanimity is not required. Thus, although not all members of the international community have ratified an international instrument against corruption, the broad international consensus may shape the content of transnational public policy, namely the condemnation of corruption.

[666] In the words of the tribunal in *World Duty Free v Kenya*: "*In concluding these Conventions, States have shown their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation. In doing so, States not only reached a new stage in the fight against corruption, but also solidly confirmed their prior condemnation of it*." *World Duty Free v Kenya*, Award, para 146.
See also e.g. Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 712 et seq. ("*This broad consensus in treaties is evidence that affirms the existence of a fundamental transnational public policy against bribery and corruption*."); see also H. Lowell Brown, *Bribery in International Commerce* (Thomson West, 2003), 212. See also Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 240. Kreindler argues that the international conventions against corruption have contributed to the development of the concept of public policy.

fight local corruption, but also transnational corruption through international conventions. For decades States could not agree on a mutual approach, and efforts to establish an international framework failed many times. However, during this deadlock and up until today, many intergovernmental organisations (see below at **1.**) and non-governmental organisations (see below at **2.**) around the world have in their own way implemented measures to raise awareness for corruption and seek solutions for this problem.[667]

1. Intergovernmental organisations

The measures adopted by international organisations on the global level such as the guidelines, recommendations and codes of conduct of the United Nations and the World Trade Organization confirm the international consensus on the condemnation of corruption at intergovernmental level. Similarly, the efforts against corruption of the European Union, the Organization of American States,[668] and the African Union[669] are a sign of the international consensus on the disapproval of corruption at a regional level.

The approaches taken by the international financial institutions support the international consensus on banning corruption from the international financial stage. Institutions such as the World Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the African Developing Bank have implemented strict measures to secure that the funded projects are free from corrupt practices.[670] The institutions also introduced mechanisms of control to ensure corruption-free activities of their own staff.[671] In addition, the World Bank encourages and supports research in the field of corruption, promoting transparency and good governance.[672] Likewise, the International Monetary Fund focuses on the economic causes of corruption and incorporated transparency and accountability as significant parts of the conditionality requirements of IMF-supported programmes.[673]

2. Non-governmental organisations

An important part of the international approach against corruption and thus also to the development of transnational public policy has to be accredited to non-

[667] For a more detailed overview on the measures taken by international organisations see Chapter Two C.
[668] E.g. Organization of American States, Inter-American Program of Cooperation to Fight Corruption, 21 November 2006.
[669] The African Union created an Advisory Board on Corruption that published a 2011-2015 Strategic Plan, June 2011.
[670] See above at Chapter Two C.
[671] The World Bank, for instance, put into place a Fraud and Corruption Hotline to report any suspicious activities.
[672] The World Bank has supervised a number of working papers about corruption, which are all available at www.worldbank.org.
[673] See above at Chapter Two C.III.

governmental organisations.[674] Transparency International, for instance, dedicates their whole work to the fight against corruption and represents the global condemnation of corruption by the civil society.[675] The organisation unites manifold experts and specialists on different fields and has more than 90 chapters around the world researching the topic,[676] collecting crucial data, supporting legal initiatives, and providing tools such as the Corruption Perception Index, the Bribe Payer's Index and the Global Corruption Barometer.

The recommendations and guidelines published by the International Chamber of Commerce show the international consensus of the private business sector to combat corruption, since it destroys fair competition and harms the members of the international business community.[677]

III. Corruption and ICSID Case law

The ICSID case law is still scarce regarding corruption as violation of transnational public policy. Since most of the times corruption cannot be established, the tribunals are obviously reluctant to examine the issue in detail. A few ICSID tribunals have made general comments that corruption would amount to a violation of transnational public policy.[678] However, so far in only one case, a tribunal dismissed the claim on these grounds.[679]

1. *World Duty Free v Kenya*

In *World Duty Free v Kenya*, it was an established fact – mainly due to the admission of the investor – that bribes were paid by the investor to the then-President of Kenya Daniel arap Moi in order to be awarded the concession for duty free stores at two Kenyan airports. The tribunal analysed the consequences of such corrupt practice under international public policy[680] and under English and Kenyan law[681].

At the outset of its remarks on international public policy, the tribunal sketched the different understandings of international public policy and pointed out that it is mostly used to refer to domestic public policy applied to foreign awards.[682] Subsequently, it emphasised that this term is sometimes also applied with the

[674] See also Kessedjian, "Transnational Public Policy," 861.
[675] See above Chapter Two D.I.
[676] Note that the publications are available at www.transparency.org.
[677] The code of conduct of the ICC, for instance, are widely obeyed rules for international trade, see ICC Rules of Conduct to Combat Extortion and Bribery, last revised 2005.
[678] See e.g. *EDF v Romania*, para 221; *Wena v Egypt*, Award, para 111. See also Waguih Elie George *Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion Orrego Vicuña, 11 May 2009 (hereinafter: "*Siag & Vecchi v Egypt*, Dissenting Opinion Orrego Vicuña"), para 17.
[679] *World Duty Free v Kenya.*
[680] *World Duty Free v Kenya*, Award, paras 138-157.
[681] *World Duty Free v Kenya*, Award, paras 158-187.
[682] *World Duty Free v Kenya*, Award, para 138. For a detailed overview of the different meaning of international public policy see above.

meaning of transnational public policy comprising universal notions, which are mandatory in all legal systems.[683] In order to identify such universal concept of international public policy, the tribunal stressed that a careful examination of international conventions, comparative law and arbitral awards was required first.[684] After briefly noting that bribery was criminalised in almost all countries around the world, the tribunal looked at the international conventions against corruption on the global and regional levels.[685] The tribunal did not fail to point out that these conventions only created obligations on the State parties to criminalise corruption in their national legal systems.[686] However, it managed to carve out that these international instruments were evidence for the willingness of the States around the world to fight corruption at the international level by coordinating the international measures through international conventions:

> "In concluding these Conventions, States have shown their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation. In doing so, States not only reached a new stage in the fight against corruption, but also solidly confirmed their prior condemnation of it."[687]

Proceeding with the analysis of arbitral awards involving corruption, the tribunal started with the probably most cited and well-known arbitral award dealing with this topic – the ICC Case No. 1110 rendered by Judge Lagergren in 1963.[688] The case dealt with the scope of an agency agreement between an investor and an Argentine agent, originally entered into for consultancy work at an energy project, and allegedly also covering the sale of equipment for another project. The arbitrator became suspicious due to the high amount of the commission, and found parts of such payments to have the purpose of bribing Argentine public officials. The arbitrator emphasised the negative impact of corruption on international business and concluded that such practice was contrary to the universal concept of public policy

> "[w]hether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is

---

[683] *World Duty Free v Kenya*, paras 139. ("*The term 'international public policy', however, is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.*").
[684] *World Duty Free v Kenya*, Award, para 141.
[685] *World Duty Free v Kenya*, Award, paras 142-146.
[686] *World Duty Free v Kenya*, Award, para 146.
[687] *World Duty Free v Kenya*, Award, para 146.
[688] *World Duty Free v Kenya*, Award, para 148. Note that Sayed also starts his analysis of transnational public policy with this arbitral award, see Sayed, *Corruption in International Trade and Commercial Arbitration*, 289.

> contrary to good morals and to an international public policy common to the community of nations."[689]

The tribunal continued to refer to further international commercial arbitral awards finding corruption to be contrary to the morality in international affairs,[690] the concept of international public policy as recognised by most nations,[691] international business ethics as conceived by most States in the international community[692] and transnational public policy.[693] It is noteworthy that all cited arbitral awards dealt with a different setting than the one of *World Duty Free v Kenya* or of a normal investor-State dispute tainted by corruption. The cited awards represent the common scenario in international commercial arbitration dealing with so-called intermediary or agency contracts. These arrangements normally provide for assistance rendered by the intermediary to the investor to obtain a certain public procurement or an investment contract. In fact, the real objective of the arrangement is the channelling of bribes to foreign officials in order to influence their decision-making.[694] Such setting cannot be compared with the scenario the *World Duty Free* tribunal was concerned with. A contract with the illegal objective of engaging in corrupt practices has an illegal subject matter, which is undisputed, while in an investor-State dispute the relevant investment contract itself has a legal subject matter – only the circumstances surrounding the contract are tainted by corruption. The tribunal failed to take this distinctive context into consideration for its reasoning. However, the findings of the international commercial arbitral tribunals were all made in a general sense condemning the use of corruption in international business completely.

Finally, the tribunal concluded that based on the approaches taken at the international level by international conventions, courts and arbitral tribunals, it could clearly be identified that corruption violates transnational public policy

> "[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

---

[689] J. Gillis Wetter, "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in Case No. 1110," *Arbitration International* 110, no. 3 (1994): 294. Emphasis added. Cited by *World Duty Free v Kenya*, Award, para 148, emphasis added.

[690] *Claimant (Iran) v Defendant (Greek company/Iran)*, ICC Case No. 3916 of 1982, Journal du droit international, 1984, 934 and Collection of ICC Arbitral Awards 1974-1985, 507 (hereinafter: "ICC Case No. 3916"). Cited by *World Duty Free v Kenya*, Award, para 150.

[691] *UK Company v French Company/African Country*, ICC Case No. 3913, Journal du droit international, 1985, 989 and Collection of ICC Arbitral Awards 1974-1985, 507 (hereinafter: "ICC Case No. 3913"). Cited by *World Duty Free v Kenya*, Award, para 151.

[692] *Frontier AG & Brunner Sociedade v Thomson CSF*, ICC Case No. 7664, 31 July 1996 (hereinafter: "ICC Case No. 7664), para 63. See Sayed, *Corruption in International Trade and Commercial Arbitration*, 307 fn.947. Cited by *World Duty Free v Kenya*, Award, para 154.

[693] ICC Case No. 8891, Journal du droit international, 2000, 1076 (hereinafter: "ICC Case No. 8891"), 1080. Cited by *World Duty Free v Kenya*, Award, para 155.

[694] For a general discussion on agency contracts see: Hilmar Raeschke-Kessler and Dorothee Gottwald, "Corruption in Foreign Investment - Contracts and Dispute Settlement between Investors, States, and Agents," *The Journal of World Investment and Trade* 9, no. 1 (2008): 26.

> to the international public policy of most, if not all, States or, to use another formula, to transnational public policy."[695]

2. Other ICSID cases

The tribunal in *Niko v Bangladesh* referred to the findings of *World Duty Free v Kenya* and concluded without any further analysis that "*the prohibition of bribery forms part of international public policy*".[696] Similarly, the tribunal in *EDF v Romania*, while analysing the violation of the substantial investment protection standard of fair and equitable treatment, stated without any analysis that a "*request for a bribe by a State agency is* […] *a violation of international public policy*".[697] The tribunal seems to have found its conclusion apparent and obvious since it did not provide further explanation for either its concrete finding or the general concept of international public policy applied by the tribunal.[698]

In *Wena v Egypt*, Egypt alleged corruption on side of the investor as a defence to the claim. The tribunal agreed that corruption is "*contrary to international bones mores*" and referred to Lalive's seminal contribution about transnational public policy.[699] In addition, it made clear that in its view corruption constituted a ground for dismissal of the claim, but it found corruption not established in this case for want of evidence.[700] Thus, the tribunal refrained from analysing this issue in further detail.

In his dissenting opinion in *Siag & Vecchi v Egypt*, Professor Orrego Vicuña came to the conclusion that a certificate of registration, crucial to prove the nationality of one of the claimants, Mr Siag, was obtained by corrupt means.[701] In fact, in the proceedings Mr Siag admitted having paid USD 5000 to a Lebanese lawyer in order to acquire the relevant certificate of registration with the goal of avoiding Egyptian military service. Orrego Vicuña quoted *World Duty Free v Kenya* with regard to the violation of international public policy and held that the case should be dismissed on the merits.[702]

---

[695] *World Duty Free v Kenya*, Award, para 157. Emphasis added.
[696] *Niko v Bangladesh*, Decision on Jurisdiction, paras 432-433.
[697] *EDF v Romania*, para 221.
[698] Note that the tribunal finally came to the conclusion that corruption could not be proven, for which reason a thorough discussion of international public policy was not essential.
[699] *Wena v Egypt*, Award, para 111 referring *inter alia* to Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 276 et seq. The tribunal also referred to Ibrahim Fadlallah, "L'ordre Public Dans Les Sentences Arbitrales," in *Collected Courses of the Hague Academy of International Law*, vol. 1994– V (The Hague: Martinus Nijhoff Publishers, 1996), 377–430.
[700] It was undisputed that Wena and the chairman of the State-owned company involved in the investment concluded a consultancy agreement and that payments were exchanged. However, the tribunal criticised that Egypt was aware of this agreement, but did never prosecute the involved persons. This led to the reluctance of the tribunal to accept this illegality defence of Egypt.
[701] *Siag & Vecchi v Egypt*, Dissenting Opinion Orrego Vicuña, para 3.
[702] *Siag & Vecchi v Egypt*, Dissenting Opinion Orrego Vicuña, paras 17.1, 18. Note that the disagreement among the arbitrators was based upon different views on the assessment of the evidence and of the standard of proof required to establish such illegal action, but not on the

In *Azpetrol v Azerbaijan* the host State sought the dismissal of the arbitration proceedings on the grounds that international public policy was violated due to bribery.[703] The tribunal had no chance to rule on this issue of corruption since the parties entered into a settlement agreement, leaving the only matter before the tribunal whether a valid settlement had been concluded.

IV. Scholarship and Literature

There is a strong consensus in scholarship that corruption must be universally banned and that it violates transnational public policy, with the understanding given in this contribution.[704] Many scholars who studied the universal concept of public policy in international arbitration as a general matter have used corruption as a typical and vivid example of a violation of this concept of public policy.[705] In

consequences such behaviour should have on the arbitration proceedings, see *Siag & Vecchi v Egypt*, Dissenting Opinion Orrego Vicuña, para 4.

[703] See *Azpetrol v Azerbaijan*, Award.

[704] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 77; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 43; Pieth, "Transnational Commercial Bribery: Challenge to Arbitration," 45; Kessedjian, "Transnational Public Policy," 869; Michael Hwang and Kevin Lim, "Corruption in Arbitration - Law and Reality," *Asian International Arbitration Journal* 8, no. 1 (2012): 60 et seq.; Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 874; Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 856; Racine, *L'arbitrage Commercial International et L'ordre Public*, 393 et seq.; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 706, 711; Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 181; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 245; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 125; Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 276 et seq., 291 et seq., 307; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 863; Born, *International Commercial Arbitration*, 2717; Mistelis, "'Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards," 251; Sayed, *Corruption in International Trade and Commercial Arbitration*, 353; Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?"; Alexis Martinez, "Invoking State Defenses in Investment Treaty Arbitration," in *The Backlash against Investment Arbitration* (Alphen aan den Rijn et al.: Kluwer Law International, 2010), 327 et seq.; Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 110 et seq. See also Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 794. Note that Hanotiau and Caprasse refer to Racine, *L'arbitrage Commercial International et L'ordre Public*, 393.

[705] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 276 et seq., 291 et seq., 307, 313, 315; Kessedjian, "Transnational Public Policy," 869; Redfern, "Comments on Commercial Arbitration and Transnational Public Policy," 874; Reisman, "Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration," 856; Racine, *L'arbitrage Commercial International et L'ordre Public*, 393 et seq.; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," 125; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 863; Born, *International Commercial Arbitration*, 2717; Mistelis, "'Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards," 251. See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 711 et seq. ("*The prohibition and indignation of bribery and corruption is so universal that it has developed into a well-established example of a rule of transnational public policy*."). See also Gaillard, "Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules," 575. Gaillard used corruption as example for a transnational rule that an award may not be based upon a contract obtained by corruption.

his seminal report about transnational public policy in international arbitration, Lalive, for instance, referred several times to corruption as violating transnational public policy at a time when no international convention had been yet concluded.[706] He pointed at the early reports, recommendations and resolutions of the United Nations, the International Chamber of Commerce and the European Communities on this topic and found these international efforts to fight corruption already sufficient to influence the content of transnational public policy[707] – although such efforts were still in their infancies.

Nowadays most commentators refer to the international conventions in order to show the global consensus to ban corruption.[708] An interesting view advanced by Kessedjian argues to deny the international conventions in force, the role of shaping the content of transnational public policy, since due to their direct applicability by national legal systems they would already determine the substance of international public policy.[709] It is true that international conventions may already have an influence on the content of international public policy, but at least in the case of corruption and against the background of the meaning given to transnational public policy in this study, this influence is not exclusive for

---

[706] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 276 et seq., 291 et seq., 307, 313, 315.

[707] For the measures against corruption taken by the three organisations see Chapter Two.
Note that Lalive considered only the early measures until 1987. He referred *inter alia* to the UN Resolution 3514 of the General Assembly of 15 December 1975 where all corrupt practices in international commercial transactions were condemned, ILM XV (1976), 1222; the "Draft Code of Conduct of the UN on Transnational Corporations", ILM XXII (1983), 177, and ILM XIII (1984), 626; and the Council Regulation No. 2641/84 of 17 September 1984, ILM XXIII (1984), 1419, about the protection against illicit commercial practices.

[708] See Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 77 et seq. ("*This brief survey of international developments demonstrates that bribery of foreign public official and money laundering are now serious crimes in international law. They can no longer be considered as simply as reprehensible business practices, or unavoidable evils of doing business in difficult parts of the world. Bribery and money laundering have been widely and repeatedly condemned by the international community.* […] *there is no doubt today that the suppression of corruption and money laundering is an established part of international public policy and must be respected by international arbitrators.*"). Similar also in Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 42 et seq. See Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts." ("[…] *over the last several years a number of states have acceded to multilateral conventions condemning illegal contracts, corruption, bribery of public state officials, etc. These accessions have arguably contributed to, or confirmed, the development of certain national and transnational concepts of public policy in abhorrence of illegality of contracts*."). Similar in Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 240. See Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 712 et seq. ("*This broad consensus in treaties is evidence that affirms the existence of a fundamental transnational public policy against bribery and corruption.*"). See also Sayed, *Corruption in International Trade and Commercial Arbitration*, 291 et seq. ("*With the increasing international attention given to the question of corruption and the signing of various international conventions* […] *committing States to criminalize corruption in all its aspects, it has become easier to point to such invigorated global interest as evidence of the large consensus in prohibiting corruption.*"). See Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 116. ("*Criminal law and international criminal cooperation have powerfully contributed to the creation and development of transnational public policy.*").

[709] Kessedjian, "Transnational Public Policy," 866.

international public policy. The international conventions against corruption are based on the global condemnation of corruption and may be referred to as evidence of the established universal value to prohibit corruption. As explained above, they show the fundamental and universal notion of the international community to condemn corruption – consequently, transnational public policy.

Some commentators have based their conclusion *inter alia* also on the widespread criminalisation of corruption under many national laws.[710] The comparative law approach is by all means one of many valid tools to ascertain an international consensus on a certain fundamental notion. However, it shall be reminded that it is not sufficient that national bribery is or was banned. For our purposes the condemnation of 'transnational' bribery is relevant.

Most scholarly contributions considering corruption as violation of transnational public policy have been made in the context of international commercial arbitration.[711] The International Law Association, for instance, focused on the enforcement of arbitral awards in international commercial arbitration, when finding that corruption violates transnational public policy. Some scholars have specifically looked at the relationship of corruption and the universal concept of public policy in international arbitration.[712]

However, to date, only a few scholarly writings have focused on the relationship of corruption and transnational public policy specifically in investment treaty arbitration.[713] Nevertheless, while made in different contexts, all these contributions share the same view that corruption violates transnational public policy.

---

[710] E.g. Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 712. See also Audley Sheppard and Joachim Delaney, "Corruption and International Arbitration" (10th International Anti-Corruption Conference, Prague, 2001). ("*In most jurisdictions, corruption is considered to be against bones mores.*").

[711] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 291 et seq.; Kessedjian, "Transnational Public Policy," 869; Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 77; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 43; Racine, *L'arbitrage Commercial International et L'ordre Public*, 393; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 863; Hanotiau and Caprasse, "Public Policy in International Commercial Arbitration," 794.

[712] Cremades, "Corruption and Investment Arbitration"; Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud"; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators"; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration"; Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility"; Sayed, *Corruption in International Trade and Commercial Arbitration*, 277 et seq.

[713] Cremades, "Corruption and Investment Arbitration," 208 et seq.; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 209 et seq.; Martinez, "Invoking State Defenses in Investment Treaty Arbitration," 327 et seq. Martinez analyses bribery as violation of international public policy as one of four defences commonly invoked by the host State in international investment arbitration.

V. Purpose and objectives of international investment arbitration

Against the background that the prohibition of corruption constitutes a fundamental notion with universal character and essential for the wellbeing of the international community, it can be said that corruption also violates the fundamental notions of the international investment community.

International investment arbitration, in fact, is at its core concerned with providing for a safe investment environment to said international community, all based on the fundamental idea of consequently achieving economic prosperity.[714] In Chapter One, we have shown that corruption actually reduces economic growth, decreases FDI and impedes development. Thus, corruption is contrary to the basic idea of investment protection to improve the economic conditions of all parties involved.

This leads to the question of who is actually protected by investment treaty arbitration. Lord Mustill once said that international commercial arbitration "*exists for one purpose only: to serve the commercial man*".[715] This provoking statement may be accepted or challenged,[716] however one notion is certain: the main purpose of international investment arbitration is definitely not to only serve the investor.[717] Much more is at stake. The parties involved are numerous. On the one hand, the host States may represent industrialised, emerging, or developing economies. On the other hand, investors may be multinational companies, institutional investors, or individuals. They all form the international investment community. And corruption has a detrimental effect on each one of them. Since the amount paid as bribes to public officials represents business expenses that the investor was willing to make, under legal circumstances the host State would have collected the corresponding amount.[718] Likewise, the investors encountering extortion of bribes are barred from the access to invest, while the investors dealing with corrupt competitors suffer from the distortion of the competition.[719]

There is one more aggrieved party. As rightly phrased by the tribunal in *World Duty Free v Kenya* it: "*the law protects not the litigating parties but the public*".[720] A significant amount of investment arbitration cases deal with projects relating to the basic needs of the public such as water- and electricity supply, infrastructure and telecommunication projects. Surely, one of the most affected parties of corruption is the public. Arbitral decisions will, most certainly, also have a direct impact on the public.

---

[714] Note that most preambles of the IIAs provide for the long-term goal of promoting economic growths.
[715] Mustill, "The New Lex Mercatoria: The First Twenty-Five Years," 86.
[716] It could be argued that international commercial arbitration is, to some extent, concerned with international trade.
[717] Surely, the system has often been criticised as being investor-biased, however, this would not change the fundamental idea the system is based upon.
[718] See above Chapter One C.
[719] See above Chapter One C.
[720] *World Duty Free v Kenya*, Award, para 181.

From this follows that a fundamental notion of the international investment community is to exclude practices that are contrary to the purpose and objectives of investment protection and that cause detrimental effects on the members of such community, including the public. In conclusion, corruption violates the fundamental values of the international investment community.

VI. Contradictory behaviour militating against an international consensus

For long time it was argued that the existence of any consensus against corruption had to be denied as long as there were still countries around the world where bribery of foreign public officials was tolerated and to some extent even encouraged by the available tax deductibility as business expenses.[721] Due to the contradictory behaviour of some States, their internationally announced measures were labelled as being merely lip service.[722] Nowadays, this reasoning is outdated and became obsolete since the already often-discussed implementation of international instruments at global and regional level accomplished during the last 15 years speaks another language.

Most importantly, the necessary consensus to establish a transnational rule and with it a rule of transnational public policy does not require unanimity around the world. Isolated deviators do not change the universal character of a fundamental value or norm if they are widely accepted in the international community. Nevertheless, some commentators still see scepticism that a uniform and coherent transnational public policy to corruption is already established.[723]

Another argument often brought forward as defence to corrupt practices is the endemic spread of corruption around the world in general and in international business in particular. In fact, although the newest reports of Transparency

[721] See Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 246. Note that in Germany, for instance, bribes paid overseas were tax deductible until the implementation of the OECD Anti-Bribery Convention on 24 March 1999. For the sake of completeness, previous German tax law had specific procedural requirements for the tax deductibility. Deductibility was e.g. not allowed in the event of criminal penalties or criminal proceedings against either the briber or the recipient.

[722] Pierre A. Karrer, Commentary to Art. 187 of Swiss Private International Law Act, in International Arbitration in Switzerland, 520 (2000), cited in Wilske and Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues," 264 fn. 78; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 246.

[723] See Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 279; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 246; Wilske and Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues," 264. Wilske and Raible refer to Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?" ("*The time has not yet come for there to be a global standard of 'public policy'* […]"). Sheppard's statement is to be understood as general statement to public policy; most certainly there has no consensus been reached about the whole topic of public policy, but this is different for the specific issue of corruption. Surely, transnational public policy may not cover all different forms, shades and issues of corruption, however, the general notion that corruption as a whole is to be banned is established transnational public policy.

International show some progress in the global efforts to curb corruption, they also demonstrate that corruption remains widespread around the world.[724] Does it have a negative impact on the international consensus that corruption is still widespread? This must clearly be answered in the negative. The mere fact that corrupt practices are still undermining the international business and investment world does not convert them into disapproved but tolerated business practices; they can also not be seen as inescapable means of doing business.[725] The international efforts taken to ban corruption speak volumes and have shaped an internationally agreed public policy despite persisting proliferation of corruption.[726]

Many arbitral tribunals faced assertions that corruption is endemic, widespread or necessary to engage in business. In *World Duty Free v Kenya*, the investor argued that the payment of bribes had cultural roots in Kenya and were rather to be considered as 'donations' based on the 'Harambee' system, where private donations are utilised for public purpose.[727] The tribunal denied such assertion. It indeed showed awareness for occasional exchanges of small gifts and also looked into the Harambee system.[728] However, it found it apparent that the payment made by the investor to the President of Kenya had the purpose of obtaining the investment contract and denied to consider such as a 'personal donation for public purpose'.[729] Actually, no payments that amount to our definition of corruption may successfully be subsumed under the term of donations for public purpose. Most certainly illicit payments are often disguised as donations, but their underlying objective is personal gain in contrast to public purpose.

While several ICC tribunals have acknowledged that corruption was a constant practice without which it was almost impossible to obtain public contracts, none has accepted such regretful condition as defence to the allegations of corruption.[730]

---

[724] See Transparency International Annual Report 2012; Global Corruption Barometer 2013; Corruption Perception Index 2013. According to Transparency International 53 per cent of the people around the world have the impression that corruption increased over the last two years, and 27 per cent of the people who took part of the survey indicated to have paid a bribe within the last year. See also Bribe Payers Index 2011, which ranked 28 of the largest economies around the world representing approx. 80 per cent of the total world outflow of goods, services and investments. While nowadays it has become unlikely for companies in the Netherlands, Switzerland, Belgium and Germany to pay bribes in international transactions, the results for countries like China and Russia are still alarming and suggest that companies of both countries still pay a significant amount of bribes overseas. The dimension is worrisome since both countries represent an overall foreign investment of USD 120 billion.

[725] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 77. ("[Bribery and money laundering] *can no longer be considered as simply as reprehensible business practices, or unavoidable evils of doing business in difficult parts of the world.* [They] *have been widely and repeatedly condemned by the international community.*").

[726] See also Pieth, "Transnational Commercial Bribery: Challenge to Arbitration," 45.

[727] *World Duty Free v Kenya*, Award, paras 110, 120. The investor also argued that bribes were considered a matter of protocol in Kenya.

[728] *World Duty Free v Kenya*, Award, para 134.

[729] *World Duty Free v Kenya*, Award, para 136.

[730] See e.g. ICC Case No. 8891 ("[…] *that corruption is widespread is a regrettable phenomenon. But from this to expect from arbitrators, who render justice, even if it is private justice, to condone*

Also Judge Lagergren dealt in his famous award of the ICC Case No. 1110 with the issue whether the fact that corrupt practices in Argentina during Peron's regime were widespread, had an impact on the final decision. After acknowledging that bribery of public officials was an accepted and tolerated practice during Peron's regime in Argentina, he nevertheless found it

> "impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to community of nations".[731]

The mere fact that corruption is still a widespread phenomenon around the world cannot impede the emerging universal public policy banning corruption, internationally agreed on multilateral level and confirmed by the approaches taken by international organisations, civil society, arbitral tribunals and scholars.

VII. Conclusion

Corruption is contrary to the universal concept of public policy. It violates the fundamental notions of the international society, in particular of the international investment community. The approach taken on international level to curb corruption shows the international consensus to condemn such practices. The various efforts adopted throughout the international community prove that such consensus has evolved among the majority of nations, at the intergovernmental level, among international financial institutions and at the level of civil society. Although there are only a few investment arbitral awards dealing with corruption, this straightforward case law shows the view that corruption is contrary to the relevant public policy conception. This view is confirmed by the dominant opinion in scholarship. The regrettable phenomenon that corruption is still widespread around the world is no impediment to the establishment of the international consensus to condemn corruption; it should rather be seen as encouragement to continue the difficult fight – also at the investment arbitration level.

C. Concluding Remarks

Generally speaking, corruption violates public policy. In international arbitration many different understandings of public policy exist. In order to determine which concept of public policy is relevant for international investment arbitration in

---

those practices, is one line that this tribunal will not cross. This line will never be crossed as long as the combat against corruption is currently reinforced."). Translation made by author. See also ICC Case No. 3916 ("*It must be acknowledged that during the operations of the Greek company in Iran, corruption or at least influence peddling was constant practice. It was extremely difficult if not impossible to obtain contracts for public projects without such means.*").

[731] Wetter, "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in Case No. 1110," 294.

connection with corruption, first it is important to distinguish the different forms of public policy.

The frequently used term international public policy leads to an easy assumption that such public policy is linked to international law. However, this term is used inconsistently in international arbitration and describes in most situations public policy concerns of a specific legal system applied to international relations. Only sometimes it is also used to describe public policy that is truly international. Despite our understanding of the significant difference between the system of commercial arbitration and investment arbitration, we believe that in order to prevent any misunderstanding and since there is some inevitable overlap between the two systems due to the hybrid nature of investment arbitration, the term transnational public policy or universal public policy is better suited to refer to the public policy concerns relevant for this study.

In investment treaty arbitration where international law plays a significant role, the public policy concerns of the international community become significant. Thus, the principles and notions with universal character and fundamental to the wellbeing of the international society must be observed. In conclusion, under international public policy we understand the core of the fundamental principles and values of a *specific* legal system applied to disputes with international implications, while transnational public policy consists of the *universal* and fundamental principles and notions of the *international community*.

Corruption violates this universal concept of public policy. This follows from the international consensus to condemn corruption reflected in the various approaches to fight it taken on different levels at the international sphere. To date, the diverse international measures implemented by international organisations, States and institutions representing the business community as well as civil society show that a common global value has established that corruption must be curbed. The violation of transnational public policy caused by corrupt practices must be observed in international investment arbitration. The review of investment arbitral cases shows that more and more tribunals are willing to base their decisions on transnational public policy.

CHAPTER FOUR:
THE ROLE OF THE ARBITRATOR

The notion established in the previous chapter that corruption violates the fundamental principles of the international society has an influence on all institutions administering and seeking justice and thus also on the role of the arbitrator. It is even contended that the function of the arbitrator includes the responsibility to observe the rules established in the international instruments against corruption.[732] So far, a consistent approach to the role of the arbitrator in corruption cases has not been established. There are different approaches to corruption in general as well as to the role of the arbitrator. This chapter focuses on the interaction of both and analyses the powers and duties of an arbitrator in cases involving allegations of corruption or indications thereof.

The general question is whether the arbitrator should actually deal with matters of corruption. The issue goes further than the mere question of how an arbitrator should respond and react to allegations of corruption. What shall the arbitrator do when she encounters indications, red flags, or general suspicion of corrupt practices in relation to the investment? Shall the arbitrator seek to shed light on these issues although the parties have not raised them or even asked her not to make a finding on that matter?[733] Would the tribunal in such case act *ultra petita*? In this context, it is telling that in the only investment treaty arbitration case where corruption was established, *Metal-Tech v Uzbekistan*, the initiative to look into the issue came from the tribunal itself and not from any party.[734]

The focus of this contribution is on investment treaty arbitration. The role of the *investment treaty* arbitrator is however connected to its role as international arbitrator in general and may also be influenced by the perspective of international commercial arbitration where corruption has been a constant issue. Generally speaking, while arbitrators in commercial arbitration are often seen as merely adjudicating private disputes, a view towards a role of the arbitrators beyond the private dispute has developed more and more. Thus, it seems pertinent to commence this analysis with a brief introduction to the role of the arbitrator in general (see below at **A.**), before examining the general approach taken towards the role of an arbitrator in corruption cases in international arbitration[735] (see below

---

[732] See e.g. Mohamed Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," in *Liber Amicorum Bernardo Cremades*, ed. Miguel Angel Fernández-Ballesteros and David Arias (Madrid: La Ley, 2010), 3.

[733] In Lagergren's Case (ICC Case No. 1110) the parties expressly asked him to overlook the issue of corruption.

[734] *Metal-Tech v Uzbekistan*, Award, paras 86 et seq.

[735] Note that this analysis is focused on the question whether the arbitrator shall seek to shed light on the obscure circumstances that might amount to corruption.
For a general overview on the role of the arbitrator see Piero Bernardini, "The Role of the International Arbitrator," *Arbitration International* 20, no. 2 (2004): 113–22; Susan D. Franck, "The Role of International Arbitrators," *ILSA Journal of International & Comparative Law* 12, no. 2 (2006): 499–521. See also Catherine A. Rogers, "The Vocation of the International Arbitrator,"

at **B.**). On the basis of these findings, the role of the *investment treaty* arbitrator will then be analysed (see below at **C.**).

A. The role of the international arbitrator in general

The cornerstone of international arbitration is party autonomy and the consent of the parties to authorise a tribunal to decide over the dispute.[736] Accordingly, the starting point for the role of the arbitrator in international arbitration will always be the arbitration agreement as the basis of the powers conferred to the arbitrator.[737] In fact, the arbitrator is mandated by the parties with the sole purpose of adjudicating their internal dispute.[738] This has led to the common phrase that 'arbitration is a creature of contract' and to the often repeated notion that the arbitrator is the 'servant of the parties'.[739]

However, besides adjudicating an international private dispute detached from national courts, the arbitrator also exercises a higher function: administering justice. In order to fulfil this mandate, the international arbitrator is expected to undergo an independent legal analysis and come to a judgment of her own. In fact, most arbitration rules grant arbitrators wide discretion and flexibility to administer the proceedings.[740] Having this in mind, the question arises as to what extent is the international arbitrator bound by the limitations of such parties' agreement and by the wishes of the parties.

Most certainly, the personality of the arbitrator will have a significant impact on the role she decides to take.[741] Such role of the arbitrator in international arbitration may be described in different ways. It may be labelled as either adversarial or

---

American University International Law Review 20, no. 5 (2005): 957–1020. For an overview on the development of a code of conduct for international arbitrators see Catherine A. Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration," *Michigan Journal of International Law* 23, no. 2 (2002): 341–424.

[736] Karl-Heinz Böckstiegel, "The Role of the Arbitrator in Investment Treaty Arbitration," in *International Commercial Arbitration: Important Contemporary Questions*, ed. Albert Jan Van den Berg, vol. 11, ICCA Congress Series (Kluwer Law International, 2003), 369.

[737] Bernardini, "The Role of the International Arbitrator," 114. Bernardini points at Section 34 of the English Arbitration Act: "*It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.*"

[738] Instead of many see Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 247. In Kreindler's words the international arbitrator "*is an instrument of the parties and an adjudicator of their internal relations*".

[739] Who actually has created these phrases cannot be traced back, they appear to be considered common goods in international arbitration.

[740] See Rules 34(2), 35(1), 36(b) of the ICSID Arbitration Rules; see also Article 17(1) of the UNCITRAL Arbitration Rules (2010); Article 25 of the ICC Rules of Arbitration (2012); Article 14 of the LCIA Rules.

[741] Sayed, *Corruption in International Trade and Commercial Arbitration*, 423. Sayed sees one reason for the inconsistent approach towards corruption in the differences of the arbitrators "*own conceptions, background and experience*". See also Böckstiegel, "The Role of the Arbitrator in Investment Treaty Arbitration," 369. Böckstiegel also points at the experience and legal background of the arbitrator to be decisive in whether he or she takes a passive or proactive role. See also Bernardini, "The Role of the International Arbitrator," 114.

inquisitorial,[742] or portrayed with the terms 'active' (see below at **I.**) and 'passive' (see below at **II.**).

I. Passive role

In the passive role the arbitrators see themselves only in the service of the parties. They listen to all the arguments and evidence submitted by the parties and make a decision on the basis of what was presented.[743] This passive role may have many facets and shades. On the one hand, the arbitrators might only deal with issues that the parties have raised or asked them to decide. On the other hand, the passivity may even reach the level of not wanting to deal with hot topics. An international arbitrator may have a reluctant position towards corruption as a whole. In such case, the arbitrators might see themselves merely as an adjudicator and might strongly prefer to leave the sensitive issue of corruption to prosecutors and national judges.[744]

II. Active role

In the active role the arbitrators find themselves to be more than a servant of the parties, but rather a guardian of the law[745] and administrator of justice. The active role also comes in different shades. The international arbitrators might make inquiries, analyse facts and law beyond the submissions of the parties, and suggest different arguments and conclusions with the purpose of finding truth and justice. Another possibility to be proactive is to influence and shape the proceedings in an active way to find a reasonable solution acceptable, to a certain extent, for all the involved parties.

One important stage for the active role of the arbitrator is the production of evidence. The arbitrator may not be satisfied with the probative value of the presented evidence and request more. The arbitrator might even initiate investigations of her own and ask for evidence in the first place. Such wide interpretation of the duty of the arbitrator goes hand in hand with the duty to establish the facts of the case by all appropriate means.[746]

At the same time, the role of the arbitrator has been understood as more complex than described by the terms active and passive. An 'interactive' role based on a constant communication between the arbitrator and the parties has been proposed to overcome the conflicting views and approaches of the parties.[747]

---

[742] See instead of many e.g. Bernardini, "The Role of the International Arbitrator," 113.
[743] See Ibid., 114. Bernardini describes the passive role vividly as "*limited to watching a game played by other subjects (the disputing parties), as a neutral observer, and then proclaiming the victory of one of them when the game is over*".
[744] See Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2010, 3.
[745] Franck, "The Role of International Arbitrators," 521.
[746] Article 25 of the ICC Rules of Arbitration (2012).
[747] Bernardo M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration," *Arbitration International* 14, no. 2 (1998): 157–72.

In fact, many commentators stress the importance of the exchange of communications between all involved parties in the arbitration.[748] It is a common view that it is important to inform the parties about the rules applied to the arbitration proceedings as soon as possible, in order to allow them to adapt and not be caught by surprise.[749] In addition, a proactive role does not always have to transform into an inquisitorial approach. When confronted with suspicious circumstances, the arbitrator should seek an explanation from the parties in order to shed light on the subject.[750]

The active role of an arbitrator has gained supporters. A tendency in scholarship and practice can be seen to increase the arbitrator's discretion to implement the suitable means in order to reach a just decision.[751] States have entrusted international arbitration more and more to decide over delicate issues, it can even be said that States have confidence in the international arbitrator to ensure that the fundamental principles are protected. This may only be guaranteed when the arbitrator takes an active role in protecting these principles. So actually from the widening of the scope of arbitration by national laws, the argument can be made that by enjoying more freedom to arbitrate, the responsibility of arbitrators also grows. This responsibility leads to actively ensuring compliance with the fundamental principles States would also be concerned with.[752]

In addition, most arbitration rules grant the arbitrator wide flexibility and discretion to successfully perform her mandate and reach a sound decision, with the only limit to this freedom being due process.[753] In a nutshell, the active role of the arbitrator is limited by the fundamental principles of being fair and impartial, thus assuring the equality of the parties and the reasonable opportunity to bring their case.

III. Conclusion

The power of the arbitrator stems from party autonomy. However, the national and international laws governing international arbitration also shape the scope of arbitration and with it the role of the arbitrator. The arbitrator enjoys freedom and wide discretion in conducting the proceedings and may adopt an active role in finding the truth behind the dispute and achieving justice. Generally speaking, the

[748] See e.g. Böckstiegel, "The Role of the Arbitrator in Investment Treaty Arbitration," 372.
[749] Bernardini, "The Role of the International Arbitrator," 121. Bernardini also emphasises that once established, the rules should not be changed without compelling reason in order to secure due process.
[750] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 82.
[751] Bernardini, "The Role of the International Arbitrator," 115.
[752] This argument is based on Ibid., 118. ("[…] *the measure of autonomy enjoyed by the arbitrator derives from the particular mission entrusted to him or her, which is to resolve the dispute between the parties in their interest, but also in the interest of the community of states*.").
[753] Ibid., 115.

ultimate limitation on the arbitrator will not be the parties' wishes but the duty to safeguard impartiality and due process.[754]

B. The role of the international arbitrator in corruption cases

The role of the international arbitrator becomes in particular significant in corruption cases. In such context, the outcome of the case will be more than ever dependent on the role the arbitrator decides to play in the arbitration proceedings. Parties may deliberately not raise the issue of corruption or even try to hide it. In other situations, the parties may be incapable of obtaining the necessary evidence to prove their allegations. Particularly due to the inherent difficulty of proving corrupt practices, arbitrators are often faced with the question whether to search independently for truth or to limit themselves to the allegations, arguments and evidence provided by the parties. But do arbitrators have the right to initiate investigations on their own motion? This issue remains unclear in scholarship and in practice.[755]

Corruption violates transnational public policy; that is certain. From there it follows that the international arbitrator has the independent right to at least raise public policy concerns.[756] This right is actually a duty to respect and observe the public policy significance of corruption.[757] In fact, transnational public policy

---

[754] Ibid., 122.

[755] Most international tribunals have refrained from conducting own investigations and have limited their analysis to the parties' submissions. See e.g. *Consultant (Liechtenstein) v Contractor (Germany)*, ICC Case No. 6497, Yearbook of Commercial Arbitration Vol. XXIV, 1999, 71 (hereinafter: "ICC Case No. 6497"), 73; *Westacre (UK) v Jugoimport (Yugoslavia)*, ICC Case No. 7047, Yearbook Commercial Arbitration XXI (1996), 79 (hereinafter: *"Westacre Case*), 93 et seq. For an overview on ICC case law on corruption see Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence," in *Arbitration, Money Laundering, Corruption and Fraud* (Paris: ICC Publishing, 2003), 109–46.

[756] Allan Philip, "Arbitration - Money Laundering, Corruption and Fraud: The Role of the Tribunals," in *Arbitration, Money Laundering, Corruption and Fraud*, ed. Kristine Karsten and Andrew Berkeley (Paris: ICC Publishing, 2003), 151. In Philip's words, the arbitrator has the "*independent right to invoke good morals and international public policy*". See also Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 861. ("[…] *arbitrators have the right – and even the obligation – to themselves raise the issue of whether disputed contracts or legal provisions put before them satisfy the requirements of international public policy*."). See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 709. ("*In addition to concerns about enforceability, commercial arbitration tribunals have a public responsibility to administer justice and uphold universally accepted principles of law which requires them to address violations of transnational public policy*."). See also Hwang and Lim, "Corruption in Arbitration - Law and Reality," 18. ("*Given that corrupt dealings by one or both parties can have a dispositive impact on the enforceability of the claims submitted to the tribunal, and are therefore relevant to the resolution of the dispute between the parties, it stands to reason that consideration of issues of corruption falls well within the tribunal's mandate, even if neither party raises corruption as part of its claim or defence and the tribunal conducts its own investigations into corruption sua sponte*.").

[757] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 80; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 43 et seq.; Hwang and Lim, "Corruption in Arbitration - Law and Reality," 18; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 247; Philip, "Arbitration - Money Laundering, Corruption and Fraud:

demands the arbitrator to accept the challenge of dealing with the issue of corruption in the first place and not turning a blind eye on this sensitive topic. It is true that the arbitrator's authority is based on party autonomy and her job is to adjudicate the private dispute between the parties, however, the role of the arbitrator in international arbitration cannot be confined to these limits.[758] The arbitrator has a public responsibility to the administration of justice.[759] She is an organ of the international community[760] and she is often seen as the guardian of international trade and international business.[761] The arbitrator does not only owe responsibility to the parties, but to the international business community[762] and to the institution of international arbitration as dispute resolution mechanism of said

---

The Role of the Tribunals," 151; Mistelis, "Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues," 594.

[758] Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 247. ("*The arbitrator is not solely a manifestation and instrumentalization of party autonomy, and his or her role cannot be reduced to that of a private adjudicator of the parties' dispute, solely with power to decide the rights and duties without any broader reference to international goals or sanctioning illegality.*").

[759] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 80; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 43.

[760] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 271 et seq. ("*While he is clearly not an organ of the State, the international arbitrator is not acting in a legal vacuum and is not called upon to decide, so to speak, as if he did not belong to this world! The question may be raised here, in passing (and it appears to be connected with that of the existence of a transnational public policy) whether the arbitrator is not, perhaps, the organ of the international community, be it the community of States or the 'international community of businessmen' (in which more and more States and State organs appear to be active) or both international communities.*"), footnote omitted.

[761] Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 540, para. 413. ("[The arbitrators] *are the guardians of the international commercial order: they must protect the rights of participants in international trade; give effect to the parties' respective obligations under the contract; imply the presence of commercial bona fides in every transaction; respect the customs followed in international trade practice and the rules developed in relevant international treaties; uphold the commonly accepted views of the international commercial community and the policies expressed and adopted by appropriate international organisations; and enforce the fundamental moral and ethical values which underlie every level of commercial activity.*"), footnotes omitted.

Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 97. ("*Arbitrators are naturally sensitive to the need for morality in international business.* […] *it is because arbitrators are the natural judges of international trade that they are the natural guardians of ethics and good morals in international commerce*."). See also Ibid., 115.

For a different view see Stephan Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," *Contemporary Asia Arbitration Journal* 3, no. 2 (2010): 228. Wilske ("*Arbitrators are not the 'guardians of international public policy' but should be diligent service providers who have to guide the parties through fair as well as time- and cost-efficient proceedings and who – after careful review and consideration of all relevant information – should reach a reasoned decision in light of the applicable law without regard to any personal idiosyncrasies.*"). See also Wilske and Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues," 272. Wilske and Raible argue that the role of the arbitrators should not be the one of 'guardians of moral value'.

[762] See Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 115.

community. The view is advancing that the international arbitrator in general does not only serve the parties, but also the public.[763]

This responsibility does not only lead to an obligation to deal with corruption when raised by the parties, but also to make sure that the subject matter of the decision is not tainted with corruption. The arbitrator must safeguard that corruption is not condoned by her reluctance or negligence to deal with the issue.[764] Accordingly, the powers of the international arbitrator include the right to take action in case of indications of corruption. However, the scope of such right remains disputed.

Some commentators argue that arbitrators should refrain from self-initiating investigations, but should merely raise their concerns and ask for further explanation from the parties.[765] A school of thought that is gaining more and more proponents contends that arbitrators have the power to investigate into the issue without the will or even against the wishes of the parties.[766] The international arbitrator may examine issues of corruption on her own initiative if the suspicion is

[763] Mistelis, "Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues," 585. ("[…] *the arbitral tribunal, despite being a creation of the parties, not only owes a duty to the parties but also to the public*."). See also Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2010, 15. ("[…] *arbitrators serve the public interest when they properly tackle corruption issues.*").
Note that Pierre Mayer strongly rejects the view that arbitrators have a legal duty towards society. In his opinion "*arbitrators are not empowered to adjudicate disputes by the society of merchants and do not render their awards in the name of that society; they receive their powers only from the parties in the particular dispute"*, Mayer, "Effect of International Public Policy in International Arbitration," 65. However, Mayer argues for a moral duty on the arbitrator to protect the fundamental principles of society, see Ibid., 66. ("[The arbitrator] *should act reasonably, he should defend, and defend only, those principles which are considered as inviolable by the community of men, or by a majority of States having enacted legislation or entered into treaties in order to protect them. That is his duty, it being observed that it is not a legal duty since it is not sanctioned as such; it is a professional, and to some extent a moral, duty.*"). Note that corruption is also covered by this definition of duty. It is negligible whether such duty is legal or moral, important for our purposes is that such duty exists advocating for an active role of the arbitrator when facing suspicious circumstances.

[764] See also Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 81. ("*Bribery, money laundering and fraud are no issues of moral choice for an arbitrator. They involve crimes, widely condemned in the international community, which under no circumstances must be condoned or facilitated by a reluctance of arbitral tribunals to recognize the true nature of these acts.*").

[765] Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 111. Note that Mourre cites the 1999 Edition of Redfern and Hunter, Law and Practice of International Commercial Arbitration as reference for his view that no duty to investigate exists where no allegations were made. In the 2009 Edition of the same treaties the standpoint changed. Now it states that the issue is disputed and remains unclear, Blackaby et al., *Redfern and Hunter on International Arbitration*, 134.

[766] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 80; Cremades, "Corruption and Investment Arbitration," 209. ("*The modern public policy significance of corruption and the possible procedural complexity of arbitrations involving allegations of corruption make it necessary for arbitral tribunals to investigate issues of corruption whenever they arise in arbitration, regardless of the parties- wishes, and to record their legal and factual conclusions in their awards*."). See also Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 277.

reasonable.[767] Such right may even amount to a duty of the arbitrator where strong indications of corruption exist.[768] In fact, there are convincing grounds for a far-reaching function of the arbitrator to secure that no party has engaged in corrupt practices with regard to the subject matter of the dispute: The arbitrator must minimise the risk of becoming an instrument of corruption (see below at **I.**) and perpetuating the wrong by overlooking the red flags (see below at **II.**). Moreover, the arbitrator has a duty to render awards that are enforceable (see below at **III.**). In addition, the arbitrator should consider being part of the international fight against corruption (see below at **IV.**) and take the integrity of international arbitration into account, which would otherwise be at stake (see below at **V.**). Against all these valid reasons for a far-reaching function of the arbitrator, there are also limitations, which need to be kept in mind (see below at **VI.**).

I. Risk of becoming an instrument of corruption

Despite the fact that the international arbitrator renders her services to the parties with the objective of deciding over their private dispute, the arbitrator is not a slave of the parties. The arbitrator may not passively endure the abuse of her role and must refuse to become an instrument of the parties' illegal activities.[769] Arbitrators who are reluctant to pay the necessary attention to suspicious red flags on an international transaction may run the risk of being used as tools to validate such illegal contracts and render an enforceable title through the affirmative arbitral award.[770] From this it follows that the arbitrator must not only be alert and be able

[767] Mistelis, "Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues," 594. See also Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 249.

[768] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 80 et seq.; Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 277.
Note that a proactive arbitrator making inquiries and investigations of his or her own may cause discomfort to parties with something to hide, which consequently may then push for an early termination. Most arbitration rules grant the option for the arbitrator to object such award by consent, see Article 30 of the UNCITRAL Model Law, Article 32 of the ICC Rules of Arbitration (2012). See also Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 82; Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 113.

[769] Bernardini, "The Role of the International Arbitrator," 118 et seq. ("[…] *states expect that these functions and this role be exercised in a manner which is respectful of basic notions of justice and of states' public policy and that the international arbitrator does not become an instrument for the violation of rules and principles considered essential by the plurality of states*."), footnotes omitted. In the footnote Bernardini mentions especially corruption. See also Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 114. ("*Arbitrators should* […] *not let themselves be used as a tool for fraud.*"). See also Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," in *Contemporary Problems in International Arbitration*, ed. Julian D.M. Lew (Dordrecht et al.: Martinus Nijhoff Publishers, 1986), 68. Jarvin welcomes the development that international arbitrators consider corruption cases arbitrable in order to penalise such illicit conduct due to its violation of public policy. In his view that "*proves that arbitration is not an escape system for contracts which would not be upheld in a trial court*".

[770] See Pieth, "Transnational Commercial Bribery: Challenge to Arbitration," 45 et seq. ("[…] *arbitrators have to examine with great care if they – for example by adjudicating a highly suspicious commission – could become accessories to the corrupt dealings.*"), emphasis added. See

to read suspicious signals, but also be willing to engage in further examination of the underlying circumstances.

II. Perpetuation of corruption

As discussed in Chapter One, corruption has a detrimental effect on society, international trade and development. By ignoring signs of corrupt practices or by not taking the initiative to investigate, the international arbitrator fails to put an end to such harmful behaviour and to some extent even contributes to the detrimental effect of corruption.[771] By overlooking corruption or by not adjusting to the specific problems of corruption, the damage that has been inflicted by such illegal behaviour is perpetuated.[772] Some commentators go even further and argue that the arbitrator's reluctance may amount to 'aiding and abetting' of corruption.[773] At least by not adapting to the specific challenges of corruption, the international arbitrator's passive role allows wrongdoers to take the fruits from their illegal conduct.[774]

III. Enforceability and finality of the award

The arbitrator has the duty of rendering an award that is enforceable at law.[775] While the exact scope of this duty is not easily determinable, reality limits it since the arbitrator will not be capable of considering all the mandatory laws and public policy concerns of the different national legal systems where enforcement might be

---

also Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 132. In Mills' view, the arbitrator has the obligation "*to be diligent and vigilant as we humanly can to ensure that we do not become an unwitting party to corruption and injustice*.").

[771] See also Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 249; Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 280.

[772] Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 129. See also Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 249; Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 280. ("*Failure or refusal to address an illegality or public policy issue head-on in arbitral proceedings could be seen as a toleration, or indeed perpetuation, of nefarious practices*.").

[773] Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 129.

[774] Ibid.

[775] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 80; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 247; Philip, "Arbitration - Money Laundering, Corruption and Fraud: The Role of the Tribunals," 153; Llamzon, *Corruption in International Investment Arbitration*, 100. For a general overview on the duty of the arbitrator to render an award that is enforceable at law see Günther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award," *Journal of International Arbitration* 18, no. 2 (2001): 135–58; Martin Platte, "An Arbitrator's Duty to Render Enforceable Awards," *Journal of International Arbitration* 20, no. 3 (2003): 307–13.

sought.[776] However, as explained before, the public policy considerations that are common to the majority of the legal systems around the world and those principles and notions with universal character constitute the minimum threshold of public policy.[777] Thus, an arbitrator must consider transnational public policy to provide her best efforts in rendering an enforceable award.

Since corruption is a violation of transnational public policy, by not examining corruption, the arbitrator raises the risk that the award will subsequently be held unenforceable by national courts.[778] Thus, by thoroughly addressing all suspicious issues the tribunal ensures to make the award ready to withstand any type of review and scrutiny.[779]

At the same time, the arbitrator may not leave her obligation of dealing with public policy issues that concern the international community to the national courts. As analysed above, despite the fact that they apply international public policy, national courts will most certainly put their interests above those of the international community. Surely, corruption will be a violation of all types of public policy, however, the international arbitrator is the closest to the specific subject matter of international trade and international business. The international arbitrator has the best access to deal with the issue at the moment of the proceedings.[780] Due to their experience and expertise, arbitrators are well suited – to some extent better suited than national courts – to deal with the specific issues of illegality typical to international transactions.[781]

IV. Assisting members of international trade to fight corruption

International arbitration as an institution has the purpose and objective of serving the members of international trade, be it States or businesses. As examined in Chapter Two and also illustrated in relation to transnational public policy, these members have gradually implemented several measures in different forms and at different levels to fight corruption. In addition, many internationally operating companies have ethical codes of conduct and compliance systems in place to make their contribution from the supply side to the international fight against corruption.

---

[776] The arbitrator should at least consider mandatory laws and public policy considerations of the legal systems of the *situs* and where enforcement is likely due to the existence of seizable property in that jurisdiction.

[777] See Chapter Three A.I.4.

[778] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 80; Philip, "Arbitration - Money Laundering, Corruption and Fraud: The Role of the Tribunals," 153.

[779] See Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," 248.

[780] Ibid.; Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 278. In Kreindler's words the arbitrator has the 'unique position' and 'unique access' to the facts in order to best deal with public policy concerns.

[781] Mistelis, "Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues," 594; Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 97; Jarvin, "The Sources and Limits of the Arbitrator's Powers," 68.

The international arbitrator as member of the institution of international arbitration has the responsibility to acknowledge this agenda in international trade and engage in a proactive role to best assist these efforts.[782]

V. Integrity of the institution of international arbitration

The duty of the arbitrator to address issues of corruption follows also from the duty to protect the integrity of the institution of international arbitration.[783] The scope of arbitration has increased continuously around the world due to the confidence among the States that arbitration is best suited to deal in an appropriate way with international business relationships. In order not to risk losing the trust of the States[784] and to be useful to the other members of international trade and business community, the arbitrator must secure that the institution of international arbitration is not abused to circumvent the public policy of States.[785]

VI. Limits of the arbitrator's duty to investigate

The international arbitrator has the difficult task of exercising her proactive role with caution and of achieving a balance between the private mandate and the protection of the integrity of international trade.[786] From this it follows that the duty to engage in investigations on her own initiative when reasonable suspicion demands so, also has its limits. Due process is the safeguard that must always be met by the arbitrator. Any suspicion leading to further inquiries and investigation must be communicated clearly to the parties, and they must be given the opportunity for explanation and clarification.[787]

---

[782] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 80.

[783] Ibid., 86; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 48.

[784] A vivid example for the grown trust of national courts in international arbitration is the decision of the English court in *Westacre*:
"[…] *that conclusion* [that the award shall not be set aside] *is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption is referred to high caliber ICC arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.*" [1998] 2 Lloyd's Rep. 111.

[785] Mistelis, "Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues," 585; Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 115.

[786] See also Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 97. ("*Arbitrators* […] *may still face difficult questions when dealing with allegations of fraud, and need to find the proper balance between the private nature of their mission and the necessary protection of ethics and good morals in international trade.*").

[787] See also Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 83; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 44; Philip, "Arbitration - Money Laundering, Corruption and Fraud: The Role of the Tribunals," 152. See also José Rosell and Harvey Prager, "Illicit Commissions and International Arbitration: The Question of Proof,"

In addition, the arbitrator must be aware that the parties may abuse the natural repugnance of corruption for tactical reasons.[788] Allegations of corruption are easily made, and while the arbitrator should take such allegations seriously, she must refrain from being dazzled with the hideousness of corruption itself without a fair investigation of such allegations and without proof. Mere suspicion is not sufficient to establish corruption; reasonable evidence is required in order for an arbitrator to make a finding of corrupt practices. The requirements for the burden of proof and the standard of proof as well as the arbitrator's approach regarding the probative value of the evidence remain highly disputed.[789] However, it is certain that the arbitrator must observe due process at all stages of the proceedings.

The arbitrator should also resist to manipulations and influences on her reasoning and decision by suspicious facts unconnected to the subject matter of the dispute.[790] Unrelated illegal behaviour in different international transactions may be an indication of unethical character, but it is no proof of corrupt practices in relation to the relevant questions at issue. The arbitrator has the duty to remain impartial and must reject any preconception. Basing the decision on circumstances unrelated to the subject matter would also violate the notion of *ultra petita.*[791]

VII. Concluding remarks

In general, the role of the arbitrator in international arbitration should be proactive towards fighting corruption. Still, reality looks different. *De facto*, international arbitrators show reluctance to accept a proactive role towards corruption. The survey of 25 international commercial arbitration cases dealing with corruption showed that most international arbitrators "*consider that their primary duty is owed to the parties and is to settle their dispute in accordance with the parties' agreement, and not a duty to be an 'organ' of the international community entrusted with enforcing morality in trade operations*" and that "*only in a minority of cases search for indicia of bribery on their own initiative*".[792] One reason for such reluctance may be the general problem in international arbitration to obtain

---

Arbitration International 15, no. 4 (1999): 348. For a general suggestion to invite the parties to comment on any new issues not raised by the parties see Giuditta Cordero Moss, "Tribunal's Powers Versus Party Autonomy," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 1241 et seq.

[788] See also Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 84; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 45.

[789] See Chapter Eight.

[790] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 84; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 45. ("[The arbitrator] *should firmly reject the argument that illegal activities in other contracts or circumstances are evidence that similar conduct taints the contract in dispute.*").

[791] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 84.

[792] Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence," 118.

evidence due to the no compellability of witnesses and the fact that no evidence under oath is available. Another reason might be the seriousness of corruption allegations and the impact it might have on the reputation and integrity of the parties. In fact, the criminal connotation of such allegations has a deterrent effect on raising the issue of corruption in the first place.

In conclusion, the arbitrator should be aware of the problem of corruption and have sharp eyes on the issue. In particular, those arbitrators who see their obligations only towards the parties, must not become a tool of their illegal transactions. Thus, this study suggests that there are many compelling reasons why an international arbitrator shall proactively engage in shedding light on suspicious circumstances. Against the background that corruption violates universal public policy, the international arbitrator should ensure that any corruption issue does not render the award unenforceable on its face. Moreover, as an international organ of the administration of justice, the international arbitrator has a duty to assist in the global fight against corruption. Finally, the international arbitrator must secure the integrity of the institution of international arbitration and not become a tool of corrupt parties.

C. The role of the investment treaty arbitrator in corruption cases

The analysis above concluded that the function of the international arbitrator in general goes beyond merely solving the private dispute at issue. Even the commercial arbitrator has a special responsibility in connection with corruption and should assume a proactive role. Thus, the international arbitrator in general has to take transnational public policy into consideration and shall examine issues of corruption relating to the subject matter of her mandate.

While most of the general grounds for such proactive role towards corruption are also valid for investment treaty arbitrators,[793] specific reasons exist why in particular the investment treaty arbitrator shall act as the guardian of the international community and actively deal with issues of corruption.[794]

As a starting point, a first observation needs to be made with regard to investment treaties. The increasing international awareness of the urgent need to fight corruption is so far not reflected in the vast majority of international investment treaties. Most of the over 2500 bilateral and multilateral instruments do not contain any provision dealing with corruption. So far only a very few initiatives have

[793] For instance, the duty to produce an enforceable award must also be respected under investment treaty arbitration, see Eloïse M. Obadia, "How Proactive Arbitrators Really Are in Conducting Arbitral Proceedings: An ICSID Perspective," *News from ICSID* 16, no. 2 (1999): 9.

[794] Note that in scholarship the role of the investment treaty arbitrator has been contrasted to the one of arbitrators international commercial arbitration in order to conclude that the former has a responsibility to the public, while the latter one is merely private, see Stephan W. Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator," *Leiden Journal of International Law* 23, no. 2 (2010): 410 et seq. In this contribution we believe that also commercial arbitrators have a right and duty to be proactive against corruption.

included anti-corruption provisions in investment treaties. The efforts of Japan to insist in BIT negotiations on incorporating an article on anti-corruption measures are notable. To date the BITs between Japan and Peru,[795] Uzbekistan,[796] Lao,[797] Cambodia,[798], Kuwait,[799] Mozambique,[800] Myanmar,[801] and Papua New Guinea[802] contain the following provision:

> "Measures against Corruption
>
> 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."

In addition, three Free Trade Agreements concluded by Canada with Peru,[803] with Colombia,[804] and with Panama[805] contain a sub-chapter on Anti-Corruption policy. The provisions include the obligation to adopt certain measures against corruption and criminalise certain types of corruption.[806] Note that these provisions are in a separate chapter than those related to investment, however the provision makes clear that the Parties of the treaty commit to fighting corruption in international trade and investment.[807] Moreover, the Norway 2007 Model BIT contains a reference to anti-corruption policy in its preamble: " *Determined to prevent and combat corruption, including bribery in international trade and investment [...]".*[808] So far, Norway has not concluded a new BIT, but it can be expected, that

---

[795] Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, signed on 21 November 2008, in force since 10 December 2009.
[796] Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment, signed on 15 August 2008, in force since 24 September 2009.
[797] Agreement between Japan and the Lao People's Democratic Republic for the Liberalisation, Promotion and Protection of Investment, signed on 16 January 2008, in force since 3 August 2009.
[798] Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment, signed on 14 June 2007, in force since 31 July 2008.
[799] Agreement between Japan and the State of Kuwait for the Promotion and Protection of Investment, signed on 22 March 2012, in force since 24 January 2014.
[800] Agreement between the Government of Japan and the Government of the Republic of Mozambique on the Reciprocal Liberalisation, Promotion and Protection of Investment, signed on 2 June 2013, in force since 29 August 2014.
[801] Agreement between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalisation, Promotion and Protection of Investment, signed on 15 December 2013, in force since 7 August 2014.
[802] Agreement between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment, signed on 26 April 2011, in force since 17 January 2014.
[803] Free Trade Agreement between Canada and Peru, entered into force 1 August 2009 (hereinafter: "FTA Canada/Peru"), Chapter 19 Section B Anti-Corruption.
[804] Free Trade Agreement between Canada and the Republic of Colombia, signed 21 November 2008 (hereinafter: "FTA Canada/Colombia"), Chapter 19 Section B Anti-Corruption.
[805] Free Trade Agreement between Canada and Panama, signed 14 May 2010 (hereinafter: "FTA Canada/Panama"), Chapter 20 Section B Anti-Corruption.
[806] FTA Canada/Peru, Article 1908; FTA Canada/Colombia, Article 1908; FTA Canada/Panama, Article 20.09.
[807] FTA Canada/Peru, Article 1907; FTA Canada/Colombia, Article 1907; FTA Canada/Panama, Article 20.08.
[808] Model Agreement of the Kingdom of Norway for the Promotion and Protection of Investment, Draft of 19 December 2007.

Norway will insist in the negotiations to include such explicit reference to anti-corruption efforts by both parties.

These scarce provisions indicate that the parties to the specific investment treaty have elevated the anti-corruption approach to a main part of the investment protection. This most certainly has an impact on the function of the arbitrator who derives her powers from the relevant treaty. However, these provisions constitute the exception. The common IIAs have no explicit anti-corruption provisions.

Notwithstanding the above, the role of the international treaty arbitrator goes, also without explicit anti-corruption provision in the underlying IIA, beyond the duties and responsibilities she generally already has as an international arbitrator. The basis for the proactive role is rooted in the particularities of investment treaty arbitration as a genuine system different from commercial arbitration. After providing an overview of the general role of the investment treaty arbitrator (see below at **I.**), the current approach in ICSID practice will be analysed (see below at **II.**) in order to conclude with a suggestion of the role investment treaty arbitrators should take towards corruption (see below at **III.**).

I. The role of the investment treaty arbitrator in general

At the outset it must be noted – although being a truism – that investment treaty arbitration is part of international arbitration and strongly influenced by commercial arbitration. Investment treaty arbitration is a field of law where public international lawyers and private commercial lawyers with different conceptions and backgrounds collide. While some commentators view investment treaty arbitration as a genuine dispute settlement model characterised by the importance of international law and its public function; others perceive it as a form of commercial arbitration with the mere function of resolving a private dispute with an impact on public interests.[809] All these different influences will most certainly have an impact on what role the arbitrator should impersonate.

Commercial arbitration and investment treaty arbitration share the same basic idea of providing a platform for the resolution of a specific dispute between two parties. Also in investment treaty arbitration the consent of the parties is the basis for the legitimacy of the arbitration[810] and the cornerstone of the arbitral procedure.[811] In addition, most arbitration rules applied to investment treaty arbitration were originally designed to deal with contractual disputes of private parties.[812] Although the ICSID Convention and the ICSID Arbitration Rules were created to exclusively cover disputes between investors and States, they are based on the general arbitration rules for commercial disputes and show only investor-State

[809] See Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator," 406 et seq.
[810] Ibid., 408.
[811] See Böckstiegel, "The Role of the Arbitrator in Investment Treaty Arbitration," 369.
[812] See e.g. UNCITRAL Arbitration Rules, ICC Rules of Arbitration, SCC Rules of Arbitration.

modifications where necessary. They are tailored to conduct arbitral proceedings with the focus on settling a specific dispute between two parties – a private investor and a State. In addition, the specific decision rendered by the tribunal will only be binding on the parties.[813] However, the decision of the investment treaty arbitrator will have a wider effect than that, it most certainly will also have an impact beyond the specific dispute, which will contribute to her responsibilities.

In order to assess the rights and duties of an investment treaty arbitrator that go beyond those we have examined above for any international arbitrator in general, the first step is to understand the differences between international treaty arbitration and commercial arbitration (see below at **1.**).[814] Thereafter, it is important to consider the effects the decisions of investment treaty arbitrators have on the system of international investment protection (see below at **2.**) and on the public (see below at **3.**). Finally, the implications of transnational public policy in investment treaty arbitration must be taken into account (see below at **4.**).

1. Differences between commercial arbitration and investment treaty arbitration

Some commentators have labelled the differences between commercial arbitration and investment treaty arbitration as a mere 'status thing'.[815] They highlight that States may also be parties to commercial arbitration and that the arbitrators sitting in the relevant tribunals of both types of arbitration are often the same individuals.[816] In addition, the argument is brought forward that cases in commercial arbitrations may have the same complexity as investment treaty arbitrations and that the values of the claims may also be similar in their economic significance.[817] However, although both types of arbitration obviously share many similarities, the differences are significant and have an influence on how to define

[813] See for instance Article 53(I) of the ICSID Convention:
"The award shall be binding on the parties."
Note that this provision incorporates two rules: first, the award is binding on the parties, and second, the award is binding on the parties.

[814] Our approach to assess the powers and duties of an investment treaty arbitrator in corruption cases is focused on the additional responsibility such arbitrator has. Thus, this analysis is not supposed to be comprehensive on the general powers and duties of the investment treaty arbitrator. For a general overview on the powers of an investment arbitrator see Cordero Moss, "Tribunal's Powers Versus Party Autonomy."

[815] Stephan Wilske, Martin Raible, and Lars Markert, "International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a 'Status Thing'?," *Contemporary Asia Arbitration Journal* 1, no. 2 (2008): 225 et seq.; Wilske and Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues," 261.

[816] Wilske and Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues," 260.

[817] Ibid. Note however that despite the view that the difference between international commercial arbitration and investment treaty arbitration is more a 'status thing', Wilske and Raible acknowledge that the role of the arbitrator may be influenced by the public interest of the decision: "*It is rather obvious that a decision involving issues that are highly sensitive politically and significant in terms of public interest require particular responsibility from an arbitrator.*"

the role of the arbitrator and also on how to deal with corruption. For the purposes of this study it is important to note that the nature and scope of consent (see below at **a)**), the relationship between the parties (see below at **b)**), the subject matter of the dispute (see below at **c)**) and the legal framework (see below at **d)**) are different.

a) Nature and scope of consent

The arbitration of a dispute arising out of an investment treaty also depends on the consent of the parties. Thus, the basis of the legitimacy and authority of the tribunal is also the decision of the parties to settle the dispute before the arbitral tribunal. The arbitral tribunal's jurisdiction depends on the scope and nature of the consent. In commercial arbitration such consent is given in arbitration agreements mostly contained in contractual arbitration clauses and constitutes an agreement between two equals.[818] The terms of the arbitration proceedings are based on party autonomy and can be fully decided by the parties through negotiations. In investment treaty arbitration, however, the host State makes a unilateral offer in an IIA determining the exact scope of its consent to arbitration.[819] The eligible investor may then accept the offer under the terms of the host State by initiating arbitration proceedings. The investor deliberately becomes party to the arbitration, but it will consequently have less say in the specific terms of the arbitration proceedings. In fact, the investor has to adhere to the conditions and limitations of scope provided for in the treaty and dictated by the host State.[820] This is one of the many particularities where the uneven relationship of the parties is revealed: if the host State is willing to create an opportunity for the investor to hold it accountable for certain violations to the promised protection standard, then it shall be under its terms. The host State is not obliged to consent to arbitration in the first place; hence it may determine the scope of such consent.

b) Unequal relationship between the parties

While commercial arbitration is concerned with a dispute between equals, investment arbitration is concerned with establishing a levelled playing field for two parties that could not be more different.[821] The host State is sovereign and may impose unilaterally binding decisions on anyone who is subject to its authority, including the foreign investor operating within the jurisdiction of the host State. The underlying idea of investment treaty arbitration is to create a fair and just platform to settle investment disputes despite the hierarchical relationship between

[818] The consent to arbitration may also be given in a separate agreement independent from the contract. Such consent may also be given after the dispute has arisen.
[819] The host State's consent may also be given in the host State's legislation.
[820] Note that the conditions are not dictated by the host State in a literal sense, since the underlying IIA was originally negotiated between the host State and the State of the investor.
[821] For an overview of the specific differences arising out of the fact that a State is party to the dispute see Barry Leon and John Terry, "Why Arbitrating against a State Is Different: Twelve Key Reasons," in *Handbook on International Arbitration and ADR*, 2nd ed. (Juris Publications, 2010), 105–20.

the two parties. However, this does not mean that the fact that the host State is more than just a private party can be totally disregarded. First of all, it may not be forgotten that behind the host State stands a population, which the host State is responsible and accountable for. In addition, the reasons behind any regulatory decision may be very complex taking many different factors into consideration such as internal and international obligations or public policy concerns. A decision of an investment treaty arbitrator must make at least allowance to the particularity that a State consents to having its sovereign decisions challenged. The State is not only party to a dispute about the contractual relationship as in commercial arbitration. In investment treaty arbitration the host State keeps its role as State, although with limited powers.

c) Subject matter of the dispute

States being parties to commercial arbitrations are parties to a contractual dispute about the terms of a contract and the rights and obligations originating from such. In investment treaty arbitration the subject matter of the dispute is mostly the review of the obligations of the host State created by IIAs. The acts of the host States – mostly sovereign acts under its regulatory powers – are scrutinised under the investment protection standards established in the IIA between the host State and the investor's home State.[822]

d) Legal framework

The legal framework in commercial arbitration is based on the party autonomy; the parties are given wide discretion and liberty in choosing the arbitral procedure and the applicable law. In investment treaty arbitration the parties only have limited control over the arbitral procedure and applicable standards for the resolution of the dispute. The legal framework is determined by the investment treaty and depends on the standards established by the consent of the host State. The eligible investor must adhere to the predetermined framework without the option of making significant changes. In addition, under such framework, the arbitrator is granted wide discretion for conducting the proceedings.[823] It is noteworthy that in

[822] Note that investment treaty tribunals might also have the authority to decide over contractual disputes. For an overview on the relationship of treaty and contractual claims see instead of many James Crawford, "Treaty and Contract in Investment Arbitration," *Arbitration International* 24, no. 3 (2008): 351–74. Many investment treaties contain so-called umbrella clauses under which also contractual obligations may amount to treaty breaches. For a brief overview on the umbrella clause see instead of many Dolzer and Schreuer, *Principles of International Investment Law*, 166–178. For a recent thorough analysis see Stephan W. Schill, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties," *Minnesota Journal of International Law* 18, no. 1 (2009): 1–97.

[823] E.g. Article 44 of the ICSID Convention provides that the tribunal has the power to decide on questions of procedures for all issues not determined by the Convention, the Arbitration Rules or other Rules agreed by the parties. See also Rules 19, 34(2), 35(1), 36(b) of the ICSID Arbitration Rules. Under Rule 19 the tribunal has the power to make procedural orders; pursuant to Rule 34(2) the tribunal has the authority to call upon the parties to produce evidence. Pursuant to Rules 35(1) and 36(b) the tribunal has the control over the witness examination. See also Böckstiegel, "The

general investment treaty arbitrators have become more proactive in a sense where they discuss with the parties over specific party agreed procedures, which in the eyes of the arbitrator might not be the best approach.[824]

The applicable law in investment treaty arbitration will – to a significant extent – be international law and thus independent from the influence of any of the parties. In addition, the interpretation of treaties under international law will be especially significant in order to determine the requirements of jurisdiction and the scope of the substantive protection standards at issue.[825] Contrary to commercial arbitration, which is based on the premise of confidentiality and on not disclosing information to the public, investment treaty arbitration is designed to deal with issues of public interest, for which reason awards have been increasingly made available to the public.[826]

2. Effect on the system of international investment protection

Investment treaty arbitration is more than just a mechanism to solve private disputes. It establishes a review mechanism for a private party, the investor, to challenge governmental actions and hence shares similarities with the judicial review provided by national administrative or constitutional law.[827] In addition, the individual investment treaty arbitration proceeding must not be seen as being merely the dispute resolution mechanism to the relevant IIA, but as part of a wider system. It must be seen in the bigger picture of the manifold IIAs around the world creating a genuine international investment protection regime. In other words, investment treaty arbitration actually serves the purpose of constituting the dispute settlement platform for the international investment community and thus enhancing and supporting the general international investment environment.[828]

Role of the Arbitrator in Investment Treaty Arbitration," 374. ("*Most details are left to the discretion of the arbitrators in conducting the procedure.*").

[824] Ibid., 370.

[825] For treaty interpretation in international treaty arbitration see J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford; New York: Oxford University Press, 2012). For treaty interpretation in general see Richard Gardiner, *Treaty Interpretation* (Oxford; New York: Oxford University Press, 2008)..

[826] Note that pursuant to Article 48(5) of the ICSID Convention, the parties have the possibility to object to the publication of the award.

[827] For investment treaty arbitration as global administrative law and global governance see e.g. Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law," *European Journal of International Law* 17, no. 1 (2006): 145–150; Stephan W. Schill, "International Investment Law and Comparative Public Law - An Introduction," in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford: Oxford University Press, 2011), 3–37; Benedict Kingsbury and Stephan W. Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, IILJ Working Paper 2009/6," Global Administrative Law Series (New York: Institute for International Law and Justice, 2009).

[828] In the words of Stephan Schill: "*Investment treaty arbitration* […] *both establishes and operates as part of a public international economic order and serves a judicial function for global system of international investment protection.*" Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator," 409.

Although investment treaty arbitral awards lack *de jure stare decisis*, in practice their authority is similar to the one of precedents.[829] Most investment awards are published and are publically available. Former arbitral awards will be reviewed and discussed by subsequent tribunals with the purpose of creating a homogeneous set of rules governing international investment protection.[830] This does not mean that a subsequent tribunal will automatically adopt the decision and findings of a former tribunal, but it will deal with the legal reasoning given by such, and may consequently follow, reject or modify such reasoning for its own legal assessment.[831] Hence, the decision of the investment treaty arbitrator will be in the public domain and will serve as basis of further discourse on the relevant issues. It may be used as reference in future disputes and thus provides a contribution to the system of investment treaty protection.

Investment treaty tribunals more and more acknowledge that their role goes beyond merely "*resolving a particular dispute arising under a particular contract*", and that they must be aware of operating within the context of a "*significant public system of private investment protection*".[832] This leads to a duty to focus on the specific case, but at the same time showing awareness for any implications of the higher system.[833] From this it follows that investment treaty arbitrators have a responsibility not only towards the particular parties of the arbitration, but also towards the system of international investment arbitration as a whole. The decisions will have an effect on other investment treaty arbitration proceedings and hence also in general on other investors and host States by creating or shaping the rules and principles of international investment law.[834]

3. Effect on the public

Due to the often-sensitive subject matters of investment treaty arbitration, the decisions of the arbitrator will not only have a direct effect on the parties, but also on the population of the host State. This is no excuse for the host State to violate investment protection standards and to breach its obligations assumed under a

[829] Böckstiegel, "The Role of the Arbitrator in Investment Treaty Arbitration," 373. On the issue of precedents in international arbitration in general see Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" For a discussion on precedents in investment treaty arbitration see Paulsson, "The Role of Precedent in Investment Arbitration"; Rigo Sureda, "Precedent in Investment Treaty Arbitration"; Gill, "Is There a Special Role for Precedent in Investment Arbitration?"; Reed, "The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management."

[830] Schill describes this function of investment treaty as 'a system of treaty-overarching precedent', see Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator," 414.

[831] Note that Schill sees the cases of dissent as proof that investment tribunals "*perceive their own function as contributing to an international public order, rather than remaining in the privacy of bilateralism*", see Ibid., 417.

[832] *Glamis Gold, Ltd. v United States of America*, NAFTA/UNCITRAL, Award, 8 June 2009 (hereinafter: "*Glamis v United States*, Award"), paras 3-7.

[833] *Glamis v United States*, Award, para 7.

[834] Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator," 413 et seq.

treaty, which in most cases were influential for the decision of the investor to invest in the host State in the first place. Nevertheless, the impact of the arbitrator's decision on the public must be taken into consideration.[835]

Besides being directly affected by the decision as taxpayers, the population is also the recipient of the services and goods related to the subject matter of the disputes. Many investment treaty arbitrations deal with infrastructure, water, power, transport or telecommunication projects. Any decision of the arbitrator will most likely have an impact on the availability of such services or on the tariffs and prices. At the same time the outcome may be of immense public interest due to environmental concerns,[836] impact on the labour force and similar public implications. The significant public interest of the outcome of investment disputes has led to an augmented request for the participation and involvement of public interest groups as well as private interest groups by *amici curiae*.[837]

---

[835] See e.g. Nigel Blackaby, "Public Interest and Investment Treaty Arbitration," in *International Commercial Arbitration: Important Contemporary Questions*, ed. Albert Jan Van den Berg, vol. 11, ICCA Congress Series (Kluwer Law International, 2003), 355–65; Charles H. Brower, "Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes," in *Yearbook on International Investment Law and Policy 2008-2009*, ed. Karl P. Sauvant (Oxford: Oxford University Press, 2009).

[836] To name only a few of many possible examples: *Methanex Corporation v United States of America*, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (hereinafter: "*Methanex v United States*, Award"); *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, 21 October 2005 (hereinafter: "*Aguas del Tunari v Bolivia*, Decision on Jurisdiction").

[837] For *amici curiae* participation in investment treaty arbitration see e.g. Eugenia Levine, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation," *Berkeley Journal of International Law* 29, no. 1 (2011): 200–224; Epaminontas E. Triantafilou, "Amicus Submissions in Investor-State Arbitration After Suez v. Argentina," *Arbitration International* 24, no. 4 (2008): 571–86; Christina Knahr, "Transparency, Third Party Participation and Access to Documents in International Investment Arbitration," *Arbitration International* 23, no. 2 (2007): 327–55. See also *Methanex Corporation v United States of America*, NAFTA, Petition To The Arbitral Tribunal Submitted By The International Institute For Sustainable Development (IISD), 25 August 2000, where the IISD together with environmental organisations argued that the subject matter was of immense public importance and the tribunal's decision would have an impact on environmental law-making. See also *United Parcel Service of America Inc. v Canada*, NAFTA, Decision Of The Tribunal On Petitions For Intervention And Participation As *Amici Curiae*, 17 October 2001, where the Canadian Union of Postal Workers and the Council of Canadians argued that the outcome of the case would have an impact on them and that they had a direct interest in the subject matter and the broader public policy implications. See also *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005 (hereinafter: "*Aguas Argentinas, Suez, Aguas de Barcelona and Vivendi* v *Argentina*, Order re *Amicus Curiae*"); and *Aguas del Tunari v Bolivia*, Decision on Jurisdiction, Appendix III, where environmental NGOs argued that the subject matter of the dispute raised environmental concerns.
Note that recent investment treaty cases have dealt with the issue that the decision may also have an influence on the interaction of international law with EU Law. The arbitral decision might have an impact on the obligations of a Member State of the EU under EU Law. See e.g. *AES v Hungary*, Award; *Micula et al. v Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (hereinafter: "*Micula v Romania*, Award").

4. Transnational public policy

The role of the investment treaty arbitrator is closely linked to transnational public policy. As organ, agent or even guardian of the international community, the arbitrator has the duty to ensure that transnational public policy is not violated.

Article 14(1) of the ICSID Convention setting the requirements for an ICSID arbitrator highlights that the ICSID Convention is based on the premises that the arbitrator may also play an important role in moral issues concerning the dispute and that it is of utmost importance that she can be trusted to come to an independent judgment.[838]

The investment treaty arbitrator conducting arbitration proceedings under ICSID, must consider that she is the only instance or authority to consider and evaluate the transnational public policy violation caused by corruption and its consequences for the outcome of the case. Awards rendered under the auspices of ICSID are enforceable without further ado and cannot be challenged before national courts under the public policy provision of Article 5 of the New York Convention. Moreover, the annulment provisions of the ICSID Convention do not provide for a review based on public policy concerns.

For investment treaty awards based on arbitration rules other than ICSID, the possibility of challenging the award at the enforcement court remains open. However, first of all the general duty to render an enforceable award applies also to the investment treaty arbitrator, and second, why should the arbitrator leave the hot topic of corruption to national judges? Only the arbitrator will be in the position to best assess the legal consequences of corruption on the specific subject matter and the outcome of the dispute at hand.[839] Besides, as explained above, the public policy approach taken by national courts is different from the one governing international arbitration, i.e. transnational public policy.

5. Conclusion: Responsibility towards public

The investment treaty arbitrator must be conscientious about the great powers granted to her and must be aware of the impact her decision has on the bigger picture. With power comes responsibility. Although the dispute at present appears

---

[838] Article 14 (1) of the ICSID Convention:
"*Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators*." Emphasis added. Note that the provision calls for a certain expertise in law, but does not make any qualifications towards the specific field of law. It seems as if the ICSID Convention evaluates the high moral character at least as importantly as the expertise in law.

[839] See also Llamzon, *Corruption in International Investment Arbitration*, 100. ("*[...] it is the international tribunal rather than the national court that is in a better position to make impartial and just decision on corruption; indeed, the authoritativeness of international arbitral findings may even help serve to force corrupt individuals to criminal account in national courts."*).

to be privy to the parties of the arbitration proceedings, non-participants are also affected by the decision of the investment treaty arbitrator. The outcome of an investment law case will have direct impact on the public and thus on society. Moreover, the arbitrator's decisions may have an influence on the development of investment law and will make a contribution – to whatever extent – to the shaping of the international investment regime. Thus, the arbitrator owes responsibility to both the parties of the dispute and the public,[840] which is not represented in the proceedings. This has led to the view that the investment treaty arbitrator in fact holds a function similar to a public office.[841] In this position, the investment treaty arbitrator is the true guardian of the international community.[842]

II. ICSID Case law on the role of the arbitrator in corruption cases

After having analysed the general duties of an international arbitrator and the particular position of an investment treaty arbitrator, we will examine how investment treaty tribunals have seen their role when faced with corruption issues. Do investment tribunals only adjudicate on what the parties have presented? Have investment tribunals initiated investigations on their own in cases of suspicious circumstances? Or should they only deal with the issue when sufficient and clear allegations of corruption were made? Do tribunals demand sufficient evidence or will they engage in their own efforts to find the truth?

The seminal case of *World Duty Free v Kenya*[843] was the first ICSID case where corruption could actually be established. The tribunal took the fact that the investment contract was procured by corruption very seriously and dismissed the case on that ground. This arbitral decision is an example of how tribunals will deal with this sensitive issue when proven and that they are willing to take the most severe steps in order to condemn such practices. However, except for being an example of assessing the legal consequences of such illegal conduct, the decision gives no direction on the specific duties of the arbitrator in case of indications of corruption. Since the investor admitted having procured the contract by corrupt means, corruption was established and the tribunal did not have to engage in a proactive role.

Such proactive role was recently adopted by the tribunal in *Metal-Tech v Uzbekistan*, where the tribunal ordered the parties to produce additional information and documents, after the existence of substantial payments in relation to the investment came to light in the first oral hearing.[844] The tribunal found these

[840] See also Wilske and Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues," 260. ("*It is rather obvious that a decision involving issues that are highly sensitive politically and significant in terms of public interest require particular responsibility from an arbitrator.*").
[841] Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator," 419.
[842] See e.g. Ibid., 424.
[843] *World Duty Free v Kenya*.
[844] *Metal-Tech v Uzbekistan*.

facts suspicious and "*considered it its duty to inquire about the reasons for such payments*".[845] Against this background, the tribunal exercised its *ex officio* powers under Article 43 of the ICSID Convention and ordered the parties in its Procedural Order 7 to provide additional information and once more in its Procedural Order 10 to provide additional testimony and evidence.[846] In particular, the tribunal gave the investor multiple opportunities to substantiate the reality and legitimacy of the services rendered in exchange for the suspicious payments. The fact that the investor was unable to provide reasonable justification of the substantial payments made to so-called consultants in connection with the investment, led to the tribunal's conclusion that the relevant services were non-legitimate. The approach taken by the *Metal-Tech* tribunal shows how effective the exercise of the *ex officio* power under Article 43 of the ICSID Convention is to uncover corrupt acts. It will be seen if future tribunals will follow such example when it comes to reacting to red flags.

Aside from these two seminal cases, some tribunals have shown reluctance to deal with the issue of corruption (see below at **1.**), have emphasised that more than mere innuendo (see below at **2.**) and a general assumption of a corrupt regime was required to establish corruption (see below at **3.**). Some tribunals seemed to depend on the parties' wishes (see below at **4.**) or on the outcome of the investigations of the national anti-corruption agencies (see below at **5.**) or preferred to base the decision on grounds other than corruption (see below at **6.**). Corruption issues have also been subject to various challenges (see below at **7.**).

1. Showing reluctance

Commentators have argued that some tribunals have closed their eyes to strong indications of corruption.[847] However, this statement does not do justice to the difficult situation that arbitrators face when encountering suspicious circumstances. The issue is normally not whether the tribunals are in general reluctant to deal with corruption; it is rather about what limitations they feel their powers have and how they interpret their scope of competence.

This being said, there is one case, which surprises due to the complete reluctance to mention corruption at all in the award. In *Metalclad v Mexico*[848] extensive rumours of corruption existed and insinuations, accusations and allegations of corruption were made by both parties along the proceedings. However, the tribunal decided not to address the issue of corruption at all. Nowadays, it appears unthinkable that a tribunal would choose not to deal at all with the issue of corruption raised during the proceedings.

---

[845] *Metal-Tech v Uzbekistan*, Award, para 241.
[846] For an overview on the procedural steps taken by the tribunal see *Metal-Tech v Uzbekistan*, Award, paras 86-103.
[847] Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2010, 11 et seq.
[848] *Metalclad v Mexico*.

2. More than innuendo required

Mere allusions are not enough. Tribunals will not accept innuendos to manipulate their impartiality and let preconceptions take over their sound judgment. If a party wants to introduce the misconduct of the other party into the proceedings, then precise allegations must be made.

In *SSP v Egypt*,[849] the host State requested that the claim of the investor be declared inadmissible or in any case unfounded due to corruption.[850] Egypt, however, refrained from making any accusations or allegations of corruption, but alluded to irregular business behaviour on the side of the investor.[851] It appears that Egypt was in a dilemma. They wanted to use corruption on the side of the investor as a defence in the proceedings, but at the same time did not want to make accusations against their own public officials.[852] Since corruption amounts to misconduct on both sides, Egypt had to limit its corruption defence to a mere innuendo without proper accusations. The tribunal found it impossible to make a finding of corruption 'based on suppositions' and not on evidence.[853]

In *Azurix v Argentina*,[854] Argentina made insinuations of corruption when examining a witness during the hearing.[855] The investor directly confronted the same witness with the question whether to his knowledge the award of the investment agreement was procured by corruption. The witness answered in the negative. In addition, an investigation conducted by an Argentine entity was still continuing, but had so far not found any evidence of corrupt practices. Since the tribunal was not provided with further information or evidence, it regarded the issue as settled and did not further deal with the issue of corruption.[856]

In *Methanex v USA*,[857] the investor argued that the former Governor of California, Gray Davis, had taken the decision to ban a product produced by the investor based only on undue influences by large political contributions from a producer of a competitive product. The investor, however, made neither allegations of bribery or criminal corruption against Mr Davis or the competitor, but rather argued that

---

[849] *Southern Pacific Properties (Middle East) Limited v The Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (hereinafter: "*SPP v Egypt*, Award").
[850] *SPP v Egypt*, Award, para 127, ("[…] *the Respondent requests the Tribunal to declare that:* '*les demandes de SPP et SPP(ME) sont irrecevables et en tout cas mal fondées en raison des faits de corruption que révèlent les comportements de SPP et SPP(ME).*'").
[851] Egypt noted that the investor had irregular business connections, employed ex-Government officials and dealt right away with the most senior public officials instead of respecting the normal channels of communication. See *SPP v Egypt*, Award, para 127.
[852] Egypt made clear that it did not want to accuse its own public official with a statement at the end of its Counter-Reply: "*Indeed nothing we have said in our Counter-Memorial or Counter-Reply should be construed as an accusation, or allegation of misconduct regarding any particular Egyptian Official referred* [to] [...]", see *SPP v Egypt*, Award, para 128.
[853] *SPP v Egypt*, Award, para 132.
[854] *Azurix Corp. v the Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (hereinafter: "*Azurix v Argentina*, Award").
[855] *Azurix v Argentina*, Award, para 56.
[856] *Azurix v Argentina*, Award, para 56.
[857] *Methanex v United States.*

the alleged acts amounted to 'corruption' relevant for the violation of the treaty. The tribunal took these allegations seriously and examined the issue. Finally, it found other reasonable grounds for the respective authorities to ban the product and held it was "*impossible plausibly to connect these dots in such a way as to*" prove undue influence and corruption.[858]

3. General assumption of corrupt regime not enough

Arbitral tribunals are not willing to make a decision on merely general considerations of corruption. In *African Holding v Democratic Republic of Congo,* for instance, the host State pointed at the illegal practices of the Mobutu regime without submitting further concrete evidence.[859] It appears obvious that – even when it is common knowledge that a country suffers from widespread corruption and the corrupt practices of public officials and businessmen are publicly assumed – without any further substantiation the tribunal cannot consider these general allegations.[860] Being concerned with host States misusing allegations of corruption in order to cut off investors of bringing their claims, the tribunal demanded specific evidence.[861]

A similar approach was taken by the tribunal in *Oostergetel v The Slovak Republic*, where the investor pointed at the widespread corruption within the Slovak judiciary.[862] While the investor failed to provide any concrete evidence of a corrupt act, it submitted various general reports about corruption in Slovak courts.[863] The tribunal emphasised that general reports could not substitute evidence for the alleged breach of treaty in form of a corrupt act.[864] In the eyes of the tribunal, the reference to widespread corruption amounted to 'mere insinuations'.[865]

---

[858] *Methanex v United States*, Part III – Chapter B, para 3.

[859] See *African Holding Company of America, Inc and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008 ("hereinafter: "*African Holding v Congo*, Decision on Jurisdiction and Admissibility"), para 53.

[860] Note that in ICC Case No. 3916, the endemic nature of corruption in Iran has been considered among others to establish corruption. However, this circumstantial evidence was merely one single factor of many to conclude that the transaction involved corruption. Thus, it can be argued that the reference to widespread corruption was substantiated by further evidence. See ICC Case No. 3916.

[861] *African Holding v Congo*, Decision on Jurisdiction and Admissibility, para 55. In fact, the tribunal argued for a particularly high standard of proof and required strong evidence similar to evidence required for criminal prosecution. For a critical analysis of a heightened standard of proof for corruption allegations see Chapter Eight C.

[862] *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (hereinafter: "*Oostergetel v Slovak Republic*, Award")

[863] See *Oostergetel v Slovak Republic*, Award, para 302. The investor submitted *inter alia* press articles about general irregularities in Slovak bankruptcy proceedings and disciplinary proceedings against members of Slovak courts as well as reports by the European Union and the United States.

[864] *Oostergetel v Slovak Republic*, Award, para 303.

[865] *Oostergetel v Slovak Republic*, Award, para 303. See also *Oostergetel v Slovak Republic*, Award, para 296 ("*As regards a claim for substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law*.").

In *ECE v Czech Republic*, the investor also referred to the general presence of corruption within the Czech Republic by submitting reports of NGOs. The tribunal clarified that the mere existence of corruption in a host State is insufficient to show that "*corruption existed in the specific event giving rise to the claim*".[866]

4. Dependent on parties' wishes

As we have discussed in connection with international arbitration of commercial disputes, the parties sometimes ask the arbitral tribunal to disregard the indicia of corruption and to merely make a finding on the contractual rights in dispute. In investment treaty arbitration it is improbable that both parties would ask the tribunal to turn a blind eye on corruption. Since in investment treaty arbitration established corruption will most likely be favourable for the case of one party and prejudicial for the case of the other party, at least one party will normally push the matter forward. However, how should an investment treaty tribunal proceed when a party alleged corrupt practices and provided evidence, but then suddenly withdraws such allegations from its claim and asks the tribunal not to make a finding on that issue?

The tribunal in *F-W Oil Interests v Trinidad and Tobago*[867] faced such situation. For most of the proceedings, the investor made serious allegations of corruption against senior public officials of Trinidad and Tobago. Strangely enough, after the oral pleadings the investor withdrew the original allegation of corruption and asked the tribunal not to make a ruling on such matter.[868] The tribunal could have refrained from mentioning corruption at all in its award, but it preferred to give the accurate picture of the proceedings by explaining the different steps of the procedural history concerning the allegations of corruption. The tribunal also reviewed the presented evidence, but finally found that it would not be useful to include it in the record of the proceedings.[869] The tribunal stressed that it is not the role of a tribunal to make a moral judgment on the conduct of the parties, but rather to rule on the claims and their legal consequences.[870] However, the tribunal made clear that an investment treaty tribunal must take allegations of corruption very seriously when proven.[871]

---

[866] *ECE v Czech Republic*, Award, para 4.879.
[867] *F-W Oil Interests, Inc. v The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 (hereinafter: "*F-W Oil v Trinidad and Tobago*, Award").
[868] See *F-W Oil v Trinidad and Tobago*, Award, paras 49-53.
[869] *F-W Oil v Trinidad and Tobago*, Award, para 211.
[870] *F-W Oil v Trinidad and Tobago*, Award, para 211. ("[…] *it is no part of the function of a Tribunal such as this to pass moral judgement on the behaviour of one or another Party, or indeed both Parties, but simply to decide on the validity of the claims brought, and on their legal consequences.*").
[871] *F-W Oil v Trinidad and Tobago*, Award, para 212. ("*We ought not, however, to leave the matter simply there without making it plain that this Tribunal (as, we assume, any ICSID Tribunal) is bound to take the most serious view of allegations of State corruption – if backed by proper evidence. This is not merely because of the potential effect of such claims on the persons involved, but equally because of the dire and pernicious effect that corruption has been shown to have on*

Although it appears that the tribunal did not make a finding on the corruption issue after the withdrawal of the allegations, the approach taken by the tribunal speaks volumes that it nevertheless treated the issue with care and ensured for itself that the allegations – at least with the evidence before it – had no basis.

5. Depending or relying on national investigation

Since arbitral tribunals lack police powers to gather evidence, they have often referred to national investigations for evidence.

In *TSA Spectrum v Argentina*[872], the investor initiated ICSID arbitration due to the termination of a concession for the privatisation of the radio spectrum. Argentina alleged that TSA had paid bribes to local public officials to receive favourable terms and conditions for the bidding process of the concession.[873] It argued that due to these irregularities the concession could not be considered a protected investment under the BIT, for which reason jurisdiction had to be denied. In fact, the Argentine Anticorruption Office had commenced criminal investigations years before, but had not come to a final decision due to the complexity of the case. The tribunal reproduced the parties' arguments about the allegation of corruption in detail,[874] but merely referred to the ongoing criminal proceedings and the consequential lack of evidence before the tribunal.[875] It appears that the tribunal's decision would have been different if the criminal proceedings had reached a decision at the time of the proceedings. It seems that it would have based its own decision on the one of the national investigations, at least for evidentiary reasons.

National investigations and court proceedings were also ongoing when the tribunal in *SGS v Pakistan* had to decide whether it had jurisdiction over the case.[876] Pakistan had terminated a contract for the assessment of all custom duties payable on goods entering Pakistan. The termination of the contract took place right after the dismissal of Prime Minister Benazir Bhutto's Government, *inter alia* due to widespread corruption charges against her and her husband. In fact, in 1998 corruption charges regarding the SGS contract, were initiated *inter alia* against her and her husband in Pakistan as well as in Switzerland. The same year the international press had published that SGS promised 'commissions' and 'consultancy fees' to the Bhutto family with regard to the contract.[877] Naturally,

---

economic development, (notably so in developing countries), and economic development is after all the purpose which Bilateral Investment Treaties and the World Bank itself were created to serve."), emphasis added.

[872] *TSA Spectrum de Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008 (hereinafter: "*TSA v Argentina*, Award").

[873] *TSA v Argentina*, Award, para 166.

[874] *TSA v Argentina*, Award, paras 163-173.

[875] *TSA v Argentina*, Award, paras 174-175.

[876] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on objections to jurisdiction, 6 August 2003 (hereinafter: "*SGS v Pakistan*, Decision on Jurisdiction").

[877] John F. Burns, "House of Graft: Tracing the Bhutto Millions - A Special Report; Bhutto Clan Leaves Trail of Corruption," *New York Times*, January 9, 1998.

when the arbitral proceedings were initiated in 2000, there were many indications and rumours about corruption in connection with the relevant contract. Thus, Pakistan reserved its rights to argue that the tribunal had no jurisdiction if corruption was finally established. The tribunal acknowledged the reservation, but did not raise the issue any further and agreed to put it aside.[878]

This reveals the *SGS v Pakistan* tribunal's perception of its function: to do only what it is asked to do. No impetus to initiate own investigations, no impulse to influence the direction of the proceedings. The dubious circumstances of the contract were in the public domain at the time of the arbitration proceedings. Many indications existed that although the contract was entered into with Pakistan, the investment was designed to suit the interests of the members of the ruling party instead of that of the country as a whole.[879] Sure, the results of the national investigations were still without results, however, the tribunal rejected to even raise the issue of corruption detached from the concrete submissions of Pakistan.

The main concern about a tribunal relying or even waiting for the outcome of national investigations is as follows: the tribunal has the duty to decide for itself and to come to an independent judgment about the relevant issues of the dispute. It should not hand over control over questions essential to the arbitral proceedings. However, the tribunal will have neither insight nor supervision of the national investigations. It cannot ensure that the investigations are not policy driven or manipulated. Doubts on the integrity of these proceedings cannot fully be eliminated. Investigations against one's own public officials are very delicate and will most certainly encounter many internal obstacles. For a country suffering from widespread corruption, one of the most difficult challenges is to perform the change to good governance. While the efforts of a new government may be honest, the task becomes arduous due to a mass of corrupt public officials whose *status quo* is in danger. Many of these individuals will torpedo the investigations. In addition, in most cases such investigations are conducted by a national agency of the host State that is also party to the dispute. Due to the involved interests the impartiality and independence of such national investigations cannot be guaranteed. Findings of national authorities on issues of corruption, regardless whether positive or negative, should have a decisive effect on the tribunal's own judgment over the matter. Thus, as held in *Inceysa v El Salvador*, it is upon the tribunal to judge over the existence of irregularities relating to the investment and not for the parties, organs or agencies to do so.[880]

On the other hand, tribunals may resort to the findings and evidence obtained in national investigations and criminal proceeding as long as they secure their own

[878] *SGS v Pakistan*, Decision on Jurisdiction, paras 141-143.
[879] See also Martin Lau, "Note on Société Générale de Surveillance SA v. Pakistan, through Secretary, Ministry of Finance," *Arbitration International* 19, no. 2 (2003): 181.
[880] *Inceysa v El Salvador*, Award, paras 209-210. Note that the tribunal made this statement with regard to the legality of the investment as requirement of the jurisdiction of the tribunal pursuant to Article 25 of the ICSID Convention.

judgment over the issue by engaging in their own review of the evidence, their own evaluations of the issue.

The national investigations may also play a different role. In *Wena v Egypt*, the tribunal was sceptical about the fact that Egypt had never initiated criminal proceedings against its public official, who had allegedly been bribed by the investor.[881] The tribunal regretted that it had not been informed of the reasons why Egypt had not prosecuted the public official accused in the arbitration proceedings. This contradictory behaviour from Egypt caused the tribunal to be reluctant to 'immunize Egypt from liability' merely on corruption allegations without further explanations and proof.[882]

6. Basing the decision on other grounds

In some cases, tribunals have preferred to base their decision on grounds other than corruption, leaving this sensitive issue undecided. In *Lucchetti v Peru*,[883] the tribunal had to decide whether it had jurisdiction *ratione temporis*, since the Peru-Chile BIT had entered into force after the investment had been made and after both parties had already commenced a dispute before the Peruvian courts. The question for the tribunal was whether judgments from the Peruvian courts rendered in 1998 could be considered as having terminated the former dispute in order to turn the present dispute to a new and separate one arisen after the BIT entered into force in August 2001. Peru alleged *inter alia* that the judgments of the Peruvian courts were obtained by corruption, since the judges were under the direct influence of the former Chief of the Peruvian Secret Service Vladimiro Montesinos Torres.[884]

The tribunal focused on whether the subject matter of the dispute or the facts constituting the real cause of the dispute were the same and concluded that the allegedly two separate disputes were actually only one ongoing dispute, which had started before the BIT entered into force. Since it denied jurisdiction on this ground, it found "*it* […] *unnecessary for it to address this issue".*[885] The tribunal however clarified that if it was proven that the judgments were obtained by corruption, this would amount to an independent ground for holding that the dispute was still ongoing.[886]

[881] *Wena v Egypt*, Award, para 116.
[882] *Wena v Egypt*, Award, paras 116-117.
[883] *Lucchetti v Peru*, Award.
[884] Note that the preamble of the decree revoking the operating licence of Lucchetti (Decree 259) stated as reason for the revocation the corrupt means by which the judgment was obtained. The Peruvian Congress disclosed *inter alia* a video-tape showing how the judges were under the direct influence of Montesinos.
[885] *Lucchetti v Peru*, Award, para 57.
[886] *Lucchetti v Peru*, Award, para 57.

7. Challenges against the award

The role of the investment treaty arbitrator has also been dealt with by challenges against the award. As noted above, one reason for the arbitrator to thoroughly deal with any arising corruption issue in the proceedings should be to avoid subsequent challenges against the awards.

a) Annulment proceedings

In *Wena v Egypt*, the tribunal devoted particular attention to the allegations of corruption raised by Egypt. It found that Egypt bore the burden of proving such an affirmative defence and had failed to prove its allegations.[887] Not satisfied with this decision, Egypt requested the annulment of the award. It argued *inter alia* that the tribunal had manifestly exceeded its powers by not applying Egyptian law and holding the relevant contracts null and void due to corruption. Acknowledging Egyptian law and the consequential invalidation of contracts obtained by corruption, the *ad hoc* Committee emphasised that due to the tribunal's finding that there was not sufficient evidence to prove the corruption allegations, the issue was not one of applicable law but of evidence.[888]

In addition, Egypt argued that by failing to request further evidence in relation to the issue of corruption, the tribunal wrongly exercised its discretion and hence breached a fundamental rule of procedure.[889] In particular, Egypt criticised that the tribunal omitted to call an essential witness whom neither party had offered in evidence, but whom the tribunal found to be important.[890] The *ad hoc* Committee made clear that it was incumbent upon the parties to produce the evidence they wish to be presented to the tribunal.[891] Pursuant to Article 43 ICSID Convention and Arbitration Rule 34 (2) the tribunal has the power to call upon the parties to produce further evidence, however this power is only discretionary. The *ad hoc* Committee concluded that there exists no obligation on a tribunal to call for further evidence.[892]

This shows that *ad hoc* Committees are reluctant to establish a duty on the tribunal to call for more evidence. It has several times been highlighted that the tribunal has a discretionary power in this regard. In the annulment proceedings in *Azurix v Argentina*,[893] Argentina claimed 'denial of fundamental evidence' in connection to

---

[887] *Wena v Egypt*, Award, paras 77, 117, 132.
[888] *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002 (hereinafter: "*Wena v Egypt*, Annulment"), para 47.
[889] *Wena v Egypt*, Annulment, para 71.
[890] *Wena v Egypt*, Annulment, para 71.
[891] *Wena v Egypt*, Annulment, para 72. The *ad hoc* Committee also stated that the principle is embodied in Arbitration Rule 33.
[892] *Wena v Egypt*, Annulment, para 73.
[893] *Azurix v Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (hereinafter: "*Azurix v Argentina*, Annulment").

its allegations that there had been irregularities.[894] The *ad hoc* Committee clarified that pursuant to Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a), the power of the tribunal to call for the production of certain documents is discretionary.[895] Thus, the tribunal has no duty to accede to a party's request, but has a duty to exercise its discretion. Hence, a negating decision is in itself no ground for annulment. However, the exercise of that discretion may have violated a fundamental rule of procedure such as 'the right of defence' and 'the principle of equality of the parties'.[896]

Moreover, the *ad hoc* Committee emphasised that the departure from a fundamental rule of procedure had to be 'serious', from which it follows that the result must have been substantially distorted.[897] By pointing at the evidence taken into consideration by the tribunal in its award, the *ad hoc* Committee came to the conclusion that it was not 'reasonably likely' that the requested documents would have proven that the concession was procured by corruption.[898] This shows that only because the tribunal had explicitly evaluated all presented evidence regarding corruption, the exercised discretion was not challengeable. Against the background that the tribunal in *Metal-Tech v Uzbekistan* considered it its duty to shed light on suspicious facts, it remains to be seen how future *ad hoc* Committees will approach this situation.

In *Rumeli v Kazakhstan*, after evaluating the presented evidence, the tribunal concluded that the investment had not been obtained by illegal means.[899] This decision was challenged by Kazakhstan by a request for annulment.[900] In the annulment proceedings, the *ad hoc* Committee clarified that it was outside of the scope of an *ad hoc* Committee to go into an in-depth analysis of the evidence;[901] but it thoroughly analysed the reasoning provided by the tribunal. By pointing to Rule 34 of the Arbitration Rules and the fact that the tribunal has the power to evaluate the probative value of the evidence, the Committee found the reasoning given by the tribunal in connection with its evaluation of each piece of presented evidence reasonable and denied any manifest excess of powers.[902] In addition,

---

[894] Note that in the arbitration proceedings Argentina never explicitly alleged that the contracts were obtained by corruption. Argentina only alleged 'irregularities at the bidding process'.
[895] *Azurix v Argentina*, Annulment, paras 207-219. ("*The discretion of the tribunal in the exercise of this power is unfettered*."), para 208.
[896] *Azurix v Argentina*, Annulment, para 211.
[897] *Azurix v Argentina*, Annulment, paras 234 et seq.
[898] *Azurix v Argentina*, Annulment, para 236.
[899] *Rumeli v Kazakhstan*, Award, paras 318-325.
[900] *Kazakhstan v Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S*., ICSID Case No. ARB/05/16, *Decision of the Ad Hoc Committee*, 25 March 2010 (hereinafter: "*Kazakhstan v Rumeli*, Annulment"). Kazakhstan based its annulment request on three grounds: (i) manifest excess of powers by accepting jurisdiction although the investment was allegedly obtained illegally; (ii) serious departure from a fundamental rule of procedure by applying a different standard to both parties; and (iii) failure to state reasons since it is not understandable to the reader why the evidence of illegality of the investment did not lead to the conclusion that the investment was not made in accordance with the host State law or international law.
[901] *Rumeli v Kazakhstan*, Annulment, para 96.
[902] *Rumeli v Kazakhstan*, Annulment, paras 95-96.

since the reasoning enabled the reader to follow the different steps taken by the tribunal to finally reach its conclusions, the *ad hoc* Committee found that the award in fact stated the reasons.[903] This illustrates both the importance of a tribunal to thoroughly deal with any issue of corruption and to evaluate the presented evidence in a comprehensible way. As long as the decision is reasonable, there is no ground for annulment.

It is noteworthy that the *ad hoc* Committee has no jurisdiction to independently investigate corruption allegations that are not relevant for any of the five annulment grounds stated in the ICSID Convention.[904] In *RSM Production Corporation v Grenada*, the investor made a request to the *ad hoc* Committee to investigate whether the underlying contract to the dispute was terminated by Grenada due to corruption on the side of Grenadian public officials.[905] Peculiar to the case is that the investor had raised the issue of corruption at the hearing of the merits in order to challenge the credibility of the allegedly corrupt witness, but did explicitly clarify that it did not ask the tribunal to make a finding to such allegations.[906] In other words, the investor asked the *ad hoc* Committee "*to do what* [the investor] *specifically said that the Tribunal need not do*".[907] The *ad hoc* Committee held that such request was outside of the scope of the annulment, since it was not based on any of the five annulment grounds stated in Article 52 of the ICSID Convention.[908] In the view of the *ad hoc* Committee such investigation would be outside of the function of the *ad hoc* Committee to decide over the request of annulment.

This case may not be interpreted as stating that an *ad hoc* Committee has no inherent power to engage in investigations of corruption. Such investigation must however be relevant and necessary for accomplishing its mandate and thus be

---

[903] *Rumeli v Kazakhstan*, Annulment, paras 98-99.

[904] Article 52(1) of the ICSID Convention states the following grounds for annulment:
(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

[905] *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/16, Decision on RSM Production Corporation's Application for a Preliminary Ruling of 29 October 2009 (hereinafter: "*RSM v Grenada*, Preliminary Ruling"), paras 3 et seq.

[906] See *RSM v Grenada*, Preliminary Ruling, paras 6-7. The investor found it unnecessary and outside of the function of the tribunal to find that the allegedly corrupt public official (Attorney-General of Grenada) was corrupt or incompetent. With regard to the corruption concerns it rather filed a complaint in the U.S. District Court for the Southern District of New York against *inter alia* the allegedly corrupt public officials on the grounds of corruption and claimed damages, see *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009 (hereinafter: "*RSM v Grenada*, Award"), para 30.

[907] From the application for preliminary ruling of the investor, cited in *RSM v Grenada*, Preliminary Ruling, para 8.

[908] *RSM v Grenada*, Preliminary Ruling, para 19. Note that the investor failed to raise the corruption issue at the original request for annulment and has not even explained on what annulment ground it raises the allegations of corruption.

based on one of the five annulment grounds stated in Article 52(1) of the ICSID Convention.

b) Challenges at national courts

Parties unsatisfied with the approach taken by the tribunal towards corruption may in limited cases also seek setting aside of the award at national courts of the seat of the arbitration.[909]

As mentioned before, during the arbitration proceedings of *Metalclad v Mexico* allusions, allegations and general indications of corruption were made on both sides, however, the tribunal refrained from dealing with any issue of corruption in the award and did not even mention it at all.[910] Mexico challenged the award before the Supreme Court of British Columbia and asked for setting aside the award *inter alia* on Metalclad's involvement with corruption and its violation against public policy in British Columbia.[911] After the court acknowledged that the tribunal had not dealt directly in its award with the allegations of corruption, it reviewed the evidence from the arbitration proceedings and found that corruption could not be established.[912]

c) Waiver

The award may also become worthless when evidence of corruption is discovered after the award has been rendered.

The events surrounding the *Siemens v Argentina* dispute illustrate another reason why it is important that the tribunal takes every possible step to ensure that the investment is not tainted by corruption. In 2002, Siemens filed an ICSID claim against Argentina after the termination in 2001 of an agreement signed in 1998 for the development of a new system for national identity cards. The proceedings took approximately five years. In 2007, the tribunal rendered the award in favour of Siemens ordering *inter alia* damages in the amount of approximately USD 220 million.[913] Rumours and reports in the international press existed indicating that the contract between Siemens and Argentina might have been procured by corrupt means. In fact, criminal investigations were initiated in Argentina in 2004 to examine the circumstances of the contract. Despite allegations of corruption made by Argentina during the course of the arbitration proceedings, the tribunal decided not to consider the question of corruption in the award. The issue is not mentioned in the award at all. It appears that Argentina had the intention to examine witnesses

[909] This option does not arise for investment treaty proceedings under the ICSID Convention, but under other arbitration rules, e.g. UNCITRAL Rules or SCC.
[910] *Metalclad v Mexico*, Award.
[911] *Mexico v Metalclad.* Mexico asked to set aside the award pursuant to Article 34(2)(b) of the International Commercial Arbitration Act, based on the UNCITRAL Model Law.
[912] *Mexico v Metalclad*, paras 106-112.
[913] *Siemens v Argentina*, Award.

on this topic, but that the tribunal disallowed such course of action on the ground that the allegations had been raised too late.[914]

In 2008, German prosecutors discovered a widespread system of corruption to procure public contracts around the world within the corporate structure of Siemens. During these investigations, indications and evidence were found that the contract between Siemens and Argentina was procured by bribes paid to Argentine public officials of the government of President Menem.[915] The first reaction to this new information of Argentina was to file a request for annulment pursuant to Article 52 of the ICSID Convention arguing that the tribunal rejected essential evidence. Then, Argentina filed a request for revision of the award pursuant to Article 51 in order to have the new evidence of corruption analysed by the tribunal, and asked to suspend the annulment proceedings during the revision. In the meantime, Siemens settled the charges of U.S. and German authorities by paying a significant amount of penalties.[916] Shortly after, Siemens announced its waiver to enforce the ICSID award against Argentina. The award became useless.

These events show how important it is for a tribunal to ensure that the real circumstances of the underlying contract are discovered before rendering its decision. Corruption is a highly delicate issue for the proceedings, for the outcome of the case and for the fate of the award. Against the background of the detrimental impact of corruption on society, the violation of transnational public policy and considering the legal consequences for the claim, it is important for a tribunal to go into the matter whenever indications arise. At what stage of the proceedings the allegations are made or suspicious signs are discovered cannot make any difference. Most certainly, the tribunal must avoid that a party takes advantage of late production of evidence or of invoking a defence at an advanced state of the proceedings. However, considering the significance of the truth about any potential illicit circumstances regarding the investment, the tribunal should find means to protect due process and the equality of the parties through other means and not by preventing evidence to be heard. Hence, the tribunal must show willingness to adjust the proceedings to the new events and provide both parties with sufficient time and opportunity to prepare and adapt their cases to the new allegations of

[914] See Investment Arbitration Reporter, "Argentina and Siemens ask annulment panel to suspend proceedings, so original arbitrators can look at bribes evidence", published on 28 July 2008 at www.iareporter.com.

[915] Indications were found that Siemens had paid bribes of at least USD 27 million in order to obtain the identity cards project. *Inter alia* a former Siemens executive testified under sworn testimony in German Court that the contract between Siemens and Argentina was procured by corrupt means.

[916] See e.g. Financial Times, "Siemens to pay EUR 1 billion to close bribery scandal", published 15 December 2008, www.ft.com; The New York Times, "Siemens to pay $1.3 billion in fines", published 15 December 2008, www.newyorktimes.com; Süddeutsche Zeitung, "Ein Bittgang, der sich gelohnt hat – Siemens zahlt für weltweite Bestechungstaten eine Rekordstrafe von 610 Millionen Euro an US-Behörden – und fühlt sich trotzdem gut behandelt", published 15 December 2008, www.sueddeutsche.de. Note that Siemens paid approximately USD 350 million to the Securities and Exchange Commission, USD 450 million to the U.S. Department of Justice, and EUR 395 million to the German authorities.

corruption. By no means shall the tribunal create obstacles for the discovery of the truth.

8. Conclusion

It can be concluded that nowadays most investment treaty tribunals take corruption seriously. The tribunals will however demand precise allegations of corrupt practices and will not deal with mere insinuations of illicit conduct. Likewise, general assumptions of widespread corruption in a certain region will not be sufficient for the tribunal to consider the issue. By all means, an investment treaty tribunal will demand specific evidence. In addition, it appears that they will not merely depend on the parties' wishes, but will evaluate the available evidence to ensure that corruption does not exist with regard to the investment. To date, only one investment treaty tribunal has exercised its *ex officio* power pursuant to Article 43 of the ICSID Convention to shed light on suspicious circumstances surrounding the investment. Whether such exercise of power may even amount to a duty to perform independent fact finding in corruption situations is for future tribunals to decide. The wide discretion of the tribunal appears to be sacred, thus it is not surprising that no *ad hoc* Committee advanced to limit the tribunal's discretion whether to call for witnesses or for more evidence.

Moreover, the difficulty of obtaining sufficient evidence and proving corrupt practices often leads tribunals and parties to rely on national investigations. Some tribunals have preferred not to rule on the issue of corruption and to advance with the decision over the claim without considering that matter, since national investigations were still ongoing. Challenges against the award have shown that tribunals minimise the weak point of an award by thoroughly dealing with corruption allegations and evaluating the presented evidence in a comprehensible way.

III. Suggested role of the investment treaty arbitrator towards corruption

When dealing with corruption in investment treaty disputes, the arbitrator has an additional responsibility resulting from the interaction of the detrimental impact corruption has on the public and the implications a treaty arbitration award has on non-participants.[917] The consequences for the affected population are immense. The relevant population will suffer from the corruption inherent damages analysed in Chapter One, such as the negative impact on the economy through the elimination of competition, on education, on democracy and so forth.[918] Besides, and as mentioned above, the public is deprived of the corresponding amount to the

[917] See Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 126. ([…] *it is most imperative that the greatest degree of diligence in scrutiny for corruption must be applied by a tribunal because, although,* […] *it is the populace that will be most affected, the populace have no advocate in the arbitral reference*.").
[918] See Chapter One C.

paid bribe. Since the briber was willing to spend such sum for the bribes, the notion exists that she would have paid the same amount for the concession or other public contracts. In addition, the population is also involved as taxpayers paying indirectly for any obligations to pay damages of the State. Moreover, as recipient of the services and goods underlying the dispute, the public pays the extra amount added on the price or tariff to compensate for the paid bribes. Hence, the subject matter and the outcome of an investment treaty arbitration dealing with corruption are definitely of public interest.

This calls for an in-depth analysis by the investment treaty arbitrator in order to evaluate the potential involvement of corrupt practices in relation to the subject matter of the dispute. On the one hand, this requires alertness and sensitivity for suspicious settings surrounding the investment. On the other hand, the arbitrator will need special powers to comply with this task. In our view, the investment treaty arbitrator has on hand all the inherent powers that she needs to perform her function to administer justice and to come to a sound and independent decision by rightly applying the applicable law, by considering the impact her decision might have on the parties and on the public, by observing transnational public policy, by acknowledging the contribution her decision might make to the development of international investment law and the evolution of the international investment regime. Under special circumstances, the public element in her office will also transform into a duty to use these powers.

This study concludes that the investment treaty arbitrator has a duty to deal with corruption issues (see below at **1.**). When suspicious facts come to light, the arbitrator has the right to raise the issue of corruption on her own motion (see below at **2.**) and investigate the matter (see below at **3.**). In cases with red flags indicating corruption, such right may turn into a duty (see below at **4.**), while to date there is no ground for obliging the arbitrator to disclose her findings to third parties (see below at **5.**). As with all exercise of power, there are certain limitations to the investment treaty arbitrator's authority to investigate the corrupt issue (see below at **6.**).

1. Duty to thoroughly deal with corruption issues

The first and most general duty of the investment treaty arbitrator is to thoroughly deal with the delicate and hot issue of corruption. The investment treaty arbitrator shall not turn a blind eye on either corruption allegations[919] or other indications of corruption. She should take any reasonable measure to evaluate whether or even

[919] The arbitrator's duty to thoroughly deal with corruption allegations was recently confirmed by the tribunal in *ECE Projectmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH&Co v The Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013 (hereinafter: "*ECE v Czech Republic*, Award"), para 4.871 ("*The Tribunal accepts [...] that it is bound to consider allegations of corruption. International tribunals cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof*.").

what role corruption plays for the subject matter of the proceedings. There should be no difference based on the stage of the proceedings where such allegations are made or suspicions arise, if there is an explanation for such delay. Note that the investment treaty arbitrator has wide discretion in choosing how to address corruption.[920]

2. Right to raise issue of corruption on her own motion

The responsibility of the investment treaty arbitrator to perform her function leads to the conclusion that she cannot be limited by the submissions of the parties in her discretion to reach a sound and independent judgment.[921] The investment treaty arbitrator must have the liberty to evaluate what is essential to fulfil her mandate. Thus, the arbitrator has the right to raise the issue of corruption on her own motion independently from the arguments, assessments and perceptions of the parties. In *Metal-Tech v Uzbekistan*, it was the tribunal and not the other party who became suspicious with certain facts that came to light in the hearing. It was in fact the tribunal who raised the issue of potential corrupt acts.

In addition, the investment treaty arbitrator is not bound by the views of the parties with respect to the assessment of the legal consequences of corruption.[922] Rather – and as mentioned before – the arbitrator has the duty to come to a sound and independent decision about the subject matter at issue. Moreover, her legal findings may also be an important contribution to the public discourse on general questions on how to deal with corruption in investment treaty arbitration.

3. Right to investigate on own motion – independent fact finding

The right to raise the issue of corruption is attended by the need to investigate into the matter and engage in an independent fact finding if needed. Any legal finding requires a factual basis. In international arbitration, such basis and the reality must not always coincide. However, this should be different for investment treaty arbitration. Due to the many implications of the decisions taken by the investment treaty arbitrator such factual basis must represent the truth. In investment treaty arbitration there is no room for having only the parties decide whether corruption shall be considered or not. This may not be confused with the parties' autonomy to decide the scope of the dispute;[923] which will most certainly remain by the parties. However, the arbitrator may require more information in order to ensure a sound

[920] See Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2010, 10.
[921] See also Kessedjian, "Transnational Public Policy," 863. ("*It would be disservice to the parties, to the arbitration process and to society at large to say that arbitrators can only look at issues which have been posed by the parties. By doing so, they would become accomplice to the grossest violations of transnational public policy* […]"). See also Cordero Moss, "Tribunal's Powers Versus Party Autonomy."
[922] For an overview on different situations how a tribunal may develop its own legal arguments see Cordero Moss, "Tribunal's Powers Versus Party Autonomy," 1236 et seq.
[923] For the importance that the arbitrator does not modify the scope of the dispute see Ibid., 1234.

judgment on the specific subject matter chosen by the parties. Indeed, the parties cannot exclude the fact that corruption does matter for the arbitrator's reasoning.

In order to ensure that her decision is based on the truth, the arbitrator needs discretion to go into the matter. The arbitrator must have the power to "*call upon the parties to produce documents or other evidence*",[924] inspect relevant scenes, make inquiries, ask for expert opinions, ask for assistance from other organisations or institutions and engage in any other fact-finding operation she deems appropriate. The tribunal in *Metal-Tech v Uzbekistan* paved the way for future tribunals to take advantage of their wide discretion granted by Article 43 of the ICSID Convention.[925]

4. Duty to investigate when strong indications of corruption

An open question remains whether such right to investigate may also become a duty for the investment treaty arbitrator. So far only one tribunal made indications, which point to the tribunal's recognition of such duty.[926] However, the *ad hoc* Committees reviewing the approaches taken by the tribunals have so far steadily rejected such duty by emphasising the wide discretion granted to the tribunal under the arbitration rules.[927] The rejection of a tribunal to engage in independent fact finding has not been accepted as annulment ground. From such annulment case law, it may be concluded that the investment treaty arbitrator has at least a duty to exercise her discretion.

However, against the background that the function of the investment treaty arbitrator has a public element, the duty towards the public and the obligation to safeguard transnational public policy may also turn into a duty to investigate where the indications of corruption are strong and lead to a reasonable suspicion.[928] In other words, where indicia of corruption are apparent, the discretion of the arbitrator may be limited by the inherent responsibilities of her office in a way which will consequently require the arbitrator to engage in an independent investigation and fact-finding.[929] This also leads to the duty to allow allegations or

---

[924] Article 43 of the ICSID Convention:
"*Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,*
(a) call upon the parties to produce documents or other evidence, and
(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate."

[925] In the other words, "*in light of the Metal Tech ruling and subsequent arbitral practice, parties to investment arbitration should be aware that the mere adduction of evidence raising suspicions of corruption could prompt a sua sponte investigation by the arbitral tribunal, even if neither party makes specific allegations in this respect*", Thomas Kendra and Anna Bonini, "Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?," *Journal of International Arbitration* 31, no. 4 (2014): 448.

[926] See *Metal-Tech v Uzbekistan*, Award, para 241.

[927] See above.

[928] See also Llamzon, *Corruption in International Investment Arbitration*, 227.

[929] See also Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator," 423 et seq.

evidence of corruption at any stage of the proceedings, provided there is a reasonable ground for the delayed raising of the issue or the production of evidence. The arbitrator may have to adjust the proceedings to the new circumstances and provide equal opportunities to the parties in presenting their case.

5. No duty to disclose

The final question is whether the arbitrator has a duty to inform the relevant authorities about the corrupt practice and thus about criminal behaviour. Most commentators reject such implied duty to disclose for international arbitrators in general.[930] The conclusion that the investment treaty arbitrator has to thoroughly deal with corruption allegations or even raise corruption concerns *ex officio* is based on the concept that her office has a public element, which she has to take into consideration for her administration of justice. Thus, the arbitrator may not render an award that ignores corruption and thus perpetuates its damages to society. The duty of the arbitrator is to come to justice in her *own* decision. However, this duty cannot be interpreted as going beyond her mandate to render a judgment settling the dispute between the two parties to the arbitration. In addition, it is said to be contra-productive to the proceedings if an atmosphere of fear and mistrust is created.[931]

However, such duty to disclose may arise from national anti-corruption laws. In this context, Hwang and Lim refer to anti-money laundering regulations in Singapore, which "*may impose on arbitrators an obligation to report his or her reasonable suspicions of a party's corrupt activities, and exempt them from liability for any breach of confidentiality obligations*".[932] Moreover, in their view, an arbitrator disclosing corrupt activities would even in absence of any legal obligation of disclosure not be liable for breach of confidentiality.[933]

It should also be noted that the investment treaty arbitrator may rely on assistance of national authorities in order to obtain evidence or other valuable information. The line between receiving assistance and cooperating with national authorities might be thin, wherefore an arbitrator must always ensure not to violate the rights of the parties and not to put their integrity in danger. In the same context, investment treaty arbitrators must also be aware that their decisions will most

[930] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 84 et seq.; Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," 46; Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 283; Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 110. Cremades refers to Article 6 of the European Convention On Human Rights. Note that Raouf raised the question, but provides no answer, see Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2010, 16.
[931] Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 111.
[932] Hwang and Lim, "Corruption in Arbitration - Law and Reality," 69 et seq.
[933] Ibid., 72 et seq.

likely become available to the public, for which reasons the established facts of corruption as well as their findings may have a similar effect on the initiation of criminal proceedings. Nevertheless, since we have come to the conclusion that it is a duty of the investment treaty arbitrator to thoroughly deal with corruption and also to assess the legal consequences of such conduct for the claim, it cannot be seen as a violation of the duty towards the parties, if she states the reasons of her decision in the award.

6. Limitations

The powers and duties of the investment treaty arbitrator to shed light on suspicious conditions surrounding the subject matter of the dispute have the limit of due process and equality of the parties.[934] Any exercise of powers must be handled with care and caution. Doubts or suspicions of the arbitrator about potential involvement of corruption must be raised to the parties first. The arbitrator must secure that they have the opportunity to make comments, explanations or changes to their submissions. In order to secure the equality of the parties, the arbitrator must avoid any disadvantages of a party when evidence is admitted at an advanced stage, when she invites the parties to produce more evidence, or when she specifically asks for a certain piece of evidence. This requires an adjustment of the proceedings in timely and substantive matter. In order to give both parties the same opportunity to prepare and adapt their arguments to the new allegations and evidence they will need a reasonable amount of time.

Moreover, it is not upon the arbitrator to decide the scope of the dispute. Her powers are bound to her duty of rendering an independent judgment within that scope. Thus, the arbitrator may not engage in a fact-finding unrelated to that scope or modifying that scope. However, seeking more information has to be understood as establishing the necessary basis for making a sound legal finding on the respective subject matter. In order to do so, the investment treaty arbitrator must ensure that the investment is not tainted by corruption and that no party has committed corrupt practices with regard to such investment.

In addition, the arbitrator must be aware of the seriousness such allegations have on the accused person, especially since most findings in investment treaty arbitration will become public. Thus, the arbitrator must refrain from making positive findings of corruption without basis, but on mere suspicion. Moreover, corruption is easily alleged and may be used for tactical reasons. However, while these reasons lead to the notion of applying care when dealing with corruption, they also call for disclosing the truth before coming to a legal judgment.

[934] For the limitations on the proactive role of the international arbitrator in general see B.VI.

IV. Conclusion

The role of the investment treaty arbitrator goes further than the function of the international arbitrator in general. While the vast majority of the investment treaties still lack any reference to an anti-corruption approach, the particularities of international treaty arbitration speak for an additional responsibility of the arbitrator. First, the consent to arbitration does not arise from the negotiations of the parties of the dispute, the specific terms are rather set by the host State and the home State, which are accepted by the investor when initiating arbitration proceedings. Second, the relationship between the parties is unequal, since the host State is not merely involved as private party to a contractual dispute, but actually as a State that has its sovereign decisions challenged. This also leads to the specific subject matter of the dispute consisting in the review of the mostly unilateral acts performed by the host State as a sovereign. Finally, the legal framework of investment treaty arbitration is particular and the applicable law will – to a certain extent – be international law. Most significantly, the impact of a decision of an investment treaty arbitrator goes beyond the limits of the specific disputes. On the one hand, the probably publicly available decision will to some extent contribute to the development of international investment law regime. It will provide substance for the public discourse and thus be the basis of further disputes and decisions. On the other hand, the decision will, due to its delicate subject matter, also have an impact on the population of the host State. This is most certainly true for decisions involving corruption issues, since the most affected partiy of corrupt practices is the public. Corruption deprives the public from fair prices of services and goods, and diverts substantial amounts of resources originally meant for the public budget – thus actually belonging to the public.

The reviewed case law shows that tribunals have become sensitive to the issue of corruption, but only slowly engage actively in shedding light to suspicious circumstances surrounding the investment. Due to the seriousness of such allegations, tribunals will rely on and demand evidence provided by the parties. In the past, where the evidence was scarce, tribunals have often refrained from taking actions on their own motion and preferred to take no decision on the issue. In the author's view, there is a duty of the arbitrator that goes beyond merely deciding over the allegations, arguments and evidence provided by the parties. In case of corruption much more is at stake. The public interest involved and the additional responsibility of the investment treaty arbitrator leads to a duty to ensure that the subject matter of the dispute is not tainted by corruption. The inherent powers of the arbitrator to come to a sound judgment of her own provide the necessary tools to investigate. When doing so she must always observe due process and the equality of the parties.

D. Concluding remarks

The international arbitrator in general should engage in a proactive role towards corruption and actively seek to shed light on suspicious circumstances independently from the views of the parties. However, the international treaty arbitrator has an additional responsibility, which comes with the public element in this function. She must be aware that her decision on corruption in international investment will most certainly have an impact beyond the parties of the dispute. Non-participants will also be affected by her findings. Most considerably, the public, in form of the population of the involved State, will be influenced significantly by the corrupt action itself and by the decision of the arbitrator on corruption in the investment treaty dispute. In addition, the arbitral award will be part of the evolution of the international investment law and regime, for which reason her decision will also have an influence on other investors and other host States. The role of the investment treaty arbitrator amounts to being the guardian of the international community and especially of the international investment community.

From this it follows that the investment treaty arbitrator has the duty to thoroughly deal with corruption issues. In order to fulfil her task, she has the power to raise the issue of corruption on her own motion and to engage in fact finding. When the indications and red flags are reasonably strong, then this right turns into a duty, since her responsibilities to administer justice and observe transnational public policy limit her discretion. Certainly, her powers and duties are overseen by the inviolable principles of due process and equality of the parties. In conclusion, the investment treaty arbitrator must not only secure that she is no obstacle to finding the truth, but she must ensure to promote the finding of the truth within the limits of due process.

CHAPTER FIVE:
CORRUPTION AND STATE RESPONSIBILITY

The notion that public international law plays a major role in investment arbitration has already been mentioned several times in the previous chapters. The present chapter is about an aspect of public international law, which is not only crucially important for investment arbitration in general,[935] but especially for the approach to corruption issues in investment arbitration: the rules of State responsibility and specifically the attribution of conduct to the State.[936] In order to provide a basis for a comprehensive analysis of how corruption may amount to (i) a cause of action of the investor as investment treaty breach or (ii) a defence of the host State to the investor's investment treaty claim, we first need to establish to what extent corruption may entail State responsibility.[937]

This requires a closer look at two issues. First, corruption must amount to a breach of an international obligation of the State and secondly, the act in question must be attributable to the State. With regard to the first question the commission of the corrupt act may constitute a breach of the host State. The corruption issues in investment treaty arbitration do not stop there. As seen in Chapters Two and Three there is an international consensus that corruption needs to be tackled. Thus, there exist international obligations on the host State that may have been breached by the circumstances surrounding the corrupt act at issue. The State may have failed to prevent the illegal act from happening by implementing the required anti-corruption measures or may have failed to prosecute the corrupt public officials. While for the latter situations the focus will be on the own acts and omissions of the host State as a response to the corrupt conduct as well as the concrete threshold for a breach of such obligation, the core question with regard to State responsibility is whether the corrupt conduct is attributable to the host State.

---

[935] Kaj Hobér, "State Responsibility and Attribution," in *Muchlinski Et. Al. (eds.) Oxford Handbook of International Investment Law* (Oxford; New York: Oxford University Press, 2008), 550.
Note that the following four essays are almost identical: Kaj Hobér, "State Responsibility and Investment Arbitration," *Transnational Dispute Management* 2, no. 5 (2005); Kaj Hobér, "State Responsibility and Investment Arbitration," in *Ribeiro (ed.) Investment Arbitration and the Energy Charter Treaty* (New York: JurisNet, 2006), 261–89; Kaj Hobér, "State Responsibility and Investment Arbitration," *Journal of International Arbitration* 25, no. 5 (2008): 545–68; Hobér, "State Responsibility and Attribution." Since the prior published essays are completely included in the newer ones and in order to avoid unnecessary inflation of the footnotes, reference will primarily be made to the most recent article.

[936] Note that attribution is not only important in the field of international responsibility; it can be relevant to *any* conduct of State. See Luigi Condorelli and Claus Kress, "The Rules of Attribution: General Considerations," in *The Law of International Responsibility*, First (New York: Oxford University Press, 2010), 222., who consider "*the topic of attribution* [a]*s one of fundamental importance for the international legal system as a whole*".

[937] Note that this chapter deals only with issues of State responsibility and attribution in connection with corruption in investment treaty arbitration. Questions about consequences to the investor's corruption claim or the corruption defence raised by the host State based on the invalidity of the transaction or forms of unilateral acts as e.g. estoppel, waiver, recognition do not fall within the scope of State responsibility and will be dealt with in Chapter Six and Seven.

This question is highly disputed. The argument is often made that since corrupt public officials act for their own benefit and to the detriment of the State their corrupt practice does not represent the official will of the State and should therefore not be considered an act of the State. However, at the same time the corrupt act is only made due to the official authority the public official was granted by the host State. While the public official acts contrary to its original mandate, such act will be based on the exercise – although outside of the original scope – of its official authority. Thus, the question arises whether the personal benefit corrupt officials seek to achieve and the *ultra vires* conduct bar the attribution and hence the State responsibility. Note that this issue is decisive regardless of who – the investor or the host State – bases its case on corruption.

This chapter starts with three vivid examples of how current case law has approached the issue of attribution of corrupt conduct (see below at **A.**). An overview of the rules of customary international law and the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts* (***ILC Articles***)[938] as basis for attribution follows together with the question of their applicability to corruption in investment treaty arbitration (see below **B.**). Subsequently, we will assess in abstract terms whether corruption may amount to a breach of an international obligation of the host State, which constitutes one element of an internationally wrongful act (see below at **C.**). This chapter concludes with a detailed analysis of attribution issues in context with corruption in investment treaty arbitration – the focus being on attribution to the State of corrupt conduct of State organs, State entities, and private actors (see below at **D.**).

A. State responsibility for corruption in arbitral practice

Three cases serve as vivid examples for the difficult questions that arise in the context of State responsibility in general and attribution of corrupt conduct in investment treaty arbitration in particular. First, in *World Duty Free v Kenya* the question of attribution arose in relation to corruption as defence of the host State (see below at **I.**). Second, in *EDF v Romania* the attribution of the corrupt conduct of State officials was crucial for the investor's case (see below at **II.**). Third, in *Metal Tech v Uzbekistan*, the tribunal refrained from raising the question of attribution in relation to the corruption defence (see below at **III.**).

I. *World Duty Free v Kenya*

In *World Duty Free v Kenya* the issue of attribution played a crucial role for the outcome of the case, in particular with regard to the question whether the receipt of the payment by the then-President Daniel arap Moi and his knowledge of the

[938] See Yearbook of the International Law Commission (ILC), 2001, Vol. II, Part Two, 31. The text is also published along with the commentaries in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (Cambridge: Cambridge University Press, 2002).

corrupt transaction, since he requested the bribe in the first place, could be attributed to Kenya.

1. Facts

The dispute arose out of an investment contract concluded in 1989 for the operation of two duty-free stores at the international airports of Nairobi and Mombasa. The basis for arbitration was the ICSID arbitration clause included in the investment contract[939] and not an IIA. The investor, a company registered in the Isle of Man owned by a Dubai businessman, Mr Ali, alleged that in 1992 a close counsellor to President Moi, Mr Pattni, misused the name of World Duty Free without the investor's awareness in order to commit massive fraud and to raise funds for President Moi's re-election campaign.[940] Subsequently, Kenya allegedly expropriated the investor of World Duty Free through various acts of Kenyan courts with the intention to cover up the fraud.[941] The courts declared Mr Pattni the beneficial owner and placed the company under receivership, which through mismanagement allegedly led to the destruction of the investment.[942] Moreover, the investor alleged that the judgments of Kenyan courts supporting these measures were based on forged documents[943] and that the Government of Kenya used its power to block any appeals against these judgments.[944]

---

[939] The arbitration clause of the contract reads:
"*9 Arbitration:*
(1) The parties hereby consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes. ("the Centre") all disputes arising out of this Agreement or relating to any investment made under it for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention").
(2) It is hereby stipulated (a) that the Company is a national of the United Arab Emirates:(b) that the transaction to which this Agreement relates is an "investment" within the meaning of the Convention; (c) that any arbitral tribunal constituted pursuant to this Agreement shall apply English law; (d) that any arbitration proceeding pursuant to this Agreement shall be conducted in accordance with the Rules of Procedure for Arbitration Proceedings of the Centre in effect on the date on which the proceeding is instituted."

[940] See *World Duty Free v Kenya*, Award, para 68. Mr Pattni acted through Goldenberg International Ltd (*Goldenberg*) and forged documents to pretend the export of gold and diamonds to foreign consignee. By presenting those false documents to the Treasury and the Central Bank of Kenya, Goldenberg received export compensation. According to Mr Ali the fraud amounted to USD 438 million. As late as 1994 and only under pressure of the International Monetary Fund, Mr Pattni and some of his accomplices were arrested.

[941] *World Duty Free v Kenya*, Award, paras 70-71.

[942] *World Duty Free v Kenya*, Award, paras 70-71.

[943] The High Court of Kenya declared by order of 24 February 1998 Mr Pattni on his request the beneficial owner of the company from 1992 onwards and placed the company under receivership. Mr Ali was able to prove forgery and the Kenyan police indicted Mr Pattni, however, the Attorney General under the influence of the Kenyan Government refused to bring the case to trial. In addition, when Mr Ali sought to lift the receivership in 1999, he was informed that in order to restore the contractual position he would have to decline to give prosecution evidence in the Goldenberg fraud. After a statement to the press on 19 July 1999 by Mr Ali linking President Moi and others to the Goldenberg scandal, Mr Ali was arrested and deported to United Arab Emirates. In addition, a formal judgment and a decree by the High Court of Kenya on 24 and 27 September 2001 were rendered in favour of Mr Pattni.

[944] See *World Duty Free v Kenya*, Award, para 70.

During the proceedings, the investor itself stated that he had been requested to make a 'personal donation' of USD 2,000,000 to the back-then President of Kenya, Daniel arap Moi, in order to gain approval for the project.[945] In the first meeting with the President, Mr Ali brought cash worth USD 500,000 in a brown briefcase, which only represented a portion of the requested amount. While entering the room an intermediary placed the briefcase on the wall. After the meeting with the President, Mr Ali collected the briefcase and found the money replaced by fresh corn.[946] Subsequently, the President approved the investment and the investment contract was concluded.

After these facts were introduced into the arbitration proceedings, Kenya submitted an application to avoid the contract alleging that under the applicable law of the contract – English and Kenyan law – the contract tainted with illegality was unenforceable and lacked "the force of law".[947]

2. Tribunal's findings

After having established that the investment contract had been obtained by corruption,[948] the tribunal dismissed the claim on two grounds. First, the tribunal concluded that corruption is contrary to international public policy or transnational public policy,[949] for which reason "claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld".[950] Secondly, it analysed the consequence of the findings of corruption under English and Kenyan law. The tribunal found that the violation of Kenyan and English public policy had a procedural and a substantive effect.[951] On the one hand, on the ground of *ex turpi causa non oritur action*, the investor was not legally entitled to maintain any of its pleaded claims.[952] On the other hand, the contract obtained by corruption was voidable and formally set aside by Kenya by its Counter-Memorial.[953]

---

[945] See *World Duty Free v Kenya*, Award, para 130.
[946] See *World Duty Free v Kenya*, Award, para 130.
[947] *World Duty Free v Kenya*, Award, paras 105-109. Note that Kenya first submitted an application on 19 March 2003 alleging that the contract was unenforceable and requesting the dismissal of the investor's claims, before it expressly voided the contract in its Counter-Memorial dated 18 April 2003 ("[…] *the Claimant's claims must fail because they arise from a contract that, on the Claimant's own case, is unenforceable, and which the Republic of Kenya now avoids*"), *World Duty Free v Kenya*, Award, para 109.
[948] The investor had alleged that the payment was a lawful "*gift of protocol or personal donation made to the President to be used for public purposes*" and fell under the Kenyan cultural system of 'Harambee', *World Duty Free v Kenya*, Award, para 133. The tribunal was however not persuaded and found that the payments were only made with the purpose of obtaining the approval of the President for the investment and must therefore be considered a bribe, *World Duty Free v Kenya*, Award, para 136.
[949] The basis of the tribunal's finding was an analysis of domestic anti-bribery laws, international conventions against corruption and decisions of courts and commercial arbitral tribunals. For a detailed analysis of *World Duty Free* and transnational public policy see Chapter Three B.III.1.
[950] *World Duty Free v Kenya*, Award, para 157.
[951] *World Duty Free v Kenya*, Award, para 160.
[952] *World Duty Free v Kenya*, Award, para 179.
[953] *World Duty Free v Kenya*, Award, para 182.

The issue of attribution arose twice. First, the tribunal found that the receipt of the payment by the then-President could not be attributed to Kenya, since it was a bribe.[954] The tribunal's explanation was fairly scarce and somewhat unclear. However, it appears that the tribunal refrained from analysing whether the participation of the then head of State of Kenya in corruption by (i) soliciting and (ii) accepting the bribe with the aim of abusing public power was attributable to it under the rules of State responsibility. The tribunal rather limited its consideration to the question whether the receipt of the payment could be seen as an action of Kenya, which then would have concluded the contract with "full knowledge" of the payment amounting to a waiver or an affirmation.[955] In the words of the tribunal

> "Mr. Ali's payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself. If it were otherwise, the payment would not be a bribe. It is also important to recall that the Respondent in this proceeding is not the former President of Kenya, but the Republic of Kenya. It is the latter which is the contracting party to the ICSID Convention; and although the Agreement of 27 April 1989 describes the Government of Kenya as the Claimant's co-contracting party, the Claimant has treated that Agreement as having been made with the Republic of Kenya throughout this proceeding, for obvious reasons."[956]

Secondly, also in context with the avoidance of the contract, the investor argued that the knowledge of the President about the bribe was attributable to Kenya, for which reason Kenya had known about the corrupt transaction over 10 years before the contract was set aside during the arbitration proceedings. Against the background that Kenya had failed to take any appropriate actions against the corrupt transactions in the past, in the investor's view, Kenya had affirmed the contract or at least waived its rights to estoppel on grounds of corruption.

In the tribunal's view, under the applicable English law the knowledge of a corrupt public official could not be attributed to the State.[957] The tribunal based its conclusion on English agency law, under which the knowledge of an agent in bribery is not attributable to the innocent principal.[958] In the words of the tribunal

> "[…] there can be no affirmation or waiver in this case based on the knowledge of the Kenyan President attributable to Kenya. The President was here acting corruptly, to the detriment of Kenya and in

[954] *World Duty Free v Kenya*, Award, para 169.
[955] Note that the investor had raised the issue of attribution merely with regard to its argument that due to the full knowledge of Kenya of the payment during the negotiation of the contract and its subsequent performance of the contract, it was estopped of rescinding the contract (waiver and affirmation), see *World Duty Free v Kenya*, Award, para 114.
[956] *World Duty Free v Kenya*, Award, para 169.
[957] *World Duty Free v Kenya*, Award, para 185.
[958] *World Duty Free v Kenya*, Award, para 185.

> violation of Kenyan law (including the 1956 Act). There is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal) of a state officer engaged as its agent in bribery."[959]

Rejecting the argument of the investor that due to the exercised power of the former President Daniel arap Moi he was in fact to be seen as the State, the tribunal emphasised that also the President is subject to the rule of law. It is worth quoting the tribunal in full

> "[t]he Claimant ripostes that the Kenyan President was "one of the remaining 'Big Men' of Africa, who, under the one-party State Constitution was entitled to say, like Louis XIV, he was the State": paragraph 5 of its written submissions dated 18 January 2006. In the Tribunal's view, this submission is ill-founded under Kenyan law: the President held elected office under the Kenyan Constitution, subject to the rule of law (including the 1956 Act). As Lord Denning MR famously said in Ex p. Blackburn [1968] 2 QB 118, 148 (quoting Thomas Fuller): "Be ye never so high, the law is above you"; and in law, in Kenya as in England, the position is materially the same."[960]

Consequently, the tribunal found that Kenya had only gained knowledge of the corrupt payment during the proceedings and was therefore not able to affirm the voidable contract or to waive its right to avoid the contract.[961] In the tribunal's view Kenya "cannot waive a right which [it] does not know to exist.[962]

3. Comments

As the first decision in investment arbitration where the tribunal's findings were based on corruption, *World Duty Free v Kenya* has become the basis and the starting point of any discussion on corruption in international arbitration. The focus of the tribunal on corruption was widely welcomed, whereas the reasoning of the tribunal both found approval among some commentators and has been highly disputed in scholarship.[963]

---

[959] *World Duty Free v Kenya*, Award, para 185.
[960] *World Duty Free v Kenya*, Award, para 185.
[961] *World Duty Free v Kenya*, Award, para 184.
[962] *World Duty Free v Kenya*, Award, para 184.
[963] See e.g. Andreas Kulick and Carsten Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," *Legal Issues of Economic Integration* 37, no. 1 (2010): 66 et seq.; Aloysius P. Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 42 et seq.; Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 558 et seq.; Llamzon, *Corruption in International Investment Arbitration*, 251 et seq.; R. Zachary Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," *Virginia Journal of International Law* 52, no. 4 (2012): 1014 et seq.; Kulick, *Global Public Interest in International Investment Law*, 317 et seq.

While the tribunal's decision was based on English law and is therefore a mere demonstration of the strict *ex turpi causa* defence under English law, commentators have questioned the tribunal's reluctance to apply the principles of international responsibility and attribute the corrupt conduct of the President of Kenya to the State.[964] In this regard emphasis was made that under the rules of State responsibility under international law a State cannot escape liability by relying on the lack of knowledge of the illegal action taken by its state organ.[965] Haugeneder and Liebscher see such notion also confirmed by Article 5 of the Civil Law Convention on Corruption, which calls for State responsibility for corrupt acts committed by "public officials in the exercise of their functions" and requires the contracting States to provide for appropriate procedures under domestic law for victims of such acts to claim compensation.[966] Moreover, commentators have criticised that the tribunal failed to consider that the motive of the corrupt act was granting an *official* public contract, which is a 'classic example' for the exercise of the official capacity.[967] On the basis of the principles of State responsibility Raeschke-Kessler and Gottwald argue for upholding the investment contract obtained by corruption valid and enforceable.[968] In their view

> "[s]tate responsibility includes contractual responsibility, which means that the state must in general meet its obligations as a contractual party in spite of the corrupt activities of its officials. The economic argument for this principle is simple: if the state could easily avoid any obligation resulting from a contract tainted by corruption, it could profit from its own violation of international law."[969]

Other commentators have supported the tribunal's decision in *World Duty Free v Kenya* and have militated against the application of the principles of State

---

[964] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 558 et seq.; Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 66 et seq.; Kulick, *Global Public Interest in International Investment Law*, 319 et seq. See also Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," 1015 et seq. Note that while Torres-Fowler acknowledges the inapplicability of the ILC Articles since the investor "*was not arguing that it had been harmed by an internationally wrongful act*", he emphasises "*that there is no reason to believe that they could not adequately provide guidance to an arbitral tribunal*", Ibid., 1015.

[965] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 558 et seq.

[966] Ibid., 559.

Article 5 of the Civil Law Convention on Corruption reads:

"*Article 5 – State responsibility*

Each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities."

[967] Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," n. 103. Moreover, Torres-Fowler emphasises that not only the President has benefitted from the corrupt act, but also Kenya through the royalty payments of USD 1 million a year. He also rejects the tribunal's considerations regarding detriment to the well-being of the taxpayers in Kenya, Ibid.

[968] Raeschke-Kessler and Gottwald, "Corruption," 596 et seq.

[969] Ibid.

responsibility to the facts of the case for two reasons.[970] First, as contract-based arbitration, the question of attribution of the corrupt behaviour of the President of Kenya is governed by the applicable law of the contract, which in this case is municipal Kenyan and English law.[971] Secondly, commentators have argued that the issue of attributing the corrupt conduct of the President of Kenya, i.e. the solicitation of the bribe, was not a question of State responsibility governed by the ILC Articles, but rather a question of 'valid expression of State will'.[972] Lim, for instance, understands the underlying question of the President's involvement in the corrupt act not as one of State responsibility, but rather as one of authorisation to enter into commitments on behalf of the State.[973] In his words

> "[s]uch act by the Kenyan President was not sought to be imputed to Kenya for the purposes of establishing Kenya's responsibility for a violation of international law (which would have triggered the application of the [ILC Articles]), but was instead sought to be imputed for the purposes of establishing that Kenya had expressed its intention to consent to the investor's corrupt act through its President. The rules of state responsibility only apply to govern the former issue, not the latter."[974]

The question whether "Kenya had expressed its will to be bound by the corruptly procured contract was" in fact "at the heart of the affirmation argument made by the investor in *World Duty Free*".[975] However, the question was not whether the solicitation of the bribe by the President was attributable to Kenya in order to constitute the expression of will of the State in the form of an affirmation of the corruptly procured contract. The question of attribution of the corrupt conduct of the President was rather only raised with regard to the attribution of knowledge of the President to Kenya as basis for Kenya to subsequently affirm the contract through its performance during 10 years without any corruption based challenge.[976] The expression of will constituting the affirmation and the solicitation of the bribe are two separate acts and need to be analysed accordingly.

---

[970] Kevin Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," *Yearbook on International Investment Law & Policy* 2011/2012 (2012): para. 41 et seq.

[971] Ibid., para 42. ("[…] *in the context of a contract-based claim by an investor against a state, i.e. where the investor has contracted directly with the state and brings an arbitration against it under such contract, international law does not necessarily apply to determine whether the conduct of state officials can be attributed to it. This issue is instead governed by the law applicable to the contract, which in most cases is municipal law (as was the case in World Duty Free).*").

[972] Ibid., para 44. ("*Even assuming international law applied in World Duty Free, the issue whether the Kenyan President's solicitation of bribes from the investor could have been attributed to Kenya was not a question of state responsibility governed by the ARSIWA, as suggested by the above mentioned commentary. Rather, it was a question whether such act by the Kenyan President constituted a valid expression of state will, which is governed by separate and distinct rules of attribution.*").

[973] Ibid., para 45 et seq.

[974] Ibid., para 48. Emphasis added.

[975] Ibid., para 47.

[976] See *World Duty Free v Kenya*, Award, para 185.

The question of attribution of plain knowledge does not consider the commission of an internationally wrongful act and is therefore not a matter of State responsibility. The tribunal therefore rightly refrained from applying the principles of State responsibility for attribution of the President's knowledge to Kenya and referred to the applicable law of the contract, i.e. English and Kenyan law. Since such applicable law does not provide for any attribution of knowledge of the agent to the innocent principal, the tribunal rightly rejected such attribution of knowledge.[977] In this context it is important to note that the rules of attribution under State responsibility and the question whether a contract is tainted by corruption are two different questions.[978] The latter along with the civil law consequences of corruption are governed by the applicable law of the contract.[979]

However, the analysis of the tribunal was merely concerned with the attribution of knowledge. The question remains unanswered whether the corrupt behaviour of the President at the moment of the corrupt transaction – and thus leaving aside the questions of subsequent affirmation or waiver – may be attributable to the host State on the basis that corruption is an internationally wrongful act and under the premise that international law was applicable. This question will be one of the major focuses of this chapter.

The reluctance of the tribunal to at least raise the issue whether international law and the rules of State responsibility may be applicable[980] – despite the contractual choice of law clause – is even more surprising since the tribunal considered international law in its comparative law analysis of international public policy.[981] The question could be raised whether customary international law may find its application through the applicable English (and Kenyan) law.[982] As in many jurisdictions, international law is part of English law,[983] which may call for a *renvoi* to customary international law.[984] While the substantive consequences of the corrupt act on the validity of the contract may be governed by English (and

[977] See *World Duty Free v Kenya*, Award, para 185.
[978] See James Crawford, "Investment Arbitration and the ILC Articles on State Responsibility," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 134.
[979] Ibid.
[980] Note that all three members of the tribunal in *World Duty Free v Kenya* had an outstanding expertise in public international law. In particular H.E. Judge Gilbert Guillaume, the president of the tribunal, who was member of the ICJ from 1987 until 2005, which he presided from 2000 to 2003.
[981] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 42; Llamzon, *Corruption in International Investment Arbitration*, 251.
[982] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 42 et seq.; Llamzon, *Corruption in International Investment Arbitration*, 251 et seq.
[983] See references in Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," n. 168. See also Llamzon, *Corruption in International Investment Arbitration*, 252 n. 53.
[984] Note that for instance in *Inceysa v El Salvador* the tribunal applied the principles and rules of international law in connection with the 'in accordance with host State law'-requirement on the basis that under domestic law of El Salvador international law is considered "*laws of the Republic*", see *Inceysa v El Salvador*, Award, paras 219 et seq.

Kenyan) law, the argument could be made that with regard to corruption as internationally wrongful act, the rules of State responsibility apply.

Without any specific indications for its decision, it appears that the tribunal was guided by the concept of international treaty law.[985] Under Article 50 of the Vienna Convention on the Law of Treaties (***VCLT***), a State can void a treaty procured by corruption of another contracting State.[986] Commentators have challenged the application of the principles of international treaty law to the situation of a contract between an investor and a State which is tainted by corruption.[987]

In conclusion *World Duty Free v Kenya* does not provide any answer as to the applicability of the rules on attribution under international law to corruption committed by public officials. In this context it must be emphasised once more that *World Duty Free v Kenya* was not a treaty based investment arbitration, but it was rather based on a contract stipulating national law as applicable law. The precedential value for corruption issues in investment treaty arbitration where international public law will be at the heart of the case is therefore limited.

II. *EDF v Romania*

EDF v Romania is one of the few cases where corruption was at the core of the investor's treaty claim[988] and dealt with the attribution of a request for a bribe by the staff of the then-Prime Minister to the conduct of State.[989]

---

[985] This was e.g. suggested by Constantine Partasides, former counsel of Kenya in *World Duty Free v Kenya*, see Constantine Partasides, "World Duty Free v The Republic of Kenya: A Unique Precedent?" (Chatman House, March 28, 2007).

[986] Article 50 of the Vienna Convention on the Law of Treaties reads:
"*Article 50: Corruption of a representative of a State*
If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."

[987] Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," n. 102. ("*Although the concept of the procurement of a treaty and a contract through corruption are broadly analogous, its* [sic] *is not clear whether this argument is entirely appropriate in deciding claims of expropriation and to determinations of State attribution. If given choice between applying the VCLT* [Vienna Convention on the Law of Treaties] *or the* [ILC Articles], *the principles of attribution established by the* [ILC Articles] *provide a seemingly more logical and directly applicable solution to the issue that confronted the tribunal in World Duty Free*.").

[988] For other cases where corruption was raised by the investor as basis for its treaty claim see *Methanex v United States*, Award (the investor alleged that the Governor of California enacted regulations harmful to the investor due to political campaign contribution by the competitor); *F-W Oil v Trinidad and Tobago*, Award (the investor alleged that during the negotiation of an oil and gas project with the host State's national energy company bribes were solicited); *Rumeli v Kazakhstan*, Award (investor alleged the solicitation of bribes by the judiciary); *RSM v Grenada*, Preliminary Ruling (the investor alleged that the underlying contract to the dispute was terminated by the host State due to corruption on the side of its public officials).

[989] Note that the issue of State responsibility for the solicitation of a bribe was not discussed as an issue of attribution, but rather in connection with evidence and burden of proof.

1. Facts

EDF participated in two joint venture companies with Romanian entities owned by the Romanian government. One joint venture company, ASRO, held duty-free licences and operated such facilities at several International Airports in Romania. The second joint venture company, SKY, provided in-flight duty-free services on board of the Romanian Airlines TAROM. In 2002, the Romanian entity withdrew from ASRO and the duty-free licences were revoked. The same year, TAROM terminated the service agreement with SKY and refused further access. Thus, the investment of EDF became of no value. EDF alleged that the reason for such behaviour on the side of the Romanian entities was the refusal to pay a bribe of USD 2.5 million solicited by the then-Prime Minister of Romania, Adrian Nastase.

2. Tribunal's finding

The tribunal confirmed that a request for a bribe by a State agency constitutes a breach of the fair and equitable treatment standard and of international public policy.[990] Moreover, the tribunal clarified that any exercise of public discretion based on corruption violates transparency and legitimate expectations. In the clear words of the tribunal

> "[…] a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that "exercising a State's discretion on the basis of corruption is a […] fundamental breach of transparency and legitimate expectations."[991]

The tribunal, however, found the evidence presented by the investor neither clear nor convincing in order to establish corruption.[992] Important for the issue of attribution is the tribunal's finding that the investor had not only to prove

> "that a bribe had been requested […], but also that such request had been made not in the personal interest of the soliciting person, but *on behalf and for account of the Government authorities in Romania*, so as to make the State liable in that respect."[993]

3. Comments

The general statement that the request of a bribe by a State agency constitutes a breach of the fair and equitable treatment obligation that the host State owes to the investor reveals that the tribunal acted on the assumption that the request of a bribe

[990] *EDF v Romania*, para 221.
[991] *EDF v Romania*, para 221.
[992] *EDF v Romania*, para 221. For a detailed analysis of the tribunal's application of the 'clear and convincing' standard of proof see Chapter Eight C.
[993] *EDF v Romania*, Award, para 232, emphasis added.

may be attributable to the host State.[994] Only if the involvement of the State agency in corruption constitutes an act of the host State it may trigger State responsibility under the IIA.

The tribunal however held that in order to attribute the solicitation of a bribe by a State organ it must be established that the request was made "*on behalf and for account*" of the State. A further explanation as well as the doctrinal background of such requirement was omitted in the tribunal's reasoning, which makes it simply not comprehensible. It appears that the tribunal was guided by the relationship between an agent and its principal under civil law, rather than international law. In fact it is questionable that under international law attribution may depend on whether the (corrupt) act was made on behalf and for account of the Government.[995]

The reasoning of the tribunal leads to absurd results. Bribes are always solicited for personal purposes. The main motive of corrupt public officials is to take advantage of their decision-making position by taking bribes and keeping them for personal purposes. It must be borne in mind that the (alleged) basis of the request of USD 2.5 million was the promise of rendering the official decision of extending the Joint Venture for a 10-year term. Such official decision belongs to the scope of authority of the government regardless of whether the money ends up in the Prime Minister's own pocket or not.

Moreover, the additional requirement introduced by the tribunal would lead to the bizarre situation where the public official would have to solicit the bribe "*on behalf and for the account of*"[996] the State. That would mean to transfer the paid money to the public purse, but that would convert the bribe into a sort of levy, tax, fee or special charge; it could not be considered a bribe anymore. A State basing its discretion on a certain sum of money paid to the State – thus to the public – cannot be considered to be corrupt under the core definition of corruption: misuse of public power for private gain. Such behaviour by a State might violate provisions of transparency or legitimate expectations, but it is not corruption.

III. *Metal-Tech v Uzbekistan*

In the recent case of *Metal-Tech v Uzbekistan* the tribunal dismissed the claim on grounds of established corruption, but refrained to engage in any analysis of whether the corrupt acts in question where attributable to the host State.

---

[994] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 37 et seq. ("*The cumulative effect of these holdings is a measure of clarity on State responsibility for* unconsummated *corruption, where the public official was engaged in bribe solicitation/extortion*." Emphasis in original). See also Llamzon, *Corruption in International Investment Arbitration*, 248.

[995] For a detailed analysis of the attribution of corrupt conduct by public officials see below at D, p. 199.

[996] This is the exact wording used by the tribunal in *EDF v Romania*, para 232.

1. Facts

In *Metal-Tech v Uzbekistan*, an Israeli investor brought a claim under the Israel-Uzbekistan BIT against Uzbekistan. The dispute arose out of the investor's investment in Uzmetal, a joint venture with two state-owned companies initiated in 2000. The main objective of the joint venture was the processing of molybdenum products from raw material deposits of the Tashkent region. In 2006, criminal proceedings were brought against Uzmetal's management for alleged abuse of authority and a series of actions were taken by Uzbek authorities which culminated in bankruptcy proceedings against Uzmetal initiated by one of the two state-owned entities.[997] In 2008, Uzmetal was liquidated and its assets transferred to the two state-owned entities, which destroyed any value left of the investor's investment.[998]

2. Tribunal's findings

The corruption defence was initially not brought by the host State, but emerged during the hearing on jurisdiction and liability in January 2012. After further review of additional documents and a one-day hearing on the corruption issues, the tribunal found it established that the investor breached Uzbek anti-corruption law by making payment to (i) the brother of Uzbekistan's prime minster from 1995 to 2003 and deputy prime minister until 2000,[999] and (ii) a member of the Uzbek president's staff.[1000]

On the basis of the established corrupt conduct of the investor, the tribunal concluded that it lacked jurisdiction over the dispute. Due to the violation of Uzbek's anti-bribery law in connection with the establishment of the investment, the tribunal found that the investor had failed to make an investment in accordance with the host State law as required under Article 1(1) of the BIT,[1001] for which reason the consent requirement of Article 25(1) of the ICSID Convention was not satisfied.[1002]

In context with the tribunal's analysis of corruption and its consequences to the jurisdiction of the tribunal, it refrained from even raising the question whether the corrupt behaviour concerning the brother of the back-then Prime Minster and a senior staff member of the President was attributable to the host State. While the tribunal failed to take the involvement of the host State in the corrupt acts into consideration for the jurisdiction decision, it based its cost decision on the host State's "participation, which is implicit in the very nature of corruption".[1003] The

[997] *Metal-Tech v Uzbekistan*, Award, paras 37-54.
[998] *Metal-Tech v Uzbekistan*, Award, paras 50-54.
[999] *Metal-Tech v Uzbekistan*, Award, paras 337-352
[1000] *Metal-Tech v Uzbekistan*, Award, paras 311-327. Note that with regard to the payments made to the third Uzbek national, the tribunal saw no facts on record that would have called for *ex officio* scrutiny nor has the respondent extended its allegation of bribery to these payments, *Metal-Tech v Uzbekistan*, paras 365-366.
[1001] *Metal-Tech v Uzbekistan*, Award, para 372.
[1002] *Metal-Tech v Uzbekistan*, Award, para 373.
[1003] *Metal-Tech v Uzbekistan*, Award, para 422.

tribunal's conclusion is not accompanied by any legal or factual analysis or further explanation. It is rather a statement that stands for itself. The tribunals consideration is worth quoting in full

> "[…] the Tribunal's [cost] determination is linked to the ground for denial of jurisdiction. 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."[1004]

3. Comments

The fact that the tribunal regarded it unnecessary to provide any legal or factual analysis for its conclusion that the host State "participated in creating the situation that leads to the dismissal of the claims",[1005] i.e. corruption, may well be interpreted as an indication that such notion is apparent with regard to corruption. The tribunal did not require any analysis of whether the ILC Articles are applicable to this situation and whether corruption can be attributed to the host State in order to reach its conclusion. For the tribunal such participation is implicit. While the tribunal purposely used the neutral term 'participation' rather than the legal term 'attribution', it nonetheless serves as example for such link between the corrupt conduct of public officials and the responsibility of the host State.

Against the background that the tribunal found the involvement of the host State in the illegal acts at issue apparent and even intrinsic for corruption, the question remains why the tribunal refrained from considering and discussing such participation in its analysis at the jurisdictional stage. In any case, the decision stands for how the question of attribution is generally neglected, while the particularity of corruption calls for a consideration of the involvement of the host State.

[1004] *Metal-Tech v Uzbekistan*, Award, para 422, emphasis added.
[1005] *Metal-Tech v Uzbekistan*, Award, para 422, emphasis added.

B. State responsibility and investment treaty arbitration

Upfront, it must be borne in mind that States and other subjects of international law constituting collective entities may only carry out their activities through individuals.[1006] Thus, under the law of international responsibility it is necessary to establish whether a given conduct of a physical person is to be characterised as an 'act of State'. This is achieved by attribution of the relevant act to the conduct of State.[1007] Attribution is not a legal fiction comparable to principles of liability in domestic law;[1008] it is also not based on a certain link of factual causality between the effects of the act in question and the correspondent conduct of the State, for which reason it is not a question of causation either.[1009] Attribution is rather a normative operation based on principles of international law.[1010] It is a legal operation[1011] by which the actor and/or the act are legally characterised in order to identify the act as that of the State.[1012]

It is important to keep in mind that the following discussion about attribution is directed to the question of attribution of conduct of the State for the mere purpose of State responsibility and is not applicable to other purposes without further adjustment.

[1006] Condorelli and Kress, "The Rules of Attribution: General Considerations," 221; James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility," in *Evans (ed.) International Law* (Oxford; New York: Oxford University Press, 2010), 452; Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge et. al.: Cambridge University Press, 2008), 786; Antonio Cassese, *International Law*, 2nd ed. (Oxford; New York: Oxford University Press, 2005), 246; Stephan Hobe, *Einführung in Das Völkerrecht*, 10th ed. (Tübingen: A. Francke Verlag, 2014), 314; Hobér, "State Responsibility and Attribution," 554; Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*, Ninth (London: Longman, 1992), § 159, 540.

[1007] Note that both terms 'attribution' and 'imputation' are used interchangeably. Since 'imputation' has different meanings in common law and introduces an element of fiction where none is, the ILC decided to use the term 'attribution'. See 3rd Report Special Rapporteur Ago, ILC Yearbook 1971, Vol. II, Part One, 199, 214; 1st Report Special Rapporteur Crawford, ILC Yearbook 1998, Vol. I, 228. However, the term imputation as well as imputability and imputable are nonetheless used in scholarly writings, e.g. Shaw, *International Law*, Chapter 14; Cassese, *International Law*, Chapter 13; James Crawford, *Brownlie's Principles of Public International Law*, Eight (Oxford; New York: Oxford University Press, 2012), Chapter 21.

[1008] Georgios Petrochilos, "Attribution," in *Yannaca-Small (ed.) Arbitration under International Investment Agreements - A Guide to the Key Issues* (New York: Oxford University Press, 2010), 287.

[1009] Knut Ipsen, *Völkerrecht*, 6th ed. (München: Verlag C. H. Beck, 2014), 556 et seq.; Meinhard Schröder, "Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung Und Sanktionen," in *Graf Vitzthum (ed.) Völkerrecht* (Berlin, New York: De Gruyter, 2010), 589; Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht*, Second (Berlin: De Gruyter, 2002), § 176, 895.

[1010] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 91. Article 2(a) ILC Articles clarifies that the conduct must be attributable to the State under 'international law', which shows the normative character of attribution, see Condorelli and Kress, "The Rules of Attribution: General Considerations," 225.

[1011] Ipsen, *Völkerrecht*, 556.

[1012] This follows from the wording of ILC Article 4, para 1: "[…] *shall be considered an act of the State* […]", see also Petrochilos, "Attribution," 287. Petrochilos rejects classifying attribution as a legal fiction, since the connecting factors must exist in fact. Note that Shaw calls it nevertheless a legal fiction, Shaw, *International Law*, 786.

This sub-chapter starts with a brief introduction of the particularities of State responsibility in the investment treaty arbitration context (see below at **I.**). An overview of the ILC Articles on State Responsibility as the current state of the customary international law on State responsibility follows (see below at **II.**), before the applicability of the ILC Articles to the investor-State situation is analysed (see below at **III.**). Finally, the sub-chapter concludes with the applicability of the ILC Articles to the attribution of corruption in investment treaty arbitration (see below at **IV.**).

I. Investment treaty regime as sub-system of State responsibility

The law of State responsibility as part of international law developed from State practice and the interaction of States. The original basis of international responsibility was the State-to-State conception, since the primary subjects on the international scheme were merely States. However, international law has evolved over the last decades and international investment arbitration – along with human rights law and environmental protection – became an apposite example of how the role of individuals increased significantly in international law and changed from 'object' to 'subject' of international law.[1013] IIAs on bilateral or multilateral level as e.g. NAFTA, the Energy Charter Treaty (***ECT***) and the ICSID Convention break with this original concept of international responsibility and confer rights upon non-state actors, the investors. The legal relationship created by such violation is directly between the investor and the host State, while the second party to the treaty – the State of the investor – plays no further role in the new regime. These new regimes establish special mechanisms for the investor to invoke the violation of a right conceded to her by treaty different to the mechanisms applied in the inter-State plane.[1014] Thus, the view has advanced that the investment treaty regime is a 'sub-system' of State responsibility[1015] or a 'distinct regime of international responsibility',[1016] both meaning the same.

Common to both the original regime of State responsibility as well as the new investment treaty regime is the core notion that each internationally wrongful act of a State results in international responsibility of the State;[1017] a well-established

[1013] See Edith Brown Weiss, "Invoking State Responsibility in the Twenty-First Century," *The American Journal of International Law* 96, no. 4 (2002): 812. Weiss especially points at ICSID arbitration and to the shift from State-to-State conception of diplomatic protection to the new direct investor-State dispute settlement system in order to illustrate that the individual no longer has to rely on her State to invoke State responsibility against the host State, but is entitled to invoke it himself. See also Alain Pellet, "The Definition of Responsibility in International Law," in *The Law of International Responsibility*, ed. James Crawford, Alain Pellet, and Simon Olleson (Oxford University Press, 2010), 7 et seq.

[1014] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 13; Llamzon, *Corruption in International Investment Arbitration*, 245.

[1015] Zachary Douglas, "The Hybrid Foundation of Investment Treaty Arbitration," *British Yearbook of International Law* 74 (2003): 184–193.

[1016] Douglas, *The International Law of Investment Claims*, 94–106.

[1017] This fundamental principle of State Responsibility has been set out in ILC Article 1:

principle of customary international law. Thus, for the following analysis it is essential to keep in mind that the international investment treaty regime is governed by both the general rules of State responsibility and specific investor-State rules.

II. The ILC Articles on State Responsibility

The most authoritative document on the law of State responsibility is the final version of the ILC Articles adopted by the General Assembly of the United Nations on 9 August 2001.[1018] The international community has so far failed in implementing the ILC Articles into a multilateral agreement and establishing a treaty stating the rules of State responsibility, for which reason they officially lack any binding character and the status of source of international law.[1019] However, the ILC Articles are widely recognised for (mainly) mirroring the present state of customary international law with regard to the attribution of conduct of States and thus are heavily relied on by international tribunals and scholars with regard to the principles of State responsibility.[1020]

1. General overview of the ILC Articles

The ILC Articles are based upon the fundamental notion that the primary rules – the customary or treaty rules laying down the substantive obligations for States –

"*Responsibility of a State for its internationally wrongful acts*
Every internationally wrongful act of a State entails the international responsibility of that State."

[1018] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*. The ILC started the project of codifying the rules of State responsibility in 1955. The work of the ILC over the last 5 decades and more was directed by a number of outstanding Special Rapporteurs: F. v García Amador, R. Ago, W. Riphagen, G. Arangio-Ruiz, J. Crawford.

[1019] Note however that the ILC Articles were attached to a resolution of the General Assembly of the United Nations (UN GA), which 'took note' of the ILC Articles and 'commended' them to the attention of the members 'without prejudice to the question of their future adoption or other appropriate action'. See GA Res 56/83, 12 December 2001, para 3.

[1020] See e.g. Crawford, "Investment Arbitration and the ILC Articles on State Responsibility," 133; Karl-Heinz Böckstiegel, "Applicable Law to State Responsibility under Energy Charter Treaty and Other Investment Protection Treaties," in *Ribeiro (ed.) Investment Arbitration and the Energy Charter Treaty* (New York: JurisNet, 2006), 259; Hobe, *Einführung in Das Völkerrecht*, 313; Hobér, "State Responsibility and Attribution," 553; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 10; Llamzon, *Corruption in International Investment Arbitration*, 243; Jörn Griebel, *Internationales Investitionsrecht - Lehrbuch Für Studium Und Praxis*, 1st ed. (München: C. H. Beck, 2008), 50.
For ICSID Case law see below at footnote 1066.
Note that the ILC Articles also contain 'progressive development' rather than merely codifying the present state of customary principles of State responsibility. However, there exist a consensus that such progressive thoughts are merely reflected in Part Two and Part Three of the ILC Articles, rather than in Part One. Thus, the rules of attribution (ILC Articles 4-11) are considered as reflecting customary international law. The ILC Commentary clarifies that Article 4 is of "a customary character", Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 95. See also *ICJ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007 (hereinafter: "*Genocide case (Bosnia v Serbia)*"), where the ICJ confirmed that Article 4 is a rule of "customary international law", see *Genocide* case, 138.

and the secondary rules – which state the general conditions and consequences of breaches of primary rules – are separate bodies of international law.[1021] Thus, for the sake of achieving a general application and function of the ILC Articles, the ILC Articles are formed as a body of secondary rules, separated from any primary rule of international law.[1022] Additionally, in order to capture all the situations of State responsibility that may arise from the vast variety of primary rules and thus to create a uniform system of attribution for all substantive, primary rules of international law, the ILC Articles are formulated in an abstract form and in a general manner.[1023]

The ILC Articles consist of 59 Articles divided in three parts. Part One deals with the conditions of an internationally wrongful act of a State and is divided in five chapters including the – for our purposes relevant – Chapter II 'Attribution of conduct to a State' (Articles 4 – 11).[1024] Part Two of the ILC Articles states the rules concerning the content of the international responsibility of a State, while Part Three focuses on the implementation of the State responsibility.

2. General principles of State responsibility as set out in the ILC Articles

The main focus of this chapter is on the rules of attribution. However, a brief overview of the main principles of State responsibility as set out in the ILC Articles follows in order to provide a clearer understanding of the general approach to State responsibility taken in the ILC Articles.

a) Internationally wrongful act

The two main elements of State responsibility are stated in Article 2 of the ILC Article: the relevant conduct must (i) be attributable to the State and (ii) constitute a breach of an international obligation.[1025] These two constitutive elements must be

[1021] See Cassese, *International Law*, 244.

[1022] See for example the quote of Special Rapporteur Roberto Ago: "*the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility* [...]. [I]*t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation*.", cited in Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*.
Note that the distinction between primary and secondary rules has been widely criticised. Basis of such criticism was the idea that the rules of attribution are inseparably linked to the specific substantive primary rules, for which reasons the particular form of attribution depends upon the primary rule in question.

[1023] Petrochilos notes that the high level of abstraction makes the mechanical application of the ILC Articles impossible and that the application of the ILC Articles in particular situations has led to inconsistent outcomes; see Petrochilos, "Attribution," 289.

[1024] Note that although the final version of the ILC Articles was, as already mentioned, adopted in 2001, the provisions on attribution were already adopted on first reading in 1973-1974. In the 1974 version, the provisions on attribution extend from Article 5-15 (compared to 4-11 in the final version), however, the content is substantially the same.

[1025] See Article 2 of the ILC Articles:

read in conjunction with Chapter V of Part One of the ILC Articles providing the rules for the preclusion of the wrongfulness. Consequently, the ILC Articles name three elements for State Responsibility: (i) attribution, (ii) breach of an international obligation, and (iii) the absence of any circumstance precluding wrongfulness. In addition, the conduct at issue can – as stated in Article 2 of the ILC Articles – be both an action and an omission.

b) Breach of an international obligation

The breach of an international obligation is defined in Article 12 of the ILC Articles and exists when an act of State is not in conformity with the international obligation, whereby the origin and character of the obligation is of no relevance.[1026] From this it follows that the international obligations may flow from customary international law, a treaty or elsewhere.[1027] It is noteworthy that States are free to undertake obligations concerning certain conduct that would otherwise not be attributable to them. This is actually very common in treaty practice.

c) Attribution

Under international law the State is a single legal person and is therefore treated as unity for the purposes of the international law of State responsibility.[1028] A State therefore acts through its organs and agents. The basis for the attribution of conduct to the State is stipulated in Articles 4, 5 and 8 of the ILC Articles, which rely on different elements for attribution.[1029] Article 4 of the ILC Articles alludes

---

"*Article 2. Elements of an internationally wrongful act of a State*
There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State."

[1026] ILC Article 12:
"*Existence of a breach of an international obligation*
There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

[1027] Note that the international obligation does not necessarily have to be a treaty obligation. See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 83. See also *ICJ Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, 30 April 1990, RIAA, Vol. XX, 215 (hereinafter: the "*Rainbow Warrior case*"), where the tribunal held that "*any violation by a State of any obligation, of whatever origin, gives rise to State responsibility*", *Rainbow Warrior case*, 251, para 75.

[1028] James Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, First (Cambridge et al.: Cambridge University Press, 2002), 83.

[1029] Note that the ILC Articles provide for further attribution rules, which however will be not relevant for the approach of corruption in the investor-State context; e.g. ILC Article 6 (*Conduct of organs placed at the disposal of a State by another State*), ILC Article 9 (*Conduct carried out in the absence or default of the official authorities*), ILC Article 10 (*Conduct of an insurrectional or other movement*), ILC Article 11 (*Conduct acknowledged and adopted by a State as its own*).
Note also that it has been criticised that the subject of State responsibility suffers from too much categorisation and that it is overlaid by categories of imputability, Crawford, *Brownlie's Principles of Public International Law*, 445.

to the *structure* of the actor within the internal governmental organisation and requires that the actor is an organ of the State. Article 5 of the ILC Articles takes the *function* of the actor into account and looks at whether the entity or the individual is empowered to "*exercise elements of the governmental authority*". Article 8 of the ILC Articles refers to the *control of the State* and establishes attribution when the entity or the individual is acting under the instructions of or is controlled by the State. The three categories of attribution are mutually exclusive[1030] and somewhat graded. The various elements of attribution will be analysed below (see below at **C.**).

d) Objective approach (fault irrelevant)

It is noteworthy that the majority of the relevant cases[1031] and the academic opinions[1032] favour the principle of objective responsibility, under which the liability of the state is strict.[1033] Pursuant to this view, the question of bad or good faith is of no relevance with regard to State responsibility. The contrary approach is the subjective responsibility theory, which demands an element of intention or negligence.[1034] The ILC Articles make clear that standards as to objective or

---

[1030] Petrochilos, "Attribution," 289.

[1031] See e.g. the *Estate of Jean-Baptiste Caire (France) v United Mexican States*, Mexico/France Claims Commission, 7 June 1929, RIAA Vol V, 516 (hereinafter: "*Caire v Mexico*"), where the French-Mexican Claims Commission held that the situation renders unnecessary any proof of fault on the part of the competent authorities. The Commission explicitly applied "*the doctrine of the objective responsibility of the State, that is to say, a responsibility for those acts committed by its officials or its organs, and which they are bound to perform, despite the absence of 'faute' on their part.*" ("[…] *la 'responsabilité objective' de l'Etat, c'est-à-dire une responsabilité pour les actes commis par ses fonctionnaires ou organes, qui peut lui incomber malgré l'absence de toute 'faute' de sa part.*").
See also *Harry Roberts (U.S.A.) v United Mexican States*, Mexico/United States General Claims Commission, 2 November 1926, RIAA Vol IV, 77, 80, where the Mexico/United States General Claims Commission rejected the contention to consider the grounds for an unreasonable detention of an American Citizen; the Commission rather solely looked at the unreasonable duration of the detention. See also *L. F. H. Neer and Pauline Neer (U.S.A.) v United Mexican States*, Mexico/United States General Claims Commission, 15 October 1926, RIAA Vol IV, 60 (hereinafter: the "*Neer v Mexico*"), 61-62, where the Mexico/United States General Claims Commission held that a governmental conduct, in order to amount to an internationally wrongful act, should account for an insufficiency of official action falling short of international standards, whereas the grounds for such insufficiency were immaterial.

[1032] See Crawford, *Brownlie's Principles of Public International Law*, 437 et seq.

[1033] See Shaw, *International Law*, 783. Shaw concludes that "*doctrine and practice support the objective theory and that this is right, particularly in view of the proliferation of state organs and agencies*."

[1034] This theory is based on the Grotian view that *culpa* or *dolus malus* is necessary in order to establish State responsibility. See e.g. Clyde Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928), 209. For an enumeration of commentators see Hildebrando Accioly, "Principes Généraux de La Responsabilité Internationale D'après La Doctrine et La Jurisprudence," *Hague Academy of International Law: Recueil Des Cours* 96, no. I (1959): 364–370.
For arbitral awards supporting the fault doctrine see e.g. *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v Great Britain*, 18 December 1920, RIAA Vol VI, 42, 44, where the tribunal stated that "[i]*t is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in*

subjective approaches, fault, culpability or negligence are not a question of secondary rules, but depend upon the terms of the primary obligation in question.[1035] Thus, the ILC Articles refrain from laying down any standard or any presumption as between the different standards.[1036]

Following the ILC approach, the question of fault may remain open, since it plays no role in the present issue of attribution. However, it shall be kept in mind that although *culpa* is not a general condition for responsibility, it is argued that it may be relevant in certain contexts.[1037] Some commentators contend, for example, that when the internationally wrongful conduct is an omission the focus of determining attribution is on whether the State kept the due diligence.[1038] This view is, however, challenged by scholars as not being in line with the objective theory.[1039]

e) No damage requirement

In addition, there has been an intense debate with regard to the requisite of harm or damage in the law of State responsibility. However, since the scope of damage includes material and immaterial harm, there is no practical case where a breach of international obligation would not lead to at least immaterial harm. Thus, the ILC stated that "*under international law an injury, material or moral, is necessarily inherent in every violation of an international subjective right of a State*".[1040] Nowadays, the notion prevails that any violation of international law is in itself harm.[1041] Since the violation of an obligation and the damage occur together and at

---

violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection." Emphasis added.
The *Corfu Channel* case has been used to support the fault theory where the ICJ stated "*it cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof*", ICJ *Corfu Channel* case, Judgment of 9 April 1949, ICJ Reports, 1949, 4 (hereinafter: the "*Corfu Channel* Case"),18. See e.g. Jennings and Watts, *Oppenheim's International Law*, § 149, 509.

[1035] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 69–70. In addition, Crawford and Ollison emphasise that "*there is neither a rule that responsibility is always based on fault, nor one that it is always independent of it – indeed, there appears to be no presumption either way.* […] *Everything depends on the specific context and on the content and interpretation of the obligation said to have been breached."* Crawford and Olleson, "The Nature and Forms of International Responsibility," 458. See also Jennings and Watts, *Oppenheim's International Law*, 509. ("*There is probably no single basis of international responsibility, applicable in all circumstances, but rather several, the nature of which depends on the particular obligation in question.*")

[1036] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 69–70.

[1037] Crawford, *Brownlie's Principles of Public International Law*, 440.

[1038] See Schröder, "Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung Und Sanktionen," 589.

[1039] See e.g. Ipsen, *Völkerrecht*, 556 et seq.

[1040] ILC Yearbook 1973, Vol. II, 165, 183.

[1041] See *Corfu Channel* Case, 35. See also Hobe, *Einführung in Das Völkerrecht*, 314 et seq.

once, there is not room for an extra requirement.[1042] Thus, the ILC Articles do not refer to any damage requirement.

III. General Applicability[1043] of the ILC Articles to investor-State disputes

Against the background of the historical development of international law with States as primary subjects[1044] and the interaction of States as source for customary international law, it is not surprising that the ILC Articles are based on such former State-to-State conception of international law.[1045] Contrary to this State-to-State concept, the investment treaty context is dominated by the relationship between a (host) State and a non-state actor, the investor,[1046] leading to a "*distinct regime of international responsibility*".[1047] This raises the question whether the attribution rules of the ILC Articles are merely applicable to assess the State responsibility between States or whether they are also applicable in the investor-State context.[1048]

While the IIA contains specific requirements for host State responsibility towards the investor as primary rules of international law, the vast majority of IIAs fail to provide rules on attribution.[1049] Based on such lack of specific rules on attribution, the argument runs that in such cases reference needs to be made to customary

---

[1042] Ipsen, *Völkerrecht*, 557. For the contrary opinion see Cassese, *International Law*, 251 et seq. Cassese argues "*that the legal regime of 'ordinary' State responsibility (but only this legal regime) requires the objective element of a material or moral damage*", Ibid., 253.

[1043] Note that the term "applicable" is from a formalistic point of view not entirely correct, since the ILC Articles still lack the validity of an international convention. However, as explained above, the ILC Articles are the most important collection of the customary international rules of State responsibility, for which reason they may be considered as elevated to an authority that can be 'applicable'.

[1044] See Crawford and Olleson, "The Nature and Forms of International Responsibility," 442.

[1045] Crawford and Olleson acknowledge the new developments in international law regarding the international responsibility outside the outdated State-to-State concept and emphasise the future challenge to make the rules of State responsibility applicable to the new situations in international law. Ibid., 469. ("[I]*nternational law now contains a range of rules which cannot be broken down into bundles of bilateral relations between States but cover a much broader range. How can these be accommodated within the traditional structure of State responsibility? The attempt to develop the law beyond traditional paradigms was the greatest challenge facing the ILC, and constitutes one of the more fascinating fields of a rapidly developing – and yet precarious – international order."*)

[1046] See above A.

[1047] Douglas, *The International Law of Investment Claims*, 96.

[1048] For a detailed analysis of the application of the ILC Rules to international investment arbitration see James Crawford and Simon Olleson, "The Application of the Rules of State Responsibility," in *International Investment Law*, ed. Marc Bungenberg et al., 1st ed. (Baden-Baden: Nomos, 2015), 411–41.

[1049] For an exception see NAFTA Case *United Parcel Service of America Inc v Government of Canada*, NAFTA, Award on the merits, 24 May 2007 (hereinafter: "*UPS v Canada*, Award"*)*. The tribunal held that the rules of attribution stated in Chapter 11 and 15 of the NAFTA precluded the application of Article 4 and 5 of the ILC Articles, since "*Chapter 15* [NAFTA] *provided for a lex specialis regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations*"; *UPS v Canada*, Award, paras 58-63.
Note also Article 1(7) of the French Model BIT (2006), which restates international law principles of State responsibility without modifying them. It clarifies the attribution of federal states, regions, local bodies and entities to the State.

international law.[1050] Thus, if an investment treaty does not contain any rule on attribution, then customary international law – thus the ILC Articles – must provide the relevant rule.[1051]

However, the ILC Articles do not contain any clarifying regulation that State responsibility may be invoked by non-state entities. In fact, in investor-State disputes the argument is often made that the ILC Articles are not applicable to the situation where at least one party is not a State.[1052]

The analysis of the applicability of the ILC Articles to investor-State disputes starts with a close look at the provisions of the ILC Articles (see below at **1.**) and at the corresponding Commentary to the ILC Articles (see below at **2.**). Subsequently, the views of ICSID case law (see below at **3.**) as well as of commentators will be considered (see below at **4.**). Finally, the exception to the applicability of the ILC Articles is presented (see below at **5.**).

1. Structure and system of the ILC Articles

Based on the lack of provision in the ILC Articles clarifying that individuals and other non-state actors may invoke State responsibility, commentators have noted that the articles "*should have done more to recognize the expanded universe of participants in the international system entitled to invoke state responsibility*".[1053] In fact the ILC Articles contain merely a few explicit references to individuals. In Article 33 (2) of the ILC Articles, which states that Part Two of the ILC Articles (which addresses the content of the international responsibility of states) "*is without prejudice to any right, arising from the international responsibility of a State, which <u>may</u> accrue directly to any person or entity other than a State*".[1054]

[1050] See also Sasson, *Substantive Law in Investment Treaty Arbitration*, 7.

[1051] Ibid. For an example in ICSID case law see e.g. *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (hereinafter: "*Noble Ventures v Romania*, Award"), para 69.

[1052] See Hobér, "State Responsibility and Attribution," 552.

[1053] Weiss, "Invoking State Responsibility in the Twenty-First Century," 809. Weiss argues that "[a]*n article could have confirmed that individuals and nonstate entities are entitled to invoke the responsibility of a state if the obligation breached is owed to them or an international agreement or other primary rule of international law so provides*", see Ibid., 816. Crawford defends the work of the ILC by stating that "*Article 33 clearly shows* […] *that the secondary obligations arising from a breach may be owed directly to the beneficiary of the obligation, in this case the investor, who effectively opts in to the situation as a secondary right holder by commencing arbitral proceedings under the treaty*", see James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," *The American Journal of International Law* 96, no. 4 (2002): 888. In addition Crawford presents reasons why such notion was not included in a detailed provision. First, the ILC was concerned to complete the project in time, secondly, the responsibility of non-State entities raised difficult and controversial questions, and finally, the acceptability of the text as whole was in danger, see Ibid.

[1054] Article 33 reads in whole as follows:

"*Scope of international obligations set out in this Part*

1. *The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.*

The relevance of such reference to individuals is, however, limited regarding the present question of whether the provisions of the ILC Articles concerning attribution are applicable to investor-State disputes. First, Article 33 (2) of the ILC Articles merely illustrates that no general rule regarding State responsibility *vis-à-vis* individuals and non-state entities was sought to be formulated in the ILC Articles, but that this matter was instead left to *lex specialis*.[1055] It therefore identifies that special procedures may be available to an individual "*to invoke the responsibility on its own account and without the intermediation of any State*",[1056] while the specific issues of such rights of individuals or entities other than States are to be treated elsewhere.[1057] Thus, Article 33 (2) of the ILC Articles is an indication for the above mentioned sub-system of state responsibility of investment treaty arbitration, but provides no evidence that the principles of attribution in the ILC Articles shall be applicable to individuals or non-state entities. At the same time, it gives no reason for the opposite. Secondly, Article 33 (2) of the ILC Articles refers merely to Part 2 of the ILC Articles and leaves Part 1, Chapter II with the attribution provisions of ILC Articles 4 to 11 untouched.

The general principle that rules of State responsibility remain open to special treaty provisions is stipulated in Article 55 (*lex specialis*) of the ILC Articles which provides that the "*articles do not apply where and to the extent that"* special provisions over State responsibility exist.[1058] While this provision creates the gateway for special treaty provisions dealing with international investment protection, it says nothing in support of or against applying the principles of attribution to investment treaty law in paucity of special provisions.

However, throughout Part One of the ILC Articles, several provisions identify and confirm its universal character. First, while the title of the ILC Articles suggests that they contain rules on international responsibility *of* States for internationally wrongful acts, it makes no reference to the holder of the right or claim which violation forms the basis for such responsibility.[1059] Secondly, Article 2 of the ILC Articles, for instance, focuses merely on the breach of an international obligation

---

2. *This Part is without prejudice to any right, arising from the international responsibility of a State, which <u>may</u> accrue directly to any person or entity other than a State*." (Emphasis added).

[1055] Weiss, "Invoking State Responsibility in the Twenty-First Century," 815.

[1056] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* Art. 33, para. 4.

[1057] See Crawford and Olleson, "The Nature and Forms of International Responsibility," 467. Note that 'elsewhere' could be an investment treaty in order to establish the mechanisms for an investor to invoke a breach of a protection standard established in the investment treaty.

[1058] ILC Article 55:

"*Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

[1059] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 11; Llamzon, *Corruption in International Investment Arbitration*, 244.

of the State, but does not narrow such obligation to one owed to another State.[1060] In addition, Article 12 of the ILC Articles makes clear that the character and origin of the international obligation are of no relevance for the rules of State responsibility.[1061] Following this reasoning, any international obligation of the State, despite the fact that it is based on an IIA and that it is owed to an investor, falls under this provision, which supports the view that at least the rules on attribution (Articles 4 to 11) of the ILC Articles are applicable to the investor-State context.

2. ILC Articles Commentary

The commentary to the ILC Articles adopted by the ILC along with the ILC Articles in 2001 (ILC Commentary) emphasises that ILC Article 1 was intended to reflect "*all international obligations of the State and not only those owed to other States*".[1062] Moreover, the ILC Commentary clarifies that "*State responsibility extends* […] *to* […] *breaches of international law where the primary beneficiary of the obligation breached is not a State*".[1063] From this statement it follows – notwithstanding the outdated State-to-State approach – that the ILC Articles in Part One focus on the party on whom the obligations rest and not to whom they are owed. It is the State who in any case carries the burden of compliance with international law. This is the situation in investor-State disputes. While certain rights are conferred to the investor on the international setting through investment treaties, those treaties do impose obligations on States.[1064]

The ILC Commentary continues with the conclusion that although Part Two of the ILC Articles dealing with the content of the international responsibility of a State has a limited scope, "*Part One applies to all the cases in which an internationally wrongful act may be committed by a State*".[1065] From this it follows that at least the provisions of attribution of the ILC Articles are of universal character and are applicable to all situations where the international obligation in question is imposed on a State. This again is the case in investor-State disputes.

[1060] ILC Article 2, see footnote 1025.

[1061] Article 12 of the ILC Articles:

"*Existence of a breach of an international obligation*

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." Emphasis added. The ILC Commentary continues that there is only one single general regime of State responsibility, for which reason it does not matter whether the obligation is of civil or criminal character, ILC Yearbook 2001, Vol. II, Part 2, 55.

[1062] ILC Yearbook 2001, Vol. II, Part 2, 87.

[1063] ILC Yearbook 2001, Vol. II, Part 2, 87.

[1064] It shall be noted that investment treaties do not only impose duties and obligations upon the States, but under a modern approach also the investor carries the burden of complying with certain obligations. For duties and obligations imposed on the investor see Kulick, *Global Public Interest in International Investment Law*. However, for the present issue of the applicability of the ILC Articles on investor-State disputes it is sufficient that the main situation is that concerning obligations are imposed upon the host States.

[1065] ILC Yearbook 2001, Vol. II, Part 2, 87.

3. Investor-State case law

ICSID tribunals frequently refer to the ILC Articles in investor-State disputes with regard to attribution to conduct of State.[1066] Due to the high number of cases, it can be asserted to be common practice of international investment tribunals to rely on the principles stated in the ILC Articles when it comes to attribution. Although most tribunals acknowledge that the ILC Articles are not binding, they emphasise their importance by clearly reflecting the underlying general principles of State responsibility.[1067]

[1066] See e.g. *Compañia de Aguas del Aconquija, S.A. & Vivendi Universal (formally Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000 (hereinafter: "*Vivendi v Argentina I*, Award"), para 49; *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (hereinafter: "*ADF v United States*, Award"), paras 166 et seq.; *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No. ARB/01/08, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (hereinafter: "*CMS v Argentina*, Decision on Jurisdiction"), para 108; *Generation Ukraine, Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (hereinafter: "*Generation v Ukraine*"), para 10.2; *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (hereinafter: "*Tokios Tokelės v Ukraine*, Decision on Jurisdiction"), para 102; *Noble Ventures v Romania*, paras 69, 70, 81, 82; *F-W Oil v Trinidad y Tobago*, paras 202 et seq.; *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (hereinafter: *"Jan de Nul v Egypt*, Decision on Jurisdiction"), para 89; *Azurix v Argentina*, Award, para 50; *Saipem v Bangladesh*, Decision on Jurisdiction, para 148; *Helnan International Hotels A/S v Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006 (hereinafter: *Helnan v Egypt*, Decision on Jurisdiction"), para 93; *Ioannis Kardassopoulos v Republic of Georgia*, ICSID Case Nos. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (hereinafter: "*Kardassopoulos v Georgia*, Decision on Jurisdiction"), para 190; *Noble Energy, Inc. and Machalapower Cia. Ltda. v Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Award, 5 March 2008 (hereinafter: "*Noble Energy v Ecuador*"), para 166; *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (hereinafter: "*Jan de Nul v Egypt*, Award"), paras 155 – 173; Waguih Elie George *Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (hereinafter: "*Siag & Vecchi v Egypt*, Award"), para 193 et seq.; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (hereinafter: "*Bayindir v Pakistan*, Award"), para 113; *Toto Costruzioni Generali S.P.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (hereinafter: "*Toto v Lebanon*, Decision on Jurisdiction"*)*, paras 44-47; *EDF v Romania*, paras 185 et seq.; *Kardassopoulos v Georgia*, Award, para 274; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (hereinafter: "*Hamester v Ghana*, Award"), paras 171 et seq.; *Alpha v Ukraine*, Award, paras 399-401; Bosh v Ukraine, Award, paras 163-184; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2013 (hereinafter: "*Deutsche Bank v Sri Lanka*, Award"), paras 401 et seq.

[1067] See e.g. *Noble Ventures v Romania*, para 69 ("*While those Draft Articles are not binding, they are widely regarded as a codification of customary international law*."); *F-W Oil v Trinidad and Tobago*, para 202; *Jan de Nul v Egypt*, Award, para 156; *Bayindir v Pakistan*, Award, n. 19; *EDF v Romania*, n. 7 ("*The ILC Draft Articles on State Responsibility have frequently been applied by courts and arbitral tribunals as declaratory of customary international law*."); *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009 (hereinafter: "*Al-Bahloul v Tajikistan*, Decision on Jurisdiction"), para 165; *Hamester v Ghana*, Award, para 171 ("*The Tribunal must decide the issue of attribution under international law, and is guided by the* [ILC Articles] *as a codification of customary international law.*"); *Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability, para 7.60 ("[The tribunal] *refers as a codification of customary international law to the Articles of State Responsibility* […]").

The tribunal in *Loewen v United States* summarised the meaning and importance of the ILC Articles for international investment arbitration when stating that "[a]*lthough the draft has not been finally approved, it is a highly persuasive statement of the law on State Responsibility as it presently stands*."[1068] The tribunal in *Jan de Nul v Egypt* stated that the ILC Articles were "*applicable by analogy to the responsibility of States towards private parties*".[1069] In similar terms, in *Hamester v Ghana*, the tribunal indicated that its analysis of attribution was "*guided*" by the ILC Articles.[1070]

4. Scholarly opinions

Many scholars contend that the rules on attribution and other core principles of the ILC Articles are also applicable to subjects of international law other than States.[1071] The word 'State' in Article 1 of the ILC Articles could, so the argument runs, be substituted with the term 'international legal person'.[1072] From this it follows that the basic principles of State responsibility do not only apply to the State-to-State situation, but also to other situations between two international legal persons. While this broad notion may refer to the applicability of the principle of State responsibility to international legal persons other than States, as for instance international organisations,[1073] it also opens the gate to the notion that the ILC

[1068] *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3), Decision on hearing of Respondent's objection to competence and jurisdiction, 9 January 2001 (hereinafter: "*Loewen v United States*, Decision on Jurisdiction"), para 70.
[1069] *Jan de Nul v Egypt*, Award, para 156.
[1070] *Hamester v Ghana*, Award, para 171.
[1071] Crawford and Olleson, "The Application of the Rules of State Responsibility," 415 et seq.; Crawford and Olleson, "The Nature and Forms of International Responsibility," 442; Hobér, "State Responsibility and Attribution," 552 et seq.; Stefan H. Dudas and Nikolaos Tsolakidis, "Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?," *Transnational Dispute Management* 10, no. 3 (2013): 15; Hobe, *Einführung in Das Völkerrecht*, 313; Michael Feit, "Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity," *Berkeley Journal of International Law* 28 (2010): 147.
[1072] Crawford and Olleson, "The Nature and Forms of International Responsibility," 442.
[1073] The following discussion will focus merely on the relevant issues of State responsibility for corruption in investor-State disputes. However, the rules of State responsibility bear many other challenging questions. For the international responsibility of international organisations see the draft Articles on Responsibility of International Organizations, as adopted by the ILC on first reading: *Report of the International Law Commission, Sixty-First Session*, A/64/10 (2009); Ian Brownlie, "The Responsibility of States for the Acts of International Organizations," in *International Responsibility Today* (Leiden [et al.]: Nijhoff, 2005), 355–62; Wladyslaw Czaplinski, "International Responsibility of International Organisations," *The Polish Yearbook of International Law* 27 (2005): 49–58; Thomas Giegerich, "Verantwortlichkeit Und Haftung Für Akte Internationaler Und Supranationaler Organisationen," *Zeitschrift Für Vergleichende Rechtswissenschaftchaft* 104, no. 2 (2005): 163–91; Eglantine Cujo, "Invocation of Responsibility by International Organizations," in *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 969–83; Canadian Council on International Law, ed., *Responsibility of Individuals, States and Organizations: Proceedings of the 35th Annual Conference of the Canadian Council on International Law, Ottawa, 26 - 28 October 2006* (Ottawa, Ontario: CCIL, 2007).
Another challenge for the law of State responsibility is the approach to acts not prohibited by international law, which turn out to cause damage. See the ILC draft "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", Official Records of the General Assembly, Fifty-sixth Session, 2001, Supplement No. 10 (A/56/10).

Articles "*cover obligations of the state towards individuals and legal entities*"[1074] for which reason the principles of attribution to conduct of State may be also applicable to a situation where the opponent of the State is not a State but an investor, as a limited subject of international law under the specific situation of investment treaty law.

In fact, in scholarship the rules of attribution of the ILC Articles are often applied to the investor-State context without further analysis about their applicability,[1075] which indicates that in the view of many commentators such issue is clear. The main argument for the applicability of the ILC Articles is that in investment treaty law the relation between the host State and the investor is actually based on the notion of State responsibility and reparation, for which reason in the absence of *lex specialis*, customary international law shall apply.[1076] The applicability of customary international law leads to the applicability of the ILC Articles since a consensus exists among scholars that – at least with regard to the rules of attribution – the ILC Articles "*accurately reflect customary international law on state responsibility*".[1077]

At this point it is worth mentioning that Parts Two and Three of the ILC Articles are not applicable to the investor-State disputes, but merely to inter-State claims.[1078] This chapter, however, focuses on the attribution of corrupt practices to the State, for which reason only the applicability of the rules of attribution stated in the ILC Articles are of relevance. For the same reason, the notion that the ILC Articles may in addition to the codification of the existing rules of State responsibility also provide some "progressive development",[1079] has no

[1074] Feit, "Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity," 147.

[1075] See e.g. Dolzer and Schreuer, *Principles of International Investment Law*, 216 et seq.; R. Doak Bishop, James Crawford, and W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials, and Commentary*, 2nd ed. (The Hague: Kluwer Law International, 2014), chap. VII.

[1076] See e.g. Sasson, *Substantive Law in Investment Treaty Arbitration*, 7; Griebel, *Internationales Investitionsrecht - Lehrbuch Für Studium Und Praxis*, 50. Griebel argues that it can be assumed that the relevant rules regarding State responsibility of international investment treaties develop parallel to the customary law of State responsibility, at least where no particularities exist.

[1077] Hobér, "State Responsibility and Investment Arbitration," 2008, 553. See also footnote 1020. For an example in ICSID jurisprudence see, *Noble Ventures v Romania*, Award, para 69 ("*While those Draft Articles are not binding, they are widely regarded as a codification of customary international law*.").

[1078] Crawford and Olleson, "The Application of the Rules of State Responsibility," 417 et seq.; Douglas, *The International Law of Investment Claims*, 96 et seq.; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 13 et seq.; Llamzon, *Corruption in International Investment Arbitration*, 245 et seq. See also Stephan Wittich, "State Responsibility," in *International Investment Law*, 1st ed. (Baden-Baden: Nomos, 2015), 39 et seq.; Jonas Dereje, *Staatsnahe Unternehmen - Die Zurechnungsproblematik im Internationalen Investitionsrecht und weiteren Bereichen des Völkerrechts*, (Baden-Baden: Nomos, 2016), 107-111. Note that for these commentators the application of Part One of the ILC Articles and thus the rules on attribution are clearly applicable to investor-State disputes.

[1079] See Crawford and Olleson, "The Application of the Rules of State Responsibility," 420; Crawford and Olleson, "The Nature and Forms of International Responsibility," 447; Cassese, *International Law*, 244. An example for such progressive approach of the ILC Articles to State responsibility is the concept of international crimes, which was introduced in the previous drafts of

consequence to the present analysis. To what extent other provisions of the ILC Articles provide a progressive approach to State responsibility not entirely consistent with customary international law is irrelevant for the purposes of this study. Rather it is only important that the rules of attribution stated in the ILC Articles mirror the customary international law applicable to all situations of international responsibility, which has already been established.[1080]

A second issue requires emphasis. The ILC Articles may only be applicable to investor-State disputes where international law is the applicable law. Relations between States and investors may also concern merely contractual issues, which may be subject to domestic law only. Without a specific reference to international law as provided in Article 42 (2) of the ICSID Convention or without an IIA as basis for the legal relationship between the State and the investor, international law may not govern the dispute. Böckstiegel rightly emphasises such required applicability of international law in his statement that "[…] *most commentators agree that* [the ILC Articles] *are applicable not only between states, but also for relations between states and foreign investors insofar as these are subject to international law*". [1081]

In conclusion, there is a widespread understanding[1082] among scholars that the ILC Articles provide the appropriate rules on attribution of conduct to the State for investor-State disputes since they mirror customary international law and are not bound to an exclusive State-to-State relationship.

5. *Lex specialis*

As shown above, the ILC Articles may not be applicable where special provisions on State responsibility exist. This follows from ILC Article 55, which reflects the maxim *lex specialis derogat legi generali*.[1083] Note that States as contracting parties of IIAs are free to determine the rules of attribution that shall apply to a particular investment law situation. Such special attribution rule may be set out in BITs, the ECT, NAFTA or in any other IIA.[1084] Thus, the concrete applicability of

---

the ILC Articles, but due to the controversy it created, it was finally deleted and not included in the final draft of 2001.
Moreover, Crawford explained that the mere task of codifying customary international law immanently led to an 'act of creation', Crawford, "Investment Arbitration and the ILC Articles on State Responsibility," 128. ("*One of the things that the Commission learned about codification at a very early stage is that it is impossible to write down any proposition of international law without engaging in an act of creation*.").

[1080] See footnote above 1020.

[1081] Böckstiegel, "Applicable Law to State Responsibility under Energy Charter Treaty and Other Investment Protection Treaties," 259.

[1082] Feit, "Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity," 147.

[1083] See ILC Article 55, footnote 1058.
See also ILC Articles Commentary, Yearbook 2001 II, Part Two, 31, 140, para 2.

[1084] For further examples, see, Jonas Dereje, *Staatsnahe Unternehmen - Die Zurechnungsproblematik im Internationalen Investitionsrecht und weiteren Bereichen des Völkerrechts*, (Baden-Baden: Nomos, 2016), 369 et seq.

the ILC Articles will in each instance depend on whether the rules provided under the relevant treaty supersede the rules provided under the ILC Articles.[1085] However, in each case it will have to be determined whether the provisions amount to *lex specialis* or merely to a restatement of customary law.

In *UPS v Canada*, the issue arose whether the conduct of Canada Post, an institution of the Canadian Government under Canadian law,[1086] was attributable to Canada. Under ILC Article 4, the conduct would have been attributable to Canada, since Canada Post had the status of State organ under internal law. However, Chapter 15 of the NAFTA contains detailed provisions under which such conduct would not be attributable. Finally, the tribunal held that the rules of attribution stated in Chapter 11 and 15 of the NAFTA precluded the application of Articles 4 and 5 of the ILC Articles, since "*Chapter 15* [NAFTA] *provided for a lex specialis regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations*".[1087]

However, not every specific treaty provision dealing with attribution is considered to be a *lex specialis* provision to the customary rules of attribution stated in the ILC Articles. Article 22[1088] and Article 23(1)[1089] of the ECT are interpreted as

---

[1085] See Crawford, "Investment Arbitration and the ILC Articles on State Responsibility," 131. ("*The ILC Articles are residual articles and a adjudicator must first look at the treaty under review and see what it says on the subject. If the treaty (such as a BIT) covers the field of the issue at state, the ILC Articles have no role to play*."). See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 14; Llamzon, *Corruption in International Investment Arbitration*, 246.

[1086] *UPS v Canada*, Award, para 9.

[1087] *UPS v Canada*, Award, para 62. The decision of the tribunal found approval in scholarship, see e.g. Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 131.

[1088] Article 22 of the Energy Charter Treaty reads:

"*STATE AND PRIVILEGED ENTERPRISES*

(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.

(2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.

(3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty.

(4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.

(5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual."

[1089] Article 23 of the Energy Charter Treaty reads:

"*OBSERVANCE BY SUB-NATIONAL AUTHORITIES*

Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area."

restating customary rules on attribution.[1090] Article 2 of the 2006 prototype French BIT[1091] must be understood similarly. It merely restates international law principles of attribution of federal unions, regions, local bodies and entities to a federal state without modifying them.[1092]

6. Conclusion

Notwithstanding the outdated State-to-State approach, the ILC Articles also cover obligations owed to non-state entities, since they focus on all international obligations of a State without regard to whom the obligation is owed. Thus, it is of no relevance that the obligations in investor-State disputes are not owed to a State, but to a non-state entity: the investor.

In addition, although it might be argued that the ILC Articles, to some extent, provide a progressive approach beyond what has been accepted so far on the international setting, the rules of attribution codified in the ILC Articles in any case reflect customary international law and have overall validity as general principles of law.

In conclusion the ILC Articles are applicable to the extent that (i) the investor-State dispute is subject to international law; (ii) the relevant ILC Articles reflect customary international law, which they do for Part One, especially for the rules of attribution; and (iii) no *lex specialis* provision governs the attribution of conduct to State.

IV. Applicability of the ILC Articles to corruption issues in investor-State disputes

While the applicability of the ILC Articles to investment treaty arbitration has many supporters in arbitral practice and in scholarship, its appears that tribunals and commentators are reluctant to apply the ILC Articles to corrupt acts committed by corrupt officials. After analysing the ILC Articles and the corresponding commentary on the issue of applicability to corruption (see below at **1.**), we will consult the arbitral case law (see below at **2.**) and the views in scholarship (see below at **3.**) in order to identify the major issues for the attribution of corruption to the host State on basis of the ILC Articles (see below at **4.**).

[1090] Dolzer and Schreuer, *Principles of International Investment Law*, 218.
[1091] Article 2 of the French Model BIT 2006:
"*Pour l'application du present Accord, il est entendu que les Parties contractantes sont responsables des actions ou omissions de leurs collectivités publiques, et notamment de leurs Etats fédérés, regions, collectivités locales ou de toute autre entité sur lesquels la Partie contractante excerce une tutelle, la representation ou la responsibilité de ses relations internationales ou sa souveraineté.*"
[1092] See Petrochilos, "Attribution," footnote 7.

1. ILC Articles and Commentary

The ILC Articles do not contain any reference to the attribution of corrupt acts to the State. However, the ILC Commentary refers to the receipt of a bribe of a public official as an example for a classic *ultra vires* conduct, which would nonetheless be attributable to the State. In the words of the Commentary

> "[o]ne form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction."[1093]

The Commentary therefore seems to proceed on the assumption that the ILC Articles apply to the participation of public officials in corrupt acts. This confirms the objectives of the ILC Articles to provide abstract and general secondary rules for all relevant situations of attribution.

The Commentary continues with general comments to different situations that may occur with regard to corruption. First, it clarifies that the questions regarding the validity of the transaction tainted by corruption are not governed by the rules of State responsibility, but rather by the rules of treaty law.[1094] Moreover, it confirmes that a corrupting State may be responsible for the acts it controlled by bribing an organ of another State.[1095] Finally, the Commentary notes that while State responsibility for accepting a bribe generally arises under Article 7, it would not arise towards the corrupting State itself. In the words of the ILC Commentary

> "[t]he articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7."[1096]

2. Investor-State case law

Arbitral case law applying the ILC Articles in order to analyse whether a corrupt act conducted by public officials is attributable to the host State is scarce. While arbitral tribunals have on various occasions found clear words for the general requirements under the ILC Articles to attribute an act to the host State, such

[1093] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 7 (8).
[1094] Ibid.
[1095] Ibid.
[1096] Ibid.

clarification is not available for the issue of corruption. Tribunals have so far avoided an express application of the ILC Articles to corruption issues. In *EDF v Romania*, for instance, the tribunal conducted a thorough analysis based on Articles 4, 5 and 8 of the ILC Articles with regard to all acts performed by the two State-owned entities, which were joint venture partners of EDF,[1097] but refrained from providing any indication on which basis the alleged solicitation of bribes of the Chief of Cabinet and the State Secretary on behalf of the then Prime Minister would be attributable to the host State. When dealing with the investor's failure to meet the burden of proving the solicitation of the bribe, the tribunal merely stated that not only the request of bribe had to be shown by clear and convincing evidence, "*but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect*".[1098] The reference to the requirement 'on behalf and for the account of the government authorities' appears to be based on agency law rather than the principle of the ILC Articles.

As discussed in detail above, the tribunal in *World Duty Free v Kenya* – apparently due to the choice of law clause stipulated in the contract – refrained from applying the ILC Articles to attribute the solicitation of the bribe in an amount of USD 2 million by the then President of Kenya to the State of Kenya.[1099] In the recent case of *Metal Tech v Uzbekistan* the tribunal found the host State to have participated in corruption and even emphasised that such participation "*is implicit in the very nature of corruption*",[1100] but refrained to engage in any analysis of how the corrupt acts in question were attributable to Uzbekistan. In conclusion, the arbitral practice provides no guidance on the question of attribution of corrupt acts to the host State.

3. Scholarly opinions

Some commentators apply the rules of attribution under the principles of international responsibility also to corrupt acts of public officials without questioning its applicability to corruption.[1101] Some other commentators seem to

[1097] The tribunal conducted a 13-page analysis on the basis of the ILC Articles, see *EDF v Romania*, paras 185-214.
[1098] *EDF v Romania*, para 232.
[1099] See above at A.I.3.
[1100] *Metal-Tech v Uzbekistan*, Award, para 422.
[1101] Giorgio Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," *ICSID Review - Foreign Investment Law Journal* 24, no. 2 (2009): 585; Gabriel Bottini, "Legality of Investments under ICSID Jurisprudence," in *The Backlash against Investment Arbitration*, ed. Michael Waibel et al. (The Hague: Kluwer Law International, 2010), 307; Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 558 et seq.; Bruce W. Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities," *SSRN eLibrary No. 2298886*, 2013, 4 et seq. See also Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," in *Between East and West: Essays in Honour of Ulf Franke*, ed. Kaj Hobér, Annette Magnusson, and Marie Öhrström (New York: Juris Publications, 2010), 322.

favour the view that corrupt acts of public officials should be attributed to the host State without further reference to the basis of such attribution.[1102] And yet others apply the ILC Articles in order to analyse whether corruption is attributable to the host State, but raise the question whether corruption requires special rules on attribution.[1103]

Commentators have identified mainly three issues with regard to the applicability of the ILC Articles to corruption and the attribution of corrupt acts to the State. The first issue is whether for the purpose of attribution corruption should be divided into the official act and the private motives of the public official (see below at **a)**). Another disputed question is whether the ILC Articles are only applicable where the State responsibility for corruption is invoked by the investor as part of her treaty claim, rather than part of the defence invoked by the host State (see below at **b)**). Commentators have also questioned whether the ILC Articles are applicable to corrupt conduct of public officials where the investor was part of the illegal transaction (see below at **c)**).

a) Is corruption a private act of the public official?

Cremades raised the question of attribution of corrupt acts committed by public officials before the decision of *World Duty Free v Kenya* was rendered and heavily discussed. In his view the acts of the corrupt public official are attributable to the host State under public international law.[1104] At the same time, Cremades points at the difficulty that arises with regard to corruption. There are two combined aspects that constitute the corrupt act: the official act triggered by a bribe and the dishonesty of the public official.[1105] In his words

> "[i]n international law, a State is responsible for acts committed by its officials, of whatever status, in their official capacity, even when the officials exceed their authority, contravene instructions, or violate internal law. Accordingly, if a public official accepts a bribe to exercise his public duties in a certain manner, for example by smoothing the regulatory path for a foreign investment, then the acts of that official

---

Kreindler appears to apply Article 8 of the ILC Articles to any situation of attribution of corrupt acts by government officials ("*Is there evidence or even specific allegation that any government officials who received bribes were acting on the specific instructions of or under the direction or control of the respondent in receiving bribes?*").

[1102] Daniel Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," *Transnational Dispute Management*, no. 3 (2013): 11. ("*In investor-state arbitration, the investor takes part in supply-side corruption but the state takes part in demand-side corruption – if, as argued by a number of commentators, the conduct of public officials should be attributed to the state.*").

[1103] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 47 et seq. ("*Another question that bears consideration is whether corruption is by its nature a singular substantive category of illegality under international law that necessitates the development of special rules on attribution that modify the generally applicable principles.*"). See also Llamzon, *Corruption in International Investment Arbitration*, 255.

[1104] Cremades, "Corruption and Investment Arbitration," 216.

[1105] Ibid.

> are attributed to the State itself in public international law. There is an issue as to whether it is possible to distinguish between the official's act (such as issuing a licence or consent, or awarding a contract) and the official's dishonesty for the purposes of attribution. "[1106]

These remarks have been understood as advocating that corruption of public officials should be attributable to the host State under general principles of State responsibility.[1107] However, in the last sentence of Cremades' statement, commentators have seen some hesitance to make an absolute statement that a State is responsible for corruption of its public officials.[1108] Such hesitance follows from the question whether the 'dishonesty' of the public official can be distinguished from the 'official act' as to be considered completely private and entirely removed from the public authority.[1109] Although the statement of Cremades is phrased openly, it appears as if in his opinion and for the purpose of attribution a corrupt act performed by public officials cannot be split into two parts (official act and public official's dishonesty) but must be viewed as a whole.

Some commentators however appear to distinguish between the official act and the dishonesty of the public official for purposes of attribution.[1110] While questioning the attribution of corruption to the host State, Kreindler, for instance, seems to apply Article 8 of the ILC Articles to any situation of attribution of corrupt acts by government officials and points at the fact that specific instructions, direction and control of the host State with regard to the taking of the bribe will hardly be proven.[1111] Kreindler refrains from providing any explanation why only Article 8 of the ILC Articles would be applicable to the situation of corruption of public officials. It could however be an indication that in his view the corrupt officials must be considered as private persons acting for private purposes and therefore not connected to the State. Other commentators have argued that attribution must fail

---

[1106] Ibid.

[1107] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 46; Llamzon, *Corruption in International Investment Arbitration,* 254; Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," 11.

[1108], Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 47; Llamzon, *Corruption in International Investment Arbitration,* 255.

[1109] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 47; Llamzon, *Corruption in International Investment Arbitration,* 255. ("[…] *the more nuanced question is whether such 'dishonesty' can be considered so removed from the 'official's acts' as to be considered wholly private and thus not attributable to the State*.").

[1110] Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 322; Jörn Griebel and Sophie Spetzler, "2. Tagung Junger Investitionsrechtler Auf Schloss Krickenbeck Am Niederrhein," *German Arbitration Journal* 8, no. 5 (2010): 265–68.

[1111] Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 322. ("*Is there evidence or even specific allegation that any government officials who received bribes were acting on the specific instructions of or under the direction or control of the respondent in receiving bribes?*").

since the corrupt official apparently does not act for the benefit of the host State, but for her private gain.[1112]

Raeschke-Kessler and Gottwald view the corrupt act as a whole and argue for the attribution of corrupt acts of State officials to the host State and conclude that the host State must 'assume full responsibility' for the corrupt officials. In their view, such responsibility even arises when both the investor and the public officials were part of the corrupt act.[1113] It is worth quoting the statement in full

> "[i]nternational law contains the fundamental principle of state responsibility, referring to 'the accountability of states for violation of international law, and the requirement that states make reparation for such violations'. With the growing international consensus on anti-corruption, and the signing of multilateral anti-corruption conventions, hard corruption is to be considered as a violation of international law. Accountability means in this context that states have to bear the consequences of corruption and assume full responsibility for the actions of their organs. This is obvious if the highest-ranking hierarchy, such as heads of state or the prime minister, is involved in the corrupt acts. It is not different if the state is represented by corrupt lower-ranking officials, like heads or deputy heads of departments."[1114]

b) Are ILC Articles only applicable when the investor invokes State responsibility for corruption?

Some commentators favour a more limited view on the applicability of the ILC Articles.[1115] Lim, for instance, argues that the ILC Articles are only applicable if the international responsibility is in fact expressly "invoked" by the investor with regard to the act in question.[1116] According to this view, the ILC Articles can

---

[1112] See Griebel and Spetzler, "2. Tagung Junger Investitionsrechtler Auf Schloss Krickenbeck Am Niederrhein," 267. (*"Weitgehende Einigkeit bestand schließlich darüber, dass das korrupte Verhalten des Investors jedenfalls regelmäßig nicht deshalb unbeachtlich sei, weil der Staat durch seine Beamten daran teilgenommen habe. Eine Zurechnung der illegalen Handlung des Beamten findet in der Regel nicht statt, da dieser für den Investor erkennbar nicht zu Gunsten des Gaststaats handelt, sondern 'in die eigene Tasche wirtschaftet'*.")

[1113] Raeschke-Kessler and Gottwald, "Corruption," 596 et seq.

[1114] Ibid., 596. Note that Raeschke-Kessler and Gottwald made such observations with the focus on the validity and enforceability of contracts procured by corruption. In their view, the host State must assume responsibility for the corrupt acts of its public officials, for which reason the contract remains valid and enforceable. ("*State responsibility includes contractual responsibility, which means that the state must in general meet its obligations as a contractual party in spite of the corrupt activities of its officials. The economic argument for this principle is simple: if the state could easily avoid any obligation resulting from a contract tainted by corruption, it could profit from its own violation of international law*.").

[1115] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," 49 et seq.; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 48; Llamzon, *Corruption in International Investment Arbitration*, 256.

[1116] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 49 et seq. The basis of the approach is the notion that the rules on attribution in Chapter II Part One of the ILC Articles only apply to situations

merely be applied to acts, which form the factual basis of the investor's treaty claim. However, pursuant to this approach, the ILC Articles would not be applicable to the acts, which provide the factual basis for the corruption defence of the host State against the treaty claim and which are crucial to the question whether the State may rely on such defence.[1117] Using the factual situation of *World Duty Free* as example, Lim contends that

> "[…] the rules of state responsibility cannot be applied in such case to determine whether the *Kenyan President's solicitation of bribes* (the basis for Kenya's alleged affirmation of the contract on the actual facts of the case) are attributable to Kenya, since the investor will *not* be seeking to *invoke* Kenya's international responsibility for such act of its President. Rather, the investor will *only* be relying on the President's solicitation of bribes to *preclude* Kenya from raising the illegality of the investment as a defence to the investor's expropriation claim, the argument being that its President's act constituted a *valid expression of Kenya's will to be bound by the corruptly procured contract*, which it cannot later be allowed to contradict by raising the defence of investor corruption."[1118]

Lim therefore analyses the corrupt act committed by the corrupt official through the lense of whether the State through (i) the solicitation and (ii) the receiving of a bribe by the public officials as well as (iii) the granting of permission by the public official to the investor to establish its investment on basis of the bribe *exercised its will to be bound by the investment despite its illegality*.[1119] However, the question at issue in this chapter is not limited to such narrow perspective; attribution of corruption to the host State is not restricted to the issue whether the State expressed its will to be bound by the investment.

Moreover, State responsibility is not limited to the situation where it is expressly invoked in a dispute claiming compensation or restitution as set forth in Part Two of the ILC Articles. As stated above, Part Two and Part Three of the ILC Articles are not even applicable to the situation of investor-State disputes since the investment treaty regime provides *lex specialis* for the consequence and the assertion of such rights.[1120] The concept of State responsibility must be understood in a broader sense. This follows already from Article 1 of the ILC Articles, which makes clear that "[e]*very internationally wrongful act of a State entails the international responsibility of that State*". The international responsibility is triggered automatically, detached from any express invocation or claim.

---

where the international responsibility of the State is at issue, but not for other purposes, see e.g Crawford and Olleson, "The Application of the Rules of State Responsibility," 432.

[1117] See Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para. 50.

[1118] Ibid.

[1119] Ibid., para. 179 et seq.

[1120] See above at B.I

In the context of corruption, State responsibility is concerned with the question whether the host State should bear the consequences of such corrupt acts committed under its public authority and be held accountable for the corruption of its public officials. The application of the rules of State responsibility therefore depends on whether corruption is an internationally wrongful act, rather than on the artificial requirement of the investor invoking it as part of its claim.

c) Are ILC Articles applicable to consummated corruption?

Some commentators argue that corruption is only attributable to the host State if the corrupt officials attempted to solicit or extort a bribe without the investor engaging in such corrupt act.[1121] If both parties are however involved in the corrupt act, then corruption of the public officials should in their view not be attributable to the host State, while it would be attributed to the investor.[1122]

Llamzon calls this result 'the attribution asymmetry of international investment arbitration' and bases his conclusion on his interpretation of the current case law. While *EDF v Romania* shows in clear terms that 'unconsummated corruption' is attributed to the host State, he interprets the reluctance of the tribunal in *World Duty Free v Kenya* to find the host State accountable for corruption of its most senior public official as indication that 'consummated corruption' is not attributable to the host State. In his opinion, the participation of the investor in corruption despite its knowledge of the dishonesty of the public officials bars the application of the attribution rules of the ILC Articles.[1123] Llamzon finds confirmation of his conclusion in the ILC Commentary stating that the "*question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise*".[1124]

The statement in the ILC Commentary referred by Llamzon calls for a closer look.

> "One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would

[1121] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 48; Llamzon, *Corruption in International Investment Arbitration*, 256.
[1122] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 48; Llamzon, *Corruption in International Investment Arbitration*, 255 et seq. ("[…] *if corruption were only attempted through solicitation/extortion by the public official or an offer made by the investor (or intermediary) that was not accepted, corruption would potentially engage the international responsibility of States. However, if a bribe was consummated (i.e., a quid pro quo freely paid and freely received by the private investor and public official), the picture alters dramatically: investors would not be allowed any arbitral recourse, as corruption participated in by its agents (whether employees or third-party intermediaries) would be attributable to the investor. However, host States would not be subject to similar responsibility, as the corruption of their public officials would not be attributable to them*."). See also Bottini, "Legality of Investments under ICSID Jurisprudence," 307.
[1123] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 57; Llamzon, *Corruption in International Investment Arbitration*, 262.
[1124] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, n. 150.

> then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7."[1125]

The first sentence makes clear that as a general principle of State responsibility, the participation of the public official in corruption is attributable to the host State. While the second sentence merely clarifies that the ILC Articles do not deal with the issue of validity of the transaction tainted by corruption, which is rather governed by the rules of treaty law, it emphasises that the specific situations of corruption are not expressly mentioned in the ILC Articles. In the following two sentences the ILC Commentary provides mere examples of the situations that could arise between two States, but without giving detailed explanations as to the concrete results. First, it mentions that a corrupting State may be responsible for the acts it controlled by bribing an organ of another State.[1126] Finally, the Commentary notes that while State responsibility for accepting a bribe generally arises under Article 7, it would not arise towards the corrupting State itself. These notions are only two examples referring to the relationship between two States, as stated in the commentary, and are not directly applicable to the investor-State situation, but rather provide guidance.

While the first sentence deals with attribution, the final sentence refers to State responsibility. Applied to investment treaty arbitration, the participation of public officials in corruption is still attributable to the host State, however, in case the investor is part of the corrupt act, then it cannot invoke State responsibility against the host State, which it corrupted by paying the bribe. From this follows that under the general rules of State responsibility, an investor who bribed a public official has no claim based on the concrete corrupt act against the host State whose public official it bribed. It seems therefore unimaginable that an investor could bring a treaty claim based on corruption if she was part of the illegal act.[1127] This follows already from various general principles of international law as e.g. the unclean hands doctrine or *ex turpi causa non oritur*.[1128]

[1125] Ibid., Article 7 (8).
[1126] Ibid.
[1127] Note that this notion does not automatically bar an investor from bringing a treaty claim based on a treaty breach of the host State on different grounds than corruption.
[1128] For details on these principles see Chapter Seven C.II.

A different question is however if the host State should be free from any accountability for the corrupt behaviour of its public officials.[1129] The ILC Commentary made clear that it was unnecessary to expressly deal with the various situations of corruption in the ILC Articles, which leads to the conclusion that the general nature of the ILC Articles is more than able to deal with each situation, which may arise due to corruption. Neither the ILC Articles nor the ILC Commentary state that the rules of attribution are not applicable to consummated corruption. Thus, while an investor is barred to invoke State responsibility for corruption against the host State whose public officials it bribed, the corrupt act of the public official may nonetheless be attributed to the host State (as only one element of State responsibility).

The same argument can be brought against Bottini. He rejects the attribution of corruption to the host State if both the investor and the public official are involved on the basis that corruption is contrary to international public policy and without providing further explanation.[1130] There is no doctrinal reason for negating the application of the rules on attribution on the basis of international public policy, particularly since this even confirms the gravity of the illegal act performed by the public officials. International public policy may rather be a ground for dismissing a claim of an investor against the host State on the basis of the corrupt act; however, attribution as such is not barred.

4. Conclusion

The arbitral case law provides little guidance on the issue of applicability of the ILC Articles and the attribution of corrupt conduct of State officials to the State. However, the analysis of the views in scholarship shows more sensitivity to the problem. For the purposes of attribution, there are mainly three issues that require further consideration.

First, the initial question is whether in case of corruption a distinction should be made between the official act performed on the basis of corruption and the additional corrupt part of the transaction. Many scholars identify the latter as the 'official's dishonesty'.[1131] The description as dishonesty hints to the fact that the public official is apparently acting for her own benefit and not in the best interest of the host State. It also makes it difficult to grasp what specific act is supposed to be attributed to the State. 'Dishonesty' is a subjective motive of the public official,

[1129] For such accountability see e.g. Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption"; Raeschke-Kessler and Gottwald, "Corruption"; Kulick, *Global Public Interest in International Investment Law*.

[1130] Bottini, "Legality of Investments under ICSID Jurisprudence," 307. ("*However, because corruption is contrary to international public policy and because it always entails fault of both the public official involved and of the non-state party in the transaction, the act to* [sic] *should not be imputed to the state as such, lest international protection be accorded to an act contrary to international public policy.*").

[1131] See e.g. Cremades, "Corruption and Investment Arbitration," 216; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 47; Llamzon, *Corruption in International Investment Arbitration*, 255.

which will most certainly not be shared by the State. In fact, the public official acts apparently to the detriment of the host State. Viewed from this perspective, the reluctance of some commentators to attribute corruption to the host State appears comprehensible.

Thus, the emphasis should not be on the dishonesty as motive, but on the mere participation of the public official in corruption, which – to use the core definition presented in Chapter One – is the misuse of public authority for private gain. As shown by the definition, corruption is precisely the link or combination between the official authority to perform an official act and the corrupt exercise of such official discretion based on bribery. The essential part of the receipt of a bribe, which will most certainly end up in the pocket of the public official, is the public official's promise to misuse her public authority. A separation of the two aspects would be artificial and fail to meet the core problem of corruption.

Secondly, the question arises whether the ILC Articles are only applicable to corruption when the investor bases its claim upon an express action of State responsibility for corruption. In such case, the corrupt conduct of a public official would not be attributable to the host State if the host State bases its defence to the investor's treaty claim upon corruption. Such view would however lead to a narrow scope of State responsibility. The concept of State responsibility must be understood as the accountability of a host State for acts of its public officials which amount to an international wrong. In which precise circumstance such State responsibility is invoked is not a condition for it to arise. Rater, it is important that the conduct in question constitutes an international wrongful act and the attribution is aimed at holding the host State accountable for the corruption of its State officials. Corrupt acts may therefore be attributable to the host State whether invoked by the investor as part of the treaty claim or by the host State as defence.

Thirdly, the question arises whether the rules of attribution under the ILC Articles are applicable to the situation where both the investor and the public official are involved in the corrupt act. It is argued that the general rules on attribution do not apply to corrupt acts where the corruption is consummated meaning that the investor was part of the corrupt act in question. Neither the ILC Articles nor the ILC Commentary provide grounds for such bar to the applicability of the rules on attribution. To the contrary the rules on attribution are codified in a general manner so as to also apply to the issue of corruption as confirmed by the statement in the ILC Commentary. There is also no doctrinal reason for negating the applicability. The participation of the public officials in corruption may therefore be attributable to the host State – despite the involvement of the investor. However, the involvement of the investor in the corrupt act bars it from claiming State responsibility against the host State whose public official the investor bribed.

C. Corruption as breach of an international obligation of the host State

As mentioned above, besides it being attributable to the host State, the corrupt act must also constitute a breach of an international obligation of the host State, in order to hold the State internationally liable.[1132] Article 12 of the ILC Articles clarifies that such breach of an international obligation exists

> "when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[1133]

From the irrelevance of the origin or character of the international obligation it follows that such obligation "*may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order*".[1134] Moreover, for the purpose of State responsibility it is irrelevant whether the obligation has a contractual, tortious or criminal character – in international law there is only "*a single general regime of State responsibility*".[1135]

Commentators agree that corruption is proscribed under international law.[1136] As discussed in Chapter Two various international instruments have been implemented in the last two decades dedicated to combat corruption. While the OECD Anti-Bribery Convention still focused on the prohibition of the supply-side corruption, the more recent conventions, as for instance the UNCAC, tackle both the supply-side and demand-side of corruption and oblige all signatories – currently 140 States – to criminalise both forms of corruption.[1137] None of the international instruments, however, contains an express undertaking of the States stating that its public officials will refrain from soliciting, extorting or receiving bribes from foreign investors – although it seems necessary that such obligation is implied. Nonetheless, commentators have expressed concerns whether the involvement in corruption attributed to the host State may amount to a direct breach of the relevant international instrument.[1138]

The international consensus to combat corruption expressed in the numerous Anti-Corruption Conventions leads to the conclusion that corruption is not only a

---

[1132] See Article 2 of the ILC Articles.
[1133] Article 12 of the ILC Articles. The 'inconformity with an international obligation' has also been described by the ICJ as "*'incompatibility with the obligations" of a State, acts 'contrary to' or 'inconsistent with' a given rule, and 'failure to comply with its treaty obligations'*", Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 12 (2).
[1134] Ibid., Article 12 (3).
[1135] Ibid., Article 12 (5).
[1136] See e.g. Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 61; Llamzon, *Corruption in International Investment Arbitration*, 265 et seq.; Raeschke-Kessler and Gottwald, "Corruption," 596; Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities," 19.
[1137] See Article 15 of UNCAC. For further examples see Chapter Two B.III
[1138] Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities," 14.

violation of transnational public policy, but also a violation of customary international law.[1139] The worldwide criminalisation of solicitation, extortion or accepting of a bribe by public officials is proof of the State practice of banning corruption.[1140] The signing and ratification of the various regionals and global Anti-Corruption Conventions is evidence for the *opinio juris* of the international community that a normative consensus against corruption exists.[1141] The international consensus to combat corruption leads to the international obligation for any State to join in good faith the international fight against corruption and tackle corruption by all means. As witnessed by the various international instruments, the international community requires more than merely criminalising corruption under domestic law. The obligation to ban corruption implies also the obligation not to participate in it. Moreover, the States are obliged to implement anti-corruption policies and measures to prevent corruption among its own ranks.[1142] Furthermore, the international fight against corruption also requires the States to actually enforce its anti-corruption laws and to prosecute its corrupt public officials as well as confiscating the proceeds of corruption.[1143] At the same time, the international obligation that States must redress the victims of corruption by its public officials follows from the requirement to implement good governance and to enhance the rule of law.[1144]

In conclusion the following conduct in connection with corruption in investor-State disputes may amount to a breach of an international obligation and therefore to State responsibility:

(i) Participation of public officials in a corrupt act such as solicitation, extortion or receipt of bribes;

(ii) Failure to have measures in place to prevent participation of its public officials in corruption;

[1139] Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," n. 98. ("*It may be worth stating that given the current status of the Global Anti-Bribery Regime, namely the number of international coventions* [sic] *currently in place that categorically reject acts of bribery and corruption, there may be room to argue that the receipt of a bribe is actually an internationally wrongful act as a matter of customary international law*."). See also Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities," 19 et seq.

[1140] See also Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities," 19.

[1141] See also Ibid., 20.

[1142] See e.g. Articles 5-14 of UNCAC; Article III of the Inter-American Convention against Corruption; Article 5 of the African Union Convention on Preventing and Combating Corruption.

[1143] See e.g. Articles 30 and 31 of UNCAC; Article 19 of the Criminal Law Convention on Corruption; Article 16 of the African Union Convention on Preventing and Combating Corruption. See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 73; Llamzon, *Corruption in International Investment Arbitration*, 275. ("*Inaction in pursuing corruption can thus be considered a separate violation of international law engaging international responsibility*.").

[1144] See Article 35 of UNCAC; see also Civil Law Convention on Corruption.

(iii) Condoning the corrupt act by failing to prosecute the corrupt officials as well as failure to attempt to recover the bribe;

(iv) Failure to provide redress to victims of corruption.

These acts amounting to a breach of an international obligation of the host State are the basis for the following analysis.

D. Attribution of corruption to the host State

Having concluded that the ILC Articles are applicable to corruption in investment treaty arbitration, the crucial question for State responsibility remains under which circumstances the corrupt act can be attributed to the host State, in other words under which conditions can the corrupt conduct be considered an act or omission of the host State. Moreover, as shown above, State responsibility for corruption may not only arise from actual participation in the corrupt act. The international fight against corruption imposes more international obligations on States with regard to corruption, the breach of which may also result in State responsibility. Since the different legal duties are based on different specific omissions or acts, the requirements for their attribution and for international responsibility to arise will differ. The following analysis will therefore treat each conduct separately.

We will commence with the question under which conditions the participation of public officials or entities related to the State in the corrupt act may be attributable to the host State (see below at **I.**). Subsequently, we will analyse the requirements for State responsibility to arise from the failure to prevent corruption (see below at **II.**) the failure to enforce the anti-corruption laws (see below at **III.**), and the failure to provide redress to victims of corruption (see below at **IV.**).

I. Attribution of participation in corruption

As mentioned in Chapter One, there are many different forms of corruption in the international investment landscape. However, with regard to the relevant question of attribution there are three main situations which will cover the vast majority of cases and which will be discussed in detail. First, the constellation where a public official being a State organ is involved in a corrupt practice, and consequently her official decision dealing with the investment is tainted by corruption (see below at **1.**). In the second situation, the decision regarding the investment is not made by a state organ, but by a state-owned, legally separate entity, which participates in a corrupt scheme (see below at **2.**). Finally, the corrupt act might also be performed by an individual, which is neither a State organ nor a State-owned entity (see below at **3.**). All three situations are dealt with differently under the rules of State responsibility and will thus be discussed separately.

Common to all situations of corruption is that since corruption is prohibited under almost any municipal law, the corrupt act of an organ or an non-state entity will necessarily be unlawful under internal law and outside the scope of any official

authority, thus *ultra vires*. Moreover, due to the actor's dishonesty and the ulterior motive of acting for private gain rather than for the public benefit, the question arises whether corrupt conduct must be considered mere private conduct. The following discussion will therefore focus on these – for matters of corruption – relevant issues of attribution.

1. Corrupt practice by a State organ

A highly disputed question in scholarship and in arbitral practice is if the corrupt conduct of a public official is attributable to the host State.[1145] Since this issue is most likely one of the most crucial questions for how to deal with corruption in investment treaty arbitration and since no conclusive answer is so far available, a thorough step-by-step analysis is required. The starting point for such analysis is the basic rule of attribution for conduct of a State organ to the State described in Article 4 of the ILC Articles, which reflects the cardinal principle of the unity of State.[1146]

> "Conduct of organs of State
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has the status in accordance with internal law of the State."

This rule defines the core cases of attribution and is the point of departure for all cases.[1147] Article 4 of the ILC Articles constitutes the general and fundamental principle that the State is responsible for breaches of obligations committed by its

---

[1145] See above at 188 et seq.
For commentators favouring attribution of corrupt conduct of public officials to the host State see e.g. Cremades, "Corruption and Investment Arbitration," 216; Raeschke-Kessler and Gottwald, "Corruption," 596 et seq.; Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 558 et seq.; Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption"; Kulick, *Global Public Interest in International Investment Law*; Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities," 4 et seq.; Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption."
For commentators rejecting such attribution see e.g. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 322; Griebel and Spetzler, "2. Tagung Junger Investitionsrechtler Auf Schloss Krickenbeck Am Niederrhein"; Bottini, "Legality of Investments under ICSID Jurisprudence," 307.
For commentators with a limited approach on attribution see e.g. Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration"; Llamzon, *Corruption in International Investment Arbitration*; Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread."
[1146] Petrochilos, "Attribution," 290.
[1147] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 94.

own organs.[1148] It further clarifies that all forms of organs are treated equally when it comes to attribution. Moreover, the general rule of attribution does not distinguish between *iure gestionis* or *iure imperii*, rather all conduct of an organ is attributable to the State.[1149] Therefore even conduct classified as commercial or *acta iure gestionis* may amount to an act of State.[1150] Since the analysis parts from the core concept of 'State organ', the first step is to examine whether the person or entity committing the corrupt act is a State organ.

a) State organ

The ILC Articles do not provide a definition of 'State organ'.[1151] In order to understand the omission of providing a definition of the central term, it is important to visualise the general approach of the ILC Articles. The ILC Articles claim to provide general principles and rules of secondary law for all potential primary obligations. Thus, a definition would have to fit all possible situations and bears the risk of limiting its applicability. At the same time, the ILC Articles have to recognise the important principle of international law that each State is free to organise and structure itself at its own discretion. Since international law has to respect and consider such obligatory characteristic of the principle of self-determination, the approach to part from the term 'State organ' in order to establish attribution to conduct of State leads automatically to numerous different situations. This obviously leads to umpteen different conceptions of organs throughout the international plane. From this it follows that a generally valid definition of 'State organ' applicable to all situations cannot exist.

Notwithstanding the paucity of definition of 'State organ', Article 4 provides guidance. Paragraph 1 refers to the "*position … in the organization of the State*". The ILC Commentary clarifies that the definition of organ includes "*all the individual or collective entities which make up the organization of the State and*

[1148] This principle is clear and universally established under international law, see e.g. Franciszek Przetacznik, "The International Responsibility of the State for Ultra Vires Acts of Their Organs," *Revue de Droit International de Sciences Diplomatiques et Politiques* 61 (1983): 129; Ipsen, *Völkerrecht*, 563 et seq.; Shaw, *International Law*, 786. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports 1999, 62 (hereinafter: (*ICJ Advisory Opinion on Immunity*"), 87, where the ICJ stated that "[a]*ccording to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state*". See also *Genocide case (Bosnia v Serbia)*, para 385, where the ICJ confirmed that this rule represents customary international law and regarded such rule as "*one of the cornerstones of the law of state responsibility, that the conduct of any state organ is to be considered an act of the state under international law, and therefore gives rise to the responsibility of the state if it constitutes a breach of an obligation of the state".*

[1149] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 96. See also Yearbook 2001, Vol. II Part Two, 41, note 113.

[1150] Ibid. This is a major difference from the attribution rules of ILC Article 5 and ILC Article 8, under which an *acta iure gestionis* is not attributable.

[1151] Petrochilos finds that Article 4 of the ILC Articles merely provides a description rather than a definition of the term organ; see Petrochilos, "Attribution," 291. Sasson states that ILC Article 4 also fails to provide examples, see Sasson, *Substantive Law in Investment Treaty Arbitration*, 8.

act on its behalf".[1152] In addition, the ILC Commentary makes clear that the reference to 'State organ' has to be interpreted "*in the most general sense*".[1153] However, examples for what shall be considered a State organ are missing.

The Special Rapporteur Ago also referred to the organisation of the State, which in his view had the meaning of *"the machinery of the State, the complex of concrete structures, through which it manifests its existence and performs its actions*."[1154] In the role of ICJ judge, Ago added a decade later that organs are "*persons or groups directly belonging to the State apparatus and acting as such*."[1155] It seems as if organisation, machinery and State apparatus are used as synonyms.

While the arbitral case law before the codification of the ILC Articles used various different terms without providing a definition,[1156] the ILC Articles make clear reference to internal law in order to determine whether an entity or an individual is a State organ for the purpose of attribution.

(1) Reference to internal law

Paragraph 2 of ILC Article 4 provides guidance for the determination of what is to be considered a State organ. Paragraph 2 refers to internal law and indicates that "[a]*n organ includes any person or entity which has the status in accordance with internal law of the State*". From this it follows that all persons and entities considered a State organ under municipal law will be regarded as State organs under international law.[1157] However, the reversed statement of this rule is not

---

[1152] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 94. It is important to note that Article 4 and also this particular passage from the Commentary were referred to with approval by the ICJ in the *Genocide case (Bosnia v Serbia)*, para 388.

[1153] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 95.

[1154] ILC Yearbook 1971, Vol. II, Part 1, Ago Third Report, 199, 237, para 116.

[1155] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, Separate Opinion Ago, ICJ Reports 1986, 181 (hereinafter: *Case Military and Paramilitary Activities*, Merits, Separate Opinion Ago"), 188.

[1156] See e.g. *Gertrude Parker Massey (U.S.A.) v United Mexican States*, Mexico/United States General Claims Commission, 15 April 1927, RIAA Vol IV, 155 (hereinafter: "*Parker Massey v Mexico*"), 157, para 6 ("public servants"); *William T. Way (U.S.A.) v United Mexican States*, Mexico/United States General Claims Commission, 18 October 1928, RIAA Vol IV, 391 ("officials"); *Thomas H. Youmans (U.S.A.) v United Mexican States*, Mexico/United States General Claims Commission, 23 November 1926, RIAA Vol IV, 110 (hereinafter: "*Youmans v Mexico*") ("officers"); See *Question relating to Settlers of German Origin in Poland*, Advisory Opinion of 10 September 1923, PCIJ, Series B, No. 6, 1923 (hereinafter: "*Settlers of German Origin*, Advisory Opinion"), 22 ("agents and representatives"); *Différend Dame Mossé*, France/Italy Claims Commission, 17 January 1953, RIAA, Vol XIII, 486 (hereinafter: "*Mossé v Italy*"), where the French-Italian Conciliation Commission used the term "fonctionnaire". In the *Petrolane* case, the Iran-United States Claims Tribunal based its analysis on whether the act had been committed by persons "*cloaked with governmental authority*", *Petrolane, Inc. v Islamic Republic of Iran*, Award No. 518-131-2, 14 August 1991, Iran-U.S.C.T.R. 1991, Vol. 27, 64 (hereinafter: "*Petrolane v Iran*"), 92.

[1157] See ILC Commentary Article 4, para 11: "*Where the law of a State characterizes an entity as organ, no difficulty will arise*." See also Petrochilos, "Attribution," 296. ("*If a State chooses to create an organ, for whatever reason or purpose, the conduct of that organ can engage its*

true.[1158] The mere fact that internal law shall serve as guidance does not justify the notion that State organs under international law are only those persons and entities labelled as such under internal law.[1159]

Firstly, the reference to internal law does not lead to the conclusion that internal law determines the attribution. The basis for such remains under international law as clarified by Article 3 of the ILC Articles.[1160] Thus, the determination of international responsibility is governed by international law, while internal law has to be taken into account to the extent that it is relevant.[1161]

Secondly, the primacy of international law ensures that a State cannot avoid responsibility for the conduct of an individual or entity acting as an organ by simply denying it such status under municipal law.[1162] The term 'State organ' under Article 4 of the ILC Articles has rather a broad meaning and cannot be limited under internal law.[1163] Hence, when the municipal law is silent about whether a certain individual or entity happens to be a State organ or not, or when such term has a narrow meaning under internal law, international law is not bound by the determinations under municipal law.[1164] In such case the main focus must be

---

responsibility."). See also Crawford and Olleson, "The Application of the Rules of State Responsibility," 425. ("*In such situation, the characterisation as an organ under domestic law is the end of the enquiry; the entitiy is conclusively to be regarded as constituting an organ for the purpose of attribution, and the State cannot deny that characterisation in order to argue that the conduct of that person or entity is nevertheless attributable*.").

[1158] See also Crawford and Olleson, "The Application of the Rules of State Responsibility," 425.

[1159] This already follows from the wording "*includes*", see also ILC Commentary Article 4, para 11. See also Sasson, *Substantive Law in Investment Treaty Arbitration*, 7.

[1160] Article 3 of the ILC Articles:

"*Article 3. Characterization of an act of State as internationally wrongful*

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

[1161] See also the clarification of the Drafting Committee regarding Article 3, 2681st ILC Meeting, 29 May 2001, ILC Yearbook 2001, Vol. I, 91, para 14.

[1162] See Crawford and Olleson, "The Application of the Rules of State Responsibility," 425; Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 98. See also Report of the ILC on the work of its Fiftieth Session 1998, A/53/10, ILC Yearbook 1998, Vol. II Part Two, 80, para 363, stating that several Governments were concerned with States escaping responsibility through reference to municipal law, for which reasons broad attribution rules were favoured. In addition, it is interesting to note that no Government had come forward with the request for more restrictive conditions.

See also ILC Article 3, above at footnote 1160. The fundamental principle of international law, which is set out in ILC Article 3 can also be found in Article 27 of the Vienna Convention of the Law of Treaties: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*"

Note that in *Eureko v Poland* one arbitrator, Professor Rajski, interpreted ILC Article 4(2) as limitation to international law; see *Eureko B.V. v Republic of Poland*, *Ad hoc* Arbitration, Partial Award, Dissenting Opinion Jerzy Rajski, 19 August 2005 (hereinafter: "*Eureko v Poland*, Dissenting Opinion Jerzy Rajski"), paras 8-9.

[1163] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 98.

[1164] See Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 4(11).: "*The internal law of a State may not classify, exhaustively or at all, which entities have the status of 'organs'*".

on whether the body acts like an organ and not whether internal law denies such body the status of organ.[1165] Thus, from the principle of the unity of the State it follows that the State cannot escape responsibility for State organs with separate legal personality under internal law, even if they have separate accounts and liabilities on a domestic level.[1166]

Thirdly, Article 4 (2) of the ILC Articles is not to be misunderstood as a reference to internal law 'labelling'.[1167] Rather, the mere relevance of internal law is to provide the factual basis for the determination under international law. Thus, the internal law has merely the function of providing the facts of what happens on inner-State level, for which reasons it amounts to a 'simple description of facts'.[1168] In other words, the meaning of the reference to internal law is rather to be understood as clarification that the relevant facts for the determination under international law are to be found in internal law. For such determination it is

---

Note that the objectives of characterisation of State organs are different in internal law and international law. In internal law, the main purpose is to build the internal organisation and structure of the State, while in the law of State responsibility the objective is to provide a basis for the question of what entity shall be considered related to the State in a way that it justifies attribution.

[1165] See Petrochilos, "Attribution," 293. ("*International law is concerned with the reality of the status of the relevant person or entity, not with internal-law labels*."). See also Sasson, *Substantive Law in Investment Treaty Arbitration*, 7. ("*If municipal law does not consider the entity an organ, the structure of the State and the relationship between it and the entity must be considered to determine whether the entity is nonetheless under the State's de facto strict control.*").

[1166] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 83. ("*The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law*."), emphasis added.

[1167] Note that the wording of Article 4 (2) of the ILC Articles is misleading and could lead to a misapprehension that the reference to internal law is a formalistic cross reference to internal law. This 'formulaic' interpretation has been adopted by the United States, who brought forward its concerns that such wording could create a loophole where States could refer to internal law in order to escape international responsibility; see Comments and observations received by Governments, ILC Yearbook 1998, Vol. II, Part One, 81, 105: "*Under this formulaic rule, it could be that according to some State law, the conduct of State organs will be attributable to the State, while the conduct of identical entities in other States will not be attributable to the State*."

In order to reduce the possibility of misunderstanding, the ILC discussed the deletion of the reference to internal law in Article 4 (2) ILC Articles as suggested by Special Rapporteur Crawford in line with many Governments; see ILC 2553rd Meeting, ILC Yearbook 1998, Vol. I, 229. However, internal law was found to be of primary importance for determining State organs. In addition, the view was also expressed that the reference would also encompass practice and customs. Thus, the views favouring deleting the reference and merely referring to internal law in the commentary was rejected and the reference to internal law was kept in the body of the articles. See Summary of ILC Sixth Committee, 53rd Session, UN Doc A/CN.4/496, 17, para 118. The view of merely including the reference to internal law in the commentary was brought forward e.g. by Simma, see ILC 2554th Meeting, ILC Yearbook 1998, Vol. I, 239, para 57.

Finally, it was agreed that while keeping the reference to internal law in the body of the Articles, the commentary would clarify that the reference to internal law would also include practice and convention and it would explain the supplementary role of international law in the case that internal law was silent or provided an incorrect assessment of State organ; see Statement of Drafting Committee, ILC Yearbook, Vol. I, 289, para 77.

[1168] See Yearbook of the International Law Commission 1971, Vol. II, Part 1, 238. See also Delbrück and Wolfrum, *Völkerrecht*, § 176, 891. Note that domestic law is generally valued as a factual element under international law; the determination of State organs is no exception.

important to note that not only positive law is relevant, but also all forms of laws including 'practice and convention'.[1169]

In conclusion, the concept of State organ under international law is broader than that under internal law. While the concrete label given under internal law may serve as guidance, it is no limitation for the international law approach.

(2) *De facto* organs

Against the background that there is a wide consensus in international law that the characterisation of an entity by domestic law may not bar State responsibility, in practice the term *de facto* organ has evolved. However, a unanimous definition of the term *de facto* organ does not exist. In fact, the term is used on the one hand to capture all entities, which are not *de jure* organs under internal law, but which under international law shall be treated equal to *de jure* organs.[1170] On the other hand, it is also applied to encompass those entities, which are not *de jure* organs, but whose acts should nonetheless be attributed to the State under international law.[1171] What seems to be a mere theoretical question does in fact hold some crucial differences in praxis. Pursuant to the first understanding of the term, the Article 4 of the ILC Articles would be applicable with its all-embracing attribution rule. However, following the second approach, the term *de facto* organ would be used for all circumstances covered by Articles 4, 5 and 8 – all three Articles having different requirements for attribution.

Especially since the requirements for attribution differ for the different forms of entities and in order to avoid any misconception, the term *de facto* organ should only be used for entities, which under internal law are not a State organ, but due to its place in the machinery of the State should be considered for the purpose of attribution an organ under international law and thus fall under Article 4 of the ILC Articles. International law remains as a corrective and the ILC Articles provide additional safeguards through Articles 3, 5 and 8 against any abuse by a State.

[1169] See First Report on State responsibility by James Crawford, ILC Yearbook 1998, Vol. II, Part One, 1, 35, para 163. See also Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 4 (11).

[1170] See e.g. *Genocide case (Bosnia v Serbia)*, para 392 ("*according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.*").

[1171] See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, 14 (hereinafter: "*Military and Paramilitary Activities*, Merits"), para 109 (The Court emphasised that it had to "*determine* […] *whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.*").

Whether an entity may be considered a *de facto* organ of the State will depend on the concrete circumstances of the case. One focus may be to what extent the entity is part of the machinery of State. Another focus may be on the entities' core purpose. The arbitral practice only provides limited guidance. In *Eureko v Poland*, for instance, the tribunal found the State Treasury, which under domestic law constitutes a legal person separate from the State, to be an organ of the State for purposes of attribution.[1172] Referring to the above-mentioned extracts from the ILC Commentary, the tribunal found that the separate legal personality under internal law is no bar to attribution.[1173] In *Noble Ventures v Romania*, however, the tribunal came to the conclusion that the relevant entities could not be considered as *de jure* organs, since they were legal entities separate from Romania.[1174] Without questioning whether despite the legal separate character under internal law the relevant entities may nevertheless be considered as state organs under Article 4, the tribunal directly jumped to the issue of attribution under Article 5 and came to the conclusion that the relevant entities constituted *governmental agencies*, for which reason their acts are attributable to Romania.[1175] In *Ulysseas v Ecuador*, the tribunal found it not sufficient that under the constitutional law of the host State the relevant entities were defined as part of the public sector in the electricity area.[1176]

b) Any function

In addition, Article 4 of the ILC Articles states that the conduct of the organ shall be attributable to the State regardless of the function exercised by the organ.[1177] Thus, it shall be of no relevance whether the organ belongs to the legislative, executive or judicial branch of the State.[1178] From this it follows that the degree of

[1172] See Articles 33, 34 of the Polish Civil Code as quoted in *Eureko B.V. v Republic of Poland*, *Ad hoc* Arbitration, Partial Award, 19 August 2005 (hereinafter: "*Eureko v Poland*, Partial Award"), para 120. While this case is often cited as an example for a *de facto* organ, note that from the terminology used by the tribunal it is not clear whether it in fact applied Article 4. The tribunal rather named all possibilities under which the acts could be attributable (Articles 4, 5 and 8 of the ILC Articles) and concluded that "*whatever may be the status of the State Treasury in Polish law, in the perspective of international law, which this Tribunal is bound to apply, the Republic of Poland is responsible for the actions of the State Treasury*"; see *Eureko v Poland*, Partial Award, para 134.

[1173] *Eureko v Poland*, Partial Award, para 130-131, referring to ILC Commentary, 87, para 6 and 83, para 7.

[1174] *Noble Ventures v Romania*, Award, para 69.

[1175] *Noble Ventures v Romania*, Award, para 79.

[1176] *Ulysseas, Inc. v Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (hereinafter: "*Ulysseas v Ecuador*, Final Award"), paras 128, 135.

[1177] Article 4 ILC Articles: "[…] *whether the organ exercises legislative, executive, judicial or any other functions* […]". See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 94.: "*No distinction is made for this purpose between legislative, executive or judicial organs*."

[1178] What has become the fundamental rule in State Responsibility was challenged at the beginning of the twentieth century by several theories. One theory was based upon the principle of the separation of powers and relied upon the independence of the courts in order to exclude the international responsibility of the State for acts of the judiciary. Since under internal law most governments are not able to influence the judiciary, it was felt unjust to make the State responsible for judicial acts. The Guerrero Report of 1930, for instance, asserted that a national judgment could not be challenged on international level due to its sovereign character. Gustavo Guerrero, Annex to

independence of action and decision-making may not prejudice the determination of organ of State. While a member of parliament or a judge requires a certain amount of independence from other branches of government to pursue their duties, they nevertheless are State organs, whose acts are attributable to the State. Arbitral tribunals have constantly confirmed this general rule. The tribunal in *CMS v Argentina*, for instance, especially pointed at Article 4 of the ILC Articles when stating that

> "it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the Articles on State Responsibility adopted by the International Law Commission is abundantly clear on that point."[1179]

Following this general rule, international investment tribunals have held actions by the executive,[1180] by the legislative[1181] and by the courts[1182] attributable to the

---

Questionnaire No. 4, Committee of Experts for the Progressive Codification of International Law, Report of Sub-committee, League of Nations Document C.196.M.70.1927.V. This theory was challenged as early as 1938, when Freeman published his extensive work on Denial of Justice and concluded: "*Although the independence of the courts may mean that other organs of the State will have difficulty in preventing judicial officers from embarking on a course of conduct contrary to some rule of international law, this fact in no sense alters the principle that such acts are indeed acts of the State. From the standpoint of international law, the doctrine of 'separation of powers' is of no moment in this connection*." Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (London et al.: Longmans, Green and Co., 1938), 31 et al. The next big step towards the present notion of international responsibility for judicial acts was the work of ICJ Judge Eduardo Jiménez de Aréchaga. In his often cited passage of his General Course in Public International Law at the Hague Academy, he concluded that "*in the present century State responsibility for judicial acts came to be recognised. Although independent of Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive*." Jiménez de Aréchaga, 'International Law in the Past Third of a Century', Recueil des Cours, 1978, 159, Vol. I, p. 278. Likewise, a theory leaning on the sovereignty of Parliament excluded acts of the legislature from State responsibility, see ILC Yearbook 1973, Vol. II, 165, 196, para 8.

[1179] *CMS v Argentina*, Decision on Jurisdiction, para 108. See also *Loewen v United States*, Decision on Jurisdiction, para 70 ("*The modern view is that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial,* […]."). The *Loewen* Tribunal also referred to Article 4 of the ILC Articles.

[1180] See e.g. *Eureko v Poland*, Partial Award, paras 115 – 134, where the *ad hoc* tribunal referred to the Commentary to the ILC Articles and attributed the acts of the Polish State Treasury to the conduct of Poland.

[1181] See e.g. *EDF v Romania*, paras 185 et seq..

[1182] See e.g. *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (hereinafter: "*Azinian v Mexico* Award"), paras 97-103, a Mexican Municipality relied on Mexican court decisions when holding a concession contract invalid under Mexican law; the tribunal emphasised that it was the Mexican court decisions and not the reliance of the Municipality that had to constitute a breach of Mexico's obligations. See also *Loewen v United States*, Decision on Jurisdiction, paras 47-60, where the NAFTA tribunal held that the Mississippi trial court's judgment ordering Loewen to pay USD 500 million and the Mississippi Supreme Court requirement that Loewen post a USD 625 million bond were "*measures of a Party*", from this it follows that both court decisions where held to be acts of State. For State responsibility for juridical acts in general see Béla Vitányi, "International Responsibility of States for Their Administration of Justice," *Netherlands International Law*

State. Thus, corrupt acts committed by officials belonging to the government and administration, by members of parliament and even by judges and other members of the judiciary may be attributable to the State.

c) Any position

Article 4 of the ILC Articles also clarifies that the particular position of the organ in the organisation of the State plays no role in the attribution process.[1183]

Formerly, it was argued that only acts of State officials with the power to bind and commit the State such as the head of State or the government or the minister of foreign affairs[1184] may be attributed to the State.[1185] Under such theory acts of lower State officials would not be attributable to the State[1186] since the State does not owe the absolute obligations and liabilities of an insurer; only acts "at the level of the state" could amount to acts of State.[1187] It is true that in principle under international law only such high organs may represent the State on an international level, but the international law rule of authorisation to enter into commitment on behalf of the State must be distinguished from the rules of attribution for the purpose of State responsibility.[1188] The objectives of both sets of laws are different and not comparable.

At present, there is consensus that any State organ may be the author of an act that is attributable to the State, while the level in the hierarchy is of no relevance for the purpose of attribution.[1189] Acts of subordinate officials are attributable on the same

---

Review 22, no. 02 (1975): 131–63. See also Jan Paulsson, *Denial of Justice in International Law*, First (Cambridge et al.: Cambridge University Press, 2005), 38 – 44.

[1183] Article 4 of the ILC Articles: "[…] *whatever position* [the State organ] *holds in the organization of the State* […]".

[1184] See Article 7 (2)(a) of the Vienna Convention on the Law of Treaties, which states that the above-mentioned organs may represent the State with regard to the conclusion of the treaty without having to produce full powers.

[1185] See Delbrück and Wolfrum, *Völkerrecht*, § 176, 894.

[1186] Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, First (New York: The Banks Law Publishing Co., 1915), 185–190.

[1187] This view was advanced by Great Britain in the European Court of Human Rights dispute *Republic of Ireland v Great Britain* concerning the conditions in Northern Ireland. See Jochen Abr. Frowein, "Probleme Des Allgemeinen Völkerrechts Vor Der Europäischen Kommission Für Menschenrechte," in *Von Münch (ed.) Staatsrecht - Völkerrecht - Europarecht: Festschrift Für Hans-Jürgen Schlochauer Zum 75. Geburtstag Am 28. März 1981* (Berlin, New York: De Gruyter, 1981), 297. The European Commission of Human Rights dismissed such argumentation in its Report and held "[t]*he responsibility of a State under the Convention may arise for acts of all its organs, agents and servants. As in connection with responsibility under international law generally, their rank is immaterial in the sense that in any case their acts are imputed to the State*", *Yearbook of the European Convention on Human Rights*, Vol. 19, 1976, 758 et seq. The remarks of the European Court of Human Rights regarding State responsibility were much shorter than the ones of the Commission, however, the Court held that higher State officials are responsible for their lower State officials, *Republic of Ireland v Great Britain*, Judgment, 18 January 1978, Series A, Vol. 25 (1978), 64.

[1188] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 91.

[1189] See Ibid., 95. See also Jennings and Watts, *Oppenheim's International Law*, § 159, 540; Crawford, *Brownlie's Principles of Public International Law*, 447. Note, in *Oppenheim's*, various organs of States are dealt with separately due to their alleged distinct effect on the degree of State

basis as those of superior officials.[1190] From this it follows that it is of no relevance whether the corrupt action is committed by a high public official as e.g. a President of a State or a Minister or by a low level public official in charge of administrating or observing licences. Corrupt practices of all sorts of organs irrespective of their position in the State hierarchy are attributable to the conduct of State.

d) Any character

Moreover, any organ of any territorial governmental entity within the State as well as any organ of the central government is covered by the broad meaning of the term 'State organ'.[1191] Under Article 4 of the ILC Articles even acts of organs at provincial and local levels are attributable to the State.[1192] In fact, the internal or constitutional structure of the State is irrelevant for purposes of attribution.[1193] The State is internationally responsible for all acts of its separate federal units, even in cases where the central government has no power under domestic law to oblige the territorial unit to comply with the State's international obligations.[1194]

---

responsibility. This is no contradiction to the notion that irrespective of the particular position of the organ, its official actions are attributable to the conduct of State. Rather, the distinction of the various groups of organs merely allows focusing on the different characteristics of the various groups of State organs for specific issues of State responsibility. However, the distinction made by *Oppenheim's* between 'original' and 'vicarious' State responsibility is confusing and misleading. Under this theory, original responsibility results from acts by the government of a State or by acts committed with the authorisation of such, while vicarious responsibility flows from unauthorised acts by agents of the State or by private individuals. Despite some slight differences in the consequences, there is no fundamental difference between the two categories and the State responsibility remains the same. Thus, such distinction appears to be erroneous and should not be followed. See also Ibid., 436.

[1190] See *Way v Mexico*, 400: "*The* [Mexico/United States General Claims] *Commission has in other cases extensively considered cognate questions relating to responsibility of a Government for its officials, including such as are some times called 'minor officials'.* […] *It is believed to be a sound principle that, when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility*." (Emphasis added). See also *Parker Massey v Mexico*, 159: "*it is undoubtedly a sound general principle that, whenever misconduct on the part of any* [persons in State service], *whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants."*
See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 96.

[1191] Article 4 of the ILC Articles: "[…] *whatever its character as an organ of the central government or of a territorial unit of the State.*"

[1192] *Generation v Ukraine*, para 10.3. See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 95.

[1193] *Vivendi v Argentina I*, Award, para 49, which confirms the statement of the ILC that "*a federal state cannot rely on the federal or decentralized character of its constitution to limit the scope of its international responsibilities*." Note that the decision was annulled by *Vivendi v Argentine Republic*, Decision of Annulment, 3 July 2002. However, the Annulment Committee remained silent with regard to the tribunal's finding of attribution to the central government, for which reason such concept of attribution was not affected by the annulment.

[1194] See e.g. *LaGrand (Germany v United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, 9 (hereinafter: "*LaGrand*, Provisional Measures"), 16, para 28; *LaGrand (Germany v United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001,

This rule of customary international law has constantly been confirmed in arbitral case law. In *Metalclad v Mexico*, for instance, the local municipalities of San Luis Potosi and Gualdalcazar, Mexico, had allegedly interfered with the already federal- and state-approved investment consisting in the development and operation of a hazardous-waste landfill. One important question was whether the conduct of the local governments could be attributed to Mexico. The tribunal referred to NAFTA Article 105[1195] under which the States are committed to ensure the observance of

---

466 (hereinafter: "*LaGrand*, Judgment"), para 81.
See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 97. In this context, Crawford emphasises that "[t]*he State, for purposes of attribution, is a very broad concept*", Crawford, "Investment Arbitration and the ILC Articles on State Responsibility," 133.
This general rule of attribution has constantly been confirmed in early practise of international tribunals and courts, see e.g. *Estate of Hyacinthe Pellat (France) v United Mexican States*, Mexico/France Claims Commission, 7 June 1929, RIAA Vol V, 534, 536. The France-Mexican Claims Commission held that "*such responsibility may not be denied, not even in cases where the federal Constitution denies the central government the right of control over the separate States or the right to compel them to comply in their conduct with the rules of international law*" ("*Cette responsabilité indirecte ne saurait être niée, pas même dans les cas où la Constitution fédérale dénierait au Gouvernement central le droit de contrôle sur les Etats particuliers, ou le droit d'exiger d'eux qu'ils conforment leur conduite aux prescriptions du droit international*").
See also *Différend Héritiers de S.A.R. Mgr le Duc de Guise,* France/Italy Claims Commission, 15 September 1951, RIAA Vol XIII, 154, 161: "*For the purpose of reaching a decision in the present case it is irrelevant that the decree of 29 August 1947 was not enacted by the State of Italy but by the region of Sicily. The Italian State is even responsible for Sicily regarding the implementation of the Peace Treaty, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic."* ("*Il importe peu pour décider dans la présente affaire que le décret du 29 août 1947 émane non pas de l'Etat italien mais de la Région sicilienne. L'Etat italien est responsable, en effet, de l'exécution du Traité de Paix même pour la Sicile, nonobstant l'autonomie accordée à celle-ci dans les rapports internes, par le droit public de la République italienne*.")
See also *Salome Lerma Vda. De Galvan (United Mexican States) v United States of America*, 21 July 1927, RIAA IV, 273, 274, where the United States was held responsible for the acts committed by the authorities of the State of Texas against a Mexican national.
Note that exceptions to this general rule are of course possible under the *lex specialis* principle (Article 55 ILC Articles). A treaty may contain a federal clause in order to limit the international responsibility of the federal State, see Alfred Verdross and Bruno Simma, *Universelles Völkerrecht - Theorie Und Praxis*, Third (Berlin: Duncker & Humblot, 1984), § 1275, 860. For an example of a federal clause see *Convention for the Protection of the World Cultural and Natural Heritage*, Paris, 16 November 1972, U.N.T.S., Vol. 1037, 152, Article 34.
In addition, the general rule does not apply when constituent units of a federal State have the power to enter into 'international agreements' independently from the federation and this limited authority is apparent to the other State. Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 98; Ipsen, *Völkerrecht*, 564. This follows from the notion that a subject of international law (e.g. a State or an International Organisation) waives implicitly its right to invoke State responsibility against the Federation when it enters into an international agreement with a single federal State, see Delbrück and Wolfrum, *Völkerrecht*, § 176, 893. However, such exception should be of little relevance for investor-State disputes since the agreements entered into by the investors and States do not amount to 'international agreements' in terms of the meaning of 'agreements between two subjects of international law'.

[1195] Article 105 NAFTA reads:
"*Extent of Obligations*
The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."

all NAFTA obligations by state and provincial governments.[1196] Relying on NAFTA Article 201,[1197] the tribunal found that the term 'state and province' would also include local governments of those territorial entities. Although it had relied upon the NAFTA provisions, the tribunal refrained from finding that they constituted a special regime,[1198] it rather confirmed that they reflected the customary international law rules stated in the relevant ILC Articles.[1199] On such basis, the tribunal held Mexico responsible for the conduct of its local governments, although the central government of Mexico had internally no position to interfere in such conduct.

Hence, any corrupt scheme implemented by officials of any territorial unit regardless of whether they belong to the central, provincial or local government may be attributable to the host State. To recapitulate, neither the specific function (executive, legislative, juridical) nor the particular position (high or low) of that individual or local entity is relevant for purposes of attribution.

e) Even *ultra vires* acts

A crucial issue for attribution of corrupt conduct arises from the manifest unlawfulness of such act. Corruption will most certainly be prohibited under the law of each host State. Moreover, the host State will most likely have agreed through several international instruments to combat corruption, which leads to the assumption that it is against the host State's will to engage in corrupt conduct evidently breaching its international obligations. In addition, the corrupt officials act for their own benefit and to the detriment of the public and the host State. All these circumstances make the corrupt act fall outside of the public authority originally granted to the public official, i.e. *ultra vires*, which in turn raises questions on whether it may be attributable to the State.

(1) General rule –Article 7 of the ILC Articles

Article 7 of the ILC Articles provides the general attribution rule for acts committed outside the authority of the State organ or even against instructions – *ultra vires* acts.[1200] ILC Article 7 states:

"Article 7. Excess of authority or contravention of instructions

---

[1196] *Metalclad v Mexico*, para 73.

[1197] Article 201 NAFTA reads:

"[…]

2. For purposes of this Agreement, unless otherwise specified, a reference to a state or province includes local governments of that state or province." Emphasis added.

[1198] Sasson, *Substantive Law in Investment Treaty Arbitration*, 6.

[1199] *Metalclad v Mexico*, para 73. Note that the tribunal referred to the version of the ILC Articles adopted in 1975. In that version, the attribution for territorial entities was included in Article 10; see ILC Yearbook 1975, Vol. II, 61.

[1200] Note that Article 7 of the ILC Articles has constantly been confirmed by investment treaty arbitral tribunals, see e.g. *ADF v United States*, Award, n. 184; *Noble Ventures v Romania*, Award, para 81; *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 190.

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[1201]

This rule makes it clear that unauthorised or *ultra vires* acts of State organs are attributable to the State when acting in their official capacity.[1202] Nowadays, ILC Article 7 corresponds to the general principles of law on State Responsibility.[1203] This notion was already part of the 1961 revised draft of the ILC Articles by Special Rapporteur F. v García Amador which provided that "*an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity*".[1204]

One reason for this rule is that foreign States shall not be required to be aware of the particular "*allotment of powers*" to the State officials of the other States.[1205] Another reason for such far-reaching attribution rule is the notion that only the State, by appointing the relevant person as organ, creates through the transfer of public authority the necessary conditions to use such official power to the detriment of others[1206] and of the State itself. Furthermore, attribution of *ultra vires* acts is necessary in order to secure the legal certainty and stability on the international level.[1207]

[1201] ILC Article 7, emphasis added.

[1202] This rule accords to the concept of objective responsibility, see Crawford, *Brownlie's Principles of Public International Law*, 452.

[1203] For references of opinions by scholars and commentators see Yearbook of the International Law Commission 1972, Vol. II, 88, Fn. 76. See also Wolff Heintschel von Heinegg, *Casebook Völkerrecht*, 1st ed. (München: Verlag C. H. Beck, 2005), 280.
For examples in investor-State arbitration see *SPP v Egypt*, Award, para 85, *Noble Ventures v Romania*, Award, para 81.
For statements of the outdated contrary opinion see references given by Crawford in footnote 145 of Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 106. For an opposite view see also the 1926 Report of Rapporteur Gustavo Guerrero for 1930 Codification Conference of the League of Nations, published in American Journal of International Law, Supplement Vol. 20, 1926, 177-203. Guerrero argues that acts of officials accomplished outside the scope of her competence cannot be imputed to the State and therefore are not acts of the State, ibid, 188. For a recent opinion questioning the far-reaching scope of this rule see Ipsen, *Völkerrecht*, 568.

[1204] Yearbook of the International Law Commission 1961, vol. II, p. 47.

[1205] See Cassese, *International Law*, 246.

[1206] Stephan Wilske, *Die Völkerrechtswidrige Entführung Und Ihre Rechtsfolgen* (Berlin: Duncker & Humblot, 2000), 70.

[1207] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 106. See also Katja S. Ziegler, *Fluchtverursachung Als Völkerrechtliches Delikt - Die Völkerrechtliche Verantwortlichkeit Des Herkunfsstaates Für Die Verursachung von Fluchtbewegungen* (Berlin: Duncker & Humblot, 2002), 105; Wilske, *Die Völkerrechtswidrige Entführung Und Ihre Rechtsfolgen*, 70; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 54; Llamzon, *Corruption in International Investment Arbitration*, 260 et seq.

Besides, it would create a loophole for States to escape responsibility by merely relying on a breach of national law.[1208] States could take advantage of the fact that a certain act is unlawful in order to deny attribution and any responsibility, although they might have been aware of the illegal conduct but tolerated it, or even secretly allowed it. Such loophole would also run counter to the general rule of ILC Article 3,[1209] i.e. that the State may not rely on internal law in order to escape international responsibility.[1210] Thus, whether an act is attributable or not may not be excluded by reference to a violation of internal law. Abuse of public power is irrelevant for purposes of attribution.[1211] This general rule has been constantly confirmed by arbitral case law.

(2) Arbitral jurisprudence

The attribution of *ultra vires* acts has for a long time been a frequent subject matter of arbitral proceedings.[1212] The arbitral awards that formed the basis for the rules codified in the ILC Articles mostly dealt with the *ultra vires* acts of soldiers.[1213]

In the often-cited case of *Youmans*, Mexican troops failed to follow the orders of the mayor of a Mexican town to protect American citizens threatened by a mob and joined the riot instead. As a consequence of the troops opening fire on a house and the mob's attack, three American citizens were killed. The Mexico/United States General Claims Commission considered the murder committed by the Mexican troops attributable to the State of Mexico and thus found it responsible, although the mayor acted correctly and the Mexican troops disobeyed concrete instructions.[1214]

[1208] ILC Yearbook, 1975 Vol. II, 51, 67, para 18: "[…] *the principle that only conduct of its organs which is in conformity with the provisions of its municipal law is to be attributed to the State, that would make it all too easy for the State to evade its international responsibility."*

[1209] See ILC Article 3, above at footnote 1160.

[1210] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 106.

[1211] Ibid., 99.

[1212] See e.g. *Caire v Mexico*, see footnote 1031. The French-Mexican Claims Commission confirmed that unlawful acts may be imputed to the state even where it was beyond the legal capacity of the official involved.

[1213] Note that the *ultra vires* rule became generally recognised by international arbitral jurisprudence and is not merely applicable to soldiers.

[1214] *Youmans v Mexico*, 116. Note that Mexico submitted extracts from a discussion of a subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law stating that acts committed outside the scope of competence of the official can not be imputed to the State. The Mexico/United States General Claims Commission found that the statement was merely directed to the issue of authority of an official defined by internal law to act on behalf of the Government. The Commission however clarified that "[c]*learly it is not intended by the rule asserted to say that no wrongful act of an official acting in the discharge of duties entrusted to him can impose responsibility on a Government under international law because any such wrongful act must be considered to be 'outside the scope of his competency'. If this were the meaning intended by the rule it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable. We do not consider that any of these passages from the discussion of the subcommittee quoted in the Mexican brief are at variance with the view which we take that the action of the troops in participating in the murder at Angangueo imposed a direct responsibility on the Government of Mexico.*").

The *ultra vires* rule has constantly been confirmed by international courts and tribunals. More recently, the Inter-American Court of Human Rights in *Velásquez Rodríguez*[1215] stated that the *ultra vires* rule is a general principle of international law. This case dealt with the violation of a provision of the American Convention on Human Rights by the Government of Honduras due to a detention and subsequent disappearance of a Honduran student by members of the Honduran Armed Forces. The Court found that although the acts where *ultra vires,* they were carried out under colour of public authority and were therefore attributable to the Honduran State. [1216] The Court made clear that

> "[t]his conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[1217]

The tribunal in *SPP v Egypt*, for instance, emphasised the importance of the attribution of *ultra vires* for State responsibility in general

> "[…] the principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or ultra vires acts of officials have been performed by State agents under cover of their official character. If such unauthorized or ultra vires acts could not be ascribed to the State, all State responsibility would be rendered illusory."[1218]

(3) Limitation of apparent excess of authority

In an earlier version of the ILC Articles under the Special Rapporteur Ago the *ultra vires* rule contained the limitation that apparent excess of competence would not lead to attribution of conduct to the State.[1219] However, the final version of the

---

[1215] IACHR, *Case of Velásquez Rodríguez v Honduras*, Merits, Judgment of 29 July 1988, Inter-Am.Ct.H.R. Series C, No. 4 (1988) (hereinafter: "*Velásquez Rodríguez*").

[1216] *Velásquez Rodríguez*, para 170. See also paras 182-183.

[1217] *Velásquez Rodríguez*, para 170. See also *Sandline Inc. v Papua New Guinea*, Interim Award, 9 October 1998, International Law Review, Vol. 117, 552 (hereinafter: "*Sandline v Papua New Guinea*"), 561 ("[It] *is a clearly established principle of international law that acts of a state will be regarded as such even if they are ultra vires or unlawful under the internal law of the state* […] *their* [institutions, officials or employees of the state] *acts or omissions when they purport to act in their capacity as organs of the state are regarded internationally as those of the state even though they contravene the internal law of the state.*").

[1218] *SPP v Egypt*, Award, para 85.

[1219] Yearbook of the International Law Commission 1972, vol. II, 95:

"*Article 10. - Conduct of organs acting outside their competence or contrary to the provisions concerning their activity*

1. […]

2. However, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest."

ILC Articles favoured an absolute rule of liability and refrained from limiting the attribution by a reference to the apparent exercise of authority. Thus, even "*overtly committed unlawful acts*" are attributable to the State when committed under the cover of its official status.[1220] This is even the case when the competence or authority is *manifestly* exceeded.[1221]

This rejection of the limitation for conduct manifestly outside the competence of the organs has been criticised.[1222] The argument runs that apparent *ultra vires* acts shall not be subject to attribution.[1223]

Since any act of corruption, such as soliciting or accepting a bribe, is for everybody apparently unlawful and manifestly outside the scope of the public official's authority, it is crucial for the present analysis to resolve whether the *ultra vires* rule shall be limited by the apparent excess of competence or whether it shall cause absolute liability.[1224]

(a) Arguments for a limitation

One argument for a limitation refers to the main idea behind the *ultra vires* rule, namely that the foreign State or non-state entity invoking State responsibility shall not be required to be aware of the particular "*allotment of powers*" [1225] to the acting State officials. Since the specific authorisation of competence and designation of functions of the officials is in the sole sphere of the State, it is almost impossible for the victim to obtain such information. However, in the case of conduct that is apparently outside the scope of competence, this difficulty disappears and it is no longer an issue, since the victim is aware of the excess of power and of the unlawfulness of such act.

Furthermore, it has been argued that the apparent excess of competence provides enough range for the victim to react. Thus, through the awareness of the unlawfulness of the official's act, the victim is elevated to a position to avoid any harm and damage.[1226]

[1220] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 106.
[1221] Ibid.
[1222] See e.g. Ipsen, *Völkerrecht*, 569. See also Schröder, "Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung Und Sanktionen," 594. Schröder points out that some scholars find the proof under customary international law for attribution of manifest *ultra vires* acts a difficult task.
[1223] See Verdross and Simma, *Universelles Völkerrecht - Theorie Und Praxis*, § 1274, 859. Simma argues that the majority of commentators are in favour of the limitation of manifest or apparent excess of competence. However, he only refers to Ago and the above-mentioned Article 10. At present such general notion cannot be upheld without further ado. See also Christophe Fischer, *La Responsibilité Internationale de L'etat Pour Les Comportements Ultra Vires de Ses Organes* (Tolochenaz: Imprimerie Chabloz, 1993), 235.
[1224] Note that although the provisions on attribution of the ILC Articles have been found to mirror the customary international law rule on attribution (see B.III.6), the specific question of attribution of apparent *ultra vires* acts is of utmost importance for the attribution of corruption and thus requires further examination of the different opinions and arguments.
[1225] See Cassese, *International Law*, 246.
[1226] See ILC Yearbook 1972, Vol. II, 71, 95, fn 115, referring to Mr Garcia Amador's revised draft.

In addition, supporters of a limitation for apparent *ultra vires* acts frequently point at Article 46 of the VCLT,[1227] which provides that the consent of a State organ to be bound by a treaty may not be attributed to the State when the violation of competence is manifest.[1228]

(b) Arguments against a limitation

The limitation was abolished from the ILC Articles in order to avoid "*the unpardonable risk of presenting the State with an easy loophole in particular serious cases*".[1229] The State could escape responsibility by assuring that the act – besides of being outside the competence of the official – is committed in a way that the excess of powers is obvious to everybody. This would be an easy undertaking for a host State and would amount to an escape clause.

Another weakness of the limitation for acts manifestly committed outside the competence is the fact that mere knowledge of the unlawfulness of the act will not prevent the negative consequences resulting from such act.[1230] The mere awareness of the unlawfulness of the official's action will in most cases be of little avail for the victim, since this will not turn the relevant action into lawful.[1231]

To counter the argument based on Article 46 VCLT, it has been argued that "*the exception* [of Article 46] *cannot be transferred just as it stands from attribution to the State of a declaration of will to attribution to the State of action liable to be the source of international responsibility*".[1232] The situations under the law of treaties and under the law of responsibility are neither exchangeable nor comparable.

In addition, the general acceptance of the objective theory of responsibility has been brought forward to suggest that an absolute approach without limitation is preferable.[1233] Thus, it has been argued that the State would be encouraged to

---

[1227] Article 46 of the Vienna Convention on the Law of Treaties reads:
"*Provisions of internal law regarding competence to conclude treaties*
1. *A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*
2. *A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.*"

[1228] See e.g. Ipsen, *Völkerrecht*, 569. Note that Ipsen rejects the notion that the far-reaching scope of Article 7 of the ILC Articles reflects entirely customary international law. Thus, Ipsen doubts that the majority of the States will accept the rule without limitations and assumes that it will be rejected in a multilateral agreement.

[1229] ILC Yearbook 1975, Vol. II, 51, 69, para 25.

[1230] ILC Yearbook 1975, Vol. II, 51, 69, para 25.

[1231] See e.g. Verdross and Simma, *Universelles Völkerrecht - Theorie Und Praxis*, § 1274, 859; Ziegler, *Fluchtverursachung Als Völkerrechtliches Delikt - Die Völkerrechtliche Verantwortlichkeit Des Herkunfsstaates Für Die Verursachung von Fluchtbewegungen*, 107.

[1232] Yearbook of the International Law Commission 1975, vol. II, 69.

[1233] Shaw, *International Law*, 789. See also Theodor Meron, "International Responsibility of States for Unauthorized Acts of Their Officials," *British Yearbook of International Law* 33 (1957): 114.

exercise greater control over its organs if absolute liability were imposed on the State for every official act of an organ.[1234]

(c) Conclusion on limitation

With regard to Article 46 VCLT, note that the purpose and objective of the relevant provisions under the law of treaties and the law of responsibility are distinct. The question whether a treaty shall be valid is different from the question whether a conduct should trigger the international responsibility of the State. Although both fields of law have in common that legal certainty and stability are of utmost importance, the situations are different. When entering into a treaty, a State shall not be able to present an excuse (excess of competence under internal law) that is not known or verifiable by the other parties. As soon as the excess of authority is manifest, such fact is known to the other parties of the treaty and consequently, they can react by taking the necessary steps. However, in the situation of State responsibility, the mere knowledge of the unlawfulness of the act will not prevent the harmful consequences. The examples of the arbitral jurisprudence have shown that the victims were helpless against the abuse of power of the officials; the awareness of the unlawfulness of the acts could not change the impotent situation of the victims.

It could be argued that at least for those cases where the obviousness of the *ultra vires* act enables the victim to escape the consequences, attribution shall be barred.[1235] However, it must be kept in mind that the rules of attribution have a general character, detached from the specific elements set out in the primary rules. If attribution rules are narrowed down and limited, they will be deprived of such general character. The odds are that such exception of the exception to the general rule would weaken the effectiveness of the basic rule.[1236] This would also run counter to the "*need for clarity and security*" in international law.[1237]

In addition, it must be considered that only the appointment to become a State organ and the correspondent transfer of public authority from the State to the person acting in an *ultra vires* manner creates the opportunity to abuse such official power. To equip a person with official power is not in the least an undertaking that can be performed carelessly. The abuse of such authority is omnipresent and justifies some kind of imminent accountability of the State for such an abuse of its own official power. This follows also from the structural proximity between the State and its organs.

Moreover, a limitation of the *ultra vires* rule would create a loophole for States to escape responsibility by merely relying on the obviousness of a breach of national

[1234] See Shaw, *International Law*, 785. Shaw also argues that the absolute liability concept motivates the State to comply with objective standards of conduct in international relations.
[1235] See Meron, "International Responsibility of States for Unauthorized Acts of Their Officials."
[1236] See ILC Yearbook 1975, Vol. II, 51, 69, para 25.
[1237] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 106.

law. Since certain unlawful acts are always manifestly outside the scope of competence, States could take advantage of the severity of these acts to deny any responsibility. This would lead to absurd results: the severer the act, the better for the State, because it diminishes the basis for attribution. Finally, a stricter rule will encourage the State to exercise greater control over its organs.

In conclusion, the far-reaching attribution rule of *ultra vires* acts as stated in Article 7 of the ILC Articles is more favourable than a limited one. There is no room for a limitation of acts committed in apparent excess of authority. Thus, the mere fact that corruption is apparently outside the scope of public officials' authority is of no relevance for the purpose of attribution of such act to the conduct of State.

(4) Conclusion on *ultra vires* acts

According to the general *ultra vires* rule of State responsibility, attribution of corruption of public officials is not barred on the basis that the public officials acted outside their apparent authority or even against the will of the host State. Especially in the case of corruption, attribution for *ultra vires* acts – even apparent ones – does not lead to unjust outcomes. Two issues must be kept in mind. Firstly, the main task of this analysis is the approach of corruption in investment treaty law, for which reason the issue of corruption must be viewed through the lense of international investment law. As discussed in Chapter One, corruption among public officials poses a serious threat for an attractive investment environment. The mere knowledge of an investor that bribery is manifestly against internal law will not destroy the detrimental effect of the corrupt scheme on the potential investment. Whenever corrupt officials abuse their public power, this leaves the victim, in this case the investor, no possibility to turn this act into a lawful one. The investor may refrain from investing, but she cannot turn the investment into a lawful one. The apparentness of the corruption of the officials will therefore not improve the quality of the investment environment. In particular, the argument that in case of an unsafe investment environment an investor should refrain from investing at all runs counter to the purpose of investment law in the first place: to promote investment.

Secondly, at this stage of the analysis the focus is solely on the attribution of the alleged wrongful conduct of public officials to the host State. In no way shall this be an excuse for the investor to engage in corrupt practices. The investor's participation in corruption must also be condemned and will certainly have an impact on the investor-State dispute, for a corrupt investor has no claim for State responsibility for corruption against a State whose public officials she bribed. However, such consequences must be dealt with separately and are no factor for the determination of attribution of conduct to the State.

For the sake of completeness, the fact that corruption is against international law is also irrelevant for the purposes of attribution. Otherwise, the assessment would

lead to a vicious circle. The main objective of the present analysis is to determine whether corrupt acts are attributable to the State. As mentioned before, attribution is one element of State responsibility. The second element is that the conduct must amount to a breach of an international obligation, in other words a breach of international law.[1238] Since both elements are constitutive and must be met in order to establish State responsibility, it would be a circular argument if the existence of one element would preclude the other. Thus, the mere fact that corruption might be a breach of an international obligation cannot influence the determination of attribution.

Similarly, the commitment of other State organs – and thus of the State itself – to tackle the phenomenon of corruption together with the condemnation and rejection of corruption has also no bearing on the question of attribution. Even when other organs of the State disown the specific act at issue, attribution is not blocked.[1239]

Although the *ultra vires* rule stated in ILC Article 7 covers acts apparently outside the scope of competence, this does not lead to an all-embracing rule where *all* acts of a person with the status of a State organ are attributable. Only *ultra vires* acts committed in the official capacity can be subject of attribution. Thus, in order to attribute a corrupt act it must be determined whether the corrupt act can be considered as a purely private conduct.

f) Acting in official capacity

The general rule of Article 4 read in connection with Article 7 leads to the attribution rule that acts of State organs – also *ultra vires* acts and even manifest *ultra vires* acts – are attributable to the State to the extent that they are committed "*in* [official] *capacity".*[1240] The essential question is how to determine whether a person who is a State organ acted as such.

The ILC Commentary makes clear that the requirement of acting in an official capacity has been introduced to clarify that only actions and omissions of organs committed while carrying out their official functions are attributable to the conduct of State. In the words of the Commentary, the conduct is attributable to the State when it "*comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State*".[1241] Thus,

---

[1238] See ILC Article 2, see footnote 1025.

[1239] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 106.

[1240] The relevant part of ILC Article 7 reads:
"*The conduct of an organ of a State* […] *shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions*." Emphasis added.
Note that the analysis of attribution could have started with the element of "official capacity" before dealing with the question of *ultra vires* acts. By all means, both elements are interconnected with each other and have often been examined and dealt with together.

[1241] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 108. Emphasis added.

"*actions and omissions of individuals having the status of organs in their private life*" do not amount to attributable conduct.[1242]

Where to draw the line between acts concluded as private individuals and acts committed in official capacity is already difficult.[1243] This causes even more complications in the case of corruption, which inherently consists of an official and a private part.[1244] Since a conclusive definition of 'official capacity' has so far not been found,[1245] it seems appropriate to examine the international arbitral jurisprudence about *ultra vires* acts concerned with the essential distinction between purely private and official capacity (see below at **(1)**). The conclusion drawn from the international jurisprudence will then be presented together with the different views in scholarship (see below at **(2)**) in order to subsequently determine the approach of 'official capacity' in corruption cases (see below at **(3)**).

(1) Arbitral Jurisprudence

Since investment treaty case law has so far not dealt with this issue in detail, the starting point of this analysis are the arbitral decisions upon which the codification of the *ultra vires* rule was based.

(a) *Cibich* case

The need to distinguish between private and official capacity was illustrated in the *Cibich* case,[1246] where the Mexico/United States General Claims Commission found that under the particular circumstances the relevant act of a State organ amounted only to private conduct.

An American citizen was locked up in a Mexican jail until he sobered up. As part of the routine, his money was taken for safekeeping, but the money was stolen overnight by some prisoners and two policemen. The unlawful acts of the two policemen were in no manner different from the conduct of the prisoners. Thus, the Mexico/United States General Claims Commission held that the mere fact that two policemen were among the thieves would not transform such conduct into an act of State.[1247] This conclusion is comprehensible, since the policemen were acting in the same capacity as the other thieves, not at all taking advantage of their official capacity. The taking of the money was a neutral act of a thief without any ties to the function of a policeman. The two policemen just happened to be members of the police, but were not acting as such when taking the money.

[1242] ILC Yearbook 1975, Vol. II, 51, 70, para 29.
[1243] Wilske, *Die Völkerrechtswidrige Entführung Und Ihre Rechtsfolgen*, 71; Delbrück and Wolfrum, *Völkerrecht*, § 176, 896; Crawford, *Brownlie's Principles of Public International Law*, 453.
[1244] See above at B.IV.3.a)
[1245] See also Heintschel von Heinegg, *Casebook Völkerrecht*, 278.
[1246] *Nick Cibich (U.S.A.) v United Mexican States*, Mexico/United States General Claims Commission, 31 March 1926, RIAA Vol IV, 57 (hereinafter: "*Cibich v Mexico*").
[1247] *Cibich v Mexico*, 58.

(b) *Youmans* case

In the already mentioned *Youmans* case,[1248] where Mexican troops failed to follow orders to protect American citizens threatened by a riot that finally killed them, the Mexico/United States General Claims Commission clarified that the mere fact that an official is acting outside her competence does not render the conduct a private one. The Commission held

> "[…] we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts."[1249]

(c) *Mallén* case

In *Mallén v United States*,[1250] the Mexico/United States General Claims Commission dealt with two separate acts of different nature and had to draw a distinction between private and official capacity. At the core of the claim were two violent attacks of an American police officer against a Mexican consul. The first attack was committed in a street in El Paso, Texas, where the police officer walked up to the consul and slapped him in the face. This attack was held to be a "*malevolent and unlawful act of a private individual who happened to be an official*".[1251]

In the second attack, the American police officer hit and wounded the Mexican citizen and arrested him at gunpoint. This time, the police officer showed his badge in order to assert his official capacity. The Mexico/United States General Claims Commission held the U.S. liable for this second assault by stressing that the American official "*could not have taken Mallén to jail if he had not been acting as police officer*".[1252] The commission found that although the act resembled a private act of revenge, it was disguised as an official act of arrest.[1253] Thus, the tribunal distinguished between a private act and one committed in official capacity by referring to the abuse of the position of police officer in order to commit the

[1248] See footnote 1214.
[1249] *Youmans v Mexico*, 116.
[1250] *Francisco Mallén (United Mexican States) v United States of America*, Mexico/United States General Claims Commission, 27 April 1927, RIAA Vol IV, 173 (hereinafter: "*Mallén v United States*").
[1251] *Mallén v United States*, 174.
[1252] *Mallén v United States*, 177.
[1253] *Mallén v United States*, 177.

unlawful act. In the second act, the American police officer utilised and deployed his power as a police officer for his own cause.

(d) *Caire* case

In *Caire*,[1254] the French-Mexican Claims Commission based its distinction between private and official capacity on whether the act had any connection to the official function. An officer and two soldiers of the Mexican armed forces tried to extort USD 5,000 in gold from Mr Caire, a French national, under the threat of death. After he refused their demands for money stating that he did not possess such an amount, the officials detained and murdered him.

The tribunal held that for the *ultra vires* acts of officials to be attributable to the State,

> "they must have acted at least to all appearances as competent officials or organs, or they must have used powers or methods appropriate to their official capacity".[1255]

Thus, responsibility would only be excluded in cases where

> "the act had no connexion with the official function and was, in fact, merely the act of a private individual. […] the two officers, even if they are deemed to have acted outside their competence […] and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposition by virtue of that status."[1256]

(2) Different approaches to 'official capacity'

In order to determine whether a corrupt act by a State organ was committed in 'official capacity' it seems appropriate to analyse the different approaches applied by and conclusions drawn from the arbitral jurisprudence and commentators.

(a) Excess of competence is irrelevant

In the past, it was frequently argued that conduct outside the limits of competence is an individual act of the official, thus automatically private in nature.[1257] However, as seen in the *Youmans* case, such a narrow attribution rule would lead

[1254] *Caire v Mexico*, see footnote 1031.
[1255] *Caire v Mexico*, 530.
[1256] *Caire v Mexico*, 531. Emphasis added.
[1257] See e.g. 1926 Report of Rapporteur Gustavo Guerrero for the League of Nations, published in American Journal of International Law, Supplement Vol. 20, 1926, 177, 188 et. seq. Also printed in Eagleton, *The Responsibility of States in International Law*, 245. However, this view is outdated. The vast majority of arbitral tribunals, international court decisions, and commentators reject such theory. See footnote 1202.

to a general exclusion of any act committed outside the scope of authority.[1258] As already explained before, the *ultra vires* rule corresponds nowadays to a general principle of law on State responsibility and reflects customary international law.[1259]

That the excess of competence is irrelevant for the determination whether an act was committed in official capacity arises also from the ILC Articles. ILC Article 7 clearly states that the act must be committed in official capacity while concurrently clarifying that acts of an organ committed in excess of its authority or contrary to instructions will not exclude attribution. From this it follows that the element of '*official capacity*' cannot depend on actual authority or the scope of competence. Thus, the mere fact that an act is unlawful and exceeds the authority of the organ does not render such act a private one.[1260]

(b) Motives are irrelevant

Irrelevant for attribution are the subjective elements of the organ.[1261] The mere fact that an official is encouraged to act for her own cause, instead of having the motivation of acting for the public, does not transform the act into a private conduct and cannot exclude attribution. This is derived from the notion that ulterior or improper motives are of no relevance for attribution.[1262] Even malice by the official acting *ultra vires* has no effect on attribution.[1263] This corresponds to the findings in *Mallén* where the act appearing "*to have been a private act of revenge*" by the police officer did not transform it into a private act.[1264]

Therefore, the organ acting only for private reasons and driven exclusively by private impetus without any motivation to perform the act in an official manner, does not convert the whole act into private conduct; attribution is not barred.

(c) Apparent authority

One approach to determine when an act is committed under official capacity is to refer to the apparent authority[1265] of the organ. The ILC Commentary states that

---

[1258] *Youmans v Mexico*, 116 ("*There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.*").
[1259] See footnote 1203.
[1260] See Ziegler, *Fluchtverursachung Als Völkerrechtliches Delikt - Die Völkerrechtliche Verantwortlichkeit Des Herkunfsstaates Für Die Verursachung von Fluchtbewegungen*, 107.
[1261] For the prevailing view of objective responsibility see B.II.2.d).
[1262] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 99. See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 53; Llamzon, *Corruption in International Investment Arbitration*, 259 et seq.
[1263] See Crawford, *Brownlie's Principles of Public International Law*, 441.
[1264] *Mallén v United States*, 177.
[1265] Note that '*apparent authority*' is not to be confused with '*apparently outside the scope of authority*'. Both terms refer to different issues. The first refers to the question of whether an act was committed 'in official capacity', while the latter indicates an argued limitation of the *ultra vires* rule.

acts not performed in official capacity are those, which fall outside the scope of both real and apparent authority.[1266] The majority of scholars and commentators agree that where a person acts in apparent official authority, the relevant acts will be attributable to the State.[1267] It is sometimes referred to as general scope of authority.[1268]

Such apparent authority exists when the act is considered by an objective third person as to relate to the official exercise of powers of the organ.[1269] Conduct without any link to the normal scope of duty would not be attributable to the State.[1270] The question is therefore whether "*the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State*".[1271]

(d) Abusing the official position or official means

Another approach to distinguish private acts from those committed in official capacity is to focus on whether the State organ abused its official position or used some means pertaining to such position.

In Crawford's view, the basic principle stated in Article 7 of the ILC Articles clarifies that "*the State may be responsible for conduct which is clearly in excess of authority if the official has <u>used an official position</u>*".[1272] The official position is, for instance, used or even abused when the organ disguises its unlawful act with some sort of official act. Thus, where a person acts under the "*colour of authority*", the actions at issue are attributable to the State.[1273]

This was also held in *Caire*,[1274] where the French-Mexican Claims Commission held that an *ultra vires* act is attributable when the State organ "*used powers or methods appropriate to* [its] *official capacity*".[1275] The murder of Mr Caire by soldiers of the Mexican armed forces was finally attributed to Mexico "*since they*

[1266] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 107.
[1267] Ibid., 99; Crawford, *Brownlie's Principles of Public International Law*, 452; Hobér, "State Responsibility and Investment Arbitration," 2008, 555; see also Hobe, *Einführung in Das Völkerrecht*, 315.
[1268] Crawford, *Brownlie's Principles of Public International Law*, 452; Delbrück and Wolfrum, *Völkerrecht*, §176, 896. See also Hobér, "State Responsibility and Attribution," 555. Hobér considers Article 7 of the ILC Articles as "*the international law equivalent of the private law concept of apparent authority*".
[1269] Delbrück and Wolfrum, *Völkerrecht*, § 176, 896.
[1270] Ibid.
[1271] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 107.
[1272] Crawford and Olleson, "The Nature and Forms of International Responsibility," 453. Emphasis added.
[1273] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries*, 99.
[1274] *Caire v Mexico*, see footnote 1031.
[1275] *Caire v Mexico*, 530.

acted under cover of their status as officers and used means placed at their disposition by virtue of that status."[1276]

In addition, many commentators bring forward that the misuse of specific official means justifies attribution.[1277] In other words, a wrongful act is attributed to the State even for *ultra vires* acts as long as the State official acted "*by using the means and powers pertaining to his public function*".[1278]

An evident example for an act under cover of the official status and for an abuse of means pertaining to the organ's public function is *Mallén v United States*.[1279] The beating up of the Mexican consul was part of an official arrest. The officer showed his badge to assert his official capacity and used the police gun to hurt the victim.[1280] As found by the tribunal, the officer could not have accomplished his *ultra vires* act without the employment of his power as policeman.[1281] Thus he abused his position as a police officer and employed his official authority in order to render his *ultra vires* act possible in the first place.[1282]

To conclude, attribution seems justified whenever an organ uses its position or any means pertinent to such position in order to bring forward the *ultra vires* act. In other words, whenever the organ employs any means that distinguish it from a private person without official authority, then the act is committed in an official capacity. This will be the case for any unlawful act, which to certain extent requires some kind of official furtherance; an unlawful act that the official could not fulfil if she were only a private person.

(e) Conclusion

The fact that an act is committed outside the authority of the State organ does not make the act a private conduct. In addition, the specific motives of the official are of no relevance for the assessment of whether an act was committed in official capacity. Thus, the fact that an unlawful act was merely committed for private cause does not necessarily convert it into a private one for purposes of attribution.

In general, the crucial question is whether (i) the unlawful act must be regarded as a private act completely remote from the scope of official capacity, isolated from the State and thus perceived as conduct of a private individual, or (ii) the act has a connection or a certain link to the official function of the organ in such way that it

---

[1276] *Caire v Mexico*, 531. Emphasis added.
[1277] See e.g. Hobe, *Einführung in Das Völkerrecht*, 315; Wilske, *Die Völkerrechtswidrige Entführung Und Ihre Rechtsfolgen*, 71.
[1278] Cassese, *International Law*, 246. Emphasis added.
[1279] See footnote 1250.
[1280] Note that the mere fact that a police gun was used is not in itself enough to prove official capacity. A police gun seems exchangeable with any private gun. However, in the present case the other circumstances justified the finding that the police officer used her authority to render her *ultra vires* act possible.
[1281] See *Mallén v United States*, 177. ("[The American policemen] *could not have taken Mallén to jail if he had not been acting as police officer."*)
[1282] See *Mallén v United States*, 177.

can be considered official conduct. Such assessment appears to be difficult. However, in the international law praxis a tendency can be acknowledged that in case of doubt, attribution of conduct to the State is favoured.[1283]

The possible acts are manifold and there exists no definition suitable for all situations. Thus, various different approaches have developed which have shown to be practical for certain cases. It is important to note that none of the approaches is exclusive and they often describe the same with other words or from a slightly different angle. Decisive for all is the link or relation between the relevant act and the official function. One approach relies on the apparent authority of the organ, another on the general scope of duty. Furthermore, an organ also acts in official capacity when it takes advantage of the official position or employs means related to such position.

All approaches have in common that they depend on the specific scope of authority, function, or position. For such reason, the assessment starts with the determination of the specific scope of activity of the public official. At this point, the difference between acts committed by higher or lower level officials becomes apparent. As stated above, the hierarchy of the officials is irrelevant for the main question of whether their acts can be attributable or not. However, the hierarchy is relevant for the specific scope of official capacity. Most high-level officials will have a wider scope of activity and a wider range of tasks than lower level officials. This leads to the assumption that high-level officials will more often act with apparent authority or use some part of their far-reaching official power when committing unlawful acts.

(3) Conclusion on 'official capacity' of corrupt acts

When an official solicits or accepts a bribe, she does so to line her own pockets. The money is not designated to the treasury of the State, thus it is not received for public purpose. Does this lead to the conclusion that the corrupt act is committed in the private capacity of the State organ? Is attribution of the corrupt act of the State organs therefore excluded?

Upfront, corruption is more than just the paying or accepting of a certain amount of money. As discussed in Chapter One, corruption in international investment law is

> (1) the solicitation, extortion, offer or acceptance of (2) any kind of unlawful or lawful private benefits (3) in the interactions between public officials and investors, (4) either directly or indirectly, (5) with the objective of obtaining an unlawful advantage for the investor in the conduct of his investment (6) at the expense of public needs.

Thus, an essential part of corrupt action is the purpose to obtain or give an advantage with regard to the investment. Only payments with such objective are

[1283] Heintschel von Heinegg, *Casebook Völkerrecht*, 278.

considered bribes and not merely private presents. If a public official receives money to be influenced in a totally private decision without any link to her public office, then such act is not considered corruption. Thus, the interaction of accepting money for private gain in exchange for an official act is a fundamental element of corruption.[1284] The purpose of influencing a public decision is what makes it a threat. This becomes apparent from the most common and general definition of corruption: '*misuse of public office for private gain*'. Thus, both parts have to be treated as a unit. To split the action and merely focus on the fact that the corrupt official acts for her own benefit falls short for the problem of corruption. The official act is inherent to the corrupt act.

When analysing the corrupt act, it is crucial to determine whether the organ was vested with the competence to make official decisions about the investment, such as to approve the investment, to issue necessary permits or to make any decision with regard to it. For the purposes of attribution, it is sufficient that the organ's act is performed based upon this kind of authority. Whether the organ failed to act to the best of its knowledge and exercise best judgment, or whether it was driven by ulterior motives or influenced by irregular means, is irrelevant.

In such cases, a corrupt official acts with apparent authority and within her scope of duty, although it is unlawful for her to accept the bribe. Furthermore, the public official must have employed her public function in order to make the extraction of the bribe even possible. Had she acted in a private capacity unrelated to her public office, then she would not have had any recourse to solicit or accept the money.[1285]

In conclusion, an *ultra vires* conduct such as participating in corrupt practices is an act committed 'in official capacity' when the position as public official and the employment of means of the public function are the basis of the corrupt act.

g) Conclusion regarding attribution of corrupt acts of State organs

The argument runs that an attribution of the unlawful corrupt act of the official is excluded, because it is apparent for the investor that the official does not act in favour of the State, but to line her own pockets. In that line of reasoning, the

[1284] Note that the purpose of obtaining the benefit of an official act is not merely an irrelevant motive, rather it is a basic element of the definition of corruption.

[1285] Note that Bottini who advocates against the attribution of corruption to the host State concedes that "*it is not always* [sic] *be clear if the corrupt act 'had no connexion with the official function'*" and quotes the *Caire* case, see Bottini, "Legality of Investments under ICSID Jurisprudence," 307. Against this background Bottini argues that the corrupt act should not be attributed to the host State since it violates international public policy, without however providing further doctrinal explanation why the *attribution* would be barred due to the violation of international public policy. See also Dudas and Tsolakidis, "Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?," 18 et seq. Dudas and Tsolakidis argue that against the background that a State signed anti-corruption treaties and anti-corruption legislation "*it is apparent that an official that accepts bribes is acting without authority*", Ibid., 19. However, they also admit that "*the conduct of the official can be qualified as 'official' if the bribery is aimed at obtaining official performance*", Ibid., 20. This shows that their rejection of attributing corrupt acts by public officials to the host State is rather based on policy grounds than on a dogmatic application of the ILC Articles.

apparentness that the corrupt act is *ultra vires* creates an exception to the general *ultra vires* rule. In addition, the fact that the public official acted for personal enrichment makes this act a private one.

It must be acknowledged that it is apparent for the investor that the official, by soliciting or accepting a bribe, acts unlawfully. Likewise, it is a fact that the public official acts for personal gain. However, as seen in the analysis above, this line of reasoning is misleading and cannot be supported under the ILC Articles and the approaches of the majority view in arbitral jurisprudence and among scholars.

At first, the term State organ has a broad meaning under Article 4 of the ILC Articles and will include all entities with the status of organ under internal law. However, the label under internal law is not only issue to consider, but rather whether the entity acts like a State organ. For such assessment, practice as well as convention of the relevant State shall be considered. It is noteworthy that the acts of *all* State organs are attributable to the State. The function of the organ (executive, legislative, or juridical), the position (low- or high-level official) and the territorial character (central, provincial or local entity) are irrelevant.

Second, it is irrelevant whether the official acts *ultra vires.* This must also be true for manifest *ultra vires* acts, since the mere awareness that an act is *ultra vires* will not enable the victim to escape the detriments resulting from the unlawfulness of the act.

Third, the corrupt act must be committed in official capacity. However, the mere fact that the official receives the bribe for her own gain, while the public is deprived of any benefit, is inherent to corruption and does not make this act a private one. Note that ulterior motives are irrelevant for purposes of attribution. Corruption and therefore a corrupt act must be considered as a unit of the misuse of a public function and a private gain on side of the public official. The counterpart of the personal enrichment is the abuse of the official position. Thus, there is a link between the general function of the State organ and the soliciting or accepting of a bribe, with the apparent authority of the State organ serving as basis for the bribe. This view is supported by the ILC Commentary, which mentions accepting a bribe as an example of such *ultra vires* conduct attributable to the State.[1286] Thus, a State official accepting a bribe in exchange for performing a certain act or in order to conclude a specific official transaction is attributable to the State.

Fourth, from a policy perspective, this reasoning ensures that the State refrains from escaping responsibility for its State organs abusing their authority conferred upon them. Most notably, the State itself, by appointing the State organ and vesting it with public authority, created the position and basis to abuse such official power. Thus, attribution seems justified due to the structural proximity and the required

[1286] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, 108. See also Yearbook of the International Law Commission 2001, Vol. II, Part Two, 46, footnote 150.

control to be exercised by the State over its organs. To conduct the public function without undue influences such as bribes is part of the overall duty of a public official and is in any case subject to the control of the State.

2. Corrupt practice by a State entity exercising governmental authority

A common scenario in investment treaty law is that the investor does not directly deal with a State organ, but with a separate State entity.[1287] States often outsource governmental tasks to separate entities, which in turn are responsible of operating specific fields of business on behalf of the State. This is often the case for the distribution of raw materials such as oil and minerals as well as for the operation of services of general public interest such as energy, sewage or waste management. These entities may also engage in corrupt conduct and solicit, extort or receive bribes in exchange for investment related decisions. Thus, the question arises under which circumstances such corrupt conduct may be attributable to the host State.

As mentioned above, in exceptional cases a separate State entity may be considered a State organ under international law due to its function within the State machinery.[1288] In such cases in which an entity acts as an organ would, the attribution of the corrupt conduct is governed by the general attribution rule of Article 4 of the ILC Articles and follows the above-discussed steps. More likely is however that a separate State entity is not considered a State organ. In principle, its acts will not be attributable to the host State, except in specific circumstances. The corresponding attribution rule is stipulated in Article 5 of the ILC Articles, which reads

> "Article 5. Conduct of persons or entities exercising elements of governmental authority
>
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

Article 5 of the ILC Articles uses the generic term 'entity' and refrains from making any requirements as to the specific form of that body.[1289] Such entities may therefore include a wide variety of bodies as for instance "*public corporations, semi public entities, public agencies of various kinds and even, in special cases, private companies*".[1290] In fact, the ownership or participation of the State is not

[1287] See e.g. Dolzer and Schreuer, *Principles of International Investment Law*, 219.
[1288] See above at D.I.1.a)(2).
[1289] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 5 (2).
[1290] Ibid.

relevant for purposes of attribution under this rule.[1291] Rather, the requirements for attribution under Article 5 are, first, that the entity is "*empowered by the law of that State to exercise elements of governmental authority*" (see below at **a)**) and secondly, that the entity acted "*in that capacity in the particular instance*" (see below at **b)**).

a) Empowered to exercise governmental authority

First, for purposes of attribution under Article 5 of the ILC Articles the separate State entity must be empowered to exercise governmental authority. The ILC Articles refrain from defining 'governmental authority' or providing further guidance for its interpretation. The ILC Commentary points at the "*particular society, its history and traditions*" in order to determine what 'governmental' means.[1292] Commentators have proposed an alternative, rather objective approach by determining the scope of 'governmental authority' through a comparative standard.[1293] Factors that may be relevant in order to determine if the authority at issue is in fact governmental are the manner in which the powers are conferred, the purpose of such transfer of powers, as well as the degree of accountability that the entity has towards the government for their exercise.[1294] It is clear, however, that the empowerment must be made by internal law.

Investment treaty tribunals have for instance found separate State entities entrusted with governmental powers when, despite their commercial mission, they were also empowered to enact regulations or issue permits and licences, managing and regulating public affairs.[1295] Moreover, entities performing tasks related to the exercise of regulatory power of the host State such as market control and safeguarding safety conditions[1296] as well as entities managing the legal regime of public property of an airport[1297] fall into this category.

b) Acting in governmental authority

Contrary to Article 4 of the ILC Articles, where all conduct is attributable to the State, according to Article 5 of the ILC Articles only the 'governmental activity' is attributable to the State. For the purposes of attribution under this rule, the entity must have acted "*in that capacity in the particular instance*".[1298] However, separate State entities empowered with the exercise of public authority will not only act in such capacity. As entities engaging in the commercial world, a major part of their conduct will be of a commercial nature, i.e. *acta iure gestionis*. Such

[1291] Ibid., Article 5 (3).
[1292] Ibid., Article 5 (6). See also *F-W Oil v Trinidad and Tobago*, Award, para 203.
[1293] Dolzer and Schreuer, *Principles of International Investment Law*, 222.
[1294] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 5 (6).
[1295] See e.g. *Hamester v Ghana*, Award, para 190.
[1296] *Ulysseas v Ecuador*, Final Award, para 130.
[1297] *EDF v Romania*, paras 195.
[1298] Article 5 of the ILC Articles.

acts that could be performed by a commercial entity are, however, not attributable under Article 5 of the ILC Articles.[1299] Only acts performed under governmental authority may be attributable to the State – only acts *iure imperii* fall within such scope.

The distinction may often be difficult. One guidance found by tribunals was the question whether "[a]*ny private contract partner could have acted in the same way*".[1300] Conduct within the contractual performance, where the State entity acted merely in the position as contractual partner is therefore not attributable to the State.[1301] The modification of a joint venture agreement between a State entity and an investor was, for instance, considered as conduct between two commercial actors and therefore not *puissance publique.*[1302] Likewise, the question of payment and supply of materials under a contract is not an act in the exercise of governmental authority.[1303]

In such context, it is also irrelevant whether the contract is governed by private law or administrative law.[1304] The mere fact that the relationship between the entity and the investor is governed by public law is not sufficient for attribution. In *Jan de Nul v Egypt*, for instance, the tribunal clarified that it was irrelevant for the purpose of attribution that the contract in question was awarded through a tender governed by public procurement law.[1305] Moreover, tribunals have found that for the purposes of attribution it is not sufficient that the conduct of the State entity was aimed at "*general fulfilment of some general interest, mission or purpose*."[1306] In this regard, it is not sufficient that the act in question has an element of also serving the public.[1307]

In *Bosh v Ukraine*, the tribunal found that the National University of Kiev was empowered to exercise certain forms of governmental authority in relation to higher education services and the management of State-owned property, but found

---

[1299] See e.g. *Emilio Agustín Maffezini v Kingdom of Spain,* ICSID Case No. ARB/97/7, Award, 13 November 2000 (hereinafter: "*Maffezini v Spain*, Award"), paras 52, 57; *Jan de Nul v Egypt*, Award, para 168; *Hamester v Ghana*, Award, paras 180, 197. Note however that the tribunal in *Noble Ventures v Romania* questioned why commercial acts should not be attributable and points to the difficulty to determine what constitutes a governmental act, *Noble Ventures v Romania*, Award, para 82 ("[…] *in the context of responsibility, it is difficult to see why commercial acts, so called acta iure gestionis, should by definition not be attributable while governmental acts, so called acta iure imperii, should be attributable. The ILC-Draft does not maintain or support such distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act*.").

[1300] *Jan de Nul v Egypt*, Award, para 170.

[1301] *Ulysseas v Ecuador*, Final Award, para 137.

[1302] See *Hamester v Ghana*, Award, para 248.

[1303] *Hamester v Ghana*, Award, para 266.

[1304] *Ulysseas v Ecuador*, Final Award, para 139.

[1305] *Jan de Nul v Egypt*, Award, para 170.

[1306] *Hamester v Ghana*, Award, para 202.

[1307] *Jan de Nul v Egypt*, Award, para 170. See also *Ulysseas v Ecuador*, Final Award, paras 138.

the conduct at issue constituting the termination of a contract merely private or commercial activity and for such reason not attributable to Ukraine.[1308] In *EDF v Romania*, the tribunal found that two State entities were empowered by internal law to exercise elements of Romanian governmental authority such as managing the public assets of an airport regulated by public law.[1309] However, the acts at issue, which were pointed at the termination of a concession agreement for retail stores in the Airport were, in the view of the tribunal, only related to the private property and commercial spaces of the airport – thus no specific exercise of governmental authority.[1310]

In order for corrupt conduct of a State entity empowered to exercise public authority to be attributable to the host State, the conduct in question must amount to the exercise of governmental authority. This does, however, not mean that the *specific* act at issue was authorised, but only that the State entity was empowered to "*carry out acts of that type insofar as they involved the exercise of governmental authority*".[1311] This leads to the same questions as with the attribution of corrupt conduct of public officials, i.e. whether corruption as an act performed to the detriment of the State and for private gain, and outside of the granted public authority, may even be considered an act within 'governmental authority'. The answer to this question lies in the general rule that even *ultra vires* acts are attributable to the State and in the arguments discussed above.[1312]

c) *Ultra vires* acts

The general rule of attribution of *ultra vires* acts also applies to the conduct of "*an entity empowered to exercise elements of the governmental authority*" as the wording of Article 7 of the ILC Articles shows.[1313] Article 5 and Article 7 must therefore be read in concert. Both contain the requirement that for the purpose of attribution the entity must 'act in that capacity', which in both cases refer to the same governmental authority. In this context, Article 7 makes clear that the mere fact that the act in question exceeds the granted authority or disobeys instructions of the State is of no relevance for attribution. From this it follows that the reference to 'act in that capacity' in Article 5 cannot be limited by the legality of the act in question.

Moreover, for Article 5, the same considerations as discussed in connection with the official capacity of corrupt acts of public officials apply.[1314] Despite the fact that the corrupt conduct contains a private element, which consists of the dishonest motive to perform a public act for private gain, it must be viewed as a whole. The fundamental part of the corrupt conduct is the public element of performing the

[1308] *Bosh v Ukraine*, Award, paras 163-184.
[1309] *EDF v Romania*, Award, para 195.
[1310] *EDF v Romania*, Award, paras 195 et seq.
[1311] Crawford and Olleson, "The Application of the Rules of State Responsibility," 434.
[1312] See above at D.I.1.e).
[1313] See Article 7 of the ILC Articles above at D.I.1.e)(1).
[1314] See above at D.I.1.e).

official act. The possibility of exercising governmental authority is in fact what makes the corrupt conduct possible in the first place. For the purpose of attribution of corrupt conduct under Article 5 of the ILC Articles it is therefore important that the entity empowered to exercise governmental authority actually performed such governmental act with regard to the corrupt conduct. The illegality of the conduct, its private element, its detrimental effect on the host State and the excess of authority, which most certainly will all be apparent to the investor, are no bar to attribution. On the other hand, any corrupt conduct in connection with acts constituting so called private corruption, acts of commercial nature and acts in the context of mere contractual performance will not be attributable to the State.

3. Corrupt practice of private actors

The investor may also deal with corrupt practices of private actors in connection with the investment. Such actors may be State entities acting in a commercial capacity[1315] or other individuals with no functional ties to the State and its governmental authority. As a general principle of State responsibility, the acts of private persons or entities are not attributable to the State. Only under certain circumstances if there is a 'real link'[1316] between the act in question and the State or if the State has 'significant involvement'[1317] in the commission of the act, such conduct may be considered an act of State. If such link is established then it is of no relevance whether the act is commercial or sovereign in nature.[1318] In contrast to Article 5 of the ILC Articles the conduct does not need to amount to an exercise of governmental authority.[1319] The corresponding attribution rule is codified in Article 8 of the ILC Articles:

> "Article 8. Conduct directed or controlled by a State
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

Article 8 looks at the special factual relationship between the person or entity, whose acts are at issue, and the State.[1320] Such factual relationship exists if the

[1315] Note that in case a corrupt conduct of a State entity empowered to exercise governmental authority cannot be attributable to the State since the specific corrupt act in question was not committed in connection with an official governmental act, but merely is of commercial nature, it must be analysed whether such conduct may be attributable under Article 8 of the ILC Articles.
[1316] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 8 (1).
[1317] *Hamester v Ghana*, Award, para 178.
[1318] See also *Bayindir v Pakistan*, Award, para 129.
[1319] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 8 (2).
[1320] Ibid., Article 8 (1). See also *Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability, paras 7.64.

private actor acted (i) under the instruction of the host State (see below at **a)**) or (ii) under the direction or control of the host State (see below at **b)**).

a) Acting under the instruction of the host State

The first potential real link between the host State and the private actor may be that the host State instructed the commission of the concrete act. By doing so the host State authorises the private actor to perform the act in question, for which reason it should be considered an act of the State itself. The ILC Commentary gives the example of so called 'auxiliaries', which remain outside of the structure of the State, but which are recruited to carry out particular missions.[1321] This question will most likely be straightforward. Either there is evidence that the host State instructed the particular conduct or not.

Emphasis must be made that the host State instructed the concrete act. From this it follows that for the attribution of corruption the host State must have instructed the corrupt act, not merely the official act as one element of the corrupt act. Contrary to the attribution under Article 4 and Article 5 of the ILC Articles, both of which leave room for some excess of authority, the *ultra vires* rule (Article 7) is not applicable to the attribution of the conduct of private actors. Thus, under Article 8 the corrupt conduct of a private actor may only be attributable to the host State if it instructed the concrete corrupt act.

b) Acting under the direction or control of the host State

The second potential real link between the host State and the acts of a private actor may be that the latter acted under the direction or control of the host State. This question is more complex than the straightforward question of instruction.[1322] The main reason for such complexity is that direction and control exist gradually.

The degree of control required for purposes of attribution is a demanding one.[1323] In order to determine whether the State had sufficient control over the acts in question, the jurisprudence of the ICJ developed the 'effective control' test.[1324] As stated in the *Case concerning military and paramilitary activities in and against Nicaragua*, for the purposes of attribution, the State requires both general control over the entity and specific control over the act at issue.[1325] While considering

---

[1321] Ibid., Article 8 (2).
[1322] Ibid., Article 8 (3).
[1323] *Jan de Nul v Egypt*, Award, para 173; *White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award, 30 November 2011 (hereinafter: "*White Industries v India*, Final Award") , para 8.1.4. ("[…] *the test is a tough one*.").
[1324] *Military and Paramilitary Activities (Nicaragua v United States*), Merits, para 115. See also *Genocide case (Bosnia v Serbia)*, para 400 ("[…] *it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations*.").
[1325] *Military and Paramilitary Activities (Nicaragua v United States*), Merits, para 115.

whether the acts committed by the *Contras* were attributable to the United States, the ICJ found

> "[…] that United States [sic] participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[1326]

Investment treaty tribunals have constantly confirmed the 'effective control' test.[1327] In *Jan de Nul v Egypt*, for instance, the tribunal found that

> "[i]nternational jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the 'effective control' test."[1328]

Thus, the mere fact that a State established a corporate entity will not justify all subsequent conduct of such entity to be considered an act of State.[1329] Likewise, the general influence that a State may exercise over a State-owned or State-controlled entity is not sufficient to amount to the required control within the

[1326] *Military and Paramilitary Activities (Nicaragua v United States*), Merits, para 115.
[1327] See e.g. *Jan de Nul v Egypt*, Award, para 173; *Hamester v Ghana*, Award, para 179; *White Industries v India*, Final Award, para 8.1.18.
[1328] *Jan de Nul v Egypt*, Award, para 173.
Note that while the effective control test has been confirmed by investment treaty tribunals, the tribunal in *Bayindir v Pakistan* emphasised that the specific realities of international economic law should nonetheless be considered ("[…] *the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant*."), *Bayindir v Pakistan*, Award, para 130.
[1329] Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 8 (6).

meaning of Article 8 of the ILC Articles.[1330] Tribunals have also found that the organisational structure of the entity, the mere fact the State has influence in the appointment of the directors and the frequency of consultations on operational or policy matters were not sufficient to establish effective control.[1331] In similar terms, the mere fact that the host State was informed of the issues between the State entity and the investor as well as the discussions with the parties were not sufficient to amount to the strong control as required under Article 8 of the ILC Articles.[1332]

Applied to corruption, the host State must, first, have general control over the private actor that engaged in corruption and, secondly, have specific control over the corrupt transaction. For the purposes of attribution of the corrupt act, it will not suffice if the host State had general control over an operation, to which the corrupt conduct was merely "*incidentally or peripherally associated*" .[1333] As mentioned above, there is no room for the *ultra vires* rule of Article 7 of the ILC Articles when it comes to attribution of acts by private actors. The remote link between the host State and the individual or separate State entity does not justify the attribution of acts, which the host State did not specifically authorised or controlled during its commission.

4. Conclusion

This study argues that corrupt acts of public officials may be attributable to the host State. The basis for such attribution is the general rule codified in Article 4 of the ILC Articles that the acts of State organs are attributable to the State and the understanding that for purposes of attribution, corruption cannot be separated into the official element of the exercising governmental authority and the private element constituting the dishonest motive of private gain. Since both elements together constitute the corrupt act, the one does not exist without the other. For such reason, for purposes of attribution, the composite act of corruption needs to be treated as one. Moreover, due to the general *ultra vires* rule codified in Article 7 of the ILC Articles, the fact that corruption is condemned by the host State and falls apparently outside the authority of the public official does not bar attribution, as long as the exercise of governmental authority was part of the corrupt act.

The corrupt conduct of a separate State entity may also be attributable to the State if it was granted governmental authority and the exercise of this authority was the basis of the corrupt conduct. This rule is codified in Article 5 of the ILC Articles, to which the *ultra vires* rule (Article 7) also applies. In case the corrupt act is not based on the exercise of governmental authority, but is rather commercial in nature, then such conduct may under the strict requirements of Article 8 of the ILC

[1330] *Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability, paras 7.95.
[1331] *White v India*, Final Award, paras 8.1.6, 8.1.18.
[1332] *Hamester v Ghana*, Award, para 199.
[1333] See Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Article 8 (3).

Articles nonetheless be attributable to the host State. For such attribution, the host State must have instructed the entity (or individual) acting in private capacity to commit the corrupt act, or must have had 'effective control' over its commission. The latter is a demanding threshold and requires the host State to have general control over the corrupt actor and specific control over the corrupt transaction. The *ultra vires* rule (Article 7) does not apply in these circumstances.

II. Failure to prevent corruption

Despite the question whether the corrupt conduct of State officials or State entities is directly attributable to the host State, the additional question arises whether the host State may be responsible for those corrupt acts because of its failure to prevent them.[1334] The failure to act constitutes an omission and Article 2 of the ILC Articles clarifies that not only acts, but also omissions are attributable to the host State. The omission in the form of not preventing corruption may therefore be attributable to the host State.

Nevertheless, Article 2 of the ILC Articles neither provides an autonomous basis for attribution nor creates a general obligation for the States to prevent any act that could interfere with an international wrong.[1335] Thus, the mere failure to prevent the corrupt act does not in itself make the corrupt act attributable to the host State and entail its responsibility. Rather, the omission must constitute an international wrong in itself and be attributable under the attribution rules (e.g. Articles 4, 5 and 8). The failure to prevent corruption must, therefore, amount to a breach of an international obligation of the State. As discussed above,[1336] some international instruments against corruption contain the State's commitment to implement measures to prevent corruption. Moreover, based on the international consensus against corruption it is customary international law, as argued above, that a State engages into the fight against corruption through the implementation of anti-corruption laws and policies as well as other measures to curb corruption. Moreover, the missions of State organs in charge of crime prevention or responsible of implementing anti-corruption laws and policies may then be attributable to the host State under Article 4 of the ILC Articles.

However, such responsibility is detached from the commission of the corrupt act at issue. The international obligation of curbing corruption demands commitment of a State, but does not create strict liability for each corrupt act committed under its watch. The mere fact that a corrupt conduct occurred within its jurisdiction cannot be constructed as an automatic failure to implement measures against corruption. Such construction would circumvent the general attribution rules and misread the

---

[1334] Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," 11. ("*States should be held accountable for the implementation of appropriate demand-side mechanisms in order to prevent their public officials from accepting or soliciting bribes.*").
[1335] *Hamester v Ghana*, Award, para 173.
[1336] See above at C.

concrete commitment States entered into to fight corruption. Against this background, a State may be responsible for the failure to comply with its obligations to fight corruption, but such responsibility would not be triggered by the mere commission of a corrupt act, which is not otherwise attributable to the host State. Moreover, the standard would be one of due diligence and the threshold rather high and demanding. Despite the international obligation to implement the required measures to fight corruption, the State retains its sovereign freedom and autonomy to decide which measures and policies it finds necessary and in its best interest to introduce.

III. Failure to prosecute

Inherent to the obligation to fight corruption is the requirement to enforce the anti-corruption laws and to prosecute the public officials that engaged in corrupt practices. The host State may therefore be held accountable for the failure of its law-enforcement State organs to take the required measures to prosecute any perpetrator of the anti-corruption laws. Such omissions of law-enforcement agencies will be attributable under Article 4 of the ILC Articles. As stated above, for purposes of attribution it will not matter whether such omissions were caused by the police, the public prosecution department or the judiciary.[1337]

Such accountability of the host State may most certainly play a role when corruption is invoked as a defence by the host State.[1338] In *Wena v Egypt*, for instance, Egypt alleged that the lease contract, which was the basis of the investor's investment in two luxurious hotels, had been obtained by corrupt means. While analysing the available evidence on the record, the tribunal found it most peculiar that while the corrupt act had been known to Egypt it had not prosecuted the responsible persons.[1339] Due to Egypt's failure to enforce its anti-corruption laws for the alleged corrupt act, the tribunal emphasised that it felt reluctant to allow Egypt to escape its liability based on the same corrupt act.[1340] In the words of the tribunals,

> "given the fact that the Egyptian government was made aware of this agreement by Minister Sultan but decided (for whatever reasons) not to prosecute Mr. Kandil, the Tribunal is reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with Mr. Kandil was illegal under Egyptian law".[1341]

[1337] See above at D.I.1.b).

[1338] The failure to prosecute corrupt officials may bar the host State's corruption defence on the basis of estoppel, see Chapter Seven B.V.3.c). See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 64 et seq.; Llamzon, *Corruption in International Investment Arbitration*, 268 et seq.; Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para. 108 et seq.

[1339] *Wena v Egypt*, Award, para 116.

[1340] *Wena v Egypt*, Award, para 116.

[1341] *Wena v Egypt*, Award, para 116.

In *World Duty Free v Kenya*, the failure of Kenya to initiate any proceedings against its former President, who had solicited the bribe from the investor in the first place, did not change the outcome of the case.[1342] Nonetheless, the tribunal made clear that it felt most disturbed by the fact that Kenya had not attempted to prosecute the former president and recover the proceeds of the corrupt transaction.[1343] As the tribunal put it

> "[i]t remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings."[1344]

IV. Failure to provide redress to victims

Within the broader scope of the fight against corruption lies the obligation to provide the necessary means for victims to receive compensation for any damages caused by corruption of public officials.[1345] While such commitment follows e.g. from Article 35 of UNCAC, the basis of such obligation may already be found in general principles of international law as e.g. the rule of law. The required measures may comprise acts from the legislative and the judiciary. Any omission of both will be attributable under Article 4 of the ILC Articles. In investment treaty arbitration a breach of such obligation may be brought in form of a denial of justice claim. The threshold is demanding and will be discussed in Chapter Six.

E. Concluding remarks

This study has shown that in specific circumstances the corrupt act of public officials may indeed be attributable to the host State. The possibility of soliciting or accepting bribes is founded in the public authority the respective public official holds. In most circumstances the two factors constituting the corrupt act cannot be artificially divided into a private act (using bribe for personal use) and an official one (use of public authority).

[1342] In the view of the tribunal, the public policy under the applicable English law did not allow for a different outcome, see *World Duty Free v Kenya*, Award, paras 181 et seq.
[1343] *World Duty Free v Kenya*, Award, para 180.
[1344] *World Duty Free v Kenya*, Award, para 180.
[1345] See above at 196.

However, it must be kept in mind that each case will have its own facts; the circumstances may vary significantly. The conclusion that corrupt acts committed by State organs may be attributed to the State shall not be taken as a given fact. The structure of the conducted analysis has especially been chosen to account for the different forms of corruption and its implications for the attribution to conduct of State. The different steps and considerations presented above shall be necessarily analysed for each individual case.

CHAPTER SIX:
CORRUPTION AS VIOLATION OF THE INVESTMENT PROTECTION STANDARDS

In international investment arbitration, corruption is often invoked by the respondent host State in order to challenge the legitimacy of the investment and consequently contest the investor's claim as a whole.[1346] The opposite situation may also arise. The investor may base its claim on the allegation that the host State engaged in corrupt practices and through its corrupt behaviour violated a protection standard guaranteed to the investor. In this context, corruption may be the basis of a cause of action under an IIA.

So far, this constellation has not yet received much attention in the international investment law scene. There exists neither a basic analysis of scholars and commentators, nor an award where corruption was successfully alleged as cause of action of the claim.[1347] The nonexistence of any successfully pleaded corruption case in investment treaty arbitration might to some extent also be due to the corruption specific problem of proving such hidden and concealed actions – an important aspect, which is analysed in full in Chapter Eight below.[1348] Moreover, most corrupt actions in connection with the investment will touch illicit behaviour on both sides. If invoked as cause of action, the corrupt conduct must be, however, only on side of the host State. The investor may not base its claim on illicit behaviour it was part of.[1349]

This study is aimed at providing a general analysis on which protection standards are breached by general corrupt behaviour of the host State and its public officials. The following examination cannot take all specific facts of each potential corrupt scenario into consideration, but rather focuses on a universal approach for the common circumstances surrounding corrupt practices.[1350] This being said, the analysis starts with a general overview of the potential corruption scenarios (see below at **A.**) before examining whether host State corruption violates the relevant protection standards (see below at **B.**).

A. Corruption scenarios

I. *EDF v Romania*

The recent case of *EDF v Romania* illustrates a potential corruption situation in a treaty-based investor-State dispute. In *EDF v Romania*, the investor based its claim on corrupt practices on the side of the host State and alleged that its existing

[1346] See Chapter Seven.
[1347] At least up to date, there exists no published investment treaty arbitration award where corruption was successfully pleaded as cause of action.
[1348] All evidence related problems are analysed in Chapter Eight below.
[1349] See below at B.I.2.a)(1).
[1350] Due to the generality of the approach the following disclaimer appears superfluous, but there might be specific facts in peculiar circumstances that might not be subsumed under the reasoning provided in this chapter.

investment was effectively destroyed after its refusal to pay bribes to the Prime Minister of Romania Adrian Nastase.

The investor, EDF, participated in two joint venture companies with Romanian entities owned by the Romanian government. One joint venture company, ASRO, held duty-free licences and operated such facilities at several International Airports in Romania. The second joint venture company, SKY, provided in-flight duty-free services on board of the Romanian Airlines TAROM. In 2002, the Romanian entity withdrew from ASRO and the duty-free licences were revoked. The same year, TAROM terminated the service agreement with SKY and refused further access to the duty-free facilities and airplanes. The investor argued that the whole investment of EDF had become of no value. EDF alleged that the only reason for such action on side of the Romanian entities was EDF's refusal to pay bribes in an amount of USD 2.5 million solicited by senior public officials on behalf of the Prime Minster.

The tribunal found that "*a request for bribes by a State agency is a violation of the fair and equitable treatment*" standard.[1351] The tribunal noted further that the notion of legitimate expectations, which is protected by fair and equitable treatment, is breached when a State bases its discretion on corruption.[1352] Both statements were made without any prior analysis or reference to authorities.

The reason for the want of thorough examination lays in the fact that corruption was not established. To recap, the tribunal did not find the evidence for corruption presented by the investor to be 'clear and convincing'.[1353] The witnesses' testimonies were evaluated as of doubtful value[1354] and new evidence in form of an audio tape recording the bribe request was declared inadmissible, mainly because of doubts regarding its authenticity.[1355] The tribunal also referred to two unsuccessful proceedings in Romanian criminal courts, which concluded that the allegations were groundless.[1356]

Most peculiar, however, is the introduction of a new requirement for proving corruption. The tribunal demanded not only proof that a bribe had been solicited, but also that such request had been made not only in the personal interest of the soliciting person, but on behalf and for account of the State, so as to make the State liable in that respect.[1357] In conclusion, the tribunal ruled that the investor failed to prove corruption, and therefore found no violation of fair and equitable treatment, and dismissed the investor's claim.

[1351] *EDF v Romania*, Award, para 221. Note that the tribunal also found that a State's solicitation of bribes violates international public policy.
[1352] *EDF v Romania*, Award, para 221.
[1353] *EDF v Romania*, Award, para 221.
[1354] *EDF v Romania*, Award, para 223.
[1355] *EDF v Romania*, Award, para 225.
[1356] *EDF v Romania*, Award, para 228.
[1357] *EDF v Romania*, Award, para 232.

The findings regarding the attribution of conduct to the State and the requirements on evidence are dealt with in Chapter Five (Corruption and State Responsibility) and Chapter Eight (Evidence of Corruption in Investment Treaty Arbitration) of this study.[1358] Of interest for the present analysis is merely the tribunal's statement that a request for bribes by State agencies and the use of discretion based on corruption may violate the fair and equitable treatment standard and will give grounds for a claim.

When introducing the fair and equitable treatment standard, the tribunal stressed that one of the most important components of this standard is the existence of legitimate expectations of the investor.[1359] In the view of the tribunal, such expectations are based upon representations made by the host State and relied upon by the investor.[1360] In addition, the tribunal emphasised that legitimate expectations may not be formulated too broadly, for which reason specific promises by the State are necessary.[1361] At the same time it found that due regard must be paid to the host "*State's power to regulate its economic life in the public interest*".[1362]

However, the tribunal refrained from applying these requirements to the concrete corruption situation and the facts of the case. The tribunal comes merely to the conclusion that basing the official discretion on corruption constitutes a violation of the principle of transparency and legitimate expectations, and consequently that a request for bribes by public officials of the host State amounts to a breach of fair and equitable treatment. As plausible as this result might be at first sight, there are no precedents in international investment arbitration nor is this conclusion in any way established in scholarship. Thus, a thorough analysis is required to assess to what extent corruption on side of the host State may be the cause of action in investment treaty arbitration.

II. Types of relevant corrupt conduct

The types of corrupt conduct scrutinised in this chapter are those that are unilaterally committed by public officials and attributed to the conduct of the host State under the principles discussed in Chapter Five. While investor corruption generally requires the involvement of public officials, e.g. accepting the bribe and concluding the corruption agreement, corrupt conduct of the host State does not necessarily involve the investor's participation.

[1358] See Chapter Five above and Chapter Eight below.
[1359] *EDF v Romania*, Award, para 216.
[1360] *EDF v Romania*, para 216, referring to *Waste Management v Mexico, Inc. v United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (hereinafter: "*Waste Management II v Mexico*, Award") para 98.
[1361] *EDF v Romania*, Award, para 217.
[1362] *EDF v Romania*, Award, para 219, referring to *Saluka v Czech Republic*, Partial Award, para 307.

1. Extortion or solicitation of a bribe

Relevant types of corrupt conduct are extortion and solicitation of a bribe by a public official, which leaves the investor with two possible reactions: (i) paying the bribe and obtaining the promised benefit in relation to the investment or (ii) refusing to engage in corrupt conduct and risking a detriment to the investment. The consequences of the first option are clear. The investor forfeits the right of bringing a claim against the host State based on this specific corrupt conduct, since it was itself part of the very same corrupt conduct.[1363] For the avoidance of doubt, this situation must be distinguished from the case where the investor bases its claim on the host State's breach of treaty for conduct other than corruption, but during the investment process, the investment became tainted by corruption.

The question, however, arises whether the investor may bring a claim under an IIA against the host State under the second option. In such situation it will be essential for the investor to prove (i) the extortion or solicitation of the bribe and (ii) the causal link between its refusal to participate in the corrupt act and the decision or measure of the host State detrimental to the investment.

2. Corruption by a competitor

In addition to direct extortion and solicitation of bribes, the investor and its investment may also suffer from corruption agreements between the host State and competitors. In *Methanex v United States*, for instance, the investor alleged that the ban of its product was caused by undue influence by contributions to the political campaign of the Governor of California Gray Davis.[1364] In such situation, the investor will have to prove (i) the concrete corruption agreement between the third party and the host State and (ii) the causal link between such agreement and the decision or measure of the host State detrimental to the investment.

III. Timing of corrupt conduct

While this chapter focuses on the substantive protection standards, it must be noted that the timing of the corrupt conduct of the host State is essential for the question whether the investor may bring a treaty claim against the host State based on corruption. The central element of every investment treaty claim is the 'investment'. An arbitral tribunal only has jurisdiction over the claim if the concrete investment activity falls within the scope of consent of the IIA. For ICSID tribunals the additional threshold of Article 25 of the ICSID Convention including the 'notion' of investment has to be met.

Where the host State's corrupt conduct is aimed at an already existing investment, as for instance in *EDF v Romania* (extortion or solicitation of a bribe) or *Methanex*

[1363] See also B.I.2.a)(1).
[1364] See C.II.2.

v United States (alleged corruption agreement with competitor), the *general* jurisdictional questions regarding the definition of investment under the IIA and, as applicable, the notion of investment under Article 25 of the ICSID Convention arise.

In corruption cases, the corrupt conduct of the host State may often take place at a time when the investment has not yet been established. Corrupt public officials may extort or solicit bribes in exchange for the concession, investment contract or permission from a potential investor seeking to invest in the host State. Moreover, investors participating in public tender proceedings with the aim of obtaining the investment project may be discriminated against due to a corruption agreement between the host State and a competitor. In fact, particularly in the pre-investment stage, where the influence of public officials on potential investors are substantial, the corrupt conduct of a host State may be detrimental to investors and potential investors. In other words, corruption is the obstacle for potential investors to even make the investment, which generally is the requirement to fall within the scope of an IIA. Thus, the question arises whether a tribunal has jurisdiction over a claim based on corrupt activities during the pre-investment phase.

1. Pre-investment protection under IIAs

In order to obtain pre-investment protection, expenditure made during the pre-investment phase must fall under the IIA's definition of investment. In order to interpret the scope of protection, tribunals have interpreted the explicit provision contained in the underlying IIA. In fact, some IIAs cover best-efforts obligations,[1365] while others even protect the right to establish a business or to participate in a tender without discrimination.[1366] However, the scope of protection of such provisions is not clear yet.

For instance, the tribunal in *Nordzucker v Poland* found that the obligation of a host State to promote and admit investments under the German-Poland BIT "*is of a different type than its obligations to grant Treaty protection to investments that have been admitted*".[1367] While the tribunal held that the host State had an

[1365] See e.g. Article 10(1) of the Energy Charter Treaty:
"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties *to make Investments in its Area. Such conditions* shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties [the substantive protection standards]."
Pursuant to the tribunal in *Plama v Bulgaria* the protection standards under the Energy Charter Treaty extent to "*all stages of the Investment*" and thus also to the pre-investment phase, *Plama v Bulgaria*, Award, para 172.

[1366] Note that the requirement of non-discriminatory access is often limited to specific sectors, see Katia Yannaca-Small, "Definition of 'Investment': An Open-Ended Search for a Balanced Approach," in *Arbitration under International Investment Agreements - A Guide to the Key Issues*, ed. Katia Yannaca-Small, 2010, 249.

[1367] *Nordzucker AG v The Republic of Poland*, UNCITRAL, Partial Award on Jurisdiction, 10 December 2008 (hereinafter: „*Nordzucker v Poland*, Partial Award on Jurisdiction").

obligation to accord fair and equitable treatment to the promotion and admission of investment,[1368] it also specified that

> "the intended investment must be not only intended by the future investor but must be actually 'in the making' or 'about to be made'. Indeed, for a host State to have an obligation to promote and admit an investment, there must be more than mere intention to invest which exists only in the mind of the potential investor. The host State can have no obligation to promote anything it is not aware of or to admit something which is not ready to be admitted."[1369]

The tribunal also rejected a protection for expenditures made during the pre-investment phase in general and for open tenders in particular.[1370] Against the background that tenders are open to a large amount of bidders, host States would be exposed to an unpredictable number of claims from unsuccessful bidders.[1371] Thus, the tribunal emphasised that in principle host States only agree to full IIA protection to investment admitted and made, i.e. to the winning bidder.[1372]

In the non-public UNCITRAL case of *Bosca v Lithuania*, it appears that the tribunal accepted the pre-contractual relations as falling within the scope of 'investment'.[1373] The investor, a producer of sparkling wine, had won the tender for privatisation of the state-owned producer of sparkling wines 'Alita' in 2003, but due to alleged due process irregularities the privatisation agency refrained from concluding the final contract.[1374] The arbitral tribunal recognised the investor's participation in the tender as *"'associated activity' in the form of 'making of contract' under the Protocol of the BIT"* to its prior investment in Lithuania.[1375] However, it only granted direct damages and rejected the investor's claim for loss

---

[1368] *Nordzucker v Poland*, Partial Award on Jurisdiction, para 185.
[1369] *Nordzucker v Poland*, Partial Award on Jurisdiction, para 185.
[1370] *Nordzucker v Poland*, Partial Award on Jurisdiction, para 189.
[1371] *Nordzucker v Poland*, Partial Award on Jurisdiction, para 189.
[1372] *Nordzucker v Poland*, Partial Award on Jurisdiction, para 189 („*It is not surprising that the host States that waive a part of their sovereign rights by agreement to arbitrate the disputes concerning the investments made and admitted in accordance with their legislation do not agree to arbitration of disputes related to pre-investment relations with persons merely intending to invest. Taking into account the fact that tenders open for privatization of State's assets (shares, business, real estate etc.) attract usually a large number of foreign bidders only one of whom can be successful, the State would be exposed to many international arbitration proceedings commenced by unsuccessful bidders. For this reason the States in principle (and specifically in the case of Germany and Poland) agree to grant the full Treaty protection only with regard to investments actually made and admitted in accordance with the law of the host State and not to intended investments.*"), emphasis added.
[1373] Vilija Vaitkute Pavan and Rapolas Kasparavicius, "Can an Investor Claim Lost Profits for Breach of Pre-Contractual Relations?," *Kluwer Arbitration Blog*, September 20, 2013.
[1374] Luke Eric Peterson, "Lithuania Update: Italian Investor Was Denied FET in Tender Process, but Tribunal Not Persuaded That $250 Million in Losses Can Be Hung on State," *Investment Arbitration Reporter*, March 28, 2013.
[1375] Vaitkute Pavan and Kasparavicius, "Can an Investor Claim Lost Profits for Breach of Pre-Contractual Relations?"

profits.[1376] It needs to be seen if other tribunals will follow this approach. It is noteworthy, however, that in the specific circumstances of the case the tribunal linked the tender participation to the prior investment and the investor had actually won the tender.

2. Pre-investment protection and the notion of investment under Article 25 of the ICSID Convention

In case the claim is brought under the auspices of ICSID, the threshold of the notion of investment under Article 25 of the ICSID Convention needs to be met.[1377] While the parties or the States concluding the IIA are free to agree on providing pre-investment protection, the second hurdle is autonomous from the parties' consent. In the words of the tribunal in *Joy Mining v Egypt*

> "The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision."[1378]

So far, ICSID tribunals have been reluctant to extend the notion of investment to the pre-investment phase. In *Mihaly v Sri Lanka*, for example, the tribunal had to consider whether the expenditure of money "*in pursuit of an ultimately failed enterprise to obtain a contract, constituted an 'investment' for the purpose of the* [ICSID] *Convention*".[1379] Emphasising the circumstances of the case, the tribunal held that since the contract was finally not concluded with Sri Lanka, the expenditures for its creation did not amount to an investment[1380] and declined jurisdiction. The tribunal, however, also noted that the costs during the pre-

[1376] Peterson, "Lithuania Update: Italian Investor Was Denied FET in Tender Process, but Tribunal Not Persuaded That $250 Million in Losses Can Be Hung on State."
[1377] The so-called 'double-barrel test' or 'double keyhole approach, see e.g. *Malicorp v Egypt*, Award, para 107; for more references see Schreuer et al., *The ICSID Convention*, Article 25, paras 122 et seq.
[1378] *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (hereinafter: "*Joy Mining v Egypt*, Award on Jurisdiction"), para 50. See also Ibid., Article 25, para 181. ("*The requirement of an existing investment under Art. 25(1) of the Convention applies even if another treaty, such as a BIT, grants rights at the pre-investment stage., for instance in the form of a right to be admitted. The wording of Art. 25(1) suggests that the Convention requires an actual investment. Therefore, disputes arising from investments that are merely planned, intended or attempted will not be covered.*").
[1379] *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 (hereinafter: "*Mihaly v Sri Lanka*, Award"), para 48.
[1380] *Mihaly v Sri Lanka*, Award, para 48.

investment phase might retrospectively become part of the investment once it is made.[1381] This approach was confirmed by *Zhinvali v Georgia.*[1382]

Commentators have also emphasised that "*steps preparatory to an investment will not by themselves be accepted as an investment*".[1383] At the same time it is argued that in absence of a specific pre-admission protection provision contained in the IIA investors "*generally do not enjoy investment treaty protection if they are excluded or discriminated against in the pre-investment phase*."[1384]

All in all, it is still unclear if and under which circumstances any expenditure made during the pre-investment phase are protected. It will depend on the specific provision of the underlying IIA, the circumstances of the case and whether the claim is brought under ICSID. It needs to be seen if ICSID tribunals will take into consideration the shifting treaty practice of broadening investment definitions in order to also include the pre-investment phase under the notion of investment.

3. Difficulty of damages

In addition to the jurisdictional hurdle of bringing an IIA claim on the basis of pre-investment relations, the question arises which damages a potential investor could claim for being prevented from making its intended investment due to corruption on the side of the host State. Even if a potential investor could overcome the jurisdictional hurdle, it appears difficult to prove that 'but for' the corrupt behaviour of the host State, the investor would have in fact won the tender or obtained the contract. Damages based on the assumption of the made investment will most likely be 'too remote and too speculative'.[1385] Thus, without an agreement, it appears difficult that an investor will be able to claim loss profit for an investment, which has not been made.

[1381] *Mihaly v Sri Lanka*, Award, para 50. This approach was also confirmed by commentators, see e.g. Prabhash Ranjan, "Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion," *Journal of International Arbitration* 26, no. 2 (2009): 226.

[1382] *Zhinvali Development Ltd. v Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (hereinafter: "*Zhinvali v Georgia*, Award"), see Walid Ben Hamida, "The Mihaly v. Sri Lanka Case: Some Thoughts Relating to the Status of Pre-Investment Expenditures," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005), 67 et seq.
Note that the tribunal in *Nagel v Czech Republic* also found that pre-investment expenditures without a prior agreement do not constitute an 'investment'.

[1383] Schreuer et al., *The ICSID Convention*, Article 25, para 175. See also Farouk Yala, "The Notion of 'Investment' in ICSID Case Law: A Drifting Jurisdictional Requirement? Some 'Un-Conventional' Thoughts on Salini, SGS and Mihaly," *Journal of International Arbitration* 22, no. 2 (2005): 125.

[1384] Claudia Annacker, "Protection and Admission of Sovereign Investment under Investment Treaties," *Chinese Journal of International Law* 10, no. 3 (2011): 548.

[1385] Vaitkute Pavan and Kasparavicius, "Can an Investor Claim Lost Profits for Breach of Pre-Contractual Relations?"

B. Substantive Protection Standards

The following analysis focuses on the fair and equitable treatment standard, which is the most relevant standard in corruption cases (see below at **I.**) and the full protection and security standard (see below at **II.**). For the sake of completeness, the analysis will also examine other protection standards, the breach of which will depend on the specific circumstances of the corruption case (see below at **III.**).

I. Fair and equitable treatment standard

The investment protection standard most likely to be violated by corrupt practices of the host State is the fair and equitable treatment standard.[1386] There is probably no other protection standard in international investment law that has led to as many discussions, articles, essays and scholarly work. It has been prominently labelled as the *"Grundnorm or basic norm of international law*".[1387] This contribution shall in no way have the pretension to add to the general understanding of this standard or to shed some light on the current issues of general concern. The focus of this work is rather on the specific application of the fair and equitable treatment standard to corruption issues. Thus, the objective of this Chapter is to determine whether and – in the affirmative – how this standard is breached by the different corruption situations relevant for investment treaty arbitration. Before analysing the concrete application of corrupt practices to this standard, it is essential to give an overview of its general scope (see below at **1.**) and content (see below at **2.**).

1. Scope of fair and equitable treatment

The fair and equitable treatment standard may not be reduced to a single, simple definition. It is more a general concept encompassing various notions to secure a reasonable relationship between the two unequal parties. For the purposes of this study, it is helpful to understand that the fair and equitable treatment standard is not a fixed norm, but rather a flexible notion which since its first appearances in international investment arbitration[1388] has constantly been interpreted more and more broadly in order to encompass the new challenges international investment arbitration is confronted with.[1389]

[1386] See e.g. *EDF v Romania*, Award, para 221; *ECE v Czech Republic*, Award, para 4.738.

[1387] Joint case of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v The Argentine Republic*, UNCITRAL, Decision Liability, 30 July 2010 (hereinafter: "*Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability"), para 188. Note that the tribunal referred to Hans Kelsen terminology of *Grundnorm.*

[1388] The first investment treaty arbitration where fair and equitable treatment was the centre of the claim was *Metalclad v Mexico.*

[1389] See Katia Yannaca-Small, "Fair and Equitable Treatment Standard: Recent Developments," in *Standards of Investment Protection*, ed. August Reinisch (Oxford; New York: Oxford University Press, 2008), 111; Katia Yannaca-Small, "Fair and Equitable Treatment Standard," in *Arbitration under International Investment Agreements - A Guide to the Key Issues*, First Edition (Oxford; New

In the past decade a vast number of arbitral awards have contributed to expanding the scope of this standard. Notwithstanding, the development of this standard is far from having reached the end.[1390] Although this standard has come to the forefront of investment arbitration[1391] and has been examined intensively in the past years, its precise scope and content remains unclear. In order to find the right grip to this broad matter it is essential not to get lost in all the different approaches and opinions about the scope of the fair and equitable treatment provision. It is clear, however, that the term 'fair and equitable' cannot be split into 'fair' and 'equitable', but comprise a single, uniform standard.[1392] Moreover, there appears to be a consensus that this standard, as opposed to national treatment and most favoured nation, is absolute and does not depend on treatment accorded to other investors.[1393]

While to date many issues remain disputed, one important question is whether the content of the fair and equitable treatment standard is linked to customary international law or if it constitutes an autonomous treaty standard (see below at **a)**). In order to analyse the relevance of this question for corruption issues (see below at **b)**), it is important to scrutinise the different approaches adopted by the tribunals in more detail.

a) Minimum standard under customary international law or autonomous standard

Generally speaking, there are two different clusters of fair and equitable treatment provisions in IIAs. In some cases, the formulation of the standard contains a link to international law. In other cases, the fair and equitable treatment provision is worded without any reference to international law. The different wordings of the provision and the different legal frameworks[1394] have led to the general discussion whether the standard of fair and equitable treatment depends on the minimum

---

York: Oxford University Press, 2010), 385. ("*'Fair and equitable treatment is a flexible, elastic standard, whose normative content is being expanded to include new elements*.")

[1390] See also Todd J. Grierson-Weiler and Ian Laird, "Standards of Treatment," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph H. Schreuer (Oxford: Oxford University Press, 2008), 271. ("*We have not reached the point at which it could be confidently stated that sufficient jurisprudence exists to explicate the gamut of factual situations for which the obligation may be relevant*.")

[1391] Note that in the last decade this standard of protection has developed to the most invoked and important provision in investment arbitration. Dolzer referred to the fair and equitable treatment standard as "*an almost ubiquitous presence*" in investment arbitration, see Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties," *The International Lawyer* 39, no. 1 (2005): 39.

[1392] See Dolzer and Schreuer, *Principles of International Investment Law*, 133.

[1393] Ibid.

[1394] Note that caution is required when referring to other investment treaty cases, since the legal framework and the wording of the provisions contained in the IIA may differ. See e.g. *Glamis v United States*, Award, paras 605 et seq. The tribunal made clear that NAFTA tribunals could only rely on other awards when the relevant IIAs shared with NAFTA the link to the minimum standard in international law and not when the decisions were based on the interpretation of an autonomous treaty standard.

standard of treatment of aliens afforded under customary international law (see below at **(1)**) or whether it constitutes an autonomous treaty standard (see below at **(2)**).[1395]

(1) Minimum standard under customary international law

The reference to international law has been interpreted as making clear that the fair and equitable treatment standard is not an independent and freestanding concept, but one determined by international law.[1396] However, the specific meaning of that reference has been interpreted differently. Many have understood it as providing the international minimum standard of treatment of aliens under customary international law,[1397] and only a few recent tribunals have taken it as a reference to Article 38(1) of the Statute of the International Court of Justice, considering all sources of international law.[1398] In *Suez Vivendi AWG v Argentina*, for instance, the tribunal found that the term minimum standard of customary international law is well established in international law for which reason it can be assumed that the parties to a treaty would have chosen that specific expression if they wanted to refer to it.[1399] In the view of the tribunal a mere reference to international law would thus include all sources of international law.[1400]

On the other hand, the vast majority of the NAFTA tribunals have understood the fair and equitable treatment provision contained in NAFTA as being limited by the minimum standard of customary international law. In order to provide for a congruent interpretation of the fair and equitable treatment standard in

---

[1395] For a discussion of the relationship between fair and equitable treatment and the minimum standard under customary international law see Hussein Haeri, "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law," *Arbitration International* 27, no. 1 (2011): 27–45; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 264–275.

[1396] Instead of many see the recent award of *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, NAFTA, Award, 12 January 2011 (hereinafter: "*Grand River v United States*, Award"), para 174.

[1397] See e.g. *Mondev International Ltd. v United States of America*, NAFTA, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (hereinafter: "*Mondev v United States*, Award"), para 119; *ADF v United States*, Award, para 184; *Glamis v United States*, Award, para 605.
Note that in the official commentary to the Draft Convention on the Protection of Foreign Property of 1967, the States agreed that the fair and equitable treatment was linked to the minimum standard of customary international law, see Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, OECD, 1967, pp. 13-15. Notes and Comments to Article 1: "The standard required conforms in effect to the 'minimum standard' which forms part of customary international law."

[1398] See e.g. *Merrill v Canada*, Award, para 184; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, paras 184 et seq.

[1399] *Suez, Aguas de Barcelona, Vivendi and AWG v Argentina*, Decision on Liability, para 184. Note that the tribunal dealt with three different fair and equitable treatment provisions from which only one had a reference to international law.

[1400] *Suez, Aguas de Barcelona, Vivendi and AWG v Argentina*, Decision on Liability, paras 184 et seq. See also *Merrill v Canada*, Award, paras 184 et seq.

Article 1105(1) NAFTA,[1401] the NAFTA Free Trade Commission provided guidance in its Notes of Interpretation of Certain Chapter 11 Provisions stating

> "[t]he concept of 'fair and equitable treatment […] [does] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[1402]

NAFTA tribunals have followed this binding guidance[1403] and refrained from understanding the fair and equitable treatment standard under NAFTA as being independent and autonomous.[1404] The link to the minimum standard under customary international law bars the tribunals from interpreting the fair and equitable treatment standard under the principles of treaty interpretation, but binds them to determine the scope of the fair and equitable treatment standard by referring to custom.[1405]

Against this background it is important to provide an overview of the scope of the minimum standard under international law (see below at **(a)**) and its evolving nature as interpreted by investment treaty tribunals (see below at **(b)**).

[1401] After the tribunal in *Metalclad v Mexico* had linked the fair and equitable treatment standard with the principle of transparency under international law, and after the tribunal in *SD Myers v Canada* focused on the relationship between the fair and equitable treatment standard and international law in general, the NAFTA Free Trade Commission sought to limit such wide interpretations.

[1402] NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions.

[1403] Note that pursuant to Article 1131(2) NAFTA the interpretation is binding on the tribunals established under NAFTA.
It is noteworthy that aside from limiting the scope of the fair and equitable treatment standard contained in Article 1105(1) NAFTA through the binding interpretation of the NAFTA Free Trade Commission, both Canada and the United States have recently shown efforts to limit the scope of fair and equitable treatment provisions in newly negotiated IIA. See Article 5(1) and (2) of the U.S. Model BIT (2012); Article 5(1) and (2) of the Canada Foreign Investment Promotion and Protection Agreement (FIPA) Model (2004).

[1404] For early cases following the interpretation of the binding FTC note see e.g. *Mondev v United States*, Award, paras 120 et seq.; *ADF v United States*, Award, para 179; *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, NAFTA, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (hereinafter: "*Loewen v United States*, Award"), para 128; *Waste Management II v Mexico*, Award, paras 90 et seq.
For examples of recent cases see *Chemtura Corporation (formerly Crompton Corporation) v Government of Canada*, NAFTA/UNCITRAL, Award, 2 August 2010 (hereinafter: "*Chemtura v Canada*, Award"); *Grand River v United States*, Award, paras 175 et seq. Note however that in the recent NAFTA case *Merril v Canada*, the tribunal argued that the reference to international law in Article 1105(1) NAFTA would also allow the interpretation of referring to international law as a whole, and not only to customary international law, see *Merril v Canada*, Award, para 184. In addition, the *Merrill* tribunal found despite the interpretation of the NAFTA Free Trade Commission enough scope for its own interpretation of the fair and equitable treatment provision and of assessing the current stage of customary and international law, see para *Merril v Canada*, Award, para 192.

[1405] See e.g. *Glamis v United States*, Award, para 607; *Cargill, Incorporated v United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/05/2, 18 September 2009 (hereinafter: "*Cargill v Mexico*, Award"), para 271; *Grand River v United States*, Award, para 176.

(a) Scope of the minimum standard under international law

Many investment tribunals used the standard applied by the Mexico/United States General Claims Commission in the *Neer* case in 1926 as starting point to assess the minimum standard of treatment under customary international law.[1406] This is somehow surprising, since it was an explicit denial of justice case dealing with the investigations conducted by the Mexican authorities of a murder of an American citizen. Thus, the findings of the *Neer* tribunal were concerned with the responsibility of a State, "*where the substantive injury has been caused by a private actor, and where the responsibility of the state lies in its failure to apprehend, prosecute and punish that actor*".[1407] In fact, in the past neither commentators nor international tribunals have suggested that the *Neer* standard shall be the overall test for all cases where the acts of a State are measured against the minimum standard.[1408]

The *Neer* tribunal emphasised that it is not for an international tribunal to evaluate the effectiveness of the measures taken by local authorities and concluded that

> "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[1409]

Commentators and claimants have often challenged the application of this high threshold as general rule to any investment claim concerning the treatment of foreign investors.[1410] In fact, so far most tribunals agree that 'bad faith' is not

---

[1406] Note that many respondent host States – especially in NAFTA cases – argue vehemently for the strict *Neer* standard as applicable standard for the minimum treatment standard under customary international law. Thus, tribunals are forced to deal with the *Neer* standard, independently whether they affirm it, deny its application or modify the requirements. The *Neer* case remains prominent in arbitral awards dealing with the minimum standard of treatment under customary international law, see e.g. *Mondev v United States*, Award, paras 114-116; *Pope & Talbot Inc. v Government of Canada*, NAFTA/UNCITRAL, Award in respect of damages, 31 May 2002 (hereinafter: "*Pope & Talbot v Canada*, Damages"), paras 57 et seq.; *ADF v United States*, Award, paras 179 et seq.; *Waste Management II v Mexico*, Award, para 93; *Gami Investments, Inc. v The Government of the United Mexican States*, NAFTA/UNCITRAL, Final Award, 15 November 2004 (hereinafter: "*Gami v Mexico*, Final Award"), para 95; *Glamis v United States*, Award, paras 612 et seq.; *Cargill v Canada*, Award, paras 272 et seq.

[1407] Jan Paulsson and Georgios Petrochilos, "Neer-Ly Misled?," *ICSID Review - Foreign Investment Law Journal* 22, no. 2 (2007): 246.

[1408] Ibid., 247.

[1409] *Neer* case, para 4.

[1410] See e.g. Paulsson and Petrochilos, "Neer-Ly Misled?" Paulsson and Petrochilos criticise that in investment arbitration the *Neer* standard is to some extent perceived as constituting the general rule of minimum standard, or at least of having controlled the minimum standard in the 1920s when the decision was rendered. However, the *Neer* case was never meant to "*lay down a general rule*", but was limited in its application. See also Stephen M. Schwebel, "Is Neer Far from Fair and Equitable?," *Arbitration International* 27, no. 4 (2011): 555–61. Judge Schwebel also challenges the use of the *Neer* standard in order to assess fair and equitable treatment. See also Grierson-Weiler and Laird, "Standards of Treatment," 269. ("[…] *it is not particularly helpful to construe 'fair and equitable treatment' as merely a euphemism for an obligation that imposes state*

required any more to establish the minimum standard of treatment.[1411] However, tribunals still rely on or refer to some extent to the stringent standard established in *Neer*, although the specific formula might change slightly from one case to another. Some tribunals demand 'shocking', 'egregious' or 'outrageous' conduct,[1412] other tribunals conform with merely 'surprising' conduct.[1413] However, the threshold applied by NAFTA tribunals remains high.[1414]

In the view of the *Cargill* tribunal, the previous NAFTA awards have adapted the *Neer* standard to new situations but maintained "*the required severity of the conduct*".[1415] The NAFTA tribunals adhering to such high threshold demand that the violation is "*'gross', 'manifest', 'complete' or such as to 'offend judicial propriety'*."[1416]

The tribunal in *Glamis v United States* analysed whether the standard had changed with time and concluded that the degree of scrutiny was still the same.[1417] In the words of the tribunal

> "[t]he fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment […], an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete

---

responsibility only for certain types of conduct that violate arcane norms of customary international law concerning the 'treatment of aliens'.").

[1411] E.g. *Mondev v United States*, Award, para 116; *Cargill v Mexico*, Award, para 296; *Glamis v United States*, Award, para 616. See also *Loewen v United States*, Award, para 132, with regard to fair and equitable treatment and denial of justice. With regard to fair and equitable treatment see e.g. *TECMED v Mexico*, Award, para 153; *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (hereinafter: "*CMS v Argentina*, Award"), para 280; *Azurix v Argentina*, Award, para 372; *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (hereinafter: "*Duke v Ecuador*, Award"), para 341.

[1412] See e.g. *Glamis v United States*, Award, para 616.

[1413] See e.g. *Pope & Talbot v Canada*, Damages, para 64. Note that the tribunal took into consideration the interpretation made by the NAFTA Free Trade Commission in relation to Article 1105. The tribunal found that the standard had evolved since the 1920s when *Neer* was decided and held that it was not essential anymore to be 'outraged'.

[1414] See e.g. *Waste Management II v Mexico*, Award, para 98; *International Thunderbird Gaming Corporation v The United Mexican States*, NAFTA/UNCITRAL, Award, 26 January 2006 (hereinafter: "*International Thunderbird Gaming v Mexico*, Award"), para 194; *Glamis v United States*, Award, para 627.

[1415] *Cargill v Mexico*, Award, para 284.

[1416] *Cargill v Mexico*, Award, para 285. In the view of the tribunal, the minimum standard of customary international law was violated by measures that are "*grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety*." *Cargill v Mexico*, Award, para 296.

[1417] *Glamis v United States*, Award, para 616. Note that it demanded evidence of custom showing State practice and *opinio juris* in order to determine a change in scope of the minimum standard of customary international law. It found that the claimant failed to proof such change in custom, see *Glamis v United States*, Award, para 627.

> lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards*"*.[1418]

The adherence to this high threshold for the minimum standard is explained with the fact that the purpose of such standard is only to provide the 'absolute bottom' of what is accepted or not by the international community, not more.[1419]

Not only NAFTA tribunals have demanded the high threshold of the minimum standard. In *Genin v Estonia*,[1420] the fair and equitable treatment provision also contained reference to international law. The tribunal briefly stated that such reference must be understood as a link to the international minimum standard and found that only "*acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith*" would violate such minimum standard.[1421] The tribunal did not explicitly refer to *Neer*, but demanded the same high threshold.[1422]

It is interesting to note that some NAFTA tribunals have, however, walked away from the strict *Neer* formula. The recent *Merrill* tribunal pointed out that there is no reason to apply the *Neer* standard as a general threshold for the minimum standard of treatment.[1423] The tribunal emphasised that such high threshold is only recognised under customary international law for "*the strict confines of personal safety, denial of justice and due process*".[1424] State practice would show especially

---

[1418] *Glamis v United States*, Award, para 616. Note however that the tribunal acknowledged that while the standard of minimum standard of treatment is still a stringent one, the perception of the international community of what is outrageous or shocking has changed.

[1419] *Glamis v United States*, Award, para 615 ("*The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community*."), this passage has often been quoted, e.g. recently in *Grand River v United States*, Award, 12 January 2011, para 214. See also *Cargill v Mexico*, Award, para 303 ("[…] *this is the very rationale for the customary international law minimum standard of treatment of aliens: regardless of the views of each State, there is a minimum, a floor below which a State will be held internationally responsible for its conduct*." Emphasis added)

[1420] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (hereinafter: "*Genin v Estonia*, Award").

[1421] *Genin v Estonia*, Award, para 367. See also para 371 ("*In light of this conclusion, in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action*.").

[1422] Note that subsequent tribunals have interpreted the approach taken by the *Genin* tribunal inconsistently. Some tribunals have understood the *Genin* decision as advocating that the strict standard established in *Neer* was applicable to fair and equitable treatment; see e.g. *Azurix v Argentina*, Award, para 372; *Siemens v Argentina*, Award, para 299; *Impregilo S.p.A v Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Judge Charles N. Brower, 21 June 2011 (hereinafter: "*Impregilo v Argentina*, Opinion Judge Brower"), footnote 1. The tribunal in *Saluka v Czech Republic* found however that the *Genin* tribunal merely stated what would consist 'an' international minimum standard, rather than stating that the fair and equitable treatment was only 'this specific' minimum standard; see *Saluka v Czech Republic*, Partial Award, 2006, para 295; see also *LG&E v Argentina*, Decision on Liability, para 129.

[1423] See *Merrill v Canada*, Award, para 213.

[1424] *Merrill v Canada*, Award, para 204. Similarly para 213. See also *Mondev v United States*, Award, para 115. The *Mondev* tribunal points out that the *Neer* case was concerned with the physical safety of aliens, rather than with the treatment of foreign investment.

with regard to business, trade and investment that the standard has become more liberal.[1425]

(b) Standard is not frozen in time – constantly evolving

Although there remains a strong strand of cases applying a strict standard to the minimum treatment standard under customary international law and thus to the fair and equitable treatment standard, there is consensus that the customary minimum standard is actually an evolving standard and not frozen in time.[1426] In *Mondev v United States*, the tribunal pointed at the extensive practice of States to commit to fair and equitable treatment evidenced in the enormous amount of IIAs containing such provisions, in order to conclude that such "*concordant practice*" shaped the scope of the required treatment of investments under international law.[1427] In the view of the tribunal, what is today perceived as amounting to a violation of fair and equitable treatment is not restrained or limited by what was outrageous or egregious in the past

> "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[1428]

Shortly after *Mondev v United States*, the tribunal in *ADF v United States* acknowledged that the link to customary international law does not mean that the minimum standard of treatment with the shape of the 1920s is incorporated; rather the content of that minimum standard is evolving.[1429] As highlighted by the

---

[1425] *Merrill v Canada*, Award, paras 207 et seq. Note that although the tribunal rejected the *Neer* standard, it did not agree on a specific standard, but decided to leave this question open by formulating two scenarios – one with a "*comparatively low*" threshold, and the second requiring a State's wrongful act "*sufficiently serious as to be readily distinguishable from an ordinary effect of otherwise acceptable regulatory measures*", para 219. The tribunal refrained to take stands and chose to base its final decision on the findings that damages had not been proven to its satisfaction, para 266.

[1426] See e.g. Yannaca-Small, "Fair and Equitable Treatment Standard: Recent Developments," 129. See also *Pope & Talbot v Canada*, Damages, paras 58-61; *Mondev v United States*, Award, paras 116 et seq.; *ADF v United States*, Award, para 179; *Waste Management II v Mexico*, Award, para 92; *Gami v Mexico*, Final Award, para 95; *Cargill v Mexico*, Award, para 282; *Merril v Canada*, Award, para 193; *Chemtura v Canada*, Award, para 121.

[1427] *Mondev v United States*, Award, para 117. ("[…] *the vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments.* […] *On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the Neer Tribunal (in a very different context) meant in 1927*.").

[1428] *Mondev* v *United States*, Award, para 116.

[1429] *ADF v United States*, Award, para 179. ([…] *what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both customary international law and the minimum*

tribunal in *Cargill v Mexico*, the changes in the international business community have to be taken into consideration.[1430] The new situations arising in the modern business world are not comparable to the specific situation of the *Neer* case, which actually dealt with the failure of a State to adequately investigate the murder of a foreigner.[1431] Even the tribunal in *Glamis v United States*, which adheres to some extent to the *Neer* standard and still demands outrageous conduct, made clear that the conception of what amounts to 'outrageous' has evolved.[1432] Thus, State action that in past times did not offend the international community may nowadays be perceived as shocking and outrageous.[1433] Non-NAFTA tribunals have also confirmed that the minimum standard of customary law is not frozen in time, but subject to evolution.[1434]

(2) Autonomous treaty standard

Outside of NAFTA, tribunals are not bound by the interpretation predetermined by the NAFTA Free Trade Commission that the fair and equitable treatment standard is not more than the minimum standard under customary international law. Thus, many tribunals refrained from understanding a reference to international law as limitation to the minimum standard of treatment and understood the fair and equitable treatment standard as an independent and autonomous standard.[1435] In the words of the tribunal in *Azurix v Argentina*, the reference to international law "*set*[s] *a floor not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law.*"[1436]

---

standard of treatment of aliens it incorporates, are constantly in a process of development.") emphasis added. The tribunal also quoted the relevant passage of the *Mondev award*, see *ADF v United States*, Award, para 184. Note that many arbitral awards refer to *Mondev v United States* and *ADF v United States* in this regard and agree that the reference to international law does not overlook the evolution of customary international law, see e.g. *Waste Management II v Mexico*, Award, para 92; *Gami Investments*, Final Award, para 95; *Cargill v Mexico*, Award, para 281; *Merril v Canada*, Award, para 190; *Chemtura v Canada*, Award, para 121.

[1430] *Cargill v Mexico*, Award, para 282.

[1431] *Cargill v Mexico*, Award, para 282.

[1432] *Glamis v United States*, Award, para 613.

[1433] *Glamis v United States*, Award, para 616. ("[…] *as an international community, we may be shocked by State actions now that did not offend us previously.*").

[1434] See e.g. *TECMED v Mexico*, Award, para 116, referring to *Mondev. v United States*, Award, para 116.

[1435] For tribunals specifically stating the autonomous nature of the fair and equitable treatment standard see *TECMED v Mexico*, Award, para 155, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (hereinafter: "*MTD v Chile*, Award"), para 111; *Azurix v Argentina*, Award, paras 359, *Saluka v Czech Republic*, Partial Award, para 309; *Total v Argentina*, Decision on Liability, para 125. Note that many tribunals interpreted the fair and equitable treatment provision as an independent treaty provision without specifically stating so, see e.g. cases mentioned in footnote 1437.

[1436] *Azurix v Argentina*, Award, para 361. See also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (hereinafter: "*Vivendi v Argentina II*, Award", para 7.4.5-7.4.7.; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 28 March 2011 (hereinafter: "*Lemire v Ukraine*, Award"), para 253.

Along these lines, tribunals made use of the principles of treaty interpretation pursuant to Article 31(1) Vienna Convention determining the scope independently from any custom.[1437] They engaged in a treaty interpretation in good faith in accordance with the ordinary meaning of 'fair and equitable treatment' considering the context and in light of the object and purpose of the IIA.[1438] Thus, many tribunals referred to the purpose of the IIAs to promote investment in order to find that the fair and equitable treatment standard is aimed at creating positive incentives for foreign investors.[1439] From this it followed that such provision is meant to provide more protection than the already binding minimum standard.[1440] A few tribunals have even engaged in a comparative law approach to determine the scope of the fair and equitable treatment standard.[1441]

In conclusion, since the minimum standard of treatment under customary law is binding in any case, it will also constitute the floor of all provided protection by the IIA.[1442] However, the specific scope of the fair and equitable treatment is not limited by and may go beyond the minimum standard.[1443] It can be assumed that if the parties of the IIA had intended such limitation, they would have used the well-known concept of 'minimum standard of treatment in customary law' instead of fair and equitable treatment or would have expressed such limitation in the IIA.[1444]

[1437] See e.g. *TECMED v Mexico*, Award, para 155; *Saluka v Czech Republic*, Partial Award, para 296; *MTD v Chile*, Award, paras 112 et seq.; *Azurix v Argentina*, Award, para 359; *LG&E v Argentina*, Decision on Liability, paras 122 et seq.; *Enron Corporation, and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (hereinafter: "*Enron v Argentina*, Award"), para 259; *National Grid P.L.C. v Argentine Republic*, UNCITRAL, Award, 3 November 2008 (hereinafter: "*National Grid v Argentina*, Award"), paras 167 et seq.; *Kardassopoulos v Georgia*, Award, para 429; *Lemire v Ukraine*, Award, paras 257 et seq.; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, paras 211 et seq.; Joint Award of *Gemplus S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. v The United Mexican States*, ICSID Case No. ARB(AF)/04/3, and *Talsud S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010 (hereinafter: "*Gemplus and Talsud v Mexico*, Award"), para 7-72. See also Roland Kläger, *"Fair and Equitable Treatment" in International Investment Law* (Cambridge et al.: Cambridge University Press, 2011), 38–47.

[1438] See Article 31 Vienna Convention on the Law of Treaties.

[1439] See e.g. *TECMED v Mexico*, Award, para 156; *Saluka v Czech Republic*, Partial Award, para 293.

[1440] *Saluka v Czech Republic*, Partial Award, para 293.

[1441] See e.g. *Total v Argentina*, Decision on Liability, paras 128 et seq.

[1442] *Saluka v Czech Republic*, Partial Award, para 292. See also *Azurix v Argentina*, Award, para 361; *Vivendi v Argentina II*, Award, paras 7.4.5-7.4.7.; *Lemire v Ukraine*, Award, para 253.

[1443] F. A. Mann, "British Treaties for the Promotion and Protection of Investments," *British Yearbook of International Law* 52, no. 1 (1981): 244; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford; New York: Oxford University Press, 2008), 29. See also *Azurix, v Argentina*, Award, para 361; *Enron v Argentina*, Award, para 258; *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (hereinafter: "*Sempra v Argentina*, Award"), para 302; see also *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (hereinafter: *Continental Casualty v Argentina*, Award"), para 254; *Total v Argentina*, Decision on Liability, paras 125-127; *Lemire v Ukraine*, Award, para 253.

[1444] Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice," *The Journal of World Investment and Trade* Vol. 6, no. No. 3 (June 2005): 360. See also *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (hereinafter:

b) Does this distinction matter in corruption cases?

The question arises whether it is relevant for corruption issues that the fair and equitable treatment standard is interpreted as an independent standard or whether it is subsumed under the minimum standard required under international law. In order to answer this question, it is important to bear in mind that the distinction refers to the level of severity of the conduct in question. While the majority of the tribunals agree that bad faith is no requirement of the customary minimum standard, many tribunals adhere to the notion that the relevant conduct must be 'shocking', 'egregious', 'outrageous' or 'surprising'. Tribunals have demanded that the violation is 'manifest', 'gross' or constitutes an 'offence to judicial propriety'.

Against this background, if corruption triggers the high threshold of the minimum standard, it can be concluded that it also constitutes a violation to the autonomous interpretation of the fair and equitable treatment standard. For such analysis it is important to recall that the minimum standard under customary international law is an evolving standard and needs to be interpreted under the current concept of what constitutes the threshold, which shall not be undercut by a State when dealing with foreign investors.[1445]

For the purpose of evaluating whether host State corruption violates such threshold it is important to refer to the findings of the previous Chapters once more. As concluded in Chapter One,[1446] corruption has a detrimental impact on *inter alia* foreign direct investment, economic growth and the wellbeing of the populations of the host State, since it destroys competition and weakens the investment environment. As presented in Chapter Two, in recent years, the international community has shifted its approach towards corruption and an international consensus has been established to engage in the global fight against corruption.[1447] After having analysed the different approaches taken at the different levels of the international community, we concluded in Chapter Three that corruption violates transnational public policy.[1448]

Against the background of this development in the international approach against corruption, the analysis based on the present perspective leads to the conclusion that corruption has become an egregious conduct, which is not tolerated by the rule of law. Every corruption scandal causes an outrage among the society. Corruption has moved away from being merely the reprehensible way of doing business, which was not welcomed, but nevertheless accepted as a necessary evil, to a fully condemned means of doing business. It is not accepted anymore in any kind of

---

"*Biwater v Tanzania*, Award"), para 591; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 184; *Merrill v Canada*, Award, para 185.

[1445] See above at B.I.1.a)(1)(b).

[1446] See Chapter One.

[1447] See Chapter Two.

[1448] See Chapter Three.

business situation. In addition, the concept of how public office shall be exercised has also developed. While public power might have been understood as a privilege in the past, there is a consensus that it bears responsibility and demands good governance. The conduct of a public official who disregards its responsibility to render decisions in the public interest in order to exercise her office for private gain by abusing her power may have been considered tolerable in the past, but nowadays it is simply shocking.

Applying the minimum standard as seen from a modern perspective, in the words of some tribunals it can be concluded that when both standards are applied to the relevant facts of the case, the difference is not material,[1449] "*more theoretical than real*"[1450] or "*more apparent than real*".[1451] Commentators have also referred to the evolving concept of the minimum standard, which is influenced by the protection provided by the thousands of IIAs,[1452] in order to argue that both standards have levelled to create a general principle of treatment in international investment law.[1453] In this context, commentators have also pointed to the general use of precedents by tribunals without distinguishing whether the decisions were based on customary international law or on an autonomous treaty provision.[1454]

In conclusion, whether tribunals will apply the threshold of the customary minimum standard of treatment or of an autonomous treaty standard, in any case corruption constitutes a severe violation that meets both thresholds. This leads to the question of the content of this investment protection standard. What is fair and equitable treatment – what exactly falls under this standard? What notions and principles does fair and equitable treatment encompass?

[1449] See *Azurix v Argentina*, Award, para 361; *Biwater v Tanzania*, Award, para 592; *CMS v Argentina*, Award, para 284; *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Administered Case No. UN 3467, Award, 1 July 2004 (hereinafter: "*Occidental v Ecuador*, LCIA Award"), para 190. See also *Duke v Ecuador*, Award, paras 333 et seq.

[1450] E.g. *Rumeli v Kazakhstan*, Award, para 611.

[1451] See e.g. *Saluka v Czech Republic*, Partial Award, para 291.

[1452] Rudolf Dolzer and André von Walter, "Fair and Equitable Treatment - Lines of Jurisprudence on Customary Law," in *Investment Treaty Law Current Issues II* (London: British Institute of International and Comparative Law, 2007), 112.

[1453] Stephan W. Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford: Oxford University Press, 2010), 151–82; Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford, Portland: Hart Publishing, 2009), 298–310; Kläger, *"Fair and Equitable Treatment" in International Investment Law*, 85–88. Note that Kläger argues that holding on to two different constructions of the standard leads to inconsistency and uncertainty in international investment law.

[1454] See e.g. Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," 153 et seq.

2. Content of fair and equitable treatment – categories, situations and settings falling under the fair and equitable treatment standard

The term 'fair and equitable' is vague.[1455] No clear definition with concise terms exists, under which all relevant situations may be subsumed. In fact, the application of the relevant facts of each case is required to determine the content of this concept.[1456] Due to the lack of a suitable definition, tribunals and commentators have focused in identifying certain categories of normative elements, notions and situations, which trigger the standard.[1457]

Thus, it is not apposite for the purpose of this study to cite the various attempts made to define the fair and equitable treatment standard. We will rather analyse the different main notions that can be extracted from the present development of fair and equitable treatment. The focus shall be on the categories and notions most relevant for cases where the corrupt practice of a host State is at scrutiny. Many categories are closely related and may overlap. The division in the following categories and settings must not be understood as a rigid distinction between the different notions. In fact, drawing a clear line between each principle will often result in difficulties and is not necessary. Moreover, certain conduct may fall within more than one category. The following sub-chapter should be understood as analysing the same underlying idea of treatment in good faith from different angles and with its particular specifications. Thus, we will begin our examination with the basic principle of good faith (see below at **a)**), before approaching the further notions of fair and equitable treatment relevant to corruption cases (see below at **b) - g)**).

a) Good faith principle

One principle that has been identified as the basis of the fair and equitable treatment standard is the principle of good faith. This principle is considered a

[1455] See e.g. *Waste Management II v Mexico*, Award, para 99; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (hereinafter: "*PSEG v Turkey*, Award"), para 239; *Enron v Argentina*, Award, para 256; *Sempra v Argentina*, Award, para 296; *Rumeli v Kazakhstan*, Award, para 583; *Jan de Nul v Egypt*, Award, para 185; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 187.

[1456] Christoph Schreuer, "Fair and Equitable Treatment (FET): Interactions with Other Standards," *Transnational Dispute Management* 4, no. 5 (September 2007): 4. See also *MTD v Chile*, Award, para 109; *Rumeli v Kazakhstan*, Award, para 610; *Merrill v Canada*, Award, para 210.

[1457] For a recent example see *Bayindir v Pakistan*, Award, para 178. ("[…] *different factors which emerge from decisions of investment tribunals as forming part of the FET standard* […] *comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment.*"). The tribunal listed various categories developed in arbitral practice and referred to *Metalclad v Mexico*, Award, para 76; *Waste Management II v Mexico*, Award, para 98; *Roland S. Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (hereinafter: "*Lauder v Czech Republic*, Final Award"), para 292; *Saluka v Czech Republic*, Partial Award, para 308; *Duke v Ecuador*, Award, para 340.

general principle of international law[1458] and constitutes one of its foundations.[1459] Good faith has colourfully been described as providing "*the glue that basically holds the international order together*".[1460] The ICJ has relied on this principle when it held that "[t]*he principle of good faith requires that every right be exercised honestly and loyally*".[1461] Two decades later it affirmed the existence of this principle by stating that "[o]*ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.*"[1462]

In the past decade, international investment tribunals applied this public international law concept more and more to the specific investment law setting and in particular to the fair and equitable treatment standard.[1463] Commentators and recent tribunals refer to the good faith principle in order to understand and ascertain the standard of fair and equitable treatment.[1464] It is even contended "*that*

[1458] See e.g. *Merrill* v *Canada*, Award, para 187; *Total v Argentina*, Decision on Liability, para 111. See also Crawford, *Brownlie's Principles of Public International Law*, 19. Brownlie names the good faith principle together with the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, domestic jurisdiction, and the freedom of the seas as examples of general principles of international law. From this it follows that these principles are widely accepted for which reason a direct link to State practice is no longer required. With regard to the good faith principle in international law in general see Jörg P. Müller, *Vertrauensschutz Im Völkerrecht* (Köln: Carl Heymanns Verlag KG, 1971); Elisabeth Zoller, *La Bonne Foi En Droit International Public* (Paris: Éditions a Pedone, 1977); Robert Kolb, *La Bonne Foi En Droit International Public - Contribution à L'etude Des Principes Généraux de Droit*, 1st ed. (Paris: Presses Universitaires de France, 2000); J. F. O'Connor, *Good Faith in International Law* (Aldershot, UK: Dartmouth, 1991); Robert Kolb, "Principles as Sources of International Law (with Special Reference to Good Faith)," *Netherlands International Law Review* 53, no. 1 (2006): 1–36.

[1459] Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 105 et seq.; Dolzer and Schreuer, *Principles of International Investment Law*, 156.

[1460] Todd Weiler, "Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Todd Weiler (ed.)* (London: Cameron May, 2005), 719.

[1461] *Fisheries Case (United Kingdom v Norway)*, Judgment, 18 December 1951, ICJ Reports 1951, 116 (hereinafter: "*Fisheries Case (United Kingdom v Norway*"), Judgment"), 142.

[1462] *Nuclear Tests Case (New Zealand v France)*, Judgment, para 49. The specific area of application concerned the legal and binding effect of unilateral statements given by States. The ICJ continued: "*Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.*"

[1463] See e.g. *S.D. Myers, Inc. v Government of Canada*, NAFTA/UNCITRAL, Partial Award, 13 November 2000 (hereinafter: "*SD Myers v Canada*, Partial Award"), para 134; *TECMED v Mexico*, Award, para 153 et seq.; *Waste Management II v Mexico*, Award, para 138; *International Thunderbird Gaming v Mexico* Award, para 147; *Saluka v Czech Republic*, Partial Award, para 303; *Siemens v Argentina*, Award, para 308; *Biwater v Tanzania*, Award, para 602; *Rumeli v Kazakhstan*, Award, para 609; *Gemplus and Talsud v Mexico*, Award, para 7-72.

[1464] See Grierson-Weiler and Laird, "Standards of Treatment," 272. See also *TECMED v Mexico*, Award, para 154; *Sempra v Argentina*, Award, para 297, ("*The principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes*."); *Siag & Vecchi v Egypt*, Award, para 450, ("*The general, if not cardinal, principle of customary international law that States must act in good faith*

good faith is inherent in fair and equitable treatment".[1465] Especially the disparity of powers between the host State and the investor – characteristic in investment treaty arbitration – makes good faith the foundation of their relationship. Each investment decision will be based, at least to some extent, upon the prospect of good faith – on both sides. Without such promise the investment situation would be bereft of the required stability and certainty to sustain such far-reaching investment decisions.[1466]

It is noteworthy that due to an overlap between the scope of the fair and equitable treatment standard and the good faith principle,[1467] it is difficult to draw an exact line between fair and equitable treatment and behaviour in good faith.[1468] However, in order to deduce the substance of the fair and equitable treatment standard from the good faith principle, a clear distinction between both is not necessary. Recognising the importance of the good faith principle in international law for the understanding of the fair and equitable treatment standard in international investment law is already the essential step of the assessment. In conclusion, the good faith principle is both a category of (and thus part of) the fair and equitable treatment standard as well as its underlying idea,[1469] which determines its shape.

The good faith principle is applicable to both the investor (see below at **(1)**) and the host State (see below at **(2)**).

(1) Good faith principle applicable to investor

The good faith principle is the guardian of the legal relationship between the investor and the host State. It has two implications on the investor in connection to corruption issues. First, the principle of good faith creates the substantive

---

is thus a useful yardstick by which to measure the Fair and Equitable standard."); *Total v Argentina*, Decision on Liability, para 111, ([…] *the fair and equitable treatment standard is derived from the requirement of good faith* […]*).*

Note that Vandevelde argues that the principle of good faith does not add anything to the other principles embraced by the fair and equitable treatment standard, see Kenneth Vandevelde, "A Unified Theory of Fair and Equitable Treatment," *International Law and Politics* 43, no. 1 (2010): 97. He referred to *ADF v United States* where the good faith principle was understood as being of 'negligible assistance' for the interpretation of the fair and equitable treatment standard, see *ADF v United States*, Award, para 191. However, Vandevelde seems to agree that the principle of good faith is an underlying principle of the fair and equitable treatment standard.

[1465] Schreuer, "Fair and Equitable Treatment in Arbitral Practice," 384; Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, 168, 175.

[1466] See Grierson-Weiler and Laird, "Standards of Treatment," 277. ("*Without the promise of good faith, the international legal order would be little more than a house of cards, upon which no certainty of individual economic activity could be built*."). See also Weiler, "Good Faith and Regulatory Transparency: The Story of Metalclad v Mexico," 737.

[1467] Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties," 91.

[1468] Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, 175.

[1469] Weiler, "Good Faith and Regulatory Transparency: The Story of Metalclad v Mexico," 719. Weiler described it as the 'common theme' underlying the positive duties of the fair and equitable treatment standard. See also *Siemens v Argentina*, Award, para 308.

obligation on the investor not to engage in corruption when investing in the host State. The detrimental socio-economical impact of corruption on the host State, the violation of transnational public policy and the condemnation by national law amount to *inter alia* a good faith responsibility of the investor not to resort to such illegal and harmful means.

Second, the principle of good faith has the procedural content that the investor cannot base a violation of a fair and equitable treatment standard on her own wrongful act. The substance of the standard of fair and equitable treatment overlaps with the meaning of good faith to the extent that the principles of *venire contra factum proprium* and estoppel must also be observed.[1470] From this it follows, that the investor cannot base its case on corruption if she had participated in the corrupt practice himself or through an agent. In other words, as soon as the investor has attempted to bribe a public official or engaged in any corrupt conduct, this investor is barred from basing its cause of action on the very same fact that the host State's public officials are corrupt. It is not relevant whether the public official extorted the bribe in the first place or pressured the investor by other means, the investor may not surrender to become part of a corrupt arrangement. Basing a claim on a wrongdoing of the host State where the investor was involved violates the good faith principle.[1471]

(2) Good faith principle applicable to the host State

The principle of good faith must be observed by both parties. The host State is required to act in good faith when dealing with the investor and its investment – at all relevant phases of the investment.[1472] When trying to fill the principle of good faith with life and content in order to apply it to the facts, tribunals have often approached it through legitimate expectations.[1473] In the words of the *Tecmed* tribunal, in light of the good faith principle "[t]*he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently*

[1470] See Dolzer and Schreuer, *Principles of International Investment Law*, 132 et seq.

[1471] This situation must be differentiated from the setting when the investor seeks relief for an unfair treatment of its investment on other grounds than corruption and the host State as respondent alleges that the investor is barred to bring any claim due to her *unclean hands* resulting from an alleged corrupt practice concerning the investment, see Chapter Seven. Note also that it is contended that bad faith on side of the investor has no impact on the violation of fair and equitable treatment but rather on the question of compensation, see Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, 173.

[1472] The tribunal in *TECMED v Mexico* held that in light of the good faith principle the host State could not arbitrarily revoke preexisting decisions or permits, *TECMED v Mexico*, Award, para 154. The good faith principle has also been found to be relevant for the approval of the investment, see Campbell McLachlan, Lauren Shore, and Matthew Weininger, *International Investment Arbitration - Substantive Principles* (Oxford: Oxford University Press, 2008), 196. The authors refer to *SPP v Egypt* and state that the host State may not escape international arbitration by repealing the approval of the investment under domestic law.

[1473] See e.g. *TECMED v Mexico*, Award, para 154; *Saluka v Czech Republic*, Partial Award, para 307. Note that the good faith principle in international law in general requires the protection of legitimate expectation, see e.g. Kolb, "Principles as Sources of International Law (with Special Reference to Good Faith)," 17, 20–24.

in its relations with the foreign investor".[1474] The tribunal in *Saluka v Czech Republic* similarly held that

> *"*[a] foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination."[1475]

Besides the protection of legitimate expectations, good faith requires *inter alia* the host State to act consistently, transparently and with a reasonable public purpose, i.e. not arbitrarily. In addition, the tribunal in *Waste Management* v *Mexico* found a deliberate conspiracy of governmental agencies to also constitute a violation of the good faith principle.[1476] All these requirements have also been found to be part of the fair and equitable treatment standard,[1477] and will be examined individually. However, at this stage we will assess the impact of a specific violation of good faith, i.e. by acting in bad faith. While there is no specific bad faith requirement for a fair and equitable treatment breach (see below at **(a)**), bad faith behaviour clearly constitutes such violation (see below at **(b)**). Corrupt behaviour most certainly amounts to 'acting in bad faith' (see below at **(c)**).

(a) No bad faith requirement

The fact that the good faith principle is a fundamental part of the fair and equitable treatment standard does not lead to the conclusion that bad faith is an essential requirement for a breach of such standard.[1478] This follows from the notion that 'acting in good faith' is not equal to 'not acting in bad faith'. The principle of good faith is an objective principle[1479] and encompasses many more duties than the mere prohibition of acting in bad faith. The latter represents merely the violation of subjective good faith. A host State's action might not amount to bad faith but nevertheless be in violation of a duty or notion protected by the good faith principle and thus breach the fair and equitable treatment standard.

Although the tribunal in *Genin v Estonia* stated that an action amounting to "*bad faith, a wilful disregard of due process of law or an extreme insufficiency of*

[1474] *TECMED v Mexico*, Award, para 154.
[1475] *Saluka v Czech Republic*, Partial Award, para 307, emphasis added.
[1476] *Waste Management II v Mexico*, Award, para 138.
[1477] Which is consistent due to the mentioned relationship between fair and equitable treatment and the principle of good faith.
[1478] See Dolzer and Schreuer, *Principles of International Investment Law*, 158; McLachlan, Shore, and Weininger, *International Investment Arbitration*, 243; Vandevelde, "A Unified Theory of Fair and Equitable Treatment," 55.
[1479] See e.g. Kolb, "Principles as Sources of International Law (with Special Reference to Good Faith)," 17.

action" would breach the fair and equitable treatment standard,[1480] this cannot be understood as a requirement for such violation.[1481] It rather states that bad faith would in any case amount to a breach of fair and equitable treatment, but it does not establish bad faith as minimum threshold.[1482] The tribunal in *Mondev v United States* found that outrageous or egregious conduct was not necessary to breach the fair and equitable treatment standard and that "*a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith*".[1483] Tribunals have constantly confirmed that bad faith is not a requirement of fair and equitable treatment.[1484] In *Siemens* v *Argentina*, for instance, the tribunal based its confirming finding on the purpose of investment treaties to promote and protect investment and held that it would be inconsistent with such purpose if only the existence of bad faith on side of the host State would breach the fair and equitable treatment standard.[1485]

(b) Bad faith violates the fair and equitable treatment standard

While the fair and equitable treatment standard might be breached without the involvement of bad faith, the mere existence of bad faith amounts to a violation of the good faith principle. Consequently, the violation of the good faith principle due to a host State's action performed in bad faith will also constitute sufficient grounds for a violation of the fair and equitable treatment standard.[1486] Tribunals

---

[1480] *Genin v Estonia*, Award, para 371. The tribunal referred to the international minimum standard for treatment of aliens to assess the substance of the fair and equitable treatment standard, in particular it drew on the *Neer* standard, which required bad faith.

[1481] Note that some tribunals have understood the decision of the tribunal in *Genin v Estonia* as requiring bad faith or malicious intention as necessary element for a violation of fair and equitable, see e.g. *Azurix v Argentina*, Award, para 372.

[1482] See also *Saluka v Czech Republic*, Partial Award, para 296. The tribunal understood the reference by the *Genin* tribunal to the *Neer* standard not as equating the fair and equitable treatment standard of the IIA with the customary minimum standard, but merely stating that such minimum standard would in any case be violated by conduct amounting to *inter alia* bad faith. See also *LG&E v Argentina*, Decision on Liability, para 129.

[1483] *Mondev v United States*, Award, para 116.

[1484] *ADF v United States*, Award, para 180, quoting *Mondev*, paras 114-116; *TECMED v Mexico*, Award, para 153, quoting *Mondev* v *United States*, Award, para 116; *Loewen* v *United States*, Award, para 132; *Waste Management II v Mexico*, Award, paras 93, 97, 98, quoting *Loewen v United States*, Award, para 132; *Occidental v Ecuador*, LCIA Award, para 186; *CMS v Argentina*, Award, para 280, the tribunal stressed that bad faith may aggravate the situation but that it is not essential; *Azurix v Argentina*, Award, para 372, quoting *CMS v Argentina*, para 372; *LG&E v Argentina*, Decision on Liability, para 129; *Jan de Nul v Egypt*, Award, para 185, quoting *CMS v Argentina*, para 280, Azurix, para 372, and *LG&E* v *Argentina*, Decision on Liability, para 129; *Bayandir* v *Pakistan*, Award, para 181, quoting *CMS v Argentina*, Award, para 280, *Azurix v Argentina*, Award, para 372, *Loewen v United States*, Award, para 132, *Waste Management II v Mexico*, Award, para 93, and *TECMED v Mexico*, Award; *Biwater v Tanzania*, Award, para 602; *PSEG v Turkey*, Award, para 256, note that the *PSEG* tribunal did not explicitly state that bad faith was not required, it rather clarified that even measures taken in good faith might amount to a breach of fair and equitable; *Enron v Argentina*, Award, para 263; *Vivendi v Argentina II*, Award, para 7.4.12; *Duke v Ecuador*, Award, para 341; *National Grid v Argentina*, Award, para 173; *Glamis v United States*, Award, para 616; *Cargill v Mexico*, Award, para 296; *Merrill v Canada*, Award, para 208; *Lemire v Ukraine*, Award, para 254; *Total v Argentina*, Decision on Liability, para 110.

[1485] *Siemens v Argentina*, Award, para 300.

[1486] See Dolzer and Schreuer, *Principles of International Investment Law*, 156 et seq.

have made clear that while bad faith is not required, the presence of bad faith aggravates the situations[1487] and is evidence enough for a breach of fair and equitable treatment.[1488] In scholarship it is also contended that when the host State acts in bad faith, a violation of the standard is 'clear'[1489] or 'likely'.[1490]

(c) Corruption is 'acting in bad faith'

Bad faith means that an action is deliberately or consciously not performed in good faith. An example for an action committed in bad faith by a host State is when legal instruments and administrative measures are intentionally used for purposes other than the original and official objective they were established for.[1491] At the same time, a measure is tainted by bad faith when the applied discretion is based on an inappropriate, illegitimate or irrelevant ground for the particular issue.[1492]

When a decision of a host State regarding or affecting the investment is only made to extract a bribe, or is based upon or at least induced by the fact that a bribe was paid, then this constitutes a ground outside of the scope of decision-making in good faith. In addition, the wrong discretion is not used by mistake but on purpose and deliberately when corruption is involved, since the public official puts her personal benefit before her duty to render sound decisions in the interest of the public. Moreover, in most countries administrative regulation will in concrete terms forbid any involvement of public officials in corruption. To be clear, the mere fact of violating such internal rules is not enough to breach the good faith principle.[1493] It is not the breach of domestic law, but the wilful disregard by the corrupt public official of these provisions leading to a manifest abuse of her official authority that constitutes bad faith. From this it follows that each measure taken by the host State, which is influenced by corruption, will most likely be an action in bad faith.

(3) Conclusion

The principle of good faith is a general principle of international law and is the underlying principle of the fair and equitable treatment standard. Thus, it serves as guidance to understand and interpret the content of the fair and equitable treatment standard. The good faith principle must be observed by both parties. The investor may only base its claim on allegations of corruption as long as the investor has not

---

[1487] See e.g. *CMS v Argentina*, Award, para 280; *Azurix v Argentina*, Award, para 372; *Vivendi v Argentina II*, Award, para 7.4.12; *Siemens v Argentina*, Award, para 299.
[1488] See e.g. *Cargill v Mexico*, Award, para 296.
[1489] Dolzer and Schreuer, *Principles of International Investment Law*, 158.
[1490] McLachlan, Shore, and Weininger, *International Investment Arbitration*, 243; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 277.
[1491] Dolzer and Schreuer, *Principles of International Investment Law*, 157–158.
[1492] Note that this description also applies to arbitrary conduct, which also falls under bad faith.
[1493] See also *ADF v United States*, Award, para 190, with regard to the fair and equitable treatment standard and not tailored to the good faith principle: "*But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)* […]."

been involved in the corrupt action. With regard to the host State, bad faith is not required for a violation of the fair and equitable treatment standard. However, the existence of bad faith will most certainly amount to a breach of good faith and thus also to a violation of the fair and equitable treatment standard. A decision tainted by corruption is deliberately based on motives outside of the required public purpose. Public officials rendering corruption tainted decisions act in bad faith.

b) Legitimate expectations

The principle of legitimate expectations is closely related to the principle of good faith,[1494] and has been identified as the dominant element of fair and equitable treatment.[1495] An investment beneficial environment depends not only on the implementation of legal rules and regulations, but also on the application and enforcement of such provisions in a manner that a reasonable investor could rely on. Before taking the decision to invest, each reasonable investor will assess the host State's activity towards the investment and will have its own expectation of how the host State applies the relevant rules and regulations.[1496] Under customary international law, general expectations of investors were originally not protected, however, in investment arbitration the standard of legitimate expectations has been developed in a strong strand of cases.

(1) Scope

The tribunal in *TECMED v Mexico* sketched the scope of the principle of legitimate expectations very broadly

> "[t]he Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State

[1494] *TECMED v Mexico*, Award, para 154. See Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 137. ("*The protection of good faith extends equally to the confidence and reliance that can reasonably be placed not only in agreements but also in communications or other conclusive acts from another State.*"). See also Grierson-Weiler and Laird, "Standards of Treatment," 275. ("*It is* […] *a corollary principle of good faith*.").
[1495] *Saluka v Czech Republic*, Partial Award, para 302.
[1496] *Saluka v Czech Republic*, Partial Award, para 301. ("*An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.*").

> actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations."[1497]

Some tribunals have criticised this interpretation of the standard as being too broad,[1498] while others have followed the core elements of the *TECMED* interpretation.[1499] This formulation, however, may lead to the misunderstanding that the content of the obligation that the host State has vis-à-vis the investor may only depend on the subjective expectations of the investor instead of the concrete terms of the investment treaty.[1500] The fair and equitable treatment standard is an objective standard, and thus the point of view must be objective. The emphasis lies on the word 'legitimate' or 'reasonable', which transfer the expectations from being subjective to having an objective character.[1501] It must be clear that the standard takes into account the whole relationship, behaviour and dealings between the two parties. It is far from letting the investor influence the content of the obligation by just having expectations. The scope of the legitimate expectations is actually determined by the conduct of the State leading to such expectations. Thus, the emphasis of each analysis must actually be on the relevant measures taken by the host State.[1502] The question is what would have been the legitimate

---

[1497] *TECMED v Mexico*, Award, para 154, emphasis added. See also *TECMED v Mexico*, Award, para 167. ("[The investor] *was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly.*").

[1498] See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Application for Annulment, 21 March 2007 (hereinafter: "*MTD v Chile*, Annulment"), para 67; referred to in *Biwater v Tanzania*, Award, para 600

[1499] For e.g. *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 30; *MTD v Chile*, Award, para 114; *Eureko v Poland*, Partial Award, para 235; *Saluka v Czech Republic*, Partial Award, para 302; *LG&E v Argentina*, Decision on Liability, para 127; *Siemens v Argentina*, Award, para 298-299; *Duke v Ecuador*, Award, paras 339-340; *PSEG v Turkey*, Award, para 240; *Enron v Argentina*, Award, para 262; *Sempra v Argentina*, Award, para 298; *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (hereinafter: "*Parkerings v Lithuania*, Award"), para 330; *National Grid v Argentina*, Award, para 173; *Jan de Nul v Egypt*, Award, para 186; *Kardassopoulos v Georgia*, Award, para 440; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 224; *Alpha v Ukraine*, Award, para 420; *AES v Hungary*, Award, para 9.3.10.

[1500] See *MTD v Chile*, Annulment, para 67. "[…] *the reliance on the foreign investor's expectations as the source of the host State's obligations* […] *is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have*."

[1501] See also *Saluka v Czech Republic*, Partial Award, para 304. ("[The] *expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances*."), emphasis changed from italics to underline.

[1502] *International Thunderbird Gaming v Mexico*, Award, para 147. ("*'legitimate expectations' relates* […] *to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.*"). Note however also that the disappointment of such legitimate expectations must be serious and material in order to amount to a breach of fair and equitable, see *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 14.

expectations of a reasonable investor in the concrete position of the investor dealing with the conduct of the host State at the time of making the investment.[1503] In addition, this assessment of the legitimate expectations must also consider the host State's legitimate interest to appropriately regulate matters within its authority.[1504]

In order to determine which factors are valid in shaping such reasonable expectations, we have to start from the premise that the purpose of IIAs is to promote and protect investments. From this it follows that the expectations of the investor must be the basis of its decision to make the investment and that the investor in fact relied on the specific behaviour of the host State. Such State actions must amount to some sort of assurances, which have finally induced the investment.[1505] The final question is whether it was legitimate and reasonable for the investor to rely on such factors.

Tribunals have often discussed what quality such assurances require in order to make the reliance reasonable. Informal and general representations will most certainly not be enough to justify and create legitimate expectations. It rather requires that "*an individual investor receives specific formal assurances that visibly display an official character and if the official(s) perceive or should perceive that the investor intends, reasonably, to rely on such representation*".[1506] In other words, the assurances must have official character[1507] and it must be perceptible that the investor may rely on them.

The case is easy when an explicit promise or guarantee was issued by the State.[1508] However, legitimate expectations cannot only arise from specific assurances made individually to the investor. They may also result from specific circumstances inducing or surrounding the implementation of the investment or from particular political, economic and social conditions of the host State.[1509] In other words, the conduct of the State at the time the investment was made might have been a decisive factor for the investor to pursue its project.[1510] Thus, valid factors for reasonable expectations may be the laws, regulations, and specific measures

[1503] A similar question was also raised by the *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 228.
[1504] *Saluka v Czech Republic*, Partial Award, para 305 et seq.
[1505] See *Glamis v United States*, Award, para 621. ("[…] *a State may be tied to the objective expectations that it creates in order to induce investment*."), emphasis changed. Note that the tribunal demanded 'specified assurances'.
[1506] Yannaca-Small, "Fair and Equitable Treatment Standard: Recent Developments," 126.
[1507] See e.g. *ADF v United States*, Award, para 189. The tribunal demanded "*misleading representations made by authorized officials of the host State*".
[1508] See *Parkerings v Lithuania*, Award, para 331.
[1509] *Duke v Ecuador*, Award, para 339-340; *Bayindir v Pakistan*, Award, para 192.
[1510] *Parkerings v Lithuania*, Award, para 331. Note that many tribunals have emphasised that the essential moment for the legitimate expectations is the one when the investment was made, see e.g. *TECMED v Mexico*, Award, para 154; *LG&E v Argentina*, Decision on Liability, para 127, *Duke v Ecuador*, Award, para 340; *Gami v Mexico*, Award, para 93; *Bayindir v Pakistan*, Award, paras 190 et seq.

implemented by the host State.[1511] From this it follows that to some extent State legislation as a mirror of the State's policies may also comprise official statements that invite investors to rely on them.[1512] In fact, the investor may assess from the host State's legislation the State's overall approach towards foreign investment. The obligation that the host State has vis-à-vis the investor is determined by the interplay between the host State's conduct in order to attract foreign investment and the reliance of the investor on that investment framework. Thus, the general domestic anti-corruption framework for tenders and public concessions, for instance, might be important in the decision making of the investor to take the risk of investing.

In most cases tribunals dealt with the setting that an investor relied on a certain legal framework, from which it was deprived after the host State changed laws and regulations.[1513] Such situation is in principle not relevant for our purposes of assessing whether corruption on the side of the host State violated the legitimate expectations of the investor.[1514] More significant is that the investor may rely on the host State to actually comply with the legal framework in force. In fact, the investor may expect that the host State applies its laws,[1515] and that it does not interfere with the investment without an appropriate public policy purpose.[1516] The argument can be made that the implementation of certain rules comes hand in hand with the assurance of enforcing them.

The principle of legitimate expectations does not amount to any kind of shift of the common business or investment risk. In *MTD v Chile*, the tribunal found the investor to bear the consequences of its own failure to act as a reasonable businessman, by refraining from investigating all relevant information for the

---

[1511] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 222. ("*When an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State.*"). See also e.g. *LG&E v Argentina*, Decision on Liability, para 130, stating that assurances may also be given in domestic law.

[1512] Note that without specific assurances the general host State legislation cannot create legitimate expectations that the laws will stay in place and not be changed.

[1513] A vivid example are the ICSID cases against Argentina. Due to an economic crisis, Argentina was forced to change the legal framework, which was challenged by numerous investors. Note that the limitations of the regulatory power of the States by legitimate expectations by investors has been criticised by commentators. Sornarajah denies the existence of a general rule that the violation of legitimate expectations gives rise to substantive remedies. In his opinion, such broad interpretation of the standard goes beyond of the original intentions of the parties to the IIAs. A State must be flexible to adapt to new circumstances. See M Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge et al.: Cambridge University Press, 2010), 355 et seq. See also the often cited PCIJ Case *Oscar Chinn (Britain v Belgium)*, Judgment of 12 December 1934, PCIJ Series A/B No. 63, 65 (hereinafter: "*Oscar Chinn Case*, Judgment"), para 99 et seq.
Note also that tribunals have acknowledged that the investor must anticipate possible changes in the circumstances and should adapt her investment correspondingly, see *Parkerings v Lithuania*, Award, para 333.

[1514] Note that the host State might change the anti-corruption law in the future, however, the national anti-corruption laws are often based or initiated by the international anti-corruption instruments, which actually oblige the State to implement anti-corruption laws within its legislation.

[1515] *MTD v Chile*, Award, para 122.

[1516] *Merrill v Canada*, Award, para 233.

investment.[1517] In other words, the investor remains responsible for any business risks.[1518]

(2) Legitimate expectations of a corruption-free investment environment

The reasonable expectations of an investor towards corruption might be shaped by various measures taken by the host State. First, corruption will most certainly be a criminal offence under domestic laws. The rule of law impedes the host State to engage in conduct that amounts to a crime and violates its own rules. Thus, the investor may anticipate that no public official may deal with the investor's matters by committing the crime of corruption. Second, the host States' legislations will probably provide for anti-corruption laws and administrative regulations implementing good governance and providing guidelines for official decision-making free from influences of corruption. Third, the host State might have implemented and announced its anti-corruption policies. All these measures taken by the host State will form the legitimate expectations of the investor that the host State will enforce its own anti-corruption laws and observe its own policies of providing a corruption-free environment.

The expectations of an investor go beyond the host State merely abiding by its own laws against corruption.[1519] The host State will most likely have actively committed to the international fight against corruption by signing one of the numerous international conventions against corruption.[1520] The State openly and freely announced that it would condemn corrupt behaviour. Such commitment was directed to the international community, which the international investment community is a part of. Thus, although the host State did not expressly promise the individual investor that it would maintain its ranks free from corruption, the argument can be made that when signing up at the international level to join the fight against corruption it made this assurance to the international community. Thus, a reasonable investor has the legitimate expectations that the host State will take the fight against corruption seriously and use all means to provide a corruption-free investment environment. In particular, an objective investor can reasonably expect that the official decision-making process regarding the investment is not influenced by corruption.

(3) Awareness of corruption

The fact that corruption is widespread in a country might have an influence on the general expectations of an investor. The investor might be aware that in the specific country the risk of having to deal with corrupt public officials is high.

[1517] *MTD v Chile*, Award , para 178.
[1518] *LG&E v Argentina*, Decision on Liability, para 130. See also *Parkerings v Lithuania*, Award, para 336.
[1519] Note that almost all countries have anti-corruption legislation in place.
[1520] For a general overview on the different anti-corruption conventions see Chapter Two B.

Does that knowledge bar the investor from having legitimate expectations? It might be part of the usual business risks an investor has to bear. In addition, corruption might just be part of the conditions that the investor must take as it finds them.[1521]

There are many studies publicly available, thus also accessible to the investor, to assess the level of corruption in a host country.[1522] Two theoretical arguments could be drawn from that. First, it could be argued that before investing in a specific country, the investor will most certainly have scrutinised the risk. Actually, it is the duty of the investor to evaluate the degree of risk and make a business call whether the sought profit is worth the risk. By reviewing the corruption index of the specific country, the investor will be informed about the degree of corruption it can expect at the place of investment. In other words, it could be said that the investor is warned. Second, some of the corruption studies are based on the perception of participants in a survey. Thus, it could be argued that such appraisal of the level of corruption actually reflects the perception of the international business community on how corrupt a country is. Under both assumptions the investor would be aware of the level of corruption and of the corresponding risk of doing business or of – more precisely – investing in that specific host State. Further, developing this thought, the argument might be raised that the investor knew all along about the risk of corruption and thus could not reasonably expect more.

Such reasoning is, however, flawed and lacks any context to international investment law. The purpose of IIAs is to improve the respective conditions in a host State in order to promote foreign investment. The underlying concept of the investment protection provisions contained in an IIA is to specify the relationship between the host State and the investor in order to create predictability and a stable framework inducing investment. Against this background, the fair and equitable treatment standard is – among other standards – aimed at tackling the predominant factors causing instability and unpredictability for the investor. As presented in Chapter One corruption has a detrimental impact on the stability of the investment framework and hence discourages foreign investment. Anti-corruption laws and anti-corruption policies are thus essential for investors to make investments in countries where corruption is widespread. A State may not use its long history of a society pervaded by corruption in order to escape responsibility, since the new laws and policies against corruption were the ones that promulgated a stable investment framework in the first place.

Moreover, the argument that corrupt practices by public officials concerning the investment may be taken as business risk of the investor is not conclusive. Again,

[1521] For the general assumption that investors must take the conditions of the host State as they find them see McLachlan, Shore, and Weininger, *International Investment Arbitration*, 236. Reference is made to the PCIJ decision in the *Oscar Chinn Case*, Judgment.

[1522] For an overview on the tools available to assess the corruption index in a certain country see Chapter Two D.I.

the internal regulations against corruption on administrative level and the international commitment to fight corruption can be seen as official assurance that the host State bans any influences by corrupt practices on the investment. While corruption of public officials might have been seen as an unpleasant business practice in the past, the new consensus among the international community and the legal frameworks implemented at the international and national levels have banned corruption from the international business scene. Nowadays, the corrupt practices by public officials do not fall under the concept of business risk of the investor, but instead trigger the responsibility of the host State. This also leads to the notion that corruption is not a condition of the host State that the investor must take as it finds it. The host State has in fact committed to take all reasonable steps to establish a corruption-free investment environment.

(4) Conclusion

This analysis confirms the *obiter dicta* statement made without explanation by the tribunal in *EDF v Romania* that "*exercising a State's discretion on basis of corruption is a* […] *fundamental breach of* […] *legitimate expectations.*"[1523] The prohibition of corruption under domestic criminal law, the anti corruption laws and administrative regulations implementing good governance as well as any publically announced anti-corruption policies, all combined with the international commitment of the host State to be part of the global fight against corruption are sufficient basis for an investor to reasonably expect from the host State and its public officials not to engage in corrupt practices. From this it follows that an explicit assurance made to the individual investor, as often required by case law, is not required in order to elevate the host State's general commitment to provide a corruption-free administrative body to one of the bases of their relationship. The awareness of widespread corruption is no bar to legitimate expectations. In fact, the purpose and objective of the IIA is to improve the legal conditions in order to provide an attractive framework, which is capable of inducing investment. The mentioned measures against corruption are proof of the host State's commitment to provide a treatment not involving corrupt practices.

c) Transparency, predictable and stable framework, and consistency

Tribunals have found that under the fair and equitable treatment standard the host State must provide transparency (see below at **(1)**), a stable legal framework (see below at **(2)**), and consistency (see below at **(3)**). These principles are linked together and also closely related to the one of legitimate expectations since the expectations are partly also based on the legal framework provided by the host State.[1524]

[1523] *EDF v Romania*, Award, para 221.

[1524] See e.g. Dolzer and Schreuer, *Principles of International Investment Law*, 145 et seq. The interrelation of transparency, consistency, stable legal framework and the expectations of an investor becomes apparent with the following statement of the tribunal in *LG&E v Argentina*:

(1) Transparency

The objective of transparency is to allow the investor to assess and predict the rules affecting her investment in order to make an informed decision. It is contended that regulatory transparency has become a requirement of customary international law.[1525] In addition, the investment arbitration case law has in any case consistently confirmed the principle of transparency with regard to the fair and equitable treatment standard.[1526] The tribunal in *Metalclad v Mexico* introduced this principle to investment arbitration.[1527] It found that "*Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment*".[1528]

Tribunals have not only applied the transparency requirement to the whole framework as such, but to administrative processes and general conduct of the host State. The tribunal in *Waste Management v Mexico*, for instance, applied this principle to the administrative process dealing with the investment and found that "[c]*omplete lack of transparency and candour in an administrative process*" would breach the standard of fair and equitable treatment.[1529] In *Tecmed v Mexico*, the tribunal found that the failure to disclose the real intentions of the public officials during negotiations with the investor led to a lack of transparency in the behaviour

---

"[T]*he fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor." LG&E v Argentina*, Decision on Liability, para 131.

[1525] Weiler, "Good Faith and Regulatory Transparency: The Story of Metalclad v Mexico," 738; Grierson-Weiler and Laird, "Standards of Treatment," 278. Note however that the NAFTA tribunal in *Cargill v Mexico* recently held that the investor failed to establish that the minimum standard of treatment under customary law contained the principle of transparency, for which reason it rejected such general duty for the fair and equitable treatment standard under NAFTA Article 1105, *Cargill v Mexico*, Award, para 294. The NAFTA tribunal in *Merrill v Canada* stated that transparency had been unsuccessfully linked to the minimum standard, but also acknowledged that the concept "*is nonetheless approaching the stage*", *Merrill v Canada*, Award, paras 208, 231.

[1526] For the principle of transparency applied to the fair and equitable treatment standard see e.g. *Metalclad v Mexico*, Award, para 99; *Maffezini v Spain*, Award, para 83; *TECMED v Mexico*, Award, para 154; *Waste Management II v Mexico*, Award, para 98*; LG&E v Argentina*, Decision on Liability, para 131; *Saluka v Czech Republic*, Partial Award, para 309; *Siemens v Argentina*, Award, para 308; *Biwater v Tanzania*, Award, para 602; *Rumeli v Kazakhstan*, Award, para 609; *Bayindir v Pakistan*, Award, para 178; *Lemire v Ukraine*, Award, para 284.

[1527] Note that the tribunal specifically referred to the reference made to transparency in NAFTA Article 102(1), see *Metalclad v Mexico*, Award, para 76. ("*The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party.*").

[1528] *Metalclad v Mexico*, Award, para 99. It is noteworthy that this part of the tribunal's reasoning was set aside by the British Columbia Supreme Court on the ground that reference to the transparency principle was outside the scope of the jurisdiction. In the view of the Canadian court, the principle of transparency is not an element of customary international law and thus not part of the fair and equitable treatment standard under NAFTA Article 1105. This decision has been harshly criticised in scholarship, see e.g. Weiler, "Good Faith and Regulatory Transparency: The Story of Metalclad v Mexico," 717 et seq.

[1529] *Waste Management II v Mexico*, Award, para 98.

of the host State.[1530] The local officials refrained from revealing first that the decision not to renew the permit was already taken, and second the true intentions and the real basis of their decision.[1531] In *Saluka v Czech Republic*, the tribunal held that the failure of the host State to disclose and discuss the relevant reasons for the constant refusal of the investor's proposals to amount to a lack of sufficient transparency.[1532] Such behaviour barred the investor from assessing the requirements for an acceptable proposal and finding a solution to the problem.[1533] The tribunal in *Maffezini v Spain*, for instance, applied the transparency principle directly to the specific action attributable to the host State.[1534] The tribunal in *Siemens v Argentina* found the denial of access to administrative information required to file an appeal to constitute lack of transparency.[1535]

These examples of arbitral jurisprudence show that the principle of transparency must be observed during all official contact between the host State and the investor or investment. Generally speaking, the host State has the obligation to create an investment environment, which puts the investor in a position where she can assess the rules applicable to the implementation of her investment as well as the required administrative processes. In order to establish such investment framework, the host State must not only ensure transparency with regard to its laws and regulations, but also with regard to its policies towards foreign investment.[1536]

However, the principle of transparency may not be overstretched.[1537] Transparency does not lead to a shift of the business risk. The investor must actively and thoroughly inform himself of all the laws, rules and policies relevant for her investment[1538] and must further take all circumstances into consideration for her investment decision.[1539] In *Champion Trading v Egypt*, the investor alleged lack of transparency of the host State in its procedure to provide financial assistance to certain companies of the cotton industry.[1540] The tribunal rejected the claim on the basis that the investor was "*in the position to know beforehand all rules and regulations that would govern their investments for the respective season to come*".[1541] Thus, the host State is not responsible for providing any kind of legal

[1530] *TECMED v Mexico*, Award, para 164.
[1531] *TECMED v Mexico*, Award, para 164.
[1532] *Saluka v Czech*, Partial Award, para 407.
[1533] *Saluka v Czech*, Partial Award, para 420.
[1534] *Maffezini v Spain*, Award, para 83. ("[…] *the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(1) of the same treaty*.").
[1535] *Siemens v Argentina*, Award, para 308.
[1536] See e.g. Vandevelde, "A Unified Theory of Fair and Equitable Treatment," 84.
[1537] See Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," 169.
[1538] *MTD v Chile*, Award, para 165.
[1539] *Parkerings v Lithuania*, Award, para 342.
[1540] *Champion Trading Company, Ameritrade International, Inc. v Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006 (hereinafter: "*Champion Trading v Egypt*, Award"), para 160.
[1541] *Champion Trading v Egypt*, Award, para 164.

advice to the investor or to engage in other positive actions in order to assist the investor in her implementation of the investment.[1542]

(2) Predictable and Stable framework

Tribunals have constantly confirmed that fair and equitable treatment requires a predictable and stable investment environment.[1543] Some tribunals have understood the requirement of a predictable and stable framework as a key element of fair and equitable treatment.[1544] The tribunal in *CMS v Argentina* even found the fair and equitable treatment to be inseparable from predictability and stability.[1545] In *Sempra v Argentina*, the tribunal referred to the objective and purpose of the protection sought by the BIT in order to find that "*what counts is that in the end the stability of the law and the observance of legal obligations are assured*".[1546] The tribunal in *Bayindir v Pakistan* referred to *Tecmed v Mexico* and clarified that the principle of legal stability does not only include the obligation to provide for a regulatory framework, but encompasses also a stable administrative practice.[1547] The stable framework also includes the "*State's policy towards investments*".[1548] Continuous changes in legislation and constant alternation in administrative proceedings have been described by the tribunal in *PSEG Global v Turkey* as a 'roller coaster' effect and found to violate fair and equitable treatment standard.[1549]

However, the requirement of stability and predictability must also take the host State's need to adapt to constant changes and new situations into consideration. The scope of this principle ends where the host State's exercise of its powers is

---

[1542] See Stephan W. Schill, "Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed," *Transnational Dispute Management* 3, no. 2 (2006): 15; Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," 168 et seq. ("[...] *it* […] *does not impose obligations upon host states to counsel foreign investors or to provide them with comprehensive legal advice*.").

[1543] *CMS v Argentina*, Award, para 274; *TECMED v Mexico*, Award, para 154; *LG&E v Argentina*, Decision on Liability, para 131; *Merrill v Canada*, Award, para 232; *Occidental v Ecuador*, LCIA Award, paras 185, 191; *Duke v Ecuador*, Award, para 339; *PSEG v Turkey*, Award, para 250; *Sempra v Argentina*, Award, para 300; *Lemire v Ukraine*, Award, para 284.
Note that the tribunal in *Cargill v Mexico* was not convinced that under NAFTA or customary international law the obligation existed to provide a stable or predictable investment framework, at least not when no specific assurances had been made by the State, *Cargill v Mexico*, Award, para 290. Note also that the tribunal in *Continental Casualty v Argentina* found that stability of the legal framework is not a legal obligation, but rather a precondition for the object of the IIA to promote investment, *Continental Casualty v Argentina*, Award, para 258.

[1544] See e.g. *LG&E v Argentina*, Decision on Liability, para 124; *Enron v Argentina*, Award, para 260. Note that the relevant US-Argentina BIT provides in the preamble "*fair and equitable treatment of investment is desirable in order to maintain a stable framework*". See also *CMS v Argentina*, Award, para 274. ("*There can be no doubt* […] *that a stable legal and business environment is an essential element of fair and equitable treatment.*"), emphasis added.

[1545] *CMS v Argentina*, Award, para 276.

[1546] *Sempra v Argentina*, Award, para 300.

[1547] *Bayindir v Pakistan*, Decision on Jurisdiction, para 240; confirmed in *Bayindir v Pakistan*, Award, para 177.

[1548] *Bayindir v Pakistan*, Decision on Jurisdiction, para 240, referring to *TECMED v Mexico*, Award.

[1549] *PSEG v Turkey*, Award, para 250.

justified due to changes in the circumstances.[1550] The obligation to provide stability and predictability cannot be misunderstood as a technical requirement to entirely freeze all legal and regulatory frameworks.[1551] The principle of predictability and stability does not amount to a stabilisation clause.[1552] An investor cannot reasonably expect from the host State to totally 'tie its hands' by promising not to react to upcoming needs that might require a change in its legislation or its policies.[1553] The mere duty to provide a predictable and stable investment environment does not lead to a loss of a State's right and discretion to modify its laws and policies.[1554] Thus, the different interests have to be balanced, on the one side the host State's right to regulate domestic matters in the public interest, on the other side the investor's legitimate expectations of a stable investment environment.[1555] However, when measures taken by the host State to deal with new circumstances distort the equilibrium between rights and obligations of the investment, the host State must take reasonable measures to restore the equilibrium or to find a new balance.[1556]

(3) Consistency

Arbitral tribunals have also held that fair and equitable treatment requires a host State to act consistently.[1557] In a broad sense, consistency may also be seen as the underlying principle of the duty to provide a predictable and stable framework. In fact, the investor will only be able to assess the effects of the laws, regulations and policies regarding the investment if the State's behaviour is consistent. At the same

---

[1550] *AES v Hungary*, Award, para 9.3.29 ("*A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.*").

[1551] See *CMS v Argentina*, Award. para 277 ("*It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.*). See also *Enron v Argentina*, Award, para 261. See e.g. Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," 161 et seq.

[1552] See e.g. *AES v Hungary*, Award, para 9.3.29; *EDF v Romania*, Award, para 218; *Total v Argentina*, Decision on Liability, para 117 ("guarantee of stability"); *Impregilo S.p.A v Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 (hereinafter: "*Impregilo v Argentina*, Award"), para 290.

[1553] *Continental Casualty v Argentina*, Award, para 258; *Impregilo v Argentina*, Award, para 291. See also *AES v Hungary*, Award, para 9.3.34. ("[…] *any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times.*").

[1554] See e.g. *Parkerings v Lithuania*, Award, para 332; *Saluka v Czech Republic*, Partial Award, para 305.

[1555] See e.g. *Saluka v Czech Republic*, Partial Award, para 305 et seq.; *Total v Argentina*, Decision on Liability, para 123.

[1556] *Impregilo v Argentina*, Award, paras 326, 330, 331, 370.

[1557] See e.g. *TECMED v Mexico*, Award, para 154; *Saluka v Czech Republic*, Partial Award, paras 307, 309; *PSEG v Turkey*, Award, paras 246, 248, 249; *Biwater v Tanzania*, Award, para 602; *Lemire v Ukraine*, Award, para 284.

time, consistent conduct is also required in order to not violate the legitimate expectations of the investor.

In *MTD v Chile*, the host State had first approved a project and even signed an investment agreement, which later was found to be in violation of a zoning law. The tribunal found the inconsistent positions of two different State agencies to be inconsistent behaviour on the side of the State and thus to violate the fair and equitable treatment standard.[1558] Similarly, the tribunal in *Encana v Ecuador* vividly phrased the notion of inconstancy by stating that "[o]*ne arm of the State cannot finally affirm what another arm denies to the detriment of a foreign investor.*"[1559] In *Occidental v Ecuador*, the tribunal found that after changes in the tax law of the host State, the practice and regulations had become inconsistent.[1560] However, the duty to act consistently cannot lead to complete loss of discretion of the host State to change its policies and regulations. Moreover, taking necessary measures to enforce the law can also not amount to inconsistent conduct of the host State. [1561]

(4) Conclusion

The principle of transparency imposes the duty on the host State to ensure transparency of the legal framework, the whole administrative and regulatory process and to some extent the specific measures, which caused damage to the investment. The principle of predictable and stable framework amounts to providing certain stability in legislative, regulatory and administrative practice as well as in the State policies towards investments. Similarly, the principle of consistency prohibits the host State to act inconsistently within the specific relationship with the investor. The basic notion behind these principles is that the investor shall be put into a position where she is able to evaluate all relevant requirements and circumstances concerning the investment to finally make an informed decision.

Corruption violates the notion of transparency in significant ways.[1562] An administrative process, which is manipulated by corrupt public officials who have been bribed by competitors and intend to punish the investor for not paying bribes or are influenced by other means of bias, bars the investor from understanding the real reasons for the official decision affecting its investment. As mentioned above, corruption due to its general prohibition is always surrounded by mystery and committed secretly. The actual grounds of the administrative or regulatory decisions, i.e. corruption, will not be disclosed and remain obscure to the investor.

[1558] *MTD v Chile*, Award, para 165 et seq.
[1559] *EnCana Corporation v Republic of Ecuador*, UNCITRAL, LCIA Case UN3481, Award, 3 February 2006 (hereinafter: "*EnCana v Ecuador*, Award"), para 158.
[1560] *Occidental v Ecuador*, LCIA Award, para 184.
[1561] *Lauder v Czech Republic*, Final Award, para 297.
[1562] Note that the tribunal in *EDF v Romania* also found that corruption violates the principle of transparency, although no explanation was given by the tribunal, *EDF v Romania*, Award, para 221.

Only if the actual basis for the official measures is revealed, the investor receives a reasonable chance to address any shortcomings and find solutions. Thus, an administrative process infiltrated by corruption amounts to a 'complete lack of transparency'.[1563] Such requirement may not be misunderstood as a requirement that the complete process must be corrupt. The qualification of 'complete' is directed at 'transparency', for which reason only the lack of transparency must be complete. Whenever one single step in an administrative or regulatory process is not based on public interest and reasonable discretion, but rather on private gain by the public official, then the investor is precluded from recognising the underlying grounds of the measure affecting her investment. Transparency as a whole will be destroyed.

Moreover, corruption also runs counter to the duty to provide a predictable and stable legal framework. The predictability and stability of the investment environment will to an important extent also depend on the stable administrative practice.[1564] On the one hand, an administrative practice based on corruption rather than on the rule of law cannot be considered stable. On the other hand, if a stable administrative practice free from corruption has developed, then any corrupt act by public officials will be a breach of such stable practice. Any decision-making influenced by corruption is based on individual preference by the public official rather then based upon the law or on reasonable discretion exercised within the limits of administrative practice.

Finally, corruption might often also lead to inconsistent behaviour of the host State. When an investment approval, a permit, a concession or any other legal position is granted to the investor by a State agency, and afterwards cancelled or revoked by another State agency on the grounds that the investor refused to pay bribes or due to corrupt influences from competitors, then the conduct of the host State – taken as a whole – will amount to inconsistent behaviour without any legitimate justification.

d) Reasonableness, non-arbitrariness and non-discrimination

Many IIAs contain a provision explicitly prohibiting arbitrariness and discrimination,[1565] or unreasonableness and discrimination.[1566] While it is contended that these standards and the fair and equitable treatment standard should

---

[1563] Note that the wording is taken from the often-cited statement of the tribunal in *Waste Management II v Mexico*, Award, para 98.

[1564] See *Bayindir v Pakistan*, Decision on Jurisdiction, para 240; *Bayindir v Pakistan*, Award, para 177.

[1565] See e.g. Article 2(3.1) of the Germany Model BIT (2008):
"*Neither Contracting State shall in its territory impair by arbitrary or discriminatory measures the activity of investors of the other Contracting State with regard to investments, such as in particular the management, maintenance, use, enjoyment or disposal of such investments*." (Emphasis added).

[1566] See e.g. Article 2(2.2) of the UK Model BIT:
"*Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party*." (Emphasis added).

be treated separately,[1567] and in fact many tribunals have done so,[1568] investment tribunals have also subsumed these notions under the fair and equitable treatment standard.[1569] The concrete relationship between these standards and fair and equitable treatment is of no relevance for the examination of corruption as a violation of substantive standards of treatment.[1570] Important for the purpose of this study is the fact that while arbitrariness and discrimination are not a requirement for a breach of fair and equitable treatment,[1571] their existence constitutes a violation of fair and equitable treatment.[1572]

(1) Reasonableness and non- arbitrariness

The prohibition to act in arbitrary manner corresponds to some extent to the general rule of law that the host State's conduct shall be reasonable.[1573] It is contended that 'unjustified' and 'unreasonable' action is generally used

[1567] See e.g. Dolzer and Schreuer, *Principles of International Investment Law*, 194.

[1568] See e.g. *Occidental v Ecuador*, LCIA Award, paras 159 et seq. and 180 et seq.; *Lauder v Czech Republic*, Final Award, paras 214 et seq. and 289 et seq.; *Noble Ventures v Romania*, Award, paras 176 et seq. and 181 et seq.; *Azurix v Argentina*, Award, paras 358 et seq. and 390 et seq.; *Siemens v Argentina*, Award, paras 289 et seq. 318 et seq.; *AES v Hungary*, Award, paras 9.3.1. et seq. and 10.3.1. et seq.

[1569] *CMS v Argentina*, Award, para 290*; MTD v Chile*, Award, para 196; *Noble Ventures v Romania*, Award, para 182; *Saluka v Czech Republic*, Partial Award, para 460; *PSEG v Turkey*, Award, para 261; *Parkerings v Lithuania*, Award, para 300; *Biwater v Tanzania*, Award, para 602; *Rumeli v Kazakhstan*, Award, para 609; *Continental Casualty v Argentina*, Award, para 261; *Bayindir v Pakistan*, Award, para 178; *Lemire v Ukraine*, Award, para 284; *Alpha v Ukraine*, Award, para 420.

Note that the NAFTA does not contain a provision with explicit prohibition of arbitrary conduct, for which reason NAFTA tribunals generally considered arbitrary behaviour under the fair and equitable provision in NAFTA Article 1105, see e.g. *SD Myers v Canada*, Partial Award, para 263; *Mondev v United States*, Award, para 127; *Waste Management II v Mexico*, Award, para 98; *Glamis v United States*, Award, para 616.

See also Yannaca-Small, "Fair and Equitable Treatment Standard," 386. Yannaca-Small calls the character of the fair and equitable 'invasive', since to some extent it covers normatively the situations of other investment protection standards.

[1570] Note that the relationship between both standards remains unsettled, see e.g. Kläger, *"Fair and Equitable Treatment" in International Investment Law*, 290 et seq.

[1571] See e.g. *LG&E v Argentina*, Decision on Liability, paras 162 et seq.; *Lemire v Ukraine*, Award, para 259. ("*Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable.*").

[1572] See e.g. *Lemire v Ukraine*, Award, para 259, ("*Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable.*"); *CMS v Argentina*, Award, para 290. See also Stephen Vascannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice," *British Year Book of International Law* 70, no. 1 (1999): 133; Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," 167; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 301. Note that while Newcombe and Paradell agree with regard to arbitrariness, they emphasise that the relationship between fair and equitable treatment and discrimination is 'less clear'.

[1573] Vandevelde, "A Unified Theory of Fair and Equitable Treatment," 54 et seq. Vandevelde approaches the fair and equitable treatment standard through the concept of rule of law and its corresponding principles. He argues that the principle of reasonableness "*requires that the host state's conduct be reasonably related to a legitimate public policy objective*." He clarifies that a State action is not reasonable when it is arbitrary or irrational.

interchangeably with 'arbitrary' conduct.[1574] However, it is also argued that a higher threshold is required for arbitrariness in order to amount to a violation of a treaty standard.[1575]

A measure is unreasonable when it is not based on a legitimate public policy consideration.[1576] Thus, the measure taken by the host State and the manner of implementation must correspond to the public policy objective of the host State.[1577] In fact, the threshold of reasonableness must be met by both the policy[1578] and the measure chosen based on that policy.[1579]

Many tribunals have found that an arbitrary measure violates fair and equitable treatment.[1580] Arbitrariness has been found to go beyond mere unreasonableness.[1581] One strand of tribunals has approached the issue of arbitrariness by assessing the ordinary meaning of the word.[1582] Following this approach, tribunals have found arbitrariness to encompass action "*depending on individual discretion;* […] *founded on prejudice or preference rather than on reason of fact*".[1583] In other words, an action is arbitrary when it is "*done capriciously or at pleasure; without adequate determining principle*" or "*without cause based upon the law*".[1584]

Another strand of tribunals has based its analysis on the often-cited definition of arbitrariness under international law established in the ICJ *ELSI* case[1585]

[1574] Dolzer and Schreuer, *Principles of International Investment Law*, 91. See also *EDF v Romania*, Award, para 303, where Professor Schreuer acted as expert; *National Grid v Argentina*, Award, para 197.

[1575] See Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 303. Newcombe and Paradell refer to *BG Group Plc. v The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (hereinafter: "*BG v Argentina*, Final Award"), para 341.

[1576] See e.g. *Saluka v Czech Republic*, Partial Award, para 460; *Biwater v Tanzania*, Award, para 692; *Rumeli v Kazakhstan*, Award, para 679. See also Vandevelde, "A Unified Theory of Fair and Equitable Treatment," 54.

[1577] *AES v Hungary*, para 10.3.9. ("[…] *there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.*"). See also *Saluka v Czech Republic*, Partial Award, para 307. Note that tribunals have often held politically motivated measures not based on legitimate public policy considerations, see *Eureko v Poland*, Partial Award, para 233.

[1578] In the view of the tribunal, in order for the policy to be reasonable it must be "*taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter*", *AES v Hungary*, Award, para 10.3.8.

[1579] *AES v Hungary*, Award, para 10.3.7.

[1580] See footnote 1569.

[1581] See e.g. *BG v Argentina*, Award, para 341. For a contrary view see *EDF v Romania*, Award, para 262.

[1582] Note that many tribunals have referred to the meaning given by legal dictionaries, see e.g. *Lauder v Czech Republic*, Final Award, para 211; *CMS v Argentina*, Award, para 291; *Siemens v Argentina*, Award, para 318.

[1583] *Lauder v Czech Republic*, Final Award, para 211; *CMS v Argentina*, Award, para 291.

[1584] *Siemens v Argentina*, Award, para 318.

[1585] See e.g. *Noble Ventures v Romania*, Award, para 176; *Azurix v Argentina*, Award, para 392; *Siemens v Argentina*, Award, para 318; *LG&E v Argentina*, Decision on Liability, para 157; *Glamis v United States*, Award, para 626; *Cargill v Canada*, Award, para 291.

> "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. […] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety". [1586]

Under this approach, arbitrariness must amount to 'wilful disregard'. Accordingly, tribunals have demanded that the relevant action is done in 'manifestly' arbitrary manner.[1587] The tribunal in *Cargill v Mexico* also applied a high threshold and found that arbitrariness is more than a decision being questionable, but constitutes "*an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive."*[1588]

(2) Non-discrimination

Discrimination may also amount to a violation of the fair and equitable treatment standard.[1589] The most frequent form of discrimination that a foreign investor has to face when dealing with host States is discrimination based on nationality.[1590] A few tribunals have demanded proof that the different treatment was aimed at the investment 'specifically as foreign investment',[1591] or based on 'sectional or racial prejudice'.[1592] However, discrimination has also been found to be not limited to

---

[1586] *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, Judgment of 20 July 1989, I.C.J. Reports 1989, 15 (hereinafter "*ELSI* Case, Judgment"), para 128.

[1587] See e.g. *International Thunderbird Gaming v Mexico*, Award, para 194; *Glamis v United States*, Award, para 626; *Sempra v Argentina*, Award, para 318; *Enron v Argentina*, Award, para 281.

[1588] *Cargill v Mexico*, Award, para 293.

[1589] See e.g. *SD Myers v Canada*, Award, para 266; *Lauder v Czech Republic*, Final Award, para 292; *Loewen v United States*, Award, paras 134 et seq.; *Waste Management II v Mexico*, Award, para 98; *CMS v Argentina*, Award, para 290; *Eureko v Poland*, Partial Award, para 233; *Saluka v Czech Republic*, Partial Award, para 307; *Parkerings v Lithuania*, Award, paras 287 et seq.; *Victor Pey Casado y President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (hereinafter: "*Pey Casado v Chile*, Award"), paras 670-674; *Biwater v Tanzania*, Award, para 602; *Continental Casualty v Argentina*, Award, para 261; *Rumeli v Kazakhstan*, Award, para 609; *Glamis v United States*, Award, para 616 ("*evident discrimination*"); *Bayindir v Pakistan*, Award, para 178; *Lemire v Ukraine*, Award, para 284. See also Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," 167 et seq.; Vandevelde, "A Unified Theory of Fair and Equitable Treatment," 63 et seq.; Vascannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice," 133.
Note that some NAFTA tribunals have held that NAFTA Article 1105(1) does not include the prohibition of discrimination between nationals and aliens, see e.g. *Methanex v United States*, Award, Part IV, Chapter C, paras 14-15; *Grand River v United States*, Award, para 208. This finding is, however, limited to the construction of NAFTA Article 1105 and cannot be understood as general exclusion of discrimination from the fair and equitable treatment standard.

[1590] Note that in such cases an overlap exists between non-discrimination based on nationality and national treatment or even MFN treatment. The relationship between these different standards remains unsettled.

[1591] *LG&E v Argentina*, Decision on Liability, para 147.

[1592] *Waste Management II v Mexico*, Award, para 98. Note that this statement forms part of the often-cited summary of the tribunal of the conduct that would infringe the fair and equitable treatment standard. However, the tribunal merely listed the different conducts developed in the four cases of *SD Myers*, *Mondev*, *ADF*, and *Loewen*. The enumeration was not meant to constitute a conclusive list. The statement on discrimination based on racial prejudice referred to the *Loewen* case, where such conduct was apparent.

nationality.[1593] The tribunal in *Saluka v Czech Republic* pointed out that conduct is discriminatory "*if (i) similar cases are (ii) treated differently (iii) and without reasonable justification".*[1594] This shows that a comparison is required to assess whether a measure is discriminatory. The investor must have been harmed more than someone else or someone must have received better treatment than the investor without reasonable justification.[1595] This raises the question of the scope of comparison. Tribunals seem to accept a wider approach and have allowed comparison among or even across sectors.[1596] However, this will depend on the specific circumstances and requires a case-by-case analysis. Whether domestic law is violated or not is of no relevance for the finding of discrimination.[1597] In addition, discriminatory intent is not required; the discriminatory nature of the consequences of the relevant measure is sufficient for a breach.[1598]

(3) Conclusion

Although the prohibition of unreasonable, arbitrary and discriminatory behaviour may constitute an independent treaty standard, such conduct is also relevant for the fair and equitable treatment standard. The notion of reasonableness requires that the measure taken by the host State is based on a legitimate public policy objective of the host State. The prohibition of arbitrary behaviour similarly demands that the measure taken by the host State is not based on prejudice or individual convenience but rather on a legitimate principle or upon the law. However, many tribunals will also ask for wilful disregard of the due process of law and will examine whether the measure offends juridical propriety. The notion of non-discrimination creates the obligation that the host State may not treat the investor differently than others who are in a similar situation without reasonable justification. However, tribunals may also require that the discrimination is based on nationality or is aimed specifically at the foreign investment.

Corruption is a violation of the notion of reasonableness and non-arbitrariness. Any decision founded on individual considerations such as the personal gain of the public official rather than on the public policy objectives of the host State is unreasonable. In addition, corruption constitutes an ulterior motive that not only

---

[1593] See e.g. *National Grid v Argentina*, Award, para 198. See also Dolzer and Schreuer, *Principles of International Investment Law*, 195.

[1594] *Saluka v Czech Republic*, Partial Award, para 313. See also *Lemire v Ukraine*, Award, para 261. In the words of the tribunal in *Enron v Argentina*, discrimination is "*any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors.*" *Enron v Argentina*, Award, para 282.

[1595] *AES v Hungary*, Award, para 10.3.53. ("*Discrimination necessarily implies that the state benefited or harmed someone more in comparison with the generality*.").

[1596] See e.g. *National Grid v Argentina*, Award, para 200; *Occidental v Ecuador*, LCIA Award, para 173. See also *SD Myers v Canada*, Partial Award, para 250, suggesting a comparison among 'business sectors' and 'economic sectors'.

[1597] See *Lauder v Czech Republic*, Final Award, para 220.

[1598] *Siemens v Argentina*, Award, para 321. Note that the tribunal in *LG&E v Argentina* held that either discriminatory intent or discriminatory impact of the measure is required to consider a measure discriminatory, *LG&E v Argentina*, Decision on Liability, para 146.

undermines the law and regulations, but also negates any policy implemented in the interest of the public. The corrupt public official intentionally places her private concerns above the public interest. Against the background of the evolved international efforts to strengthen good governance and eradicate corruption, such behaviour manifestly offends any sense of juridical propriety.[1599]

Corruption may also amount to a violation of the notion of non-discrimination. Following the approach favoured in this study, discrimination is any treatment different from the treatment of others in similar cases without reasonable justification. When a public official treats investors who pay bribes more favourably than those who reject to engage in any corrupt practice, then such different treatment is based on corruption and has no reasonable justification. However, the required comparison with others will in reality constitute an evidentiary threshold for the investor, which will be very difficult to meet. While the extortion of bribes from the investor will already be difficult to prove, the investor will only in rare circumstances have access to proof of corrupt relationships between others. In case that the tribunal requires the discrimination to be based on nationality or aimed specifically at foreign investment, then corruption will not amount to a treaty breach based on discrimination.

e) Abuse of power, coercion and harassment

Tribunals have found that abuse of power (see below at **(1)**) as well as coercion and harassment (see below at **(2)**) also violate fair and equitable treatment.[1600]

(1) Abuse of power

Abuse of power is closely related to the prohibition of arbitrary action and prohibits the misuse of power for improper purposes. Rights of host States must be exercised in good faith and correspondingly also the discretion granted to the public official.[1601] Thus, the discretionary power must be "*exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others*."[1602]

In *Metalclad v Mexico*, the municipality had denied a construction permit by reference to environmental impact considerations, which was actually under the authority of federal agencies.[1603] Under Mexican law the municipality had only the authority to deny the permit on construction considerations. The tribunal found the denial based on wrong reasons 'improper'.[1604] In *Tecmed v Mexico*, the tribunal found that the investor had the legitimate expectations that "*the State* [uses] *the*

[1599] See B.I.1.b).
[1600] See e.g. *Lemire v Ukraine*, Award, para 284.
[1601] See Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 132 et seq.
[1602] Ibid., 133 et seq.
[1603] *Metalclad v Mexico*, Award, para 86.
[1604] *Metalclad v Mexico*, Award, para 86.

legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instrument".[1605] The tribunal found that the denial to renew the permit was not properly based on public health and environmental grounds as expected from the authority of the public agency, but rather on mere political grounds due to public opposition to the project.[1606] In *PSEG Global v Turkey*, the tribunal found the measures taken by the host State to go "*far beyond the purpose of the Law*", which amounted to an abuse of authority and to a breach of fair and equitable treatment.[1607] All these examples show an abuse of power when measures are taken in order to achieve specific goals, which are not compatible with the designed objectives of the legal instruments.

(2) Coercion and harassment

The notion of fair and equitable treatment also includes the prohibition of the host State and its public officials to exercise coercion on the investor or to engage in any kind of harassment.[1608] Arbitral practice has to date not established the specific requirements for host State's conduct to amount to coercion or harassment. However, the case law shows that tribunals will find any means that amount to illegitimate pressure and vengeful behaviour to violate fair and equitable treatment.

In *Tecmed v Mexico*, the local authorities faced public opposition to the investor's operation of a landfill, which originally had been granted an unlimited licence. The tribunal found that the measures taken by the host State, *inter alia* the refusal to renew the permit, were intended to pressure the investor to relocate on its own risks and costs.[1609] In the view of the tribunal, such behaviour amounts to coercion leading to a breach of fair and equitable treatment.[1610] In *Vivendi v Argentina*, during renegotiations of the concession agreement, various regulatory measures were taken by the Province, which the tribunal considered to be a politically motivated campaign to force the investor to renegotiate the concession agreement and to accept the new terms favoured by the new government.[1611] The tribunal held that under the fair and equitable treatment standard a host State was prohibited to undermine a formerly granted concession with the purpose of forcing renegotiations.[1612] Moreover, legislation was enacted prohibiting the investor to pursue lawsuits or to enforce judgments against debtors in connection with the

[1605] *TECMED v Mexico*, Award, para 154.
[1606] *TECMED v Mexico*, Award, para 154.
[1607] *PSEG v Turkey*, Award, para 247.
[1608] See e.g. *Saluka v Czech Republic*, Partial Award, para 308; *Bayindir v Pakistan*, Award, para 178; *Siag and Vecchi v Egypt*, Award, para 450; *Lemire v Ukraine*, Award, para 284.
[1609] *TECMED v Mexico*, Award, para 163.
[1610] *TECMED v Mexico*, Award, para 163.
[1611] *Vivendi v Argentina II*, Award, para 7.4.37. In the words of the tribunal, the measures taken by the Province were "*no more than politically driven arm-twisting aimed at compelling Claimants to agree to new terms to the Concession Agreement which were acceptable to the new government*".
[1612] *Vivendi v Argentina II*, Award, para 7.4.39.

concession. The tribunal found such unjustified behaviour to be "*vindictive exercise of sovereign power aimed at punishing*" the investor.[1613]

In *Pope & Talbot v Canada*, the tribunal found that the governmental authority engaged in behaviour of 'threats and misrepresentation',[1614] which became "*too burdensome and confrontational*" for the investor to remain cooperative.[1615] In the view of the tribunal, such aggressive behaviour breached the fair and equitable treatment standard.[1616] In *Tokios Tokelės v Ukraine*, the majority of the tribunal as well as the Dissenting Opinion agreed that the deliberate campaign of State agencies aimed at punishing an investor for political reasons constitutes a clear violation of the purpose of the IIA and its standards of protection.[1617] It is noteworthy that in order to reach the level of harassment, the measure must be 'confrontational or aggressive';[1618] actions showing merely an unfriendly attitude towards the foreign investor will not suffice to amount to a breach of fair and equitable treatment.[1619]

(3) Conclusion

In a common corruption scenario, the corrupt practices of public officials will amount to an abuse of power and may also amount to coercion or harassment. In the situation where a public official extorts bribes from the investor, she will subject her positive official decision to the condition that the investor pays the solicited bribes. The corrupt public official misuses her public authority as means of pressure to force the investor to participate in the corrupt scheme. This will leave the investor with a catch 22, either engaging in illegal conduct or risking detriment to her investment. Such abuse of power establishes clear coercion. In the similar situation where public officials misuse their authority to enact measures with the intention to punish investors who refused to pay bribes, such vengeful exercise of power will amount to harassment.

[1613] *Vivendi v Argentina II*, Award, para 7.4.45.

[1614] The tribunal found the governmental authority to have imposed burdensome demands for documents, refused to provide information, made threats to reduce the export quotas, made misrepresentations in their reports, and suggested criminal investigations against the investment, see *Pope & Talbot v Canada*, Damages, para 68.

[1615] *Pope & Talbot v Canada*, Damages, para 68.

[1616] *Pope & Talbot v Canada*, Damages, para 69.

[1617] *Tokios Tokelės v Ukraine*, Award, para 123; *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion Daniel M. Price, 29 June 2007 (hereinafter: "*Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price"), para 2.

[1618] Expression used in Dolzer and Schreuer, *Principles of International Investment Law*, 159.

[1619] *M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 (hereinafter: "*MCI v Ecuador*, Award"), para 371. The investor had argued that tax audits, investigations against its legal representatives and initiation of judicial proceedings amounted to harassment. The tribunal held that the actions fell within a routine activity of public administration and were based on the existing law.

f) Denial of Justice

The fair and equitable treatment standard has been understood as also containing the principle of denial of justice.[1620] Denial of justice is a pillar of international law[1621] and one of the central concepts of the international minimum standard of customary international law.[1622] When assessing the scope of the minimum standard of treatment under customary international law, there is consensus among arbitral tribunals that it is definitely breached by acts amounting to gross denial of justice.[1623] Once again, this study is not aimed at providing a comprehensive study of denial of justice. The purpose is to look into the subject to the extent necessary to establish a basis for the application of the notion of denial of justice to the specific situation of corruption.

It shall be noted from the outset that in the past the term has misleadingly been used as a general term for an international wrong amounting to State responsibility.[1624] This results from the out-dated view that State responsibility could only arise from the failure of providing appropriate remedies for wrongful acts, but not for the wrongful acts caused by public officials as such. As seen in Chapter Five, this concept has been abolished and any act of any State organ may be attributable to the State and trigger State responsibility under specific

---

[1620] See e.g. *Loewen v United States*, Award, para 121, *Mondev v United States*, Award, para 127; *Waste Management II v Mexico*, para 98; *Vivendi v Argentina II*, Award, para 7.4.11; *Siag & Vecchi*, Award, para 455; *Jan de Nul v Egypt*, Award, para 188; *Rumeli v Kazakhstan*, Award, para 651.

[1621] For a more comprehensive understanding of Denial of Justice see: Clyde Eagleton, "Denial of Justice in International Law," *The American Journal of International Law* 22, no. 3 (1928): 538–59; J. W. Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice," *British Year Book of International Law* 10 (1929): 181; Gerald Gray Fitzmaurice, "The Meaning of the Term Denial of Justice," *British Year Book of International Law* 13 (1932): 93; Charles Visscher, "La Déni de Justice En Droit International," in *Collected Courses of the Hague Academy of International Law*, vol. 52 (The Hague: Martinus Nijhoff Publishers, 1935), 365–442; Freeman, *The International Responsibility of States for Denial of Justice*; Hans W. Spiegel, "Origin and Development of Denial of Justice," *The American Journal of International Law* 32, no. 1 (1938): 63–81; A. O Adede, "A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law," *Canadian Yearbook of International Law* 14 (1976): 73; Paulsson, *Denial of Justice in International Law*.
For a general overview on the development of Denial of Justice see Freeman, *The International Responsibility of States for Denial of Justice*, 53 et seq.; Jr. Don Wallace, "Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Todd Weiler (ed.)* (London: Cameron May, 2005), 672 et seq.

[1622] Sornarajah, *The International Law on Foreign Investment*, 2010, 357. See also *Grand River v United States*, Award, para 222.

[1623] See *Waste Management II v Mexico*, Award, para 98; *International Thunderbird Gaming v Mexico*, Award, para 194; *Glamis v United States*, Award, para 616.

[1624] See Freeman, *The International Responsibility of States for Denial of Justice*, 98 et seq. See also Paulsson, *Denial of Justice in International Law*, 44 et seq. Paulsson calls attention to the fact that due to the former view that "*denial of justice by courts was the only form of injury to foreigners that legitimized international protection*" many cases were brought under the term of denial of justice though they did not have anything to do with it. Thus, in his view, caution has to be exercised when extracting holdings and arguments from old cases in order to argue that wrongdoings of the executive and legislative do also fall under denial of justice.

circumstances. Thus, denial of justice must be understood as a specific form of State responsibility.[1625]

Along with this view on State responsibility, another notion of denial of justice has become outdated. In the past, it was contended that only the secondary judicial failure could amount to denial of justice. Under that view, denial of justice could only be triggered when an initial wrong was not redressed by the domestic judicial system.[1626] There is no distinction between original judicial or secondary judicial failure in modern international law anymore.[1627] Thus, denial of justice may occur when the wrong is caused by other branches of government and not corrected by the judicial system, or when it is first caused by the judicial system.[1628]

(1) Administration of justice

A clear definition of denial of justice does not exist. The term is vague and the scope has been interpreted as flexibly as the one of fair and equitable treatment. It does not surprise that this notion has been called 'protean jellyfish' in the literature.[1629] The term denial of justice in its actual meaning – distinguished from the general term of international wrong – refers to 'judicial' denial of justice. Under this approach, denial of justice is "[s]*ome misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law. It involves, therefore, some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process*."[1630]

However, denial of justice may not be misunderstood as being merely a wrongful act of a judiciary organ attributed to the conduct of State. As seen in Chapter Five, the rules of attribution of conduct to the State and the rules of State responsibility do not differentiate between the different functions of the organs or officials. It will not matter whether the international wrong was caused by an organ of the executive, legislative or judicial branch.[1631] Thus, the principle of denial of justice

---

[1625] The broad view has widely been criticised in the literature, as example for the majority view see Eagleton, *The Responsibility of States in International Law*, 112; Freeman, *The International Responsibility of States for Denial of Justice*, 105; Fitzmaurice, "The Meaning of the Term Denial of Justice," 95.

[1626] See e.g. *B.E. Chattin (United States) v United Mexican States*, Mexico/United States General Claims Commission, 23 July 1927, RIAA Vol IV, 282 (hereinafter: "*Chattin v Mexico*"), 286 ("*The very name 'denial of justice'* […] *would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice*.").

[1627] See Paulsson, *Denial of Justice in International Law*, 57 et seq.

[1628] See e.g. Fitzmaurice, "The Meaning of the Term Denial of Justice," 108 et seq.

[1629] See Don Wallace, "Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico," 670.

[1630] Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, 330. See also Adede, "A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law," 91. ("*Denial of justice means improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions*.").

[1631] Paulsson, *Denial of Justice in International Law*, 59.

is applicable to wrongful behaviour of all branches of the State.[1632] National legislation, for instance, might deny investors the access to the courts,[1633] while acts of the executive branch may interfere with judicial proceedings[1634] or not respect court judgments in favour of the investment.[1635]

In order to prevent the concept of denial of justice from fading away into a generic term for all breaches of international law that might amount to State responsibility, a criterion of demarcation is needed. As explained above, denial of justice neither depends on the character of the actor nor on the nature of the wrongful act. Rather, the central notion of denial of justice focuses on the administration of justice. Hence, the wrong must amount to a failure of the legal system to administer justice. In the words of Paulsson, "*denial of justice covers all situations where a foreigner has been deprived of a proper judicial process, whether he is seeking to establish or to preserve legal interests*."[1636] This includes different phases of the administration of justice. The principle protects the access to the courts, the right to due process during the proceedings and the right to receive a decision in due time.[1637]

(2) Denial of administrative and regulatory due process

Tribunals have held that procedural fairness is not only applicable to court proceedings, but must be observed in all kinds of official procedures the investor encounters when dealing with the host State.[1638] In fact, some national concepts of denial of justice are broader and include also denial of administrative and regulatory due process.[1639] This leads to the question whether violations of procedural fairness of any official proceedings also fall under the international concept of denial of justice.

[1632] See e.g. *Amco Asia Corporation et al. v The Republic of Indonesia*, ICSID Case No. ARB/81/8, Award, 5 June 1990, (hereinafter: "*Amco v Indonesia II*, Award"), para 137 ("*The Tribunal sees no provision of international law that makes impossible a denial of justice by an administrative body*.").

[1633] In *Loewen v United States*, Mississippi law required a maximum amount of a *supersedeas* bond to stay the execution of the allegedly unjust judgment of first instance. Due to the requirement of the bond and the refusal of the Mississippi court to relax that requirement, the investor was actually hindered to appeal.

[1634] For an executive intervention in a judicial decision see e.g. *Petrobart Limited v The Kyrgyz Republic*, SCC Arbitration No. 126/2003, Award, 29 March 2005 (hereinafter: "*Petrobart v Kyrgyz Republic*, Award"), pp. 75 et seq. The Vice Prime Minister had sent a letter to the Chairman of the Court during the proceedings influencing the outcome.

[1635] *Siag & Vecchi v Egypt*, Award, para 451-455. The tribunal found that disregarding the various court rulings in favour of the investor amounted to a failure to provide due process, which constituted an egregious denial of justice, para 455.

[1636] Paulsson, *Denial of Justice in International Law*, 63.

[1637] See e.g. *Azinian v Mexico*, Award, para 102.

[1638] See e.g. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, 158.

[1639] See *Grand River v United States*, Award, para 222. Dealing with the investor's allegations that a denial of administrative and regulatory due process had taken place, the tribunal held that such concept did not reflect the international law concept of denial of justice.

The scope of the fair and equitable treatment should not be confused with the one of denial of justice. In the past, under the outdated concept of State responsibility, it was essential to widen the scope of denial of justice to provide protection of aliens in the first place. Nowadays, the rules of State responsibility have changed. The protection of aliens does not solely depend on the concept of denial of justice. Tribunals have rightly found that the fair and equitable treatment standard embraces any kind of procedural fairness. However, the term denial of justice should not be widened and watered down. The accusation underlying the denial of justice allegations is that the host State failed to provide a judicial system that as a whole may protect the investor and provide due process.[1640] Irregularities at the administrative level may most certainly fall under the fair and equitable treatment standard, but they are only comprised by the denial of justice standard if they amount to a failure to provide an effective judicial system as a whole.[1641] That means that a violation of due process at one singular administrative proceeding, such as applying for a permit or a licence, may not amount to a denial of justice, until the judicial system, as a whole, was not able to provide effective protection.[1642] This narrow concept of denial of justice has been constantly confirmed by arbitral tribunals.[1643]

(3) High Threshold

Against the background that in order to establish denial of justice proof of the failure of the judicial system to fairly administer justice is required, tribunals have constantly set the bar high. In the words of the *Mondev* tribunal "[t]*he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome"*.[1644] The *Loewen* tribunal described denial of

[1640] See e.g. Paulsson, *Denial of Justice in International Law*, 7.

[1641] Note also that the tribunal in International *Thunderbird v Mexico* held that "[t]*he administrative due process requirement is lower than that of a judicial process.*" *International Thunderbird Gaming v Mexico*, Award, para 200.

[1642] Note again that procedural fairness in administrative procedures is observed under the fair and equitable treatment standard, see below at B.I.2.g). The State responsibility for such violations does not depend on the principle of denial of justice contained in the fair and equitable treatment standard, since fair and equitable is not limited to denial of justice, see also *Vivendi v Argentina II*, Award, para 7.4.11.

[1643] See e.g. *Mondev v United States*, Award, para 96; *Grand River v United States*, Award, paras 222 et seq. Note that the tribunal in *Amco v Indonesia* found the procedural irregularities of an administrative body to constitute a denial of justice. The dispute was not based on an IIA and therefore no fair and equitable clause was involved. The tribunal was primarily concerned with the question whether the procedural irregularities of the administrative body could amount to a wrong under international law. The application of the term 'denial of justice' by the tribunal does not refer to the narrow meaning of the term. It is rather a good example that procedural fairness is also required under administrative proceedings and may amount to a wrong under international law, see *Amco v Indonesia II*, Award.

[1644] *Mondev v United States*, Award, para 127 ("*In the end the question is whether, at an international level and having regard to generally accepted standards of administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable* […]."), emphasis added.

justice as "[m]*anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety*".[1645] Subsequent tribunals have used this standard as guidance.[1646]

Thus, not any judicial failure may amount to a denial of justice. The failure must be "*flagrant, notorious, obvious, gross, odious, manifestly unjust or violative of due process or similarly offensive*".[1647] In other words, when State organs perform the administration of justice to foreigners in a "*fundamentally unfair manner*".[1648]

The high threshold was also confirmed for the concrete context of corruption allegations. The tribunal in *Oostergetel v The Slovak Republic* emphasised that "*a claim for denial of justice under international law is a demanding one*".[1649] The investor alleged that the judge in the relevant bankruptcy proceedings had been bribed by the 'financial mafia' and consequently failed to act impartially.[1650] The tribunal found that

> "[t]o meet the applicable test, it will not be enough to claim that [...] the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards."[1651]

In *Al-Warraq v Indonesia*, the tribunal found it not sufficient for a breach of the fair and equitable treatment standard that Indonesia merely failed to take the necessary steps after the investor had made complaints of bribe solicitation during criminal investigations.[1652] In the tribunal's view, the investor had failed to "*demonstrate that he had a right to have his allegations of corruption investigated by State authorities*".[1653]

In conclusion, the threshold to establish denial of justice is high, in particular for corruption. Individual corrupt conduct by members of the judiciary will not suffice to amount to a denial of justice. Rather, the whole judicial system must be flawed by corruption.

[1645] *Loewen v United States*, Award, para 132. Note the similarity to the description of arbitrary conduct of the ICJ in the ELSI case: *Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.* […] *It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*." ELSI case, para 128.

[1646] See e.g. *Jan de Nul v Egypt*, Award, para 192.

[1647] Don Wallace, "Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico."

[1648] Paulsson, *Denial of Justice in International Law*, 62. See also Ibid., 60. ("*The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice*.")

[1649] *Oostergetel v Slovak Republic*, Award, para 273.

[1650] *Oostergetel v Slovak Republic*, Award, para 271.

[1651] *Oostergetel v Slovak Republic*, Award, para 273.

[1652] *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014 (hereinafter: "*Al-Warraq v Indonesia*, Final Award"), paras 611-612.

[1653] *Al-Warraq v Indonesia*, Final Award, para 612. The tribunal found the international instruments against corruption referred to by the investor as merely requiring the States to "*endeavour*" and "*make an effort*" to exercise an effective law enforcement, but that Indonesia had "*no obligation*" to investigate corruption allegations.

(4) Substantive approach – unjust decisions

No consensus exists on the question whether denial of justice also embraces the substantive right to obtain a just decision. The idea that an '*evidently unjust and partial decision*' may amount to a 'refusal' of justice goes back as far as 1758.[1654] For Fitzmaurice it is immaterial whether the judgment is unjust; in order to constitute a denial of justice, the court must be guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence.[1655] It is generally accepted that an error or a mere violation of national law never amounts to denial of justice.[1656] It is not the function of an international tribunal to act as a court of appeals,[1657] which has constantly been confirmed by international investment arbitration case law.[1658] The erroneous application of national law cannot amount to a denial of justice.

In *Azinian v Mexico*, the tribunal found that a "*clear and malicious misapplication of the law*" is necessary in order to amount to a denial of justice.[1659] This approach was followed in *Mondev v United States*, where a Canadian investor claimed to have been treated unfairly by the State courts of Massachusetts. In these court proceedings, a company owned by the investor had sued the City of Boston for breach of contract. The City of Boston and the city-owned company were granted statutory immunity from suit for intentional torts, for which reason the claim was unsuccessful. Mondev challenged the correctness of this court decision under NAFTA alleging a breach of Article 1105.[1660] The claim was not concerned with a failure to provide access to a lawsuit or to a procedural fair trial, rather with a

---

[1654] Emer Vattel, *The Law of Nations of Nations; Or, Principles of the Law of Nature (Le Droit Des Gens, Ou Principes de La Loi Naturelle*, vol. II (Philadelphia: T. & J. W. Johnson, 1852), para. 350. A more recent definition of denial of justice including unjust judgments is: "*Denial of justice means improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions*." (Emphasis added). See Adede, "A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law," 91.

[1655] Fitzmaurice, "The Meaning of the Term Denial of Justice," 112.

[1656] See Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 241; Dolzer and Schreuer, *Principles of International Investment Law*, 182; McLachlan, Shore, and Weininger, *International Investment Arbitration*, 229. ("*An attack on the substantive outcome of the national court decision can only succeed if it is clear that there has been judicial impropriety, rather than merely a mistake of law.*"). See also Fitzmaurice, "The Meaning of the Term Denial of Justice," 111.

[1657] See e.g. Dolzer and Schreuer, *Principles of International Investment Law*, 182.

[1658] See *Azinian v Mexico*, Award, para 99 ("*The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction.*"). See also *Mondev v United States*, Award, paras 126 et seq.; *ADF v United States*, Award, para 190 ("*We do not sit as a court with appellate jurisdiction.* […] *something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with* [the] *customary international law* [minimum standard of treatment]."); *Jan de Nul v Egypt*, Award, para 209.

[1659] *Azinian v Mexico*, Award, paras 102-103. Note that this category has always been applied restrictively, see McLachlan, Shore, and Weininger, *International Investment Arbitration*, 229.

[1660] It is noteworthy that the cause of action for expropriation was inadmissible due to *ratione temporis* reasons, since the conduct of the State administrative agencies occurred before NAFTA had entered into force.

breach of the standard of clear and malicious misapplication of the law.[1661] The tribunal relied on the ICJ *ELSI* case and established the following test

> "[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand [treaties for the protection of investment are] intended to provide a real measure of protection."[1662]

The tribunal continued that in the end the question is whether the decision is "*clearly improper and discreditable*".[1663] Applying this standard to the case, the tribunal found the narrowly drafted immunity from suit for intentional torts to serve a reasonable purpose. Since "*it did not involve on its face anything arbitrary or discriminatory or unjust*" it did not amount to a breach of this standard.[1664]

Likewise, the tribunal in *Jan de Nul v Egypt* clarified that as a rule it would only review the scope of authority or the application of the law by the domestic courts when the result would show "*discrimination or severe impropriety*".[1665] In the words of the *Loewen* tribunal, "[m]*anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough*".[1666] The tribunal in *Rumeli v Kazakhstan* followed this approach by stating that the concept is of procedural nature, i.e. the standard is breached when a court procedure violates due process.[1667] However, "*when the decision is so*

[1661] The tribunal in para 126 referred to the *Azinian* award:
"*A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.* […] *There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious*." *Azinian v Mexico*, Award, paras 102-103.

[1662] *Mondev v United States*, Award, para 127. Many tribunals referred to this passage, see e.g. *Waste Management II v Mexico*, Award, para 95; *Limited Liability Company AMTO v Ukraine*, SCC Arbitration No. 080/2005, Final Award, *26 March 2008* (hereinafter: "*Amto v Ukraine*, Final Award"), para 76; *Jan de Nul v Egypt*, Award, para 193; *RosInvestCo UK Ltd. v The Russian Federation*, SCC Arbitration V (079/2005), Final Award, 12 September 2010 (hereinafter: "*RosInvest v Russia*, Final Award"), para 276; *GEA Group AG v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (hereinafter: "*GEA v Ukraine*, Award"), para 312. See also *ELSI* case, para 128. ("*Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.* [...] *It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*."). Emphasis added.

[1663] *Mondev v United States*, Award, para 127; referred to by e.g. *Loewen v United States*, Award, para 133; *Jan de Nul, v Egypt*, Award, para 209; *Alpha v Ukraine*, Award, footnote 589.

[1664] *Mondev v United States*, Award, para 156.

[1665] *Jan de Nul v Egypt*, Award, para 206

[1666] *Loewen v United States*, Award, para 132.

[1667] *Rumeli v Kazakhstan*, Award, para 653.

patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith" the substance of the decision may be relevant.[1668]

The substantive denial of justice approach has been criticised in scholarship. Paulsson argues that the issue of denial of justice should always be approached from the procedural aspect.[1669] The international responsibility for a judgment that is grossly unjust results from bad faith and the failure to afford fair treatment, but not from the misapplication of national law.[1670] In other words, "*substantive absurdity evidences procedural defect*".[1671] In conclusion, a gross miscarriage of justice cannot be seen as an exercise of the rule of law and thus may constitute denial of justice.[1672]

(5) The exhaustion of local remedies

The notion of denial of justice refers to the failure of the State to provide a fair and effective judicial system.[1673] From this it follows – as already stated above – that not any wrongful act of a judicial institution may amount to denial of justice, but only if the system as a whole fails to provide any remedies against the injustice.[1674] Thus, the principle of denial of justice under customary international law demands that all available local remedies are exhausted before a claim of denial of justice can be brought.[1675] The ICSID Convention and most IIAs contain a waiver from the rule of exhaustion of local remedies.[1676] Hence, the question arises whether this would also apply to the notion of denial of justice brought under an IIA.

Commentators have argued against the application of the local remedies rule to denial of justice claims brought under an IIA.[1677] It would appear troublesome to apply the local remedies rule to investment arbitration, since it contravenes the

---

[1668] *Rumeli v Kazakhstan*, Award, para 653.
[1669] Paulsson, *Denial of Justice in International Law*, 82.
[1670] Ibid.
[1671] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 241.
[1672] Dolzer and Schreuer, *Principles of International Investment Law*, 182.
[1673] See also Ibid., 179. ("*The principles of access to justice, fair procedure, and the prohibition of denial of justice relate to three stages of the judicial process: the right to bring a claim, the right of both parties to fair treatment during the proceedings, and the right to an appropriate decision at the end of the process and its enforcement*.").
[1674] See Paulsson, *Denial of Justice in International Law*, 108 et seq.
[1675] See e.g. *ELSI* case, p. 46, para 59.
[1676] Article 26 of the ICSID Convention:
"*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention*."
See also NAFTA Article 1121(1)(b).
[1677] See e.g. McLachlan, Shore, and Weininger, *International Investment Arbitration*, 231 et seq. For a critical overview of the local remedies rule applied to international investment arbitration in general see Ursula Kriebaum, "Local Remedies and the Standards for the Protection of Foreign Investment," in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, ed. Christina Binder et al. (Oxford et al.: Oxford University Press, 2009), 418–63.

established right of an investor to seek relief directly through arbitration.[1678] It is argued that such rule has been abrogated as a whole in investment treaty arbitration, and that there is no compelling reason why wrongful acts of judicial officials shall be treated differently than those from other organs of the State.[1679]

However, arbitral tribunals have consistently applied the exhaustion of local remedies rule to denial of justice claims.[1680] The waiver of the local remedies rule of Article 26 of the ICSID Convention is understood as only being directed to jurisdictional conditions of a claim. The tribunal in *Loewen v United States* found that the exhaustion of local remedies is, however, a substantial requirement of denial of justice and is thus not affected by the waiver.[1681] This follows from the very nature of the obligation of prohibition of denial of justice. The responsibility of the State arises due to the failure to provide for a judicial system, which as a whole administers justice in accordance with the minimum standard under customary international law. A system as a whole is, however, only ineffective when remedies to rectify wrongful acts caused by lower courts are not available within that system.[1682] Subsequent tribunals have followed this approach.[1683]

The exhaustion of local remedies comprises only such remedies, which are reasonably available to the investor.[1684] To follow the straight line of the hierarchical appeal system, for instance, can be expected from the investor and is considered to be reasonable.[1685] However, the exhaustion of local remedies rule is not applicable when remedies are futile.[1686] Thus, the investor is not required to pursue remedies that are 'improbable',[1687] or have "*no reasonable prospect of*

[1678] See McLachlan, Shore, and Weininger, *International Investment Arbitration*, 232.
[1679] Ibid., 232 et seq.
[1680] E.g. *Loewen v United States*, Award, paras 142-164; *Jan de Nul v Egypt*, Award, paras 191, 255-261; *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009 (hereinafter: "*Saipem v Bangladesh*, Award"), para 176; also confirmed in *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (hereinafter: *ATA v Jordan*, Award), para 107.
[1681] *Loewen v United States*, Award, paras 158-164. Note that the decision of *Loewen v United States* has been criticised on this issue, see e.g. Alexis Mourre and Alexandre Vagenheim, "Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem," in *Liber Amicorum Bernardo Cremades*, ed. M. Á. Fernández-Ballesteros and David Arias (Madrid: La Ley, 2010), 854; Francesco Francioni, "Access to Justice, Denial of Justice and International Investment Law," *European Journal of International Law* 20, no. 3 (2009): 734 et seq.
[1682] Paulsson, *Denial of Justice in International Law*, 125.
[1683] *Saipem v Bangladesh*, Decision on Jurisdiction, para 151; *Saipem v Bangladesh*, Award, para 176; *Jan de Nul v Egypt*, Award, para 255. See also Christoph Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration," *Law and Practice of International Courts and Tribunals* 4, no. 1 (2005): 14.
[1684] See e.g. *Pantechniki S.A. Contractors & Engineers v The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 (hereinafter: "*Pantechniki v Albania*, Award"), para 96; *ELSI* case, paras 61 et seq. See also Francioni, "Access to Justice, Denial of Justice and International Investment Law," 734 et seq.
[1685] *Pantechniki v Albania*, Award, para 97.
[1686] See *Saipem v Bangladesh*, Award, para 182
[1687] *Duke v Ecuador*, Award, para 400; *Saipem v Bangladesh*, Award, para 182.

success".[1688] Commentators have argued to apply the test of reasonableness and effectiveness in a flexible and not too technical manner.[1689] However, tribunals have often applied a high threshold to this test. Most tribunals have emphasised that the burden to establish the futility of the remedies lies on the investor.[1690] In addition, tribunals have held that a lack of clarity of the available remedies does not show that the remedies have no reasonable chance.[1691] A very rigid approach to the exhaustion of local remedies rule was taken by the *Loewen* tribunal. The abstract and remote possibility of a petition for *certiorari* before the Supreme Court of the United States was found to provide sufficient protection[1692] against the conduct of the trial judge which the tribunal described as "*so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law*".[1693]

Such strict approach to the exhaustion of local remedies rule does not seem compatible with the purpose and objective of investment arbitration to provide an effective and balanced protection, actually independent from the remedies of the host State. Indeed, denial of justice constitutes the failure of the whole judicial system of a host State to provide effective protection. However, the emphasis should be on 'effective'. The reasonableness and effectiveness test of the available local remedies should not be exercised too technically, but rather flexibly. Against the background of the general waiver of the exhaustion of local remedies rule in investment treaty arbitration, it might be more appropriate to approach this issue by raising the question as to when does the wrong caused in the judicial proceedings amount to a failure of the whole judicial system.

(6) Conclusion – Corruption and denial of justice

There are two approaches to the impact that corruption might have on the principle of denial of justice. The first approach focuses on the specific effect that the corrupt practice had on the proceedings. Corrupt judicial officials might be bribed or unduly influenced in order to achieve a certain effect, for instance to deny jurisdiction over a case, to refrain from investigating into a matter, or to manipulate the outcome of the decision in a certain way. Corruption can be understood as being the negative influence causing a departure of the normal rule of due process in order to cause specific effects. Whether this manipulation of the legal system has been caused by bribery, by influence peddling or by any other means is actually not relevant. The result of corruption, i.e. the specific violation of a certain due process standard, shows that the investor has not received a fair trial

[1688] *Jan de Nul v Egypt*, Award, para 258.
[1689] Francioni, "Access to Justice, Denial of Justice and International Investment Law," 734 et seq.
[1690] See e.g. *Duke v Ecuador*, Award, para 401. See also *Loewen v United States,* Award, para 215. See Mourre and Vagenheim, "Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem," 853.
[1691] *Duke v Ecuador*, Award, para 401
[1692] *Loewen v United States*, Award, para 217.
[1693] *Loewen v United States*, Award, para 54.

or a fair access to justice in the first place. In other words, the focus of the analysis is the outcome of the manipulation. This means however that the impact corruption has on the proceedings, i.e. the specific violation, would have to be proven as well. The mere fact of corruption would be circumstantial; the actual violation of due process would be the essential part of the examination. The specific departure from due process would have to be established.

The second approach focuses on the mere existence of corruption. A corrupt judge will by nature of the manipulation not be able to provide for a fair trial. The undue influence of corruption on her decision-making process does not allow her to administer justice in the first place. Whether the judge in fact renders a different decision than as if she had not been bribed is of no relevance and does not have to be proven. The mere fact that corruption manipulated the proceedings is sufficient proof to establish the violation of due process. Corruption in itself is already a denial of justice. In other words, the denial of justice is not only caused due to the proven negative effect of corruption on a specific requirement of due process, but already because the mere fact of corruption. A corrupt judicial system in itself constitutes denial of justice.

However, even when following the second approach, it needs to be proven that the system as a whole is corrupt. This is actually the difference between the denial of justice and the other principles protected by fair and equitable treatment. Not every corrupt practice that has an influence on a judicial proceeding amounts to denial of justice. The system itself must be affected. This does not mean that each judicial official involved in the proceedings must be corrupt; it is already sufficient to prove that the system failed to properly handle corrupt practices among peers. If a judicial decision of a lower court was tainted by corruption, then higher courts have the opportunity to rectify the caused injustice. If the system fails to provide effective protection against corruption, then that failure amounts to denial of justice.

g) Administrative and regulatory due process and procedural fairness

After having concluded that the concept of denial of justice refers to the failure of the whole system to administer justice, it seems apposite to repeat that the principle of due process is not limited to judicial decisions or proceedings,[1694] but must also be observed in any decision-making process affecting the investment, i.e. administrative or regulatory proceedings.[1695] In fact, the principles of good faith, transparency, consistency, non-arbitrariness, non-discrimination, and the

[1694] Note however that due process and denial of justice are closely linked, see also *Siag & Vecchi v Egypt*, Award, para 452.

[1695] Tribunals have constantly confirmed the obligation of the host State to accord due process as part of the fair and equitable treatment standard, see e.g. *SD Myers v Canada*, Partial Award, para 134; *Saluka v Czech Republic*, Partial Award, para 308; *Rumeli v Kazakhstan*, Award, para 609; *Jan de Nul v Egypt*, Award, para 187; *Bayindir v Pakistan*, Award, para 178; *Lemire v Ukraine*, Award, para 284.

prohibition to abuse power, to engage in coercion and in harassment are related and even interlocked with the notion of due process.[1696]

(1) Scope

In the often-cited words of the tribunal in *Waste Management v Mexico* the fair and equitable treatment standard is breached

> "if the conduct […] involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[1697]

This makes clear that in addition to the prohibition of denial of justice, the notion of due process also plays an important role in administrative process and falls within the standard of fair and equitable treatment. Tribunals have constantly referred to the statement made in *Waste Management* and confirmed this approach.[1698] When applying the test whether the administrative proceedings shocked a sense of judicial propriety, the tribunal in *International Thunderbird v Mexico* contended that the due process requirement for administrative process is lower than that of judicial proceedings.[1699] The tribunal in *AES v Hungary* noted while examining the administrative process that "[t]*he standard is not one of perfection*".[1700] The tribunal confirmed the arbitral practice to require that the failure is "*manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety)*".[1701]

Tribunals have found a violation of due process when the host State failed to provide the investor with an opportunity to be heard and present its case, before drastic measures are enacted. In *Metalclad v Mexico*, for instance, the relevant construction permit was denied at a meeting of the Municipality, which took place without prior notice to the investor who thus had no opportunity to present its case.[1702] Such behaviour of lack of due process was one element of the tribunal's finding that Mexico violated the fair and equitable treatment standard.[1703] In

[1696] See McLachlan, Shore, and Weininger, *International Investment Arbitration*, 239.
[1697] *Waste Management II v Mexico*, Award, para 98.
[1698] *Azurix v Argentina*, Award, para 370; *Siemens v Argentina*, Award, para 297; *Jan de Nul v Egypt*, Award, para 187; *Bayindir v Pakistan*, Award, para 344; *Glamis v United States*, Award, para 559; *Cargill v Mexico*, Award, para 283; *Merrill v Canada*, Award, paras 199 and 208; *Total v Argentina*, Decision on Liability, para 110.
[1699] *International Thunderbird Gaming v Mexico*, Award, para 200.
[1700] *AES v Hungary*, Award, para 9.3.40.
[1701] *AES v Hungary*, Award, para 9.3.40. Note that Daniel M. Price in his dissenting opinion of *Tokios Tokelės v Ukraine* criticised the high threshold of 'manifest and gross' in order for a failure of due process to amount to a breach of fair and equitable, *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price, para 20 and footnote 40.
[1702] *Metalclad v Mexico*, Award, para 91.
[1703] *Metalclad v Mexico*, Award, para 101.

similar terms, in *Middle East Cement v Egypt*,[1704] the investor had not received proper notice of the auction of its ship. The tribunal held such failure to notify the investor by direct communication to be relevant behaviour in light of the fair and equitable treatment standard.[1705]

(2) Conclusion

Many of the above-examined notions are closely interlocked with the principle of due process. Thus, our already reached conclusion will to some extent also be applicable to the general notion of due process. A violation of most of the above-analysed notions will automatically amount to a failure to accord due process and provide procedural fairness. However, at this stage, it shall also be noted that besides the above examined categories and situations, the obligation to observe due process might include further protection. Depending on the specific facts of the case, corruption might also violate other specifications of the general principle of due process.

3. Conclusion regarding fair and equitable treatment

Generally speaking, there are two strands of cases about the nature and the scope of the fair and equitable treatment standard. One school of thought links the fair and equitable treatment standard to the minimum standard under customary international law and argues that the protection provided under fair and equitable treatment is the same as under the minimum standard. The second group of cases understands the fair and equitable treatment standard as an autonomous and independent treaty provision and contends that the scope of protection may go beyond the one assured by the minimum standard. While a majority of arbitral tribunals agree that the minimum standard under customary international law is not 'frozen in time', but is an evolving standard, the exact content remains disputed. Although bad faith is no condition for a breach of the minimum standard and many tribunals have argued against the requirement of egregious behaviour, the threshold applied remains often strict. Consensus exists, however, that the minimum standard constitutes the floor of any protection provided to the investor.

With regard to corruption there is no need to solve the on-going discussion, since the existence of corruption surrounding the decision-making process meets the strictest and highest threshold. Against the background of the widespread

[1704] *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 (hereinafter: "*Middle East Cement v Egypt*, Award").
[1705] *Middle East Cement v Egypt*, Award, para 143. Note that the findings were made in relation to expropriation, however, the tribunal found that the fair and equitable treatment standard and the full protection and security standard were relevant in view of the due process requirement of the expropriation standard.
Note that the tribunal in *Bayindir v Pakistan* acknowledged the requirement of due process in administrative proceedings, but clarified that such procedural requirements are not applicable for international processes underlying the exercise of contractual rights, *Bayindir v Pakistan*, Award, para 345.

condemnation of corruption, nowadays the international business community and the international society perceive corrupt practices within public authorities as an egregious evil that is unacceptable and causes outrage. The wilful disregard of any public interest for personal gain, along with the deliberate abuse of power by implementing measures not based on their official and legitimate purpose, simply amounts to bad faith. Corrupt decision-making violates the minimum standard of treatment and accordingly the fair and equitable treatment standard.

In fact, various notions covered by the standard are breached by corruption. Corrupt behaviour violates the principle of good faith, which is applicable to both parties. From this it follows that an investor may only base its fair and equitable treatment claims on corrupt conduct of the host State in which it has not been involved. Decisions manipulated by corrupt influences will most certainly run against the legitimate expectations of the investor that the host State will not engage in corruption. The awareness of widespread corruption in the country is no bar to such expectations. The purpose of the IIA to improve the investment environment in order to induce foreign investment and the international commitments in the fight against corruption are *inter alia* a sufficient basis for such expectations. In addition, decisions based on corruption suffer from a complete lack of transparency and fail to provide a predictable and stable framework, since the investor is precluded from assessing the real grounds determining the fate of her investment.

The mere fact that measures are based on corruption rather than on legitimate public policy considerations makes such behaviour unreasonable. Since such conduct amounts to wilful disregard and shocks any sense of juridical propriety, it is also arbitrary. Moreover, such measures could also lead to discrimination, when a less favourable treatment compared to other investors is established. The existence of corruption makes such different treatment unjustified. Any extortion of bribes by public officials embodies a threat to the investment which amounts to coercion. Similarly, the vengeful exercise of power after the investor refused to engage in corrupt practices constitutes harassment.

Corruption may lead to a denial of justice when the judicial system as such failed to provide protection to the investor. While not every single corrupt act within the administration of justice will amount to denial of justice, the judicial system must not be completely undermined by corruption. It is sufficient for a denial of justice that the system failed to provide effective remedies against a corrupt judicial decision or other corrupt measure manipulating the administration of justice. Contrary to the concept of denial of justice, the principle of due process, which must be observed in any administrative and regulatory procedure, is in any case violated by corrupt decision-making.

II. Full Protection and Security

Many IIAs contain a provision on 'protection and security'.[1706] This standard creates the obligation for the host State to actively protect the investment from adverse effects. Whether such adverse effects are caused by the host State, its organs or by third parties is not relevant for the responsibility of the host State.[1707] The standard does, however, not create strict liability, but rather an obligation to exercise due diligence.[1708]

On the meaning of due diligence many tribunals referred to the explanation given by Professor Freeman:[1709] "*The 'due diligence' is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances*."[1710] Thus, the standard of protection and security amounts to the duty to take all reasonable steps to protect the investment.[1711]

1. Scope

The scope and content of the duty to protect the investment from adverse effects has been interpreted inconsistently. Traditionally, tribunals applied the standard to

[1706] Note that the wordings differ. Most IIAs use the term 'full protection and security', see e.g. Article 2(2.1) of the UK Model BIT (2005); Article 5(2)(b) of the U.S. Model BIT (2012); Article 2(2) of the German Model BIT (2008). For other wordings see e.g. Article 2(2) of the BIT between UK/Northern Ireland and Argentina, signed on 11 December 1990, entered into force on 19 February 1993 ("*protection and constant security*"); Article 4(1) of the BIT between Argentina and Germany, signed 9 April 1991, entered into force on 8 November 1993 ("*full protection as well as juridical security*"); Article 5 of the BIT between Argentina and France, signed 3 July 1991, entered into force on 3 August 1993 ("*fully and completely protected*").

[1707] See e.g. *Biwater v Tanzania*, Award, para 730.

[1708] *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (hereinafter: "*AAPL v Sri Lanka*, Final Award"), para 53, referring *inter alia* to ELSI case, para 108; *Wena v Egypt*, Award, para 84; *TECMED v Mexico*, Award, para 177; *Noble Ventures v Romania*, Award, para 164; *Saluka v Czech Republic*, Partial Award, para 484; *Rumeli v Kazakhstan*, Award, para 668; *Jan de Nul v Egypt*, Award, para 269; *Siag & Vecchi v Egypt*, Award, para 447; *Biwater v Tanzania*, Award, para 725; *AES v Hungary*, Award, para 13.3.2; *Gemplus and Talsud v Mexico*, Award, para 9-10; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 163. Note that this notion corresponds to the rules of State responsibility, where States may only be liable for acts of third parties if they failed to exercise due diligence.

[1709] See e.g. *AAPL v Sri Lanka*, Award, para 77; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 163; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (hereinafter: "*Paushok v Mongolia*, Award"), para 323.

[1710] Alwyn V. Freeman, "Responsibility of States for Unlawful Acts of Their Armed Forces," in *Collected Courses of the Hague Academy of International Law*, vol. 88 (Martinus Nijhoff Publishers, 1955), 263–416.

[1711] *Lauder v Czech Republic*, Final Award, para 308; *Saluka v Czech Republic*, Partial Award, para 484; *AES v Hungary*, Award, para 13.3.2. Note also that a proportionality factor has been attributed to the standard, see *Pantechniki v Albania*, Award, para 81, citing Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 310.

situations of physical violence or harassment.[1712] In *AAPL v Sri Lanka*, the investment was destroyed in course of counter-insurgency operations by Sri Lankan security forces. While it could not be established that the government forces caused the damages, the tribunal held that Sri Lanka had failed to provide precautionary measures to protect the investment and had therefore not exercised the required due diligence.[1713] In *AMT v Zaire*, the investment was destroyed during riots and looting. After finding that it was of no relevance whether the damage was caused by third parties or by Zairian soldiers, the tribunal held that Zaire failed to take any precautionary measures to protect the security of the investment.[1714] In *Wena v Egypt*, hotels had been seized, but it could not be established that Egypt was part of the seizures. The tribunal nevertheless found Egypt responsible for not taking the necessary measures to prevent the seizure despite of its awareness.[1715]

Recently, tribunals have found that the standard of protection and security goes beyond mere physical protection and would also amount to a protection of the investor's legal rights.[1716] The tribunal in *Azurix v Argentina* drew from the wording of 'full' protection and security and found that the ordinary meaning would lead to the conclusion that the standard goes beyond physical protection.[1717] In the view of the tribunal, the standard included also the duty to provide a secure investment environment and concluded that the standard was breached when the State failed to provide fair and equitable treatment.[1718] The tribunal in *Biwater v Tanzania* also based its conclusion on the term 'full' included in the wording of the

[1712] See e.g. *Wena v Egypt*, Award, para 84; *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (hereinafter: "*AMT v Zaire*, Award"), para 6.02 et seq.
[1713] *AAPL v Sri Lanka*, Award, para 85.
[1714] *AMT v Zaire*, Award, para 6.08.
[1715] *Wena v Egypt*, Award, para 85.
[1716] *Azurix v Argentina*, Award, paras 406 et seq.; *Siemens v Argentina*, Award, para 303; *Biwater v Tanzania*, Award, para 729; *National Grid v Argentina*, Award, paras 187-189; *Vivendi v Argentina II*, Award, paras 7.4.15 et seq.; *Total v Argentina*, Decision on Liability, para 343; *Paushok v Mongolia*, Award, para 326. The tribunal in *Gemplus and Talsud v Mexico* is not clear on this point, but it seems as if it was willing to conclude legal protection under this standard, *Gemplus and Talsud v Mexico*, Award, para 9-12.
For a contrary view see *BG v Argentina*, Award, para 326; *Rumeli v Kazakhstan*, Award, para 668. Note that the *Saluka* tribunal emphasised that the arbitral case law appears to apply the protection and security provision only to the protection of the physical integrity of an investment. The tribunal, however, left the question on the scope of the standard open, see *Saluka v Czech Republic*, Partial Award, para 484. The tribunals in *Sempra v Argentina* and *Enron v Argentina* stated that they could not exclude in principle that in certain cases a broader interpretation of the standard might be justified. However, they finally rejected that approach since such argument lacked proof and had not been properly developed by the investor, see *Sempra v Argentina*, Award, paras 323 et seq.; *Enron v Argentina*, Award, para 287.
[1717] *Azurix v Argentina*, Award, para 408.
[1718] *Azurix v Argentina*, Award, para 408, referring to *Occidental v Ecuador*, LCIA Award, para 187 ("[…] *the question whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security.*").

IIA provision[1719] and found the standard to amount to a "*State's guarantee of stability in a secure environment, both physical, commercial and legal*".[1720] In *Siemens v Argentina*, the relevant BIT contained the wording of 'full protection and legal security'. Relying on this qualification and referring to the definition of investment, which included also intangible assets, the tribunal held that the standard was not limited to physical protection, but also demanded a secure legal system that provides certainty as to the application of the legal norms.[1721]

The tribunals in *Vivendi v Argentina* and *Total v Argentina* draw on the specific link to fair and equitable treatment contained in the provision in order to find that the protection is not limited to physical protection but includes legal security.[1722] The different approaches taken to interpret the scope of the full protection and security standard are evidenced in the opposite conclusions reached by the *CME* and the *Lauder* tribunals, which dealt with similar facts. The tribunal in *CME v Czech Republic* found that the protection and security standard would also contain the duty to ensure that no changes in its laws or administrative actions would decrease the level of protection.[1723] It must be noted that the tribunal refrained from providing any analysis of the specific scope of the protection standard. The tribunal in *Lauder v Czech Republic* came to the opposite conclusion.[1724]

Recent tribunals had to decide on the question whether to follow the strand of cases widening the scope of the protection and security standard. The tribunal in *Suez Vivendi AWG v Argentina* conducted an analysis of the jurisprudence and concluded that the full protection and security standard is primarily aimed at protecting the investment from physical harms, rather than providing an obligation to maintain a stable and secure legal and commercial environment.[1725] The standard may, however, also include the duty to provide adequate mechanisms for the prosecution of actors of such injuries.[1726] The *Saluka* tribunal noted that arbitral practice indicated that the full protection and security provision was more aimed at protecting the physical integrity of the investment, although the tribunal left the

[1719] *Biwater v Tanzania*, Award, para 729 ("*It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of 'full security' only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments*.").
[1720] *Biwater v Tanzania*, Award, para 729.
[1721] *Siemens v Argentina*, Award, para 303.
[1722] *Vivendi v Argentina II*, Award, paras 7.4.15 et seq.; *Total v Argentina*, Decision on Liability, para 343. Note that the tribunal in *Vivendi v Argentina* appears to even allow a wider interpretation not limiting the standard to either physical or legal protection, but including any measure or act that deprives the investment of protection and security, providing that the fair and equitable treatment standard is also breached.
[1723] *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (hereinafter: "*CME v Czech Republic*, Partial Award"), para 613.
[1724] *Lauder v Czech Republic*, Final Award, para 309.
[1725] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, paras 179. The tribunal was not convinced by the findings of the tribunals in *CME and Azurix*, since they failed to provide an analysis of the historical concept of the standard and to state reasons for their departure of the traditional notion, see para 177.
[1726] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 173.

question on the specific scope open.[1727] In *BG v Argentina*, the tribunal acknowledged the attempts in *Azurix v Argentina* and *Siemens v Argentina* to widen the scope of full protection and security and to include the duty to provide a secure investment environment; however, the tribunal found it "*inappropriate to depart from the originally understood standard*".[1728] In similar terms, the tribunal in *PSEG Global v Turkey* noted that the standard is originally concerned with physical safety, and that a broader scope would only be applied in exceptional situations.[1729] The tribunal in *AES v Hungary* does not exclude the possibility that in appropriate circumstances the protection might go beyond physical security, but it clarified that it does not protect against reasonable changes in legislation and regulation based on legitimate public policy objectives.[1730] Finally, the tribunal in *Rumeli v Kazakhstan* refrained from mentioning the recent attempts of widening the ambit of the full protection and security standard, but merely quoted the *Saluka* tribunal in order to conclude that the standard would only amount to protection of "*the physical integrity of the investment against inference by use of force*".[1731]

2. Relationship to customary international law

Some IIAs contain a link between the protection and security provision and international law. This has led to the same discussion as with regard to fair and equitable treatment on whether the standard amounts to an autonomous treaty standard or is it limited to the standard provided under customary international law.[1732] For NAFTA tribunals, the aforementioned Note of Interpretation is also relevant and binding for the protection and security provision in Article 1105(1) of NAFTA. Accordingly, under NAFTA the standard of protection and security is bound to the scope of the minimum standard of treatment to aliens under customary international law.[1733] However, other tribunals have understood the standard of protection and security provision as an autonomous treaty standard, which demands higher protection than the minimum standard of international law.[1734] Since the discussion corresponds to the one within the fair and equitable treatment standard, for the purposes of this study it suffices to highlight that first, the minimum standard of treatment of aliens under the customary international law

[1727] *Saluka v Czech Republic*, Partial Award, para 484.
[1728] *BG v Argentina*, Award, para 326.
[1729] *PSEG v Turkey*, Award, para 258.
[1730] *AES v Hungary*, Award, para 13.3.2.
[1731] *Rumeli v Kazakhstan*, Award, para 668, citing *Saluka v Czech Republic*, Partial Award, para 484.
[1732] See above at B.I.1.a).
[1733] Note that the ICJ in the *ELSI* case indicated that the standard of 'full protection and security required by international law' "*may go further*" than the requirements under general international law. However, the ICJ did not decide on this issue since the measure did not fall below the standard. *ELSI* case, para 111.
[1734] See discussion note 1716.

is an evolving concept and may call for higher protection than in the past;[1735] and second, the limiting specifications of the NAFTA Free Trade Commissions are not binding outside the NAFTA system and thus not relevant.[1736] Hence, the reference made to international law in the provision can be understood by non-NAFTA tribunals as only setting the 'floor', but not the 'ceiling' of protection.[1737]

3. Relationship to fair and equitable treatment

The standard of protection and security may overlap to a significant part with the fair and equitable treatment standard.[1738] In fact, some tribunals have defined the scope of the full protection and security standard through fair and equitable treatment. The tribunal in *Occidental v Ecuador*, for instance, found that a violation of fair and equitable treatment would automatically amount to an absence of full protection and security.[1739] Other tribunals understand the standard of full protection and security to be part of the notion to accord the investor and its investment with fair and equitable treatment, but with a narrower scope.[1740] Under this approach, the tribunal in *Suez Vivendi AWG v Argentina* found that a violation of the full protection and security provision would automatically amount to a violation of fair and equitable treatment, but the automatism does not apply *vice versa*.[1741] Similarly, the tribunal in *Gemplus Talsud v Mexico* made clear that 'more' was required in order to treat inequitable and unfair treatment as a violation of this standard.[1742]

The overlap between both standards also serves as argument for tribunals not to further expand the scope of full protection and security. Tribunals have raised concerns that a wider interpretation of the standard beyond physical security would make it difficult to distinguish between the two standards.[1743] That would be "*neither necessary nor desirable*".[1744]

[1735] B.I.1.a)(1)(b). Thus, it could be argued that the actual level of protection has evolved to a similar level as provided by autonomous treaty provisions, see B.I.1.b).
[1736] B.I.1.a)(2).
[1737] B.I.1.a)(2).
[1738] Such overlap or close relationship has been acknowledged by several tribunals, see e.g. *Azurix v Argentina*, Award, paras 406-408; *Jan de Nul v Egypt*, Award, para 269.
[1739] *Occidental v Ecuador*, LCIA Award, para 187. See also *National Grid v Argentina*, Award, paras 189 et seq. The tribunal did not make any statement that one standard would automatically trigger the other, but when applying the protection and security standard to the facts, it found that the unfair and inequitable treatment also breached the protection and security standard. See also *Impregilo v Argentina*, Award, para 334, where the tribunal found that when a breach of fair and equitable is established, there is no need to analyse whether there has been a violation of full protection and security.
[1740] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 171.
[1741] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 171.
[1742] *Gemplus and Talsud v Mexico*, Award, para 9-10.
[1743] *Enron v Argentina*, Award, para 286; *Sempra v Argentina*, Award, para 323; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Liability, para 174.
[1744] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 174.

4. Conclusion

While some tribunals have found the different wordings of the specific provisions in the IIA to be irrelevant,[1745] others have drawn from the wording in order to argue for a wider scope of the standard.[1746] Sometimes tribunals have given weight to whether the fair and equitable treatment and the full protection and security standards are linked together or contained in different provisions.[1747] It is no surprise that a few tribunals have been reluctant to widen the scope of the full protection and security standard in order to prevent increasing the overlaps or even its scope being assimilated with that of fair and equitable treatment.[1748]

While there is no need to equate both standards, it must be acknowledged that in certain cases widening the scope of the full protection and security standard beyond the mere physical protection is no threat for a clear and distinguishable application of both standards. The difference is in the details: while the fair and equitable treatment standard focuses on the nature and effect of the measures taken by the host State, the full protection and security standard aims at the reasonable steps taken by the host State to prevent harm from being caused to the investment either by its own public officials or by third parties. This difference should be enough *raison d'être* for both standards despite the inherent overlap of application. The specific content of the respective accusation is simply different.

For the purposes of this study there is no need to settle the discussion whether the standard of full protection and security will also encompass legal protection. However, the scope should not be limited to a technical understanding of physical harm. When an investor considers investing in a region with a tendency for turmoil and civil unrest, then physical protection of the employees of the investment together with the facilities and installations is obviously of utmost importance. The fact that the most likely and most relevant harm caused to investments may be physical and that tribunals have mainly applied this standard to physical destruction, does not lead to the conclusion that the standard must be limited exclusively to such protection. In the changing situation of the business and investment world, the typical threats for investments have also evolved. The unpredictability of administrative and regulatory decision-making processes due to the volatile exercise of discretion by corrupt public officials constitutes an equally severe threat to the chances of success and thus also to the survival of the investment. In addition, the imminent vindictive abuse of power by corrupt officials to punish investors who are not willing to concede to their corrupt practices are similarly dangerous to the integrity of the investment. There is no

[1745] See e.g. *Parkerings v Lithuania*, Award, para 354.
[1746] *Azurix v Argentina*, Award, para 408; *Biwater v Tanzania*, Award, para 729; *Siemens v Argentina*, Award, para 303.
[1747] See e.g. *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 172.
[1748] *Enron v Argentina*, Award, para 186; see also *Sempra v Argentina*, Award, para 323

relevant difference between the investment being destroyed by insufficient efforts taken by the host State against civil unrest or against aggressive behaviour of corrupt public officials.

Thus, even through the menace to the investment caused by corruption due to its destructive power may not lead to a physical demolition, it may terminate the operation of the investment. That makes corruption an 'appropriate circumstance'[1749] covered by the scope of the full protection and security standard. In the author's view, the host State's duty extends to taking the reasonable steps to protect the investor against corrupt public officials and secure that no harm is caused to the investment due to their abuse of power. The international awareness and public acknowledgment of the detrimental effects of corruption along with the newly implemented measures against corruption at different international and national levels show how seriously this topic is treated. The duty to provide adequate protection does not only include the implementation of mechanisms to prevent such harm from happening, but also to take actions against the corrupt public officials after the prejudice was caused and to provide for remedies.[1750] In conclusion, after corrupt practices of public officials have been established, the question of whether the host State has accorded full protection and security depends on all efforts and steps taken by the host State to impede such abuse of power from happening within its own ranks and on the mechanisms provided to the investor to remedy the harm. Finally, all those measures must meet the threshold of reasonableness.

[1749] See *AES v Hungary*, Award, para 13.3.2. The tribunal held that in 'appropriate circumstances' the protection might go beyond physical security.

[1750] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 173. Note that although the tribunal sees no reason to extend the scope of the standard to legal protection, it nevertheless clarifies that the standard includes "*an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor*."

III. Other protection standards

In corruption cases other protection standards may also be breached by the specific measures taken by the host State. Contrary to the fair and equitable treatment, the violation of the remaining standards will depend on the particular set of facts and circumstances, rather than on the mere existence of corruption. Corruption might only be one of many elements required to amount to a violation of the standard, or might also only be a circumstantial or aggravating factor. Therefore, the determination whether the standards have been breached by the host State is on the specific actions and measures along with their particular and combined effects on the investment, as opposed to on the mere fact of corruption. Due to the endlessly imaginable situations and the requirement of a case-by-case determination whether the standards have been violated, it seems apposite to briefly give an overview of the standards of expropriation (see below at **1.**) and national treatment (see below at **2.**) and to subsequently merely indicate where the existence of corruption might be relevant.

1. Expropriation

The right of a host State to expropriate foreign investment within its jurisdiction is based on the notion of territorial sovereignty and remains untouched by the investment protection provisions contained in IIAs.[1751] Such provisions identify solely the conditions and consequences of a lawful expropriation.[1752]

[1751] See Dolzer and Schreuer, *Principles of International Investment Law*, 98. For a general overview on expropriation in investment treaty arbitration see Christoph Schreuer, "The Concept of Expropriation under the ECT and Other Investment Protection Treaties," in *Investment Arbitration and the Energy Charter Treaty*, ed. Clarisse Ribeiro (New York: JurisNet, 2006), 108–59; August Reinisch, "Expropriation," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph H. Schreuer (Oxford: Oxford University Press, 2008), 408–58.

[1752] For an example of an expropriation provision in an IIA see Article 6(1) U.S. Model BIT (2012):
"*Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:*
(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation; and
(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment] (1) through (3)."
See also Article 4(2) German Model BIT (2008):
"*Investments by investors of either Contracting State may not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation. Such compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or other measure became publicly known. The compensation must be paid without delay and shall carry the usual bank interest until the time of payment; it must be effectively realizable and freely transferable. Provision must have been made in an appropriate manner at or prior to the time of expropriation, nationalization or other measure for the determination and payment of such compensation. The legality of any such expropriation,*

The measures taken by corrupt public officials might deprive the investor from enjoying its investment and may amount to different forms of expropriation. While this will depend on various different factors and requirements independent from the finding of corruption, the existence of corrupt practices may nevertheless have an influence on the determination whether an expropriation is lawful or unlawful. Thus, an overview of the different types of expropriation is provided (see below at **a)**), before the requirements of unlawful expropriation are presented (see below at **b)**).

a) Types of expropriation

Arbitral practice and scholarship established different categories of situations amounting to expropriation. While consensus exists that expropriation may not only be caused by a direct single act, but also by indirect measures consisting of a single act or a series of acts, the specific requirements for these measures to amount to an expropriation remain unsettled.

(1) Direct and indirect expropriation

A direct expropriation consists of a formal taking of the legal title of the owner. Due to the potential discouragement of future foreign investment, most host States are reluctant to officially affect the title of the investment.[1753] More frequently, investors encounter measures, which leave the official property title intact, but have the effect of depriving the investor of utilising her investment in a significant manner.[1754] Such measures are called indirect expropriations or 'tantamount' to expropriation,[1755] and have consistently been confirmed by arbitral tribunals.[1756]

---

nationalization or other measure and the amount of compensation must be subject to review by due process of law." Emphasis added.

[1753] See e.g. *Telenor Mobile Communications A.S. v The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 (hereinafter: "*Telenor v Hungary*, Award"), para 69.

[1754] See e.g. *Middle East Cement v Egypt*, Award, para 107. ("*When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation*."). See also *Metalclad v Mexico*, Award, para 103. Note that the definition given by the *Metalclad* tribunal has been referred to by many tribunals although it has often been criticised as being too broad, see e.g. *EnCana v Ecuador*, Award, para 177; *Fireman's Fund Insurance Company v United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 14 July 2006 (hereinafter: "*Fireman's Fund v Mexico*, Award"), para 177; *Corn Products International, Inc. v The United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (hereinafter: "*Corn Products v Mexico*, Award"), para 93. Note also the similar wording in *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 (hereinafter: "*AIG v Kazakhstan*, Award"), para 10.3.1. For a general overview on indirect expropriation in investment treaty arbitration see Rudolf Dolzer, "Indirect Expropriations: New Developments?," *New York University Environmental Law Journal* 11, no. 1 (2002): 64–93.

[1755] For an IIA provision with the wording 'tantamount' to expropriation see e.g. Article 1110 of NAFTA.

[1756] For recent examples see *Biwater v Tanzania*, Award, 452; *LESI v Algeria*, Award, para 131; *Rumeli v Kazakhstan*, Award, para 700; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 132; *Gemplus and Talsud v Mexico*, Award, para 8-23; *Impregilo v*

The difficult question of how to evaluate when exactly a measure amounts to indirect expropriation remains disputed and must be approached on a case-by-case basis.[1757] The determination whether a host State's action amounts to expropriation rather than just general regulatory behaviour is decisive for the question whether compensation has to be paid and constitutes the most difficult question for tribunals.[1758] However, a universal test applicable to all situations has not been developed so far.

In arbitral practice and in scholarship, the focus of the analysis is on the effect of deprivation[1759] rather than the form or content of the measure taken by the host State or the underlying intent.[1760] To this effect, tribunals have constantly found expropriatory intention not to be decisive[1761] or merely less important for the assessment.[1762] With regard to the required effect, tribunals have consistently stressed that the deprivation or interference must be substantial.[1763] Thus, the intensity and severity along with the duration of the economic deprivation are

---

Argentina, Award, para 270; *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 (hereinafter: "*Tza Yap Shum v Peru*, Award"), para 142. Note that expropriation provisions in IIAs generally also refer to 'measures tantamount to expropriation' or indirect expropriation, see e.g. Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Hague; Boston: M. Nijhoff, 1995), 99.

[1757] See e.g. *TECMED v Mexico*, Award, para 114; *Generation Ukraine v Ukraine*, Award" para 20.29. See also Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 366 et seq. Note that Annex B 4.(a) of the U.S. Model BIT (2012) explicitly states that a case-by-case analysis is required in order to determine whether an action constitutes an indirect expropriation.

[1758] See e.g. Schreuer, "The Concept of Expropriation under the ECT and Other Investment Protection Treaties," 111.

[1759] Note that the terms 'deprivation' and 'taking' are largely synonyms, see Reinisch, "Expropriation," 424.

[1760] This concept has been called 'sole effect' doctrine, see Dolzer, "Indirect Expropriations: New Developments?," 79 et seq. For tribunals explicitly referring to the 'sole effect' doctrine see e.g. *Saipem v Bangladesh*, Award, para 133. See also Schreuer, "The Concept of Expropriation under the ECT and Other Investment Protection Treaties," 158. Note that the form of taking without the intention to expropriate has also been called 'consequential expropriation', see W. Michael Reisman and Robert D. Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation," *British Year Book of International Law* 74 (2003): 128 et seq.

[1761] *Metalclad v Mexico*, Award, para 111; *Waste Management II v Mexico*, Award, para 79; *Azurix v Argentina*, Award, para 309; *Siemens v Argentina*, Award, para 270, referring to the wording of the BIT at issue; *Rumeli v Kazakhstan*, Award, para 700; *National Grid v Argentina*, Award, para 147.

[1762] *TECMED v Mexico*, Award, para 116; *Vivendi v Argentina II*, Award, para 7.5.20. The existence of intention to expropriate may, however, be used as positive indicator for the determination of expropriation, see e.g. Reisman and Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation," 130 et seq. Note that Judge Brower in his dissenting opinion in *Impregilo v Argentina* argued that a facially lawful termination of a concession was nevertheless to be qualified as expropriation since it was politically motivated and showed intention to extinguish the investment, see *Impregilo v Argentina*, Dissenting Opinion Judge Brower, paras 18, 28.

[1763] *Telenor v Hungary*, Award, paras 65 et seq.; *CMS v Argentina*, Award. Para 262; *Sempra v Argentina*, Award, para 284; *Enron v Argentina*, Award, para 245; *Tokios Tokelės v Ukraine*, Award, para 120; *Parkerings v Lithuania*, Award, para 455; see also *Eastern Sugar B.V. v The Czech Republic*, SCC No. 088/2004, Partial Award, 27 March 2007 (hereinafter: "*Eastern Sugar v Czech Republic*, Partial Award"), para 210.

essential for such determination.[1764] Some tribunals have focused on the commercial value of the investment and whether the benefit or enjoyment of the property was neutralised.[1765] Others based their decisions on the control of the investment, and denied indirect expropriation when the investor kept the day-to-day management over the investment.[1766] In scholarship, it has been pointed out that while control might be a central aspect, it does not serve as sole criterion.[1767] In fact, the determination should never be based only on one factor.[1768] Moreover, some tribunals have taken legitimate expectations into account for their determination whether measures amount to expropriation.[1769] Finally, it appears that tribunals would also give weight to specific representations made by the host State.[1770]

(2) Creeping expropriation

Sometimes measures evaluated as single acts do not affect the investment in a significant manner. However, taken as a whole and understanding them as a 'series of acts', they might amount to a deprivation of the investor's benefit and use of the investment.[1771] Such accumulation of acts amounting to an indirect expropriation is referred to as 'creeping' expropriation and has consistently been confirmed by arbitral tribunals.[1772] Since the single measures do not generally reveal any

[1764] *Telenor v Hungary*, Award, para 70. Note that the tribunal found that the threshold of intensity and duration was not met, see para 79. See also *LG&E v Argentina*, Decision on Liability, para 190 et seq.; *Metalpar S.A. and Buen Aire S.A. v The Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008 (hereinafter: "*Metalpar v Argentina*, Award"), paras 172-174. See also Dolzer, "Indirect Expropriations: New Developments?," 79; Schreuer, "The Concept of Expropriation under the ECT and Other Investment Protection Treaties," 145.

[1765] See e.g. *CME v Czech Republic*, Partial Award, paras 591, 604; *TECMED v Mexico*, Award, paras 115 et seq.; *CMS v Argentina*, Award, para 262.

[1766] *Pope & Talbot*, Interim Award, para 100; *CMS v Argentina*, Award, para 263; *Azurix v Argentina*, Award, para 322; *LG&E v Argentina*, Decision on Liability, para 191; *Sempra v Argentina*, Award, paras 284-285; *Enron v Argentina*, Award, para 245; *BG v Argentina*, Award, para 266-272; *PSEG v Turkey*, Award, paras 278-280.

[1767] Dolzer and Schreuer, *Principles of International Investment Law*, 118.

[1768] Ibid., 118 et seq.

[1769] *Metalclad v Mexico*, Award, para 107; *TECMED v Mexico*, Award, para 149; *Azurix v Argentina*, Award, paras 316-322; *LG&E v Argentina*, Decision on Liability, para 190. See also *Sempra v Argentina*, Award, para 288, the tribunal notes that although legitimate expectations are relevant, their existence will not "*make the test for indirect expropriation less stringent*". For an analysis of the role of legitimate expectations for the determination of indirect expropriation see Stephen Fietta, "Expropriation and the 'Fair and Equitable' Standard - The Developing Role of Investors' 'Expectations' in International Investment Arbitration," *Journal of International Arbitration* 23, no. 5 (2006): 378–385. See also Jan Paulsson and Zachary Douglas, "Indirect Expropriation in Investment Treaty Arbitrations," in *Arbitrating Foreign Investment Disputes - Procedural and Substantive Legal Aspects*, ed. Norbert Horn and Stefan Michael Kröll (The Hague: Kluwer Law International, 2004), 157; Reinisch, "Expropriation," 448 et seq.

[1770] See e.g. *Methanex v United States*, Final Award, Part IV, Chapter D, para 7; *EnCana v Ecuador*, Award, para 173.

[1771] See e.g. *Generation Ukraine v Ukraine*, Award, para 20.22; *Tradex Hellas S.A. v Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999 (hereinafter: "*Tradex v Albania*, Award"), para 191; *Siemens v Argentina*, Award, para 263; *Telenor v Hungary*, Award, para 63.

[1772] *SD Myers v Canada*, Partial Award, para 286; *Compañía del Desarrollo de Santa Elena SA v Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000 (hereinafter: "*Santa Elena*

depriving effect, the whole expropriatory outcome might often only be assessed in hindsight.[1773] In addition, it will be difficult to determine the precise moment when various valid regulatory measures turn into indirect expropriation.[1774]

(3) Non-compensatory regulatory measures

An open question remains where to draw the line between compensable indirect expropriation and non-compensable regulatory activity.[1775] Many tribunals feel reluctant to identify a taking as expropriation when the host State is merely exercising its police power to regulate concerns of public welfare in good faith.[1776] The tribunal in *Feldman v Mexico*, for instance, identified the importance for host States to enjoy the freedom to reasonably regulate matters in the public interest without having to compensate any individual, which might be negatively affected.[1777] In *Methanex v United States*, the tribunal denied the existence of expropriation *inter alia* on the ground that the measure had been implemented due to public purpose considerations.[1778] Similarly, the tribunal in *Saluka v Czech Republic* found

---

v Costa Rica, Final Award"), para 76; *Marvin Feldman v Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (hereinafter: "*Feldman v Mexico*, Award"), para 101; *Generation Ukraine v Ukraine*, Award, paras 20.22-20.26; *TECMED v Mexico*, Award, para 114; *Fireman's Fund v Mexico*, Award, para 176(i); *LESI v Algeria*, Award, para 131; *Biwater v Tanzania*, Award, paras 455 et seq.; *Impregilo v Argentina*, Award, para 270.

[1773] Reisman and Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation," 123 et seq. Also cited in Dolzer and Schreuer, *Principles of International Investment Law*, 126; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 343.

[1774] The date of the deprivation is required for the valuation of compensation. For an analysis on this temporal question see Bjørn Kunoy, "The Notion of Time in ICSID's Case Law Indirect Expropriation," *Journal of International Arbitration* 23, no. 4 (2006): 337–49.

[1775] See Reinisch, "Expropriation," 432 et seq.

[1776] Note that the U.S. Model BIT (2012) in Annex B 4.(b) clarifies that "[e]*xcept in rare circumstances, non-discriminatory regulatory action by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*"
For arbitral tribunals acknowledging the difference between the *bona fide* exercise of police power and expropriation see e.g. *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, paras 139 et seq.; *Kardassopoulos v Georgia*, Award, para 387; *Total v Argentina*, Decision on Liability, para 197; *Tza Yap Shum v Peru*, Award, para 145.

[1777] *Feldman v Mexico*, Award, para 103.

[1778] *Methanex v United States*, Award, Part IV, Chapter D, para 7, ("[…] *as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation*."). See also *Saluka v Czech Republic*, Partial Award, para 262, where the tribunal states that "*a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States'*". Note that while public purpose generally is a requirement for the legality of the expropriation, the *Methanex* tribunal and the *Saluka* tribunal used this criterion to determine whether expropriation existed in the first place. For an analysis of this approach as opposed to the traditional approach see Christina Knahr, "Indirect Expropriation in Recent Investment Arbitration," *Transnational Dispute Management* 6, no. 1 (2009): 11 et seq.

> "that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."[1779]

Another strand of cases rejects the notion that the presence of public purpose may amount to a justification of an uncompensated taking. In *Santa Elena v Costa Rica*, for instance, the tribunal held that even the most worthy public purpose did not affect the finding of expropriation.[1780] Similarly, the tribunal in *Vivendi v Argentina* made clear that public purpose is in fact a condition for compensable lawful expropriation, which leads to the conclusion that it cannot be the ground for immunising the measure from being expropriatory.[1781] In recent cases, tribunals approached this issue by introducing the principle of proportionality and requiring a balance between the host State's interest to regulate in public interest and the investor's interests.[1782] In this line of reasoning, the tribunal in *Continental Casualty v Argentina* stated that non-compensable measures could not impose an unreasonable burden on certain investors.[1783]

While the host State must be conceded discretion to implement general regulatory measures for the public welfare, the mere criterion of public interest seems not enough to distinguish non-compensable from expropriatory action. The better tool appears to be the weighing and balancing of the conflicting interests along with the requirement that the implementation of such measures is reasonable and proportional. With regard to corruption cases, the issue may remain open.

[1779] *Saluka v Czech Republic*, Partial Award, para 255. See also *CME v Czech Republic*, Partial Award, para 603. ("[…] *deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State*.").

[1780] *Santa Elena v Costa Rica*, Final Award, para 72, ("*Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains*."). See also *TECMED v Mexico*, Award, para 121; *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006 (hereinafter: "*ADC v Hungary*, Award"), paras 423 et seq.

[1781] *Vivendi v Argentina II*, Award, para 7.5.21. ("*If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose.*").

[1782] *TECMED v Mexico*, Award, para 122; *Azurix v Argentina*, Award, para 311; *LG&E v Argentina*, Decision on Liability, paras 189 et seq. See also Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 358. ("[…] *a state does not incur responsibility for legitimate and bona fide exercise of sovereign police powers subject to specific commitments or an analysis of proportionality and reasonableness.*").

[1783] *Continental Casualty v Argentina*, Award, para 276. See also Paulsson and Douglas, "Indirect Expropriation in Investment Treaty Arbitrations," 158. ("*Where the value of an investment has been totally destroyed by bona fide regulation in the public interest, it may well be that international law does not allow the Host State to place such a high individual burden on an investor for the pursuit of a regulatory objective for the benefit of the community at large without the payment of compensation*."), emphasis added.

Decisions unduly influenced by corruption do not amount to exercising public authority in good faith. Measures based on corruption will most certainly neither have a valid public purpose nor constitute reasonable and proportional regulatory action for public welfare. Thus, the establishment of corruption bars the finding that a measure with depriving effect constitutes a non-compensable regulatory measure in public welfare.[1784]

(4) Contractual rights

Corruption cases might involve interference by public officials with concessions and investment contracts due to the refusal of the investor to participate in their corrupt practice.[1785] While contracts fall under the term 'investment' and are covered by the protection standards,[1786] a mere failure by the host State to comply with a contract does not constitute expropriation.[1787] Likewise a termination of a concession does not necessarily amount to expropriation.[1788] If the investment contract provides for termination and the host State actually terminates it based on these provisions, then such act must be considered as being performed by the State in its capacity as party to the contract.[1789] Rather, the contract must be breached in the exercise of sovereign authority in order to amount to expropriation.[1790] In this context, the argument that a termination carried out in apparently lawful manner can nevertheless amount to expropriation if it was motivated by ulterior motives, is also noteworthy.[1791]

Following this rationale, the termination of a concession based on corrupt motives might amount to expropriation, if such termination constitutes the exercise of governmental authority. Thus, the corruption-based termination of a concession

---

[1784] The decisive question is who bears the burden of proof. It appears most appropriate that the investor must establish a substantial deprivation, while the host State must prove that such taking is justified as general regulatory measure for public welfare and thus not compensable. See Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 366. Citing *Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989 (hereinafter: "*Biloune v Ghana*, Award"), para 209. In line with the analysis in Chapter Evidence, the investor might challenge such contention with proving a *prima facie* corruption case.

[1785] See e.g. the alleged situation in *EDF v Romania*.

[1786] See e.g. *Siemens v Argentina*, Award, para 267; *Vivendi v Argentina II*, Award, para 7.5.3.

[1787] *Waste Management II v Mexico*, Award, para 175. See also *Siemens v Argentina*, Award, para 249; *LESI v Algeria*, Award, para 131.

[1788] See e.g. *Impregilo v Argentina*, Award, para 272.

[1789] *Impregilo v Argentina*, Award, para 272.

[1790] See e.g. *Consortium RFCC v Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003 (hereinafter: "*Consortium RFCC v Morocco*, Award"), para 65; *Azurix v Argentina*, Award, para 315; *Siemens v Argentina*, Award, para 253; *Vivendi v Argentina II*, Award, para 7.5.8.; *Parkerings v Lithuania*, Award, para 443; *Biwater v Tanzania*, Award, para 458; *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, paras 154 et seq. Note that this notion has also been confirmed generally for any measure to amount to a breach of treaty, see e.g. *Impregilo v Pakistan*, Award, para 260; *Bayindir v Pakistan*, Award, para 180; *Burlington v Ecuador*, Decision on Jurisdiction, para 204; *Hamester v Ghana*, Award, para 328; *Impregilo v Argentina*, Award, para 177. See also Reinisch, "Expropriation," 418 et seq.

[1791] See *Impregilo v Argentina*, Opinion Judge Brower, paras 18, 28.

may amount to expropriation although the formal process of the termination is within the legal terms of the concession. The argument could be brought that while mere contractual performance or non-performance falls outside the scope of expropriation, the ulterior motives of corruption introduce an element of abuse of power, which exceeds the mere capacity as contractual party.

b) Requirements of lawful expropriations

The requirements for a lawful expropriation listed in the expropriation provision of the IIA must be fulfilled cumulatively and reflect customary international law.[1792] In order to be legal, an expropriation must be based on a public purpose (see below at **(1)**), observe due process of law (see below at **(2)**), be non-discriminatory (see below at **(3)**), and provide for compensation (see below at **(4)**).[1793]

(1) Public purpose

The measures leading to an expropriation must be based on a public purpose. The host State has wide discretion to implement its policies in the public interest, for which reason tribunals show reluctance to second-guess the appropriateness of the chosen policies and purposes of public action.[1794] This does not mean that tribunals may not examine the reasonableness of the measures with regard to the public purpose.[1795] In addition, it is not sufficient for host States to merely refer to public interests in order to meet the threshold. Recent tribunals have demanded proof of the host State in order to satisfy this requirement.[1796]

Conduct based on corrupt influences runs counter to any public interest and most certainly does not pursue a public purpose. The question remains whether this may be different when the deprivation of the investment is motivated by corruption, but at the same time can be based on other reasons, which appear to be valid. In *Impregilo v Argentina*, the tribunal found that the political motivation to terminate the concession is not decisive for its determination of expropriation.[1797] The tribunal was satisfied with the host State providing valid grounds for the termination in addition to the political motivation.[1798] This decision was criticised by the dissenting opinion of Judge Brower, who argued that the mere superficially

[1792] Dolzer and Schreuer, *Principles of International Investment Law*, 99.
[1793] Schreuer, "The Concept of Expropriation under the ECT and Other Investment Protection Treaties," 109 et seq.
[1794] See Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 371.
[1795] *TECMED v Mexico*, Award, para 122. Note that the tribunal introduced the principle of proportionality to the examination of expropriation.
[1796] *Siemens v Argentina*, Award, para 273; *ADC v Hungary*, Award, paras 432 et seq. In the view of both tribunals the host State had failed to prove that its measures were based on public interest. Note that commentators suggest caution when tribunals examine the public purpose requirement, see e.g. Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 372 et seq.
[1797] *Impregilo v Argentina*, Award, paras 277 et seq.
[1798] *Impregilo v Argentina*, Award, para 278.

lawful termination might not lead to disregarding the political motivation behind the acts.[1799] This case involved merely political motivation, which is not comparable to the severity of the manipulation through corruption. In addition, it was not especially concerned with the question of public purpose. Nevertheless, the example illustrates the problem that arises when the host State is able to name a valid public purpose, despite the finding of corruption.

The general principle that the expropriation must be based on a public purpose, leads to the conclusion that the actual reason for such measure must be one of public interest. Eventually and subsequently provided public purposes will not suffice. Similarly, the tribunal in *Siag Vecchi v Egypt* stated that it is irrelevant whether the property was finally or eventually put to public use.[1800] Moreover, the detrimental and intrusive effect of corruption allows the presumption that it had at least an influence on the decision. The threshold to rebut such presumption and to extinguish the obvious doubt that corruption was not the real ground for the expropriatory measure appears extremely high and almost impossible to meet by the host State. In fact, the host State bears the general burden of proof with regard to the public purpose of the expropriation. The investor bears the burden of proving corruption during the decision-making process. Once a *prima facie* case of corruption is established, the host State must not only prove the existence of a valid public purpose, but also rebut the presumption that the corruption had an undermining influence on the decision, thus rendering the public purpose as meaningless façade.[1801]

(2) Due process

Some IIAs explicitly require the procedure of expropriation to observe due process. Such requirement is already part of the minimum standard under customary international law and must be followed in any official procedure. Due process should not be misunderstood as prohibition of denial of justice.[1802] Both principles are similar, but while denial of justice focuses on providing an effective judicial system as a whole, the principle of due process is not only an obligation of result, but of conduct.[1803] Nonetheless, due process of law also requires actual and substantive legal procedures being available to the foreign investor allowing to challenge the depriving measures beforehand or after completion.[1804] In addition,

[1799] *Impregilo v Argentina*, Opinion Judge Brower, para 18.
[1800] *Siag & Vecchi v Egypt*, Award, para 432.
[1801] For more evidential issues regarding the findings of corruption see Chapter Eight.
[1802] For the notion of denial of justice see above B.I.2.f). Note that the tribunal in *Feldman v Mexico* found that due process was not violated since the judicial and administrative procedures were available to the investor, which shows that the tribunal equated denial of due process with denial of justice, see *Feldman v Mexico*, Award, para 140.
[1803] See Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 376.
[1804] See *EDF v Romania*, Award, para 312, stating that the judicial system of the host State provided the necessary means to redress the position of the investor. See also *ADC v Hungary*, Award, para 435. ("*In general, the legal procedure must be of a nature to grant an affected investor*

due process can be denied in a substantive or procedural manner.[1805] The former is caused when the expropriation is not based on valid legal grounds.[1806] An example for the latter is if the depriving action is commenced without prior notice or if the investor had no reasonable opportunity to be heard.[1807]

As examined with regard to fair and equitable treatment, discretion influenced by corruption or any decision-making process manipulated by corruption violates due process.[1808] The tribunal in *Middle East Cement v Egypt* clarified that a breach of fair and equitable treatment must be taken in consideration within the due process requirement of expropriation.[1809] From this it follows that corruption must also be given relevance with regard to the condition of due process within the procedure of expropriation.

(3) In non-arbitrary and non-discriminatory manner

The measures taken by the host State leading to expropriation must not be conducted in an arbitrary[1810] or discriminatory manner. As examined in light of fair and equitable treatment, measures based on corruption are neither based on legitimate policy considerations nor on the law and always constitute arbitrary conduct.[1811] Action induced by corruption may also amount to be discriminatory. However, in such case the comparison with other investors is required.

(4) Compensation

Finally, a lawful expropriation also requires compensation, which is prompt, adequate, and effective.[1812] In general, IIAs will contain a provision for compensation in case of lawful expropriation demanding fair market value. However, IIAs refrain from specifically addressing compensation of unlawful expropriation. The consequences of an illegal expropriation remain unsolved to date.[1813] Since expropriatory action based on corruption will – due to the lack of

---

a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard."). See also *Kardassopoulos v Georgia*, Award, paras 395 et seq.; *Tza Yap Shum v Peru*, Award, para 223.

[1805] *Siag & Vecchi v Egypt*, Award, paras 440-443.

[1806] *Siag & Vecchi v Egypt*, Award, para 441.

[1807] *Siag & Vecchi v Egypt*, Award, para 442.

[1808] See B.I.2.g)

[1809] *Middle East Cement v Egypt*, Award, para 143.

[1810] In fact, the vast majority of IIAs and most commentators only demand that the measures must be non-discriminatory. Only a few commentators explicitly also call for non-arbitrariness. See e.g. Dolzer and Schreuer, *Principles of International Investment Law*, 100. Although the requirement of non-arbitrary measures may not be stated explicitly as requirement for a lawful expropriation, the host State must always observe the prohibition to act arbitrarily, since it also falls under the principle of due process, see Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 376.

[1811] See B.I.2.d)

[1812] Dolzer and Schreuer, *Principles of International Investment Law*, 100.

[1813] For a further discussion see Thomas W. Wälde and Borzu Sabahi, "Compensation, Damages, and Valuation," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), 1079 et seq.

public purpose and the violation of due process – most certainly amount to an illegal expropriation, the issue of compensation of unlawful expropriation shall briefly be highlighted.

Tribunals tend to differentiate between the compensation provisions contained in IIAs for lawful expropriation and damages for unlawful expropriation.[1814] Since the *lex specialis* of the IIA is only applicable to lawful expropriations, most tribunals apply customary international law and the general rules of State responsibility stated in the Permanent Court of Justice's decision in *Chorzów Factory* to determine compensation for unlawful expropriation.[1815] Under customary international law, the situation must be restored, as far as possible, to that which would have existed had the illegal act not been committed.[1816]

The difference between compensation for lawful expropriation and damages for illegal expropriation is in most cases not relevant,[1817] but it might be significant when the value of the expropriated investment increases after the date of the illegal expropriation.[1818] The amount of compensation for a lawful expropriation will be measured as of the date of expropriation. Under the customary rule, the damage resulting from a breach of international law can be calculated as of the date of the award, since the investor must be put in a position as if the illegal expropriation had not taken place.[1819] Thus, in certain circumstances the customary international law standard will provide a higher rate of recovery than the treaty standard for lawful expropriation.[1820] That was the case in *ADC v Hungary* where the rare situation arose that the investment significantly increased in value after the date of

---

[1814] See e.g. *ADC v Hungary*, Award, para 481; *Siag & Vecchi v Egypt*, Award, para 540. *Vivendi v Argentina II*, Award, paras 8.2.3-8.2.7.

[1815] For arbitral tribunals applying the *Chorzów Factory* standard for assessing damages in case of an unlawful expropriation see e.g. *ADC v Hungary*, Award, paras 483-485; *Siemens v Argentina*, Award, paras 352-353; *Vivendi v Argentina II*, Award, paras 8.2.3.-8.2.5.; *Saipem v Bangladesh*, Award, para 201; *Kardassopoulos v Georgia*, Award, paras 509 et seq. See also Wälde and Sabahi, "Compensation, Damages, and Valuation," 1080. For an overview on the *Chorzów Factory* principle of full reparation as appropriate standard of compensation for indirect expropriation see Manuel A. Abdala and Spiller Pablo T., "Chorzów's Standard Rejuvenated - Assessing Damages in Investment Treaty Arbitrations," *Journal of International Arbitration* 25, no. 1 (2008): 103–20.

[1816] *Case Concerning the Factory at Chorzów (Claim for indemnity) (Germany v Poland)*, 13 September 1928, PCIJ Seri. A., No. 17 (hereinafter: "*Chorzów Factory* Judgment"), at 47. ("*The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as is possible, wipe out consequences of the illegal act reestablished the situation which would, in all probability, have existed if that act had not been committed.*").

[1817] See e.g. *Siag & Vecchi v Egypt*, Award, para 541; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009 (hereinafter: "*Funnekotter v Zimbabwe*, Award"), para 112.

[1818] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 381.

[1819] See e.g. *ADC v Hungary*, Award, para 497; *Siemens v Argentina*, Award, para 352. See also Reisman and Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation." Note that it remains unsolved, on which specific time and date the valuation shall be based. That will depend from the particular circumstances of the case, see Wälde and Sabahi, "Compensation, Damages, and Valuation," 1081 et seq.

[1820] See e.g. *Vivendi v Argentina II*, Award, para 8.2.5.

the illegal expropriation, for which reason the calculation of the damages under customary law calculated at the date of the award ensured a higher amount.[1821] The next challenge is the specific valuation of the damages. Many different valuation methods are available, tribunals must choose the appropriate one for the particular characteristics of the case.[1822]

c) Conclusion

The fact that measures are based on corruption is not directly relevant for the determination of whether they amount to expropriation. Direct expropriation consists in an official taking of the property title. Indirect expropriation is caused by measures, which leave the legal title over the investment untouched, but nevertheless deprive the investor from benefiting from her investment. Whether the actions amount to indirect expropriation depends on the effect of deprivation, which must be substantial. The negative effect can also be caused by the combination or interaction of various measures. Tribunals have focused on different criteria such as the intensity and duration of the deprivation, whether the economic benefits are neutralised, as well as whether the investor remained in control of the operations. The determination requires a case-by-case analysis taking various factors into consideration.

Corruption has an influence on the determination whether the expropriation is lawful or unlawful. Any official decision based on corruption lacks public purpose, violates due process and will at least be arbitrary. In addition, corruption eliminates the possibility of evaluating the measures as good faith exercises of the host State's police power to regulate issues of public welfare. Decisions unduly influenced by corruption, first, violate the principle of good faith, and second, are not actually based on concerns of public welfare. Moreover, since the compensation provisions contained in IIAs only cover lawful expropriation, compensation for expropriation based on corruption must follow the customary international law rules on damages for breach of international law. Thus, the investor must be put, inasmuch as possible, into the situation that would have existed without the wrongful expropriation.

2. National treatment

Another fundamental obligation[1823] contained in most IIAs is the national treatment provision stating that the host State shall not treat the foreign investor less favourably than its national investors.[1824] This standard does not provide for an

[1821] See *ADC v Hungary*, Award, para 497.
[1822] Manuel A. Abdala and Spiller Pablo T., "Damage Valuation of Indirect Expropriation in International Arbitration Cases," *The American Review of International Arbitration* 14, no. 4 (2003): 460.
[1823] See e.g. *Feldman v Mexico*, Award, para 165; *Corn Products v Mexico*, Award, para 109.
[1824] For a typical wording of a national treatment provision see Article 3 of the German Model BIT (2008):

absolute protection, but is a relative one. That means that it lacks any intrinsic substantive content and requires the comparison between the treatment afforded to national and foreign investors or national and foreign investment.[1825] The fact that the foreign investor faces corruption will in itself not trigger this protection standard. More factors are required to constitute a violation of national treatment.

a) Requirements

A finding of national treatment depends on three requirements. First, the foreign investor and the national investor must be in a comparable situation or 'like circumstances' (see below at **(1)**); secondly, the foreign investor must be accorded less favourable treatment than domestic investors (see below at **(2)**); and finally, there must be no justification for such differential treatment (see below at **(3)**).[1826]

(1) In like circumstances

The specific parameters of the comparison between the foreign investor and local investors remain controversial. Some tribunals prefer to apply the concept broadly and tend to interpret 'like circumstances' as not limited to the same business, but more generally.[1827] Some tribunals have given weight to the fact whether the investors whose treatment shall be compared are part of the same sector, that meaning economic and business sector.[1828] Other tribunals observed that the

---

(1) Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.
(2) Neither Contracting State shall in its territory subject investors of the other Contracting State, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State.

(Emphasis added).
See also Article 3 of the U.S. Model BIT (2012):

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

For a brief overview on national treatment in investment treaty arbitration see Dolzer and Schreuer, *Principles of International Investment Law*, 198–206; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 147–192.

[1825] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 148 et seq.

[1826] See e.g. *Pope & Talbot Inc. v The Government of Canada*, NAFTA/UNCITRAL, Award on the Merits Phase 2, 10 April 2001 (hereinafter: "*Pope & Talbot v Canada*, Award Phase 2"), paras 78 et seq.; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 (hereinafter: "*ADM v Mexico*, Award"), para 196; *Grand River v United States*, Award, para 163.

[1827] See e.g. *Occidental v Ecuador*, LCIA Award, para 173.

[1828] *SD Myers v Canada*, Partial Award, para 250; *ADM v Mexico*, Award, para 198; *Corn Products v Mexico*, Award, para 120.

comparison should be made between investors who are subject to the same regulatory measures under the same jurisdictional authority.[1829]

(2) Less favourable treatment (based on nationality?)

It is unclear whether the different treatment must be based on nationality, or whether the mere effect of different treatment compared to domestic investors is sufficient.[1830] The tribunal in *Feldman v Mexico* found it obvious that the national treatment standard was "*designed to prevent discrimination on the basis of nationality, or 'by reason of nationality'*".[1831] However, the tribunal also acknowledged the practical obstacle for the investor to prove discrimination based on nationality and found it sufficient to show less favourable treatment.[1832] The tribunal in *Pope & Talbot v Canada* took the position that within the NAFTA framework the discrimination must not be based on the nationality, but that *any* different treatment compared to a national investor in similar circumstances would be relevant.[1833] Similarly, the tribunal in *SD Myers v Canada* clarified that the practical impact of the differential treatment was more important than showing protectionist intent.[1834] The tribunal in *Thunderbird v Mexico* also held that the investor does not need to prove the underlying motivation based on nationality.[1835] Tribunals have constantly confirmed that the intent to discriminate foreign investors is not required.[1836]

Hence, it is said that national treatment covers *de jure* and *de facto* discrimination.[1837] The former refers to acts that apparently pursue different treatment, while the latter merely leads to differential treatment.[1838] Sometimes *de facto* denial of national treatment has been limited by demanding a

---

[1829] *Merrill v Canada*, Award, para 89. See also *Grand River v United States*, Award, paras 166 et seq., where the tribunal emphasised that NAFTA tribunals have focused on the legal regimes applicable to the investors in order to assess like circumstances.

[1830] This question was recently raised by the tribunal in *Merrill v Canada*, which finally left it open, see *Merrill v Canada*, Award, para 94.

[1831] *Feldman v Mexico*, Award, para 181. See also *Champion Trading v Egypt*, Award, para 125 et seq., 156, where the tribunal emphasised that the discrimination is based on nationality.

[1832] *Feldman v Mexico*, Award, para 181.

[1833] *Pope & Talbot v Canada*, Award Phase 2, para 79.

[1834] *SD Myers v Canada*, Partial Award, para 254. ("*Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produced no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11*."). See also *Alpha v Ukraine*, Award, para 427.
Note that while the existence of protectionist intent by itself is not sufficient to establish a breach of national treatment, it usually leads to such violation, see Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 174 et seq.

[1835] *International Thunderbird Gaming v Mexico*, Award, para 177.

[1836] *Occidental v Ecuador*, LCIA Award, para 177; *Bayindir v Pakistan*, Award, para 390.

[1837] *ADM v Mexico*, Award, para 193. See also *Corn Products v Mexico*, Award, para 115.

[1838] *ADM v Mexico*, Award, para 193.

disproportionate disadvantage for the foreign investor,[1839] while other tribunals have explicitly denied the requirement of disproportionality in the effect.[1840]

Merely focusing on the different treatment compared to national investors, rather then requiring nationality based discrimination to some extent opens this protection standard to corruption cases. Discrimination based on corruption could be covered by national treatment under the condition that *de facto* discrimination against the foreign investor exists as compared to domestic investors.

(3) No justification

Many tribunals have accepted rational grounds based on public interest as justification for the different treatment.[1841] Such justification will not be available if the decision-making process was tainted by corruption. Thus, in corruption based discrimination no valid justification exists.

b) Conclusion

Detriments caused to the investment due to illegal behaviour of corrupt public officials may in certain situations lead to a less favourable treatment of foreign investors as compared to national investors. However, such circumstances are not inherent to the general corruption scenario and will depend on the specific facts and particular situation. While the finding that the discrimination is based on corrupt motives leads to the conclusion that the different treatment is not justified, the investor must prove such different treatment in the first place. This task is not distinctive from any other case of national treatment, for which reason the corruption case turns into a genuine national treatment case.[1842]

Since corruption amounts to a violation of the absolute standard of fair and equitable treatment and might also breach the full protection and security standard, recourse to a comparison with other investors and their treatments appears unnecessarily burdensome. Thus, the investor may rely on the relative standard when corruption cannot be established or the claim is brought independently from the corruption allegations.

[1839] See e.g. *SD Myers v Canada*, Award, para 252.
[1840] See e.g. *Pope & Talbot v Canada*, Award Phase 2, para 72.
[1841] See *Pope & Talbot v Canada*, Award Phase 2, para 78. See also Dolzer and Schreuer, *Principles of International Investment Law*, 202 et seq.
[1842] Note that the present analysis is merely focused on the corruption typical problems. Common issues that are not corruption specific are not dealt with.

CHAPTER SEVEN:
CORRUPTION AS DEFENCE OF THE HOST STATE

Against the background that corruption violates international and transnational public policy and that the investment treaty arbitrator has the duty to actively participate in the global fight against corruption, it appears consequent that corrupt conduct of the investor must be relevant for the investment arbitration proceedings.

At first sight, it seems clear that an investment made in violation of transnational public policy does not deserve the investment protection under international law.[1843] Professor Wälde rightly emphasised in the context of legitimate expectations that "[t]*here can be no international treaty protection for rights obtained by illicit means*".[1844] In the probably most cited international arbitration case on corruption, ICC Case No. 1110, Judge Lagergren found that the relevant intermediary contract had the purpose of channelling bribes to Argentine public officials.[1845] In his opinion the parties had "*forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes*".[1846] Most notably, in *World Duty Free v Kenya*, the tribunal concluded that claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld.[1847]

For many years *World Duty Free v Kenya* was the only ICSID case where corruption was established and the investor's claim dismissed on that ground. However, *World Duty Free v Kenya* was not based on an IIA, but rather on an ICSID arbitration clause in the investment agreement. The situation and the raised issues were comparable to the ones of corruption cases in international commercial arbitration. The relevant investment treaty arbitration questions were not dealt with, just to name a few e.g. the scope of consent given in the IIA and its limitation by conformity clauses in the IIA, the scope of protected investment, the question whether corruption may amount to an objection to jurisdiction or is rather reserved

---

[1843] In principle, the prevailing view in arbitral practice and scholarship is that investment tainted by corruption should not be protected under the investment protection regime, see e.g. Martinez, "Invoking State Defenses in Investment Treaty Arbitration," 331; Ursula Kriebaum, "Investment Arbitration - Illegal Investments," in *Austrian Arbitration Yearbook 2010*, ed. Christian Klausegger et al. (C.H. Beck, 2010), 332; Bottini, "Legality of Investments under ICSID Jurisprudence," 298; Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," 219 et seq.; Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010), 168.

[1844] *International Thunderbird Gaming Corporation v The United Mexican States*, NAFTA/UNCITRAL, Award, 26 January 2006, Separate Opinion of Prof. Thomas Wälde (hereinafter: "*International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde"), para 112.

[1845] See award in *Arbitration International* 1994, 277, with a note by Dr J. Gillis Wetter – "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case n° 1110".

[1846] See award in *Arbitration International* 1994, 277, with a note by Dr J. Gillis Wetter – "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case n° 1110".

[1847] *World Duty Free v Kenya*, Award, para 157.

for the merits. Due to the lack of corresponding arbitral case law the scholarly discussions on this issue were mainly based on case law on fraud and other illicit conduct of the investor. This will have changed now since the first investment treaty arbitration award with the focus on established investor's corruption was recently rendered. In *Metal-Tech v Uzbekistan*, the tribunal found that it had no jurisdiction over the investor's treaty claim since the investor had engaged in corruption in connection with the establishment of the investment. While this decision provides new fuel for the discussions in arbitral practice and scholarship about corruption in investment treaty arbitration, many questions still remain unanswered.

The aim of this chapter is to examine the different situations and available approaches to corruption in order to provide a structured method to deal with investor's corruption as defence of the host State. Generally speaking, corruption may (i) amount to an objection to jurisdiction, (ii) amount to an objection to the admissibility of the claim or (iii) constitute a positive defence at the merits stage. Moreover, the question arises how the host State's corruption defence may be affected by the host State's involvement or other shortcomings in relation to the corrupt act in question.

While analysing the relevant case law on corruption, we will also scrutinise the arbitral case law dealing with illegality in general in order to extract the general notions, which could also be applied to the more specific case of corruption. A general one-fits-all solution is however not desirable, since on the one hand corruption may occur in manifold different forms and at different stages of the investment process and on the other hand the concrete treaty provisions relevant to the particular case may vary significantly. Thus, the manner in which corruption shall be considered by the tribunal will depend on the concrete circumstances of each case.

This chapter starts with an analysis of the case of *Metal-Tech v Uzbekistan* (see below at **A.**). An examination of the relevant issues with regard to corruption as objection to jurisdiction follows (see below at **B.**). Subsequently, the questions in connection with the corruption defence at the admissibility stage (see below at **C.**) as well as at the merits stage will be presented (see below at **D.**). The chapter concludes with an analysis whether investor corruption should be dealt with as an issue of jurisdiction, admissibility or merits (see below at **E.**).

A. ***Metal-Tech v Uzbekistan***

The recent case of *Metal-Tech v Uzbekistan* is the only investment treaty arbitration case where the tribunal made a positive finding of corruption and dismissed the claim on these grounds. Thus, it seems pertinent to start the study of how to deal with investor's corruption with an analysis of the tribunal's reasoning. The comments to this decision will serve as a starting point for the structured analysis of the individual issues arising from the corruption defence.

1. Facts

At the end of the nineties, Metal-Tech, an Israeli manufacturer of metals and metal derivatives, conducted negotiations with the Uzbek government about a joint venture with the aim of producing molybdenum products in the Tashkent region.[1848] In 2000, the joint venture Uzmetal was established between Metal-Tech and two companies owned by the government of Uzbekistan.[1849] One of the two companies, Almalik Mining Metallurgy Combinate (***AGMK***), produces molybdenum concentrate. The other, Uzbek Refractory and Resistant Metals Integrated Plant (***UzKTJM***), was the primary producer and exporter of such products in Uzbekistan.[1850] Since the quality of the products of the State owned companies was low and the production failed international standards, the companies were inefficient and losing money.[1851] Thus, the aim of the joint venture was to profit from the investor's technology, know-how and financing in order to build a new plant.[1852] Moreover, the parties entered into several contracts, *inter alia*, a framework agreement between AGMK and Uzmetal granting the latter rights to purchase raw materials.[1853]

The new facilities of Uzmetal started their operation in October 2002.[1854] In 2005, the joint venture made profit, and in 2006, dividends were to be distributed.[1855] However, shortly after the decision to distribute dividends, the Public Prosecutor's Office for the Tashkent Region commenced criminal proceedings against officials of Uzmetal for abuse of their authority.[1856] On the initiative of AGMK the Economic Court of the Tashkent Region declared the supply agreement for raw materials terminated.[1857] Subsequently, on the initiative of UzKTJM the same court ordered Uzmetal to distribute dividends to UzKTJM.[1858] After Uzmetal failed to pay the dividends, UzKTJM commenced bankruptcy proceedings against Uzmetal.[1859] A temporary manager was appointed. While the claims of AGMK and UzKTJM were accepted in the bankruptcy proceedings, all claims of Metal-Tech were rejected.[1860] Both, UzKTJM and AGMK voted for the liquidation of Uzmetal. In 2008, Uzmetal was finally liquidated and its assets transferred to the two state-owned entities.[1861]

[1848] *Metal-Tech v Uzbekistan*, Award, para 7.
[1849] *Metal-Tech v Uzbekistan*, Award, paras 19 et seq.
[1850] *Metal-Tech v Uzbekistan*, Award, para 7.
[1851] *Metal-Tech v Uzbekistan*, Award, para 9.
[1852] *Metal-Tech v Uzbekistan*, Award, para 10.
[1853] *Metal-Tech v Uzbekistan*, Award, para 33.
[1854] *Metal-Tech v Uzbekistan*, Award, para 34.
[1855] *Metal-Tech v Uzbekistan*, Award, para 36.
[1856] *Metal-Tech v Uzbekistan*, Award, para 37.
[1857] *Metal-Tech v Uzbekistan*, Award, para 42. The decision of the Economic Court of the Tashkent Region was confirmed by the Court of Appeals.
[1858] *Metal-Tech v Uzbekistan*, Award, paras 43-45.
[1859] *Metal-Tech v Uzbekistan*, Award, para 46.
[1860] *Metal-Tech v Uzbekistan*, Award, paras 47-49.
[1861] *Metal-Tech v Uzbekistan*, Award, paras 50-51.

In 2010, Metal-Tech initiated ICSID arbitration against Uzbekistan under the Israel-Uzbekistan BIT alleging that the actions of Uzbekistan and its entities destroyed all value of its investment. The investor also alleged that AGMK and UzKTJM are controlled by Uzbekistan.[1862]

2. Tribunal's findings

Interestingly, the issue of corruption was not raised by the host State, it was rather the tribunal who investigated the issue after the hearing on jurisdiction and liability in January 2012 had revealed some suspicious facts. *Inter alia*, consulting agreements between the investor and three individuals with the main goal of providing lobbyist activity in exchange of approx. USD 4 million came to light.[1863] Based upon these new facts, the tribunal made use of its power under Article 43 of the ICSID Convention and ordered the production of additional information and documents.[1864]

After the review of the additional evidence and a one-day hearing with witness examination on the consulting agreements, the tribunal found that these agreements were means to bribe (i) the brother of Uzbekistan's prime minster from 1995 to 2003 and deputy prime minister until 2000,[1865] and (ii) a member of the Uzbek president's staff in order to influence the approval of the investment.[1866] While the payments were made after the establishment of the investment, approx. in 2006, the tribunal found it proven that the corruption agreement had been concluded before the investment was made.[1867]

Against this background the tribunal held that it had no jurisdiction over the investor's treaty claim due to its violation of Uzbek's anti-bribery law in connection with the establishment of the investment. The tribunal started its analysis with Article 25 of the ICSID Convention as basis for the tribunal's jurisdiction.[1868] After clarifying that the notion of investment under Article 25 of the ICSID Convention does not contain a legality requirement,[1869] the main focus of the tribunal was on the question whether the required consent of the host State includes disputes over investments tainted by corruption.

[1862] *Metal-Tech v Uzbekistan*, Award, para 54.
[1863] *Metal-Tech v Uzbekistan*, Award, para 86.
[1864] *Metal-Tech v Uzbekistan*, Award, para 86.
[1865] *Metal-Tech v Uzbekistan*, Award, paras 337-352.
[1866] *Metal-Tech v Uzbekistan*, Award, paras 197-227, 311-327. For a detailed evidential analysis see Chapter Eight.
[1867] *Metal-Tech v Uzbekistan*, Award, paras 267-273.
[1868] Article 25 of the ICSID Convention reads:
"*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*."
[1869] *Metal-Tech v Uzbekistan*, Award, paras 125-128. The tribunal therefore concluded that the investor's participation in the joint venture was an investment for the purposes of Article 25 of the ICSID Convention.

Uzbekistan's consent to ICSID arbitration is contained in Article 8(1) of the BIT,[1870] which refers to the term "investment", which is defined in Article 1(1) of the BIT as

> "any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made […]."

The Parties agreed that this definition of investment contained a legality requirement, but disagreed on the particular scope of such condition. Regardless of its scope, the investor argued that based on the most favoured nation clause, it could rely on a definition of investment of another BIT without a legality requirement.[1871] The tribunal rejected this argument since in order to rely on the substantive protection of the treaty, the investor would first have to fall within the scope of the treaty, i.e. meet the requirements of investment under the original treaty.[1872] With regard to the subject matter of the legality requirement, the tribunal pointed out that it raises no specific issues and concluded on the basis of existing case law that it covers

> "(i) non-trivial violations of the host State's legal order,
>
> (ii) violations of the host State's foreign investment regime, and
>
> (iii) fraud – for instance, to secure the investment or to secure profits.
>
> There is no doubt that corruption falls within one or more of these categories."[1873]

The parties agreed that the Uzbek anti-corruption laws fall within the legality requirement. They however disagreed on the timely scope of such legality condition. Uzbekistan argued that the word 'implement' includes the meaning of "made, carried out, or operated", for which reason the legality requirement applies to the entire operation of an investment.[1874] The investor argued that Article 1(1) of the BIT would only refer to the establishment of the investment contrary to its

---

[1870] The relevant part of Article 8(1) of the Israel/Uzbekistan BIT reads:
"*Each Contracting Party hereby consents to submit to* [ICSID] *under the* [ICSID Convention] *any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former*."

[1871] *Metal-Tech v Uzbekistan*, Award, paras 133-138.

[1872] *Metal-Tech v Uzbekistan*, Award, para 145 ("[…] *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*.").
Note that the tribunal also rejected the investor's argument that Article 7(c) of the BIT shows the intention of the parties to extend the most favoured nation clause to the definition of investment. Based on a step-by-step treaty interpretation, the tribunal concluded that the reference to the definition of investment in Article 7(c) of the BIT rather intended to "*limit the application of the MFN obligation with respect to the repatriation provision in the pre-1992 treaties*", *Metal-Tech v Uzbekistan*, Award, para 162.

[1873] *Metal-Tech v Uzbekistan*, Award, para 165, references to case law omitted.

[1874] *Metal-Tech v Uzbekistan*, Award, paras 167-175.

operation.[1875] Pursuant to the tribunal's interpretation of Article 1(1) of the BIT the reference to "assets implemented" pointed at the time of the establishment of the investment.[1876] Thus, for purposes of Article 1(1) of the BIT only illegality at the time the investment was made is relevant.

The tribunal then scrutinised the corrupt conduct of the investor against the Uzbek anti-corruption laws.[1877] After analysing the applicable rules under the Uzbek Criminal Code the tribunal summarised the propositions established under Uzbek law, which are in line with international standards against corruption

> "(i) it is unlawful to give or to promise anything of value to a public official or an intermediary of that public official in exchange for the performance or non-performance of certain action that the official must or could have performed;
>
> (ii) it is unlawful to enrich a third party, such as a member of an official's family, for the purpose of inducing an official's performance or nonperformance of certain action; and
>
> (iii) the timing of payment is irrelevant; it can occur before or after the act or omission sought."[1878]

On the basis of these rules the tribunal concluded that the investor breached Uzbek anti-corruption laws by paying (i) Mr Chijenok who was a senior officer responsible for human resources in the President's Office,[1879] and (ii) Mr Sultanov, the brother of the Prime Minister of Uzbekistan, who was officially entrusted to monitor the investment,[1880] in order to advance the investment.[1881]

[1875] *Metal-Tech v Uzbekistan*, Award, paras 176-184.

[1876] *Metal-Tech v Uzbekistan*, Award, para 193. Note that the tribunal based its interpretation on the textual and contextual approach stipulated in the Vienna Convention on the Law of Treaties.

[1877] The relevant provisions of the Uzbek Criminal Code cited by the tribunals (para 282) read as follows:
"*Article 210. Bribe-taking*
Bribe-taking, e.g. obviously illegal obtaining by an official, personally or through an intermediary, of valuables or the extraction of wealth or property benefit for the performance or non-performance in the interest of giving a bribe a specific action that the official must have committed or could have committed using his official position, -shall be punished [...]"
Article 211. Bribe-giving
Bribe-giving, that is, knowingly illegal provision of tangible valuables to an official, personally or through an intermediate person, or of pecuniary benefit for performance or non-performance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe – shall be punished […]"
Article 212. Intermediation in Bribery
Intermediation in bribery, that is, activity carried out to arrive at an agreement about acceptance of or giving a bribe as well as immediate delivery of a bribe upon instructions of the persons concerned – shall be punished […]."

[1878] *Metal-Tech v Uzbekistan*, Award, para 289.

[1879] *Metal-Tech v Uzbekistan*, Award, paras 311-327.

[1880] *Metal-Tech v Uzbekistan*, Award, paras 337-352.

[1881] Note that the tribunal found no violation of Uzbek law with regard to the third consultant, Mr Ibragimov. Contrary to the other two, there was evidence on record showing legitimate services, *Metal-Tech v Uzbekistan*, Award, para 364.

In conclusion, due to the violation of Uzbek law in connection with the establishment of the investment, the tribunal found that the investor had failed to make an investment in accordance with the host State law as required under Article 1(1) of the BIT,[1882] for which reason the consent requirement of Article 25(1) of the ICSID Convention was not fulfilled.[1883] Lacking consent of Uzbekistan, the tribunal found it had no jurisdiction.

The tribunal showed awareness of the fact that such outcome is one-sided, since it merely affects the rights of the investor, while it releases the host State from any accountability.[1884] The tribunal however supported its decision by pointing at the rule of law, which in the tribunal's view demands it not to assist a party that was involved in corruption.[1885] In the words of the tribunal

> "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."[1886]

The tribunal's unease about such one-sided outcome was reflected in its cost decision, where it did consider the host State's involvement in the event that led to the dismissal of the claim.[1887] In this context it once more supported its decision of depriving the investor of any protection and releasing the host State of any accountability, however, it emphasised that when it comes to corruption, the involvement of the host State is implicit.[1888]

3. Comments

The tribunal was the first one to have applied the "in accordance with host State law" clause contained in a BIT explicitly to the situation of corruption and to have dismissed the claim on the basis of lack of consent for disputes arising out of an investment tainted by corruption. It therefore confirmed the views of many commentators that due to legality clauses in IIAs tribunals would lack jurisdiction

[1882] *Metal-Tech v Uzbekistan*, Award, para 372.
[1883] *Metal-Tech v Uzbekistan*, Award, para 373.
[1884] *Metal-Tech v Uzbekistan*, Award, para 389.
[1885] *Metal-Tech v Uzbekistan*, Award, para 389.
[1886] *Metal-Tech v Uzbekistan*, Award, para 389.
[1887] *Metal-Tech v Uzbekistan*, Award, para 422.
[1888] *Metal-Tech v Uzbekistan*, Award, para 422 ("*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*.")

over disputes where the investor engaged in corruption in connection with the implementation of the investment.[1889] The tribunal seems to have found this result apparent and mainly focused on the factual question of whether the consulting agreements and the payments amounted to corrupt behaviour falling within the scope of Uzbek anti-corruption laws.[1890] The tribunal failed however to discuss and evaluate the increasing voices in scholarship against such a one-sided approach to corruption.[1891] It merely mentioned that it was aware of such debate without providing any reference and without dealing with the relevant arguments. It contented itself with a mere reference to the rule of law and a statement that the law was clear on this issue.

B. Corruption as an objection to jurisdiction

As seen in *Metal-Tech v Uzbekistan*, the fact that the investor participated in corrupt practices surrounding its investment may lead to a denial of jurisdiction. Constituting the core element for jurisdiction, the main focus of the tribunal was on the consent of the host State to arbitration. Since *Metal-Tech v Uzbekistan* is the only investment treaty arbitration to have established corruption, the following analysis also considers decisions of arbitral tribunals that have taken different approaches to reject jurisdiction on the ground of illicit conduct on the side of the investor. The first question is whether an unwritten requirement of good faith bars the tribunal from jurisdiction (see below at **I.**). Other tribunals, as e.g. the tribunal in *Metal-Tech v Uzbekistan*, relied on the 'in accordance with host State law' requirement in order to deny jurisdiction for investments tainted by illegality (see below at **II.**). Tribunals have also made reference to international public policy in connection with jurisdiction (see below at **III.**). A further issue, mainly raised in scholarship, is whether the corrupt investor is barred by estoppel to accept the host State's consent provided in the IIA (see below at **IV.**). After the detailed analysis of the jurisdictional issues of investor corruption, the potential consequences of the involvement of the host State in the corrupt act will be discussed (see below at **V.**) before concluding with the issues of corruption at the jurisdictional stage (see below at **VI.**).

I. Good faith as implicit jurisdictional requirement

Tribunals have found the principle of good faith to be an independent jurisdictional requirement.[1892] While it is uncontested that the principle of good faith is a general

[1889] See e.g. Bottini, "Legality of Investments under ICSID Jurisprudence"; Jason Webb Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?," *Virginia Journal of International Law* 52, no. 3 (2012): 723–45.

[1890] For a detailed discussion on the tribunal's evidentiary analysis of the so-called red flags see Chapter Eight.

[1891] For a general overview on commentators arguing against the one-sided approach see Chapter Nine.

[1892] *Phoenix v Czech Republic*, Award, paras 106-113. The tribunal referred also to *Amco Asia Corporation et al. v The Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 (hereinafter: "*Amco v Indonesia I*, Decision on Jurisdiction"),

principle of international law,[1893] which must be observed by both parties to the arbitration, the specific consequences of its violation for investment treaty arbitration proceedings remain unclear.

The tribunal in *Hamester v Ghana*, for instance, stated at the outset of its analysis that independently from specific treaty provisions, an investment made in violation of the principle of good faith, by corruption and fraud, would fall outside of the protection regime under ICSID. In the words of the tribunal

> "[a]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law […].
>
> These are general principles that exist independently of specific language to this effect in the Treaty."[1894]

The statement was however merely of general nature, since the tribunal proceeded with its examination on whether the investment was in conformity with local law, rather than engaging in an analysis of the good faith principle and the concrete consequences of its breach to the arbitration proceedings.

The tribunal in *Phoenix v Czech Republic* saw an implied general good faith requirement within the notion of investment under Article 25(1) of the ICSID Convention. In its view, a violation of the principle of good faith bars both ICSID and the tribunal from jurisdiction on the grounds of Article 25(1) of the ICSID Convention.[1895] During the proceedings, the tribunal became convinced that the real purpose of the underlying transaction was to obtain access to ICSID arbitration for an already existing national dispute.[1896] At the outset of its analysis it clarified that

> "[t]he purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of

---

para 14; *Inceysa v El Salvador*, Award, paras 230, 249; *Plama v Bulgaria*, Award, para 143-144; and *World Duty Free v Kenya*, Award, paras 148, 157.

[1893] See e.g. *Merrill & Ring Forestry L.P. v The Government of Canada*, NAFTA/UNCITRAL, Award, 31 March 2010 (hereinafter: "*Merrill v Canada*, Award"), para 187; *Total v Argentina*, Decision on Liability, para 111.
For a general overview on the principle of good faith see Chapter Six B.I.2.a).

[1894] *Hamester v Ghana*, Award, paras 123-124.

[1895] See *Phoenix v Czech Republic*, Award, paras 142-144, where the tribunal found that it lacked jurisdiction.

[1896] *Phoenix v Czech Republic*, Award, para 142.

> international protection is to protect legal and bona fide investments."[1897]

The tribunal confirmed that the principle of good faith was of utmost importance for the ICSID dispute settlement system.[1898] Thus, in the tribunal's view the ICSID Convention and the BIT had to be construed with due regard to the principle of good faith.[1899] The tribunal emphasised that in the present case, its concern was to prevent the abuse of the investment protection system by investments made in violation of good faith.[1900] It therefore introduced two additional requirements to the often relied upon *Salini* test[1901] for the notion of investment under Article 25(1) of the ICSID Convention: the investment had to be made *bona fide* and in conformity with the host State law.[1902] Since the sole purpose of the alleged investment was to seek international investment protection under ICSID for a pre-existing domestic dispute, in the view of the tribunal such transaction violated the principle of good faith and thus fell outside the protection of the ICSID mechanism. This implicit good faith requirement was adopted by some tribunals and commentators.[1903]

Commentators have also argued that the term 'investment' under the ICSID Convention should be interpreted as only providing protection to legal, non-corrupt investments.[1904] In their view, the main objective of fostering economic

---

[1897] *Phoenix v Czech Republic*, Award, para 100, footnotes omitted, emphasis added.
[1898] *Phoenix v Czech Republic*, Award, paras 106-107.
[1899] *Phoenix v Czech Republic*, Award, para 109.
[1900] *Phoenix v Czech Republic*, Award, para 113.
[1901] The *Salini* test for the notion of investment comprises four conditions, see *Salini Costrutorri S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (hereinafter: "*Salini v Morocco*, Decision on Jurisdiction"), para 52. Note that there are two approaches to the notion of investment in arbitral practice. While the first approach understands the characteristics of the notion of investment rather as 'benchmark or yardstick', the second approach requires the fulfilment of a certain set of elements, see e.g. *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (hereinafter: "*Saba Fakes v Turkey*, Award"), paras 101-105 with references.
The tribunal in *Phoenix v Czech Republic* identified six prerequisites for the notion of investment: (1) a contribution in money or other assets; (2) a certain duration; (3) an element of risk; (4) an operation made in order to develop an economic activity in the host State; (5) assets invested in accordance with the laws of the host State; (6) assets invested *bona fide*, see *Phoenix v Czech Republic*, Award, para 114.
[1902] *Phoenix v Czech Republic*, Award, para 114.
[1903] See e.g. *SAUR International S.A. v Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (Spanish), 6 June 2012 (hereinafter: "*SAUR v Argentina*, Decision on Jurisdiction and Liability"), para 308; *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v The Government of Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012 (hereinafter: "*Khan Resources v Mongolia*, Decision on Jurisdiction"), para 383; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (Spanish), 18 November 2014 (hereinafter: "*Flughafen Zürich v Venezuela*, Award"), para 132.
See also Jarrod Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration," *Journal of International Dispute Settlement* 5, no. 3 (2014): 541 et seq.
[1904] Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 313 et seq.; Richard Kreindler, "Legal Consequences of Corruption in

development as stated in the Preamble of the ICSID Convention, the reference to international law in Article 42(2) of the ICSID Convention as well as the reference in Article 31(3)(c) of the VCLT to international law for purposes of interpretation of the ICSID Convention support such construction.[1905] Kreindler also points at arbitral case law for confirmation of such notion. However, the cited cases of *Inceysa v El Salvador*, *Kardassopoulos v Georgia* and *Fraport v Philippines* – which will be dealt with in detail below – have analysed the requirement of legal investments only with connection to concrete provisions in the IIA and not as a general principle of the ICSID Convention.[1906]

While it is undisputed that the investment protection regime of ICSID must be shielded from any abuse and that an investment made in bad faith must have consequences on the rights of the investor, the chosen approach of the tribunal to incorporate an additional prerequisite to the notion of investment is questionable. The consideration of good faith in the interpretation of the ICSID Convention pursuant to Article 31(1) of the Vienna Convention does not lead to the conclusion that a *bona fide* requirement needs to be read into the notion of investment of Article 25(1) of the ICSID Convention. The approach taken in *Phoenix v Czech Republic* has therefore been rejected by subsequent tribunals and found criticism by commentators.[1907]

Based on the interpretation of Article 25(1) of the ICSID Convention, the tribunal in *Saba Fakes v Turkey*, for instance, concluded that the good faith principle and the legality requirement could not be considered elements of the notion of investment under Article 25(1) of the ICSID Convention.[1908] The tribunal however emphasised that host States are free to include in the IIA a legality requirement as a limitation to their consent.[1909] In the view of the tribunal

---

International Investment Arbitration: An Old Challenge with New Answers," in *Liber Amicorum En L'honneur de Serge Lazareff*, ed. Laurent Lévy and Yves Derains (Pedonne, 2011), 384 et seq.

[1905] Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 313 et seq.

[1906] See below at B.II.2.a); B.II.3.a) and B.II.6.

[1907] See e.g. *Metal-Tech v Uzbekistan*, Award, paras 125-128; *Saba Fakes v Turkey*, Award, para 112. See also Andrew Newcombe, "Investor Misconduct: Jurisdiction, Admissibility or Merits?," in *Evolution in Investment Treaty Law and Arbitration*, ed. Chester Brown and Kate Miles (Cambridge et al.: Cambridge University Press, 2011), 198. Newcombe emphasises that the tribunal should have proceeded to exercise its adjudicative power and treat the illicit conduct of the investor as a matter of admissibility, rather than implying additional jurisdictional requirements.
See also Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 169 et seq. Douglas argues that there is no "*inexorable link between the policies directing the national courts in their approach to a plea of illegality, on the one hand, and a requirement that an international tribunal decline its jurisdiction in the face of the same plea, on the other hand, could be discerned. [...] An appeal to 'judicial economy' [as argued by Phoenix v Czech Republic], important as it is, cannot provide the missing link between general principles of law such as good faith and nemo auditur propriam turpitudinem allegans and the jurisdiction of the tribunal*."

[1908] *Saba Fakes v Turkey*, Award, para 112. Note that the tribunal also rejected the fourth characteristic of the *Salini* test, i.e. 'contribution to the host State's economic development', *Saba Fakes v Turkey*, Award, para 111.

[1909] *Saba Fakes v Turkey*, Award, para 114. Note that this approach was recently confirmed for the ECT, which does not contain a specific legality requirement in its detailed definition of investment,

> "[…] 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."[1910]

The tribunal in *Vannessa Ventures v Venezuela* confirmed that while the principle of good faith plays an important role in investment treaty arbitration, a specific provision in the IIA is required in order to limit the jurisdiction of the tribunal. In the words of the majority of the tribunal

> "good faith has an important role in the analysis but […], in the absence of a treaty provision ascribing some different effect to the principle of good faith, it is only in circumstances where the application of good faith as a principle of national law invalidates the acquisition of the investment that a lack of good faith means that there is no 'investment' for jurisdictional purposes. In other circumstances, the question of good faith does not go to jurisdiction but is a matter to be considered by the Tribunal when exercising its jurisdiction and to be applied in the context of admissibility and/or the application of the substantive protections of the Treaty at the merits phase."[1911]

Applying this reasoning to corruption, the mere fact that an investment tainted by corruption also amounts to an investment made in bad faith would not automatically transform it into a 'non-investment' under the ICSID Convention. This does not mean that such investment would finally be protected by the international investment regime; it only leads to the conclusion that corruption does not affect the 'notion of investment' based on an implicit requirement of good faith. In conclusion, the jurisdiction over an investment tainted by corruption may not be denied on the mere argument that corruption is a violation of good faith. The violation of the principle of good faith would remain important at many other stages of the proceedings, just not for the determination whether a certain investment falls under the definition of Article 25(1) of the ICSID Convention.[1912]

Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. v The Republic of Kazakhstan, SCC, Award, 19 December 2013 (hereinafter: "*Stati v Kazakhstan*, Award,"), para 812.

[1910] *Saba Fakes v Turkey*, Award, para 112.

[1911] *Vannessa Ventures Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013 (hereinafter: "*Vannessa Ventures v Venezuela*, Award"), para 113.

[1912] Note that in the contract-based investment case of *Niko v Bangladesh*, the tribunal found that where the arbitration clause is contained in an agreement rather than a treaty, it is a firm and binding agreement between the parties and lack of good faith in the investment does not justify the denial of jurisdiction, see *Niko v Bangladesh*, Decision on Jurisdiction, paras 469-471.

Likewise, the legality under host State law requirement could also not automatically be read into the notion of investment.

At the same time, while the host State is free to limit its consent, without any express restriction in an IIA or without other clear indications, it cannot be interpreted that the host State limited its consent to only legal investments.[1913] Rather, a specific provision in the IIA is needed which provides for a clear and unambiguous limitation of the consent of the host State, which we will turn to next.

II. "In accordance with host State law" clause

The lack of jurisdiction for disputes arising out of investment tainted by corruption may be based on the 'in accordance with host State law' clause contained in many IIAs.[1914] Such clauses require that the investment is made in compliance with the laws of the host State and are understood as constituting a common requirement in IIAs.[1915] The concrete wording of such legality requirement may however differ considerably and the specific provisions where it is incorporated in the IIA also vary. The 'in accordance with host State law' clause may be included in the definition of investment,[1916] or in a combination of other provisions as the applicability of the treaty, the provisions requiring a State to admit or accept foreign investments, or the provisions guaranteeing protection and non-impairment of qualifying investments.[1917] Despite the different treaty language, tribunals have understood such clauses as a general legality requirement for the investment.[1918]

[1913] Note that Kreindler argues that based on the interpretation pursuant to Article 31(1) Vienna Convention on the Law of Treaties the consent of the host State may be interpreted as being subject to the condition that the investment is untainted and is maintained by the investor in conformity with international law, Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 316. Douglas contests such view, Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 169 et seq.

[1914] For a general overview on 'in accordance with the laws of the host State'-clauses see Christina Knahr, "Investments 'in Accordance with Host State Law,'" in *International Investment Law in Context* (Eleven International Publishing, 2008), 27–42; Andrea Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals," *The Journal of World Investment and Trade* 9, no. 1 (2008): 35–49. For an overview on the case law regarding illegal investments in general see Kriebaum, "Investment Arbitration - Illegal Investments."

[1915] Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge et al.: Cambridge University Press, 2009), 140. Crina Baltag, "Admission of Investments and the ICSID Convention," *Transnational Dispute Management* 6, no. 1 (2009): 1. The fact that these provisions have become common was also noted by the tribunal in *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, para 84.

[1916] See e.g. the 'in accordance with host State law' provision in the Israel-Uzbekistan BIT applied in *Metal-Tech v Uzbekistan*, Award, para 130 (*The term 'investments' shall comprise any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, including, but not limited to* […]."), emphasis added.

[1917] For an example of an 'in accordance with host State law' clause contained in other provisions than the definition of investment see the Spain-El Salvador BIT analysed in *Inceysa v El Salvador*, Award, paras 110 et seq. For an overview of the different forms of 'in accordance with host State law' clauses see Knahr, "Investments 'in Accordance with Host State Law,'" 2008, 27 et seq.; Stephan W. Schill, "Illegal Investments in International Treaty Arbitration," *The Law and Practice of International Courts and Tribunals* 11, no. 2 (2012): 283 et seq. For an analysis of 'in accordance with host State law' clauses incorporated in the admission requirements see e.g. Anna

The general notion of the 'in accordance with host State law' clauses seems clear: unlawful or illegal investments do not deserve treaty investment protection.[1919] In other words, the illegal conduct of the investor must be taken into consideration for her investment protection claim. While the tribunal in *Metal-Tech v Uzbekistan* confirmed that the 'in accordance with host State law' clause limits the State's consent to arbitration to merely legal investments, it refrained to enter into further discussions as to its concrete scope. Thus, in order to analyse the possible effects the legality requirement might have on findings of corruption, it seems pertinent to analyse the essential issues and notions carved out by the current arbitral case law on the 'in accordance with host State law' clauses. The different reasoning and outcomes in the mentioned cases prove that the concrete scope of the legality requirement and the consequences in case of its violation are still developing in arbitral practise.

As a starting point, the common notion is presented that the conformity with host State law clause refers to the legality of the investment rather than to its definition (see below at **1.**). The recent case law creates room for two different approaches through which jurisdiction could be denied in relation to corruption. First, the notion that the claim of an investor involved in corrupt practices is not covered by the States' consent to arbitrate (see below at **2.**). Second, the view that an investment related to corruption is not a protected investment under the relevant IIA (see below at **3.**). Subsequently, the nature and character of the violation of host State law will be analysed (see below at **4.**) as well as the timing of such violation (see below at **5.**). Then, this study will examine the question of who must have caused the illegality and what are the implications if both parties are responsible (see below at **6.**) before concluding this sub-section with the notion that the violation of host State law depends on the own assessment of the tribunal rather than on any decision of the host State (see below at **7.**).

1. Legality of investment rather than definition of investment

As mentioned above, the 'in accordance with host State law' clause is often incorporated in the provision of the IIA, which provides the definition of investment. Accordingly, host States have repeatedly argued that such clause is directed at narrowing down such definition. This however would lead to host States unilaterally determining the scope of the treaty protection with their domestic legislation.[1920] The tribunal in *Salini v Morocco* was the first tribunal to

---

Joubin-Bret, "Admission and Establishment in the Context of Investment Protection," in *Standards of Investment Protection*, ed. August Reinisch (Oxford: Oxford University Press, 2008), 9–28; Salacuse, *The Law of Investment Treaties*, 196–199.

[1918] See *Inceysa v El Salvador*, Award, paras 205 et seq. See also Schill, "Illegal Investments in International Treaty Arbitration," 287 et seq.

[1919] See e.g. Joubin-Bret, "Admission and Establishment in the Context of Investment Protection," 27; Salacuse, *The Law of Investment Treaties*, 167.

[1920] See e.g. Kriebaum, "Investment Arbitration - Illegal Investments," 307 et seq. Kriebaum calls this situation a paradox. While the host State law might be the subject of the arbitral scrutiny, it would at the same time also determine the scope of such review.

clarify – *obiter dicta*[1921] – that the 'in accordance with host State law' clause contained in the treaty provision defining investment[1922] would refer to the legality of the investment rather than to its definition.[1923] Moreover, the tribunal stated that the requirement of conformity with local law would seek "*to prevent Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal*."[1924]

The tribunal's conclusion has been confirmed by many tribunals.[1925] The definition and notion of investment can only be construed by reference to international law and is not subject to the peculiarities of domestic law.[1926] Commentators have emphasised that such interpretation prevents host States from circumventing liability under the BIT by changing its applicability through domestic legislation regulating the definition of investment.[1927] As regards corruption, due to its prohibition under almost all host State legislations, corrupt practices surrounding the investment would render the investment illegal, rather than leading to the conclusion that no investment at all was made.

[1921] *Salini v Morocco*, Decision on Jurisdiction, para 46. Note that the tribunal could not find any violation of host State law and determined that all steps of the investment, i.e. from the tender process to the concluding of the services, had been performed "*in conformity with the laws in force at that time*". This may explain why the tribunal refrained from stating on what criteria it examined the conformity of the investment with domestic law. Knahr, for instance, speculates that the tribunal took "*Morocco's legal framework in its entirety*" as reference of its examination; see Christina Knahr, "Investments 'in Accordance with Host State Law,'" *Transnational Dispute Management* 4, no. 5 (September 2007): 19; Knahr, "Investments 'in Accordance with Host State Law,'" 2008, 35.

[1922] Article 1(1) of the Italy-Morocco BIT defines the term 'investment' as "*all categories of assets invested* […] *in accordance with the laws and regulations of the aforementioned party*".

[1923] *Salini v Morocco*, Decision on Jurisdiction, para 46 ("*The tribunal cannot follow the Kingdom of Morocco in its view that paragraph 1 of the Article 1 refers to the law of the host State for the definition of 'investment'. In focusing on 'the categories of invested assets* […] *in accordance with the laws and regulations of the aforementioned party,' this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal*.").

[1924] *Salini v Morocco*, Decision on Jurisdiction, para 46.

[1925] *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, para 84; *Bayindir v Pakistan*, Decision on Jurisdiction, para 109; *Inceysa v El Salvador*, Award, para 187.

[1926] Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals," 45.

[1927] See Kriebaum, "Investment Arbitration - Illegal Investments," 307 et seq.; Christian Borris and Rudolf Hennecke, "Das Kriterium Der Einhaltung von Vorschriften Nationalen Rechts in ICSID-Schiedsverfahren - Anmerkungen Zum Schiedsspruch in Der Sache Fraport v. Philippines," *Zeitschrift Für Schiedsverfahren - German Arbitration Journal* 6, no. 2 (2008): 55. Borris and Hennecke argue that an interpretation of the term investment pursuant to national law would lead to an erosion of investment protection. They also bring forward the argument of legal uncertainty due to different interpretations for each State. This argument is only convincing regarding the different interpretation of investment between both States being party to the BIT. However, the fact that each BIT is an individual bargain between the relevant parties leads to different provisions among different States. A phenomenon that the so-called most favoured nation clause tries to mitigate.

2. Illegal investments are not covered by consent – *jurisdiction ratione voluntatis*

One strand of the arbitral case law understands the conformity clause as limitation of the host State's consent contained in the IIA.[1928] According to this view, the consent of the host State covers merely investments, which were made in conformity with its laws and regulations. Since the consent of the host State is an essential requirement for jurisdiction under Article 25 of the ICSID Convention, the arbitral tribunal would have no jurisdiction over claims considering illicit investment. This line of reasoning adopted in *Metal-Tech v Uzbekistan* was first applied by the tribunal in *Inceysa v El Salvador*.[1929] Due to the thorough examination of the issue by the tribunal it is worth having a closer look into the decision.[1930]

a) *Inceysa v El Salvador*

The Spanish investor Inceysa initiated ICSID arbitration under the Spanish-El Salvador BIT[1931] alleging that the noncompliance by El Salvador of a contract for the operation of mechanical inspection stations constituted an unjustified unilateral termination of the contract and an indirect expropriation of the rights granted under the contract.[1932] In the proceedings the tribunal found it proven that the investor had forged documents to misrepresent matters in the bidding process, in particular in relation to the financial situation,[1933] experience, qualification[1934] and the ongoing business relationships of the firm.[1935]

The tribunal focused on the jurisdiction *ratione voluntatis* and the 'in accordance with host State law' requirement contained in two provisions of the relevant BIT.[1936] At the outset of its analysis the tribunal stated that it was "*perfectly valid*

[1928] See *Metal-Tech v Uzbekistan*, Award; *Inceysa v El Salvador*, Award. See also Knahr, "Investments 'in Accordance with Host State Law,'" 2008; Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals"; Baltag, "Admission of Investments and the ICSID Convention."

[1929] *Inceysa v El Salvador*, Award.

[1930] *Inceysa v El Salvador* was not the first ICSID award to deal with an 'in accordance with the host State law' clause, but it provided the first detailed analysis of this issue.

[1931] Agreement for the Reciprocal Promotion and Protection of Investments signed between the Republic of El Salvador and the Kingdom of Spain, signed 14 February 1995, and entered into force on 20 February 1996.

[1932] *Inceysa v El Salvador*, Award, para 37.

[1933] The tribunal found that Inceysa had submitted false financial statements and that the person auditing these documents was not authorised to do so, even though he pretended to be an "Authorized Auditor".

[1934] The tribunal found the presented professional capacity to be false as the presented certifications and letters were not authentic.

[1935] *Inceysa v El Salvador*, Award, paras 53, 236. The tribunal found that Inceysa made believe in its bid that it had an experienced Spanish public entity as strategic partner, where in reality Inceysa only had business relations with a firm with similar name and incorporated after the bid for the sole purpose of this project.

[1936] Article II of the El Salvador-Spain BIT provides that the Agreement "*will also apply to investments made before its entry into force by the investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter* […]". Article III of the El

and common" for States to limit their consent through provisions set out in BITs.[1937] However, it emphasised that it was the tribunal who must determine the scope of the consent given by the parties. Thus, it made clear that any decision made by the State parties to the agreement concerning the legality or illegality of the investment, such as judicial decisions, have no meaning for the determination of the jurisdiction by the arbitral tribunal.[1938] The decision about legality could not be left to the courts of the host State, since this would create an option for the State to redefine the range and substance of its own consent to the jurisdiction "*unilaterally and at its complete discretion*".[1939]

Thereafter, the tribunal referred to three fundamental principles developed in arbitral jurisprudence to determine the scope of consent.[1940] First, there should be no presumption in favour or against the jurisdiction of the ICSID tribunal.[1941] Second, the ICSID tribunal must rather determine the specific will of the parties regarding the scope of the consent.[1942] And third, the principle of 'good faith' must be taken into consideration when determining jurisdiction.[1943] From this it follows on the one hand that the tribunal must make its jurisdictional analysis in good faith, and on the other hand, that the analysis must part from the premise that the parties gave their consent in good faith with the sincere intent that the jurisdiction would be fully effective under the agreed circumstances.[1944]

Following these principles and after having examined the *travaux preparatoires*[1945], the tribunal found that the relevant clauses – Article II of the BIT dealing with the admission of investments and Article III of the BIT concerning the protection of investments – led to the conclusion that "***any*** *investment made against the laws of El Salvador is outside the protection of the*

Salvador-Spain BIT provides that "[e]*ach Contracting Party shall protect in its territory the investments made, in accordance with its legislation* […]".

[1937] *Inceysa v El Salvador*, Award, para 184 ("[…] *it is perfectly valid and common for States to exclude from their consent to the jurisdiction of the Centre a certain type of dispute, to impose certain requisites for the investments made in their territory by an investor from the other State to benefit from the protection of the agreement in question and to limit their consent only to those that are within the limits indicated in the agreement*.")
The tribunal also cited in para 185 the tribunal in *Tokios Tokelės* stating that "*the requirement* […] *that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs*", see *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, para 84.

[1938] *Inceysa v El Salvador*, Award, para 210.

[1939] *Inceysa v El Salvador*, Award, para 213

[1940] *Inceysa v El Salvador*, Award, para 175.

[1941] *Inceysa v El Salvador*, Award, para 176, citing *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985 (hereinafter: "*SPP v Egypt*, Decision on Jurisdiction"), para 63.

[1942] *Inceysa v El Salvador*, Award, para 177, citing *Amco v Indonesia I*, Decision on Jurisdiction, para 14.

[1943] *Inceysa v El Salvador*, Award, para 179.

[1944] *Inceysa v El Salvador*, Award, para 181.

[1945] In its interpretation the tribunal gave special weight to the communications exchanged before signing of the BIT and found that El Salvador wanted to limit its consent to legally made investments, *Inceysa v El Salvador*, Award, para 192.

Agreement and, therefore, from the competence of [the] *Arbitral Tribunal*".[1946] In other words, the existence of the two provisions "*clearly indicates that the BIT leaves investments made illegally outside of its scope and benefits*".[1947] In the view of the tribunal

> "disputes that arise from an investment made illegally are outside the consent granted by the parties and, consequently, are not subject to the jurisdiction of the Centre, and that this Tribunal is not competent to resolve them, for failure to meet the requirements of Article 25 of the Convention and those of the BIT."[1948]

After having established that investment violating domestic law would fall outside of the jurisdiction of the tribunal, it went on to examine whether Inceysa's investment was indeed made in accordance with the laws of El Salvador. Rather than analysing genuine domestic law, the tribunal pointed at the Constitution of El Salvador, which states that international treaties "*are considered laws of the Republic*".[1949] Thus, it found that the BIT was the primary source for the tribunal's examination.[1950] Since the BIT contained no substantive provision with regard to the requirements to determine the legality of investments, the tribunal relied upon the reference in the BIT to 'generally recognised rules and principles of International Law'.[1951] The tribunal then turned to Article 38 of the Statute of the ICJ in order to conclude that it would base its analysis on general principles of law.[1952]

In the tribunal's opinion four general principles were applicable to determine the legality of the investment in connection to the fraud of the investor: good faith[1953], *nemo auditur propriam turpitudinem allegans*[1954], international public policy[1955] and prohibition of unlawful enrichment.[1956] The tribunal found a violation by Inceysa's fraudulent behaviour of each of the stated principles. Due to the "*clearly*

[1946] *Inceysa v El Salvador*, Award, para 203, emphasis added.
[1947] *Inceysa v El Salvador*, Award, para 206.
[1948] *Inceysa v El Salvador*, Award, para 207.
[1949] See *Inceysa v El Salvador*, Award, para 219, referring to Article 144 of the Political Constitution of El Salvador.
[1950] *Inceysa v El Salvador*, Award, para 220.
[1951] *Inceysa v El Salvador*, Award, para 222.
[1952] *Inceysa v El Salvador*, Award, paras 224 – 229.
[1953] See *Inceysa v El Salvador*, Award, paras 230 – 239.
[1954] See *Inceysa v El Salvador*, Award, paras 240 – 244.
[1955] See *Inceysa v El Salvador*, Award, paras 245 – 252. Kreindler points to this section of *Inceysa* in order to argue that investments contrary to international public policy are not protected under international investment protection instruments. See Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 314. However, Kreindler fails to mention the main focus of the *Inceysa* tribunal: the in accordance with the host State law clause. The line of reasoning of the tribunal was to deny jurisdiction only because of the limitation of consent given by El Salvador through the 'in accordance with host State law' clause. The violation of international public policy was the only grounds for holding the investment illegal.
[1956] See *Inceysa v El Salvador*, Award, paras 253-256.

illegal" investment, the tribunal held that the dispute was not "*subject to the jurisdiction of the Centre*".[1957]

b) Comments

Due to its clear words, this arbitral decision has become influential for the reasoning of subsequent tribunals.[1958] Even though this case involved fraudulent conduct on the part of the investor and not bribery, the reasoning may be important for the approach to corruption. The 'in accordance with host State law' provisions seem necessary to prevent IIAs "*from protecting investments that should not be protected*".[1959] States may limit their consent when entering an IIA for two reasons. First, the host State shall retain the ability to regulate the investment without automatically breaching the treaty. And second, parties to IIAs may seek to reject protection for an investment that is illegal.

The tribunal's interpretation of the clause is comprehensible. The *travaux preparatoires* showed that El Salvador wanted to be protected against fraudulent investments when it gave consent by signing the BIT.[1960] Unclear is, however, whether the same interpretation of the clause may be made where such indications of the parties' will are not available. It remains to be seen whether tribunals will interpret the conformity requirement in an IIA as automatically proving limitation of the host State's consent or whether they will scrutinise if such clause in fact was meant as a limitation to consent.

Moreover, the tribunal found that *any* violation of domestic law would be outside of the consent of the host State. This narrow interpretation would lead to the situation that also minor breaches would deprive the investor of its right to arbitrate. The question remains open of which investments in particular shall not be protected under the IIA, or in other words, are not covered by consent. This was not relevant in the present case, since the facts of the case were clear: Inceysa had committed egregious fraud. Turning to corruption, since it generally results in a

---

[1957] *Inceysa v El Salvador*, Award, para 257.

[1958] For tribunals citing the decision in *Inceysa v El Salvador* see e.g. *Metal-Tech v Uzbekistan*, Award, para 165; *Teinver v Argentina*, Decision on Jurisdiction, paras 330, 332; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (hereinafter: "*Quiborax v Bolivia*, Decision on Jurisdiction"), para 266; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 (hereinafter: "*Liman Caspian Oil v Kazakhstan*, Award"), para 192; *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010 (hereinafter: "*Oostergetel v Slovak Republic*, Decision on Jurisdiction"), para 181; *Europe Cement Investment & Trade S.A. v Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009 (hereinafter: "*Europe Cement v Turkey*, Award"), para 172.

[1959] *Salini v Morocco*, Decision on Jurisdiction, para 46.

[1960] Commentators have favoured such approach of analysing the *travaux preparatoires*, see e.g. Katharina Diel-Gligor and Rudolf Hennecke, "Investment in Accordance with the Law," in *International Investment Law*, ed. Marc Bungenberg et al., 1st ed. (Baden-Baden: Nomos, 2015), 571. ("*In addition to the wording and systematic context of the relevant compliance provision in the relevant BIT, this may also involve an examination of the drafting history as evidenced in the travaux preparatoires*.").

violation of domestic law, an approach that *any* violation would result in a denial of jurisdiction has a tremendous impact on any dispute involving corruption.[1961]

The decision is not free from criticism. The tribunal did not explain how it came to the conclusion that the four general principles were the right benchmark to examine the conformity with the law of the host State.[1962] Commentators found it inconsistent that the tribunal attached decisive importance to the host State law, but relied on general principles of law without proving their conformity with domestic law.[1963] In other words, the tribunal's reasoning would consist of a probable assumption, but failed to prove why the four general principles were the basis of its examination.[1964] In addition, commentators contested the tribunal's wide approach with respect to international public policy and rejected the tribunal's finding that the "respect of the law" constitutes a principle of international public policy.[1965] Finally, in recent years more and more commentators reject the approach of declining jurisdiction by limiting the host State's consent to investments which are not in contravention of the laws of the host State.[1966]

3. Illegal investments are not a protected investment – jurisdiction *ratione materiae*

The tribunal in *Fraport v Philippines* took a different approach to the 'in accordance with host State law' requirement.[1967] While the *Inceysa* tribunal found illegal investment not covered by the consent of the host State, the tribunal in *Fraport v Philippines* denied jurisdiction *ratione materiae*. It is worth having a closer look at the tribunal's reasoning, which did not explicitly deal with

[1961] Applying an *argumentum a fortiori*, if *any* violation against domestic law, minor errors included, led to a denial of jurisdiction, then corruption in an investment dispute would certainly automatically bar the jurisdiction of an ICSID tribunal.
[1962] See Knahr, "Investments 'in Accordance with Host State Law,'" 2008, 33, 34.
[1963] See Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals," 43.
[1964] Ibid., 43.
[1965] Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 181.
[1966] See e.g. Ibid., 172 et seq. ("*It follows [...] that a limitation upon the host State's consent to arbitration should not be implied in respect of investments that have been acquired in contravention of the laws of the host State either.*"), Ibid., 177.
[1967] *Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (hereinafter: "*Fraport v Philippines*, Award"), see also footnote 1928. Note that the decision was subsequently annulled pursuant to Article 52 of the ICSID Convention on 23 December 2010, see *Fraport AG Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Airport Services Worldwide, 23 December 2010 (hereinafter: "*Fraport v Philippines*, Annulment"). The annulment decision left, however, the tribunal's interpretation of the 'in accordance with host State law' clause untouched. The *ad hoc* Committee expressly stated that it saw itself not empowered to hold whether the interpretation of the tribunal on the 'in accordance with host State law' clause was correct. In fact, it emphasised that the tribunal's interpretation was not untenable, for which reason the Committee could not conclude that the tribunal manifestly exceeded its powers; see *Fraport v Philippines*, Annulment, para 112. Thus, the tribunal's reasoning in this regard can still be considered as having a strong weight in the general discussion of 'in accordance with host State law' clauses.

corruption,[1968] but raised various issues that may also be relevant in corruption cases.

a) *Fraport v Philippines*

In 1999, Fraport, a German company, became shareholder of the Philippine company PIATCO,[1969] which held the concession rights for the construction and operation of a new international passenger terminal of the International Airport in Manila. With a general interest in limiting foreign control over public utility companies, the Philippine so-called Anti-Dummy Law penalises foreign ownership and control of public utility companies exceeding 40%.[1970] Fraport never directly or indirectly owned more than the permitted 40%.[1971] However, in addition to its shareholding, Fraport concluded confidential shareholder agreements with the remainder of the shareholders of PIATCO, which granted Fraport primacy on matters of operation, maintenance and management of the terminal complex. [1972] After completion of the terminal, the Philippines declared the concession null and void and allegedly deprived the investor from all its investment.

The tribunal could not reach a unanimous decision regarding the interpretation of the conformity requirement. The majority of the tribunal found that even though an economic transaction might factually and financially qualify as an investment, it might legally not constitute an investment under the definition of the BIT.[1973] It interpreted the 'in accordance with host State law' requirement[1974] as to rendering

---

[1968] Note that although corruption allegations were made, the tribunal refrained from explicitly dealing with corruption. Thus, the decision of the tribunal in *Fraport v Philippines* rather dealt with the general issue of illegality.

[1969] Philippine International Air Terminals Co., Inc.

[1970] *Fraport v Philippines*, Award, para 309. Note that the Philippine Constitution prohibits the holding of any franchise for public utility by foreign investors and limits foreign participation in any Philippine corporation holding a public utility franchise to 40 per cent and restricts the involvement of foreign investors in the management of public utility enterprises, see *Fraport v Philippines*, Award, para 309.

[1971] *Fraport v Philippines*, Award, para 369. Fraport owned 30% of the shares of PIATCO directly and obtained 31.44% of the shares indirectly through minority participations in a cascade of Philippine companies which themselves held minority stakes in PIATCO.

[1972] *Fraport v Philippines*, Award, paras 319-321.

[1973] *Fraport v Philippines*, Award, para 306.

[1974] The legality requirement was based on four provisions:
Article 1(1) of the Germany-Philippine BIT: "[t]*he term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State* […]"
Article 2(1) of the Germany-Philippine BIT*: "*[e]*ach Contracting State shall promote* […] *and admit* […] *investments in accordance with its Constitution, laws and regulations as referred to Article 1, paragraph 1* […]."
Article 2(a) of the Protocol of the Germany-Philippines BIT states:
"*As provided for in the Constitution of the Republic of the Philippines, foreign investors are not allowed to own land in the territory of the Republic of the Philippines. However, investors are allowed to own up to 40 % of the equity of a company which can then acquire ownership of land."*
The Instrument of Ratification of the Republic of the Philippines, which was exchanged with Germany on 10 July 1997, provides:
"[…] *WHEREAS, the Agreement provides that the investment shall be in the areas allowed by and in accordance with the Constitutions, laws and regulations of each of the Contracting Parties;* […]."

an investment made in violation of domestic law illegal and thus disqualifying it from being an 'investment protected by the BIT'. In the view of the tribunal, it would lack jurisdiction *ratione materiae* in such case.[1975]

When focusing on the specific violation of the host State law, the majority first referred to the reasoning in *Inceysa* that the legality of the investment has to be determined by the tribunal itself since it is a premise for the tribunal's jurisdiction.[1976] Thus, the majority found a violation of the Anti-Dummy Law even though the shareholder agreement had not been executed and criminal proceedings in the Philippines had concluded that Philippine law had not been breached. The majority acknowledged that Fraport had not breached the statutorily determined level of equity investment in a company holding a public utility franchise, but it found the shareholder agreement to amount to managerial control and thus to a violation of the Anti-Dummy Law.[1977] While focusing on the shareholder agreement, the majority emphasised several times the secrecy of the shareholder agreement and interpreted bad faith into the behaviour of the investor.[1978] Even though the majority stressed that its decision did not rest on policy, but on the language of the BIT,[1979] it seems that the bad faith argument was the leading cause for its final decision to reject jurisdiction.[1980] In that regard the majority emphasised that the "*respect for the integrity of the law of the Host State is also a critical part of development and a concern of international investment law*".[1981]

In addition, the majority found that the jurisdictional requirement of conformity with domestic law was limited to the entry or initiation of the investment and not to the subsequent conduction of it.[1982] Consequently, subsequent violations of the host State law might raise substantive defences of the State, but may not lead to a denial of jurisdiction.[1983]

[1975] *Fraport v Philippines*, Award, paras 401, 404.
[1976] *Fraport v Philippines*, Award, para 391, citing *Inceysa v El Salvador*, Award, para 290.
[1977] *Fraport v Philippines*, Award, para 350. The tribunal found two ways of establishing a violation of the Anti-Dummy Law: first, through a quantitative test referring to the actual amount of shares, and secondly, through an actual demonstration of managerial control where the quantum of equity was of no relevance. See *Fraport v Philippines*, Award, para 354.
[1978] The language used by the majority is "*consciously concealed*" (para 387); "*egregious*" comportment (para 397), "*knowingly and intentionally circumvented*" the host State's law (para 401). In addition, the tribunal emphasised that local counsel explicitly warned Fraport that the structural arrangement would violate a serious provision of Philippine law (para 398).
[1979] *Fraport v Philippines*, Award, para 402.
[1980] See *Fraport v Philippines*, Award, paras 398, 401.
[1981] *Fraport v Philippines*, Award, para 404.
[1982] *Fraport v Philippines*, Award, para 345 ("[T]*he effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.*") (emphasis added).
[1983] *Fraport v Philippines*, Award, para 345.

The majority made an attempt to mitigate the drastic outcome of its decision by noting that the result would be different if the violation was made in good faith, i.e. violating the host State's law due to a mistake.[1984] An indicator of good faith would be if even a legal due diligence report would not detect the violation or if the violation was "*not central for the profitability of the investment*".[1985] Applying these two exceptions to the facts of the case, the tribunal found that the investor had been informed by its local counsel about the limitation on ownership and control over public utility investments in the Philippines.[1986] In addition, it emphasised the significance of the control of the investor over essential issues of the project obtained through the confidential agreements, for which reasons the violation of local law was "*central to the success*" of the investment.[1987]

Moreover, the majority emphasised that the investor was not allowed to infer from the failure of the host State to prosecute the violation that it was acting lawfully, since due to the secrecy of the agreement the host State had no knowledge of the violation.[1988] Again, it seems as though the majority put the emphasis on the secrecy of the shareholder agreement and therefore on the bad faith on the part of the investor. Besides, the tribunal also held that a formal act of admission of the investment was not required for the application of the 'in accordance with host State law' clause since the purchasing of shares of a company does not require any State acceptance or permission.[1989]

The tribunal introduced an additional corrective to the far-reaching consequences of its reasoning and emphasised the principle of fairness, which would

> "require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."[1990]

By explicitly pointing out that it could not find any indication for the State's awareness of Fraport's behaviour,[1991] the tribunal made clear that such lack of knowledge was a decisive factor for the tribunal's decision.

The dissenting arbitrator Bernardo Cremades found that Fraport's conduct did not violate the Anti-Dummy Law, *inter alia*, because Fraport never owned more than 40% of a Philippine company holding a public utility franchise.[1992] However, more

[1984] *Fraport v Philippines*, Award, para 396.
[1985] *Fraport v Philippines*, Award, para 396.
[1986] *Fraport v Philippines*, Award, para 398.
[1987] *Fraport v Philippines*, Award, paras 396, 398.
[1988] *Fraport v Philippines*, Award, para 387.
[1989] *Fraport v Philippines*, Award, para 385.
[1990] *Fraport v Philippines*, Award, para 346.
[1991] *Fraport v Philippines*, Award, para 347.
[1992] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, paras 16-32.

important for our analysis is his opinion regarding the interpretation of the 'in accordance with host State law' provision.[1993]

The dissenting arbitrator acknowledged the theoretical option to identify in an IIA the investor's behaviour as a jurisdictional requirement and recognised the seriousness of illegal conduct by an investor.[1994] However, he also emphasised the essential requirement to respect the ordinary meaning of the wording, the context and the object and purpose of the IIA in order to interpret the provision at issue.[1995] He argued that at the jurisdictional stage, the tribunal's analysis is limited to the existence of an investment as defined in the BIT.[1996] Further investigations as to the wrongfulness of the investor's behaviour are reserved for the merits phase.[1997] In his opinion, to deal with the legality of the conduct of the claimant at a different stage (jurisdiction) than with the legality of the Respondent's conduct (merits) would amount to a violation of fundamental principles of procedure, since the host State is placed in a powerful position due to the chance that the legality of its conduct might never be examined.[1998]

In particular, the dissenting arbitrator found that not *any* violation of the host State law deprives the investor of the protection under the BIT.[1999] He demanded special emphasis on the wording of Article 1(1) of the relevant BIT, which stated that the "*term 'investment' shall mean <u>any kind of asset accepted</u> in accordance with the respective laws and regulations of either Contracting State*". Thus, due to the special reference to "*kind of assets*" the limitation of protection under the BIT had to be interpreted to only refer to the illegality of the *types of assets* constituting the investment, but not to the legality of the investor's conduct.[2000] A shareholding

---

[1993] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, paras 11-14.

[1994] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, paras 14, 36. Para 14 states: "*Of course, any illegal behaviour by an investor is likely to have consequences. Criminal conduct can and should be punished within the domestic criminal justice system. <u>Illegal conduct by the investor might well excuse or limit any liability of the State Party in an arbitration pursuant to the BIT, depending on the circumstances. It is also possible for the Contracting Parties to a BIT to exclude the jurisdiction of an arbitral tribunal for illegalities committed by the investor</u>. Investor illegality is serious, and there are many means to address it*. […]". (Emphasis added)

[1995] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 13.

[1996] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 38. The dissenting arbitrator Cremades agrees that the illegal conduct of the investor has to be considered, however, he disagrees with scrutinising it at the jurisdictional level. ("*It is important to emphasise that there is no question of an Arbitral Tribunal passing over or treating lightly any illegal conduct by the investor. The question is the proper time and context to consider and evaluate the proof and the consequences of illegality*." *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 39).

[1997] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 38. ("*As a matter of principle* […] *the legality of the investor's conduct is a merits issue*.")

[1998] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 37. ("*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 <u>powerful position</u>. 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 <u>not respect fundamental principles of procedure</u>*.") (emphasis added).

[1999] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 13.

[2000] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 38.

exceeding 40 per cent of a Philippine company holding a public utility franchise would therefore amount to an asset not accepted under Philippine law.[2001] However, since at all times at least 60 per cent of PIATCO's capital was owned by Philippine citizens, Fraport's shareholding remained a "*kind of asset accepted in accordance with the laws and regulations of the Philippines*".[2002]

b) Comments

The failure to provide a unanimous decision in *Fraport* is an example of how contrarily the very same clause can be interpreted. On the one hand, the clause might lead to the jurisdictional exclusion of any activity of the investor that violates domestic law; in other words it imposes compliance with each and every aspect of the host State law. On the other hand, the wording might be interpreted to only exclude illegal *forms* of investment, i.e. assets illegal under domestic law, while the illegal conduct of the investor is rather a question for the merits.[2003] In the context of corruption, the question could arise whether such clause may only exclude an investment that is corrupt *per se*, rather than any investment that is merely tainted by some circumstantial corrupt act.

Applying the approach to corruption taken by the majority leads to the denial of jurisdiction *ratione materiae*. At the same time, the tribunal made it clear that the preclusive effect of the illegality would be excluded in case the investor acted in good faith.[2004] This approach was confirmed by the tribunal in *Desert Line v Yemen*, which held that in case violations of local law were made in good faith, a certain leniency could be granted to the investor.[2005] Commentators have however emphasised the difficulty of determining whether the investor acted in good faith, since this requirement is connected to its intent.[2006] Moreover, it seems that such exception would in any case only be available where the host State law is non-transparent or ambiguous.[2007] In addition, commentators have also criticised the tribunal's reference to the profitability of the investment in order to assess whether the investor acted in good faith.[2008] It is also unclear if lack of knowledge of the illegality, for instance due to inaccessibility of the provisions or non-transparent legislation, would suffice to fall under the good faith exception.[2009] In this context,

---

[2001] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 12.
[2002] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 11.
[2003] See *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 38.
[2004] *Fraport v Philippines*, Award, paras 396-398.
[2005] *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (hereinafter: "*Desert Line v Yemen*, Award"), paras 116-117.
[2006] Knahr, "Investments 'in Accordance with Host State Law,'" September 2007, 17. ("*This approach, however, seems problematic since it will probably be difficult in many instances to determine whether an investor had actually acted in good faith or whether he had knowingly committed a violation of a host state's domestic law. Hence, an objective assessment of the severity of the violation as performed by the Tokios Tokeles tribunal seems preferable*.")
[2007] Schill, "Illegal Investments in International Treaty Arbitration," 296.
[2008] Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 176.
[2009] See also Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals," 46. Carlevaris refers to the national and international

it remains to be seen whether tribunals follow the reasoning of the majority and accept legal due diligence reports as safeguards for the investment. Recently, the tribunal in *Anderson v Costa Rica* noted that an investor had to exercise due diligence in order to make sure that the investment complied with the law.[2010] In any case, the investor's involvement in corruption will most certainly not meet the good faith threshold. Bad faith seems inherent to corruption.

The doctrine of estoppel taken into account by the *Fraport* tribunal may be of relevance in corruption cases. In the view of the tribunal, a State that had known or might have known the breaches of domestic law but overlooked them upon admission of the investment is estopped to invoke such breaches as a bar to jurisdiction.[2011] In *Fraport*, the tribunal found no evidence of the State being aware of the investor's unlawful behaviour.[2012] However, such clear situation does not exist in corruption cases where high public officials with authority to influence the admission of the investment are a party to the corrupt act in question.[2013]

It is noteworthy that after the decision was annulled, the subsequent tribunal dealing with the same matter, *Fraport v Philippines II*, also came to the conclusion that the investment was illegal and dismissed the case for lack of jurisdiction over an illegal investment.[2014] The tribunal held both that due to the illegal investment there is no legal dispute arising out of an investment and that the host State had not consented to the arbitration of investments made in violation of their own laws.[2015] Moreover, the tribunal's thorough analysis of Fraport's arguments that it had acted in good faith shows that it confirmed the existence of the good faith attempt mentioned by the first tribunal.[2016] The tribunal, however, found that Fraport was fully aware at the time of its investment that its contractual arrangements would violate the Anti-Dummy Law.[2017]

4. Character of the violation

Tribunals have approached the question of what constitutes a violation of the 'in accordance with host State law' clause differently. The tribunal in *Inceysa*, for example, referred to general principles of law in order to find a violation to the laws of El Salvador.[2018] The majority in *Fraport* based its decision on the violation

initiatives to promote the transparency of investment legislation, e.g. World Bank Guidelines on the Treatment of Foreign Direct Investment, 7 ICSID Rev.–F.I.L.J. 297, 1992.

[2010] *Alasdair Ross Anderson et al. v Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 (hereinafter: "*Anderson v Costa Rica*, Award"), para 58. Note that commentators have argued that the 'in accordance with host State Law' clause places an absolute obligation on the investor and that 'reasonable efforts' or 'due diligence' would not be sufficient to meet the treaty requirements, see Salacuse, *The Law of Investment Treaties*, 169.

[2011] See *Fraport v Philippines*, Award, paras 346-347.

[2012] *Fraport v Philippines*, Award, para 347.

[2013] See Chapter Five.

[2014] *Fraport v Philippines II*, Award, paras 388-468.

[2015] *Fraport v Philippines II*, Award, paras 467-468.

[2016] *Fraport v Philippines II*, Award, paras 431-441.

[2017] *Fraport v Philippines II*, Award, para 440.

[2018] *Inceysa v El Salvador*, Award, para 224.

of a specific provision of the host State's ownership law.[2019] In *Salini*, the tribunal merely stated that the investor's behaviour was in conformity with the "*laws in force at that time*" without providing any reference to the laws.[2020] Some tribunals have, however, clarified that not *any* violation of domestic law would fall within the scope of the 'in accordance with host State law' clause.

In *Tokios Tokelės v Ukraine*, for instance, the tribunal dealt with a situation where a too strict interpretation of the conformity with domestic law requirements would have led to an absurd result. Ukraine based the violation of host State law with minor irregularities in the registration of the investment.[2021] The tribunal rejected such excessive interpretation of the legality requirement. In its view, the ordinary meaning of 'in accordance with host State law' had to emerge from the treaty's object and purpose to provide broad investment protection[2022] and held that

> "to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty".[2023]

The reasoning of the *Tokios Tokelės* tribunal was constantly confirmed. The tribunal in *Mytilineos v Serbia & Montenegro*, for instance, referred to the approach taken in *Tokios Tokelės* in order to hold that the failure to register the relevant agreements as investment agreements would not amount to an exclusion of investment protection.[2024] Similarly, the tribunal in *Metalpar v Argentina* found that the exclusion of the investor from investment protection only based on the failure to properly register companies under domestic law would be disproportionate.[2025] The tribunal in *Alpha v Ukraine* also agreed with the rationale

---

[2019] See *Fraport v Philippines*, Award.

[2020] *Salini v Morocco*, Decision on Jurisdiction, para 46. See also *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (hereinafter: *Saluka v Czech Republic*, Partial Award"), para 217. The tribunal based its determination of conformity with domestic law on arbitral decisions, which were accepted to be *res judicata* under the Czech law. Notably, the tribunal provided no details of the arbitral decisions it referred to. See also Knahr, "Investments 'in Accordance with Host State Law,'" 2008, 37. Knahr notes that the tribunal in *Saluka v Czech Republic* fails to provide further details of its reasoning. However, Knahr finds it comprehensible to refer to national proceedings and the conduct of domestic authorities to determine the conformity of an investment with domestic law.

[2021] *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, para 83. The name under which the investment was registered included the term 'subsidiary private enterprise' which is not a recognised legal form under Ukrainian law as opposed to 'subsidiary enterprise'. In addition, Ukraine alleged that the document provided by the investor relating to asset procurement and transfer contained errors such as the absence of a necessary signature or notarisation.

[2022] *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, para 85.

[2023] *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, para 86 (emphasis added). See also *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 (hereinafter: "*Tokios Tokelės v Ukraine*, Award"), para 97 ("*if the assets were in reality investments within the meaning of the Investment Treaty a failure to observe the bureaucratic formalities of the domestic law could not have caused their character to change*").

[2024] *Mytilineos Holdings SA v The State Union of Serbia & Montenegro*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006 (hereinafter: "*Mytilineos v Serbia*, Decision on Jurisdiction").

[2025] *Metalpar S.A. and Buen Aire S.A. v The Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, 27 April 2006 (hereinafter: "*Metalpar v Argentina*, Decision on Jurisdiction"), para 84.

of the tribunal in *Tokios Tokelės* and concluded that defects in the registration paperwork of the investment could not amount to a bar to jurisdiction.[2026] The tribunal in *Inmaris v Ukraine* refrained from expressly referring to the reasoning of *Tokios Tokelės*, but it similarly found that mere failure to register the relevant contract under domestic law could not amount to a loss of investment treaty protection.[2027] In similar terms, the tribunal in *Mamidoil Jetoil v Albania* confirmed that "'*minor errors' and 'a failure to observe the bureaucratic formalities of the domestic law' will not justify the denial of jurisdiction*".[2028]

The restricted approach taken by the tribunal in *Tokios Tokelės* appears necessary. The frustration of all investor's rights under the IIA for any unsubstantial violation of domestic law would cause a degree of uncertainty that cannot reasonably be interpreted into the parties' intention. Moreover, a broad interpretation of the legality requirement would create a loophole for the host State to take advantage of its own legal system in order to escape liability under the IIA.[2029] It could easily provoke minor errors on the side of the investor by simply implementing complicated and non-transparent legislation. The *Tokios Tokelės* tribunal, however, failed to provide any guidance on how a line can be drawn between minor and not minor errors.[2030] Commentators have interpreted the decision as "sanctioning 'illegality of business activity per se', which the tribunal understands as encompassing either the illegality of assets used in a business activity, or the prohibition of the utilisation of assets for the purpose at issue".[2031] In most cases however the investor's involvement in corrupt acts will not fall within this exception.

The tribunal in both *LESI v Algeria* cases also limited the scope of the conformity requirement and held that 'in accordance with host State law' clauses might only lead to a bar to jurisdiction if the investment violated "*fundamental principles*" of host State laws.[2032] This notion has constantly been confirmed by subsequent

[2026] *Alpha v Ukraine*, Award, para 297.

[2027] *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (hereinafter: "*Inmaris v Ukraine*, Decision on Jurisdiction"), para 145. The tribunal emphasised that the registration of the relevant contracts of joint investment activity were merely mandatory in order to obtain investment protection and other benefits under the laws of Ukraine. However, unregistered investment was not automatically "*illegal as such*".

[2028] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (hereinafter: "*Mamidoil Jetoil v Albania*, Award"), para 482.

[2029] See also Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals," 47. Carlevaris refers to the potential abuse by a State due to the better position of the State "*to take advantage of every minute detail of their legal system*".

[2030] Commentators have pointed out that the tribunal's reasoning lacks any statement on whether the point of reference for such distinction shall be the violation itself or the provision that was breached, see Ibid. Moreover, a suggested approach is to distinguish between 'formal errors' and 'actions either leading to civil liability or constituting criminal offences', see Knahr, "Investments 'in Accordance with Host State Law,'" 2008, 39.

[2031] Schill, "Illegal Investments in International Treaty Arbitration," 293.

[2032] *L.E.S.I. S.p.A. and ASTALDI S.p.A. v The Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006 (hereinafter: "*LESI v Algeria*, Decision on Jurisdiction"), para 83 (iii). ("[…] *parce que la mention que fait le texte à la conformité aux lois et règlements en*

tribunals.[2033] Since the tribunal found no such violation it refrained from elaborating on what it considered to be a fundamental principle and on how to determine a violation of such principle. However, against the background that corruption violates transnational public policy it can be assumed that future tribunals will most certainly find corruption to amount to more than merely a minor violation and in fact to constitute a violation of fundamental principles.[2034]

The tribunal in *Saba Fakes v Turkey* introduced an additional requirement. Relying on the object and purpose of the IIA, the tribunal found that 'in accordance with host State law' clauses would only refer to domestic provisions related to "*the very nature of investment regulation*".[2035] In other words, only violations of laws and regulations comprising the investment regime of the host State would fall under the legality requirement set out in IIAs.[2036] In the view of the tribunal, violations of regulations in the telecommunication sector or of competition law were not relevant for purposes of the 'in accordance with host State law' clause. The tribunal in *Mamidoil Jetoil v Albania* recently referred to the findings in *Saba Fakes v Turkey* and confirmed that "*there must be an inner link between the illegal act and the investment itself*".[2037] In the tribunal's view, such approach is required

---

vigueur ne constitue pas une reconnaissance formelle de la notion d'investissement telle que la comprend le droit le droit algérien de manière restrictive, mais, selon une formule classique et parfaitement justifiée, l'exclusion de la protection pour tous les investissements qui auraient été effectués en violation des principes fondamentaux en vigueur.") (emphasis added).

[2033] See e.g. *Desert Line v Yemen*, Award, para 104, where the tribunal referred to *LESI* in order to find that 'in accordance with host State law' clauses intended to secure that the investment did not violate fundamental principles of host State law.

The tribunal in *Rumeli v Kazakhstan* also referred to *LESI v Algeria* and confirmed that investments will only be excluded from the protection of a BIT if the investments were made in violation of fundamental principles of the host State, *Rumeli v Kazakhstan*, Award, para 319. It is noteworthy that the tribunal was not convinced by the evidence that the investments had been made fraudulently or in violation of any laws or regulations of the host State, *Rumeli v Kazakhstan*, Award, para 320. This finding has been challenged by Kazakhstan in an Annulment Proceeding. The *Ad Hoc* Committee pointed at Rule 34 of the ICSID Arbitration Rules stating that the tribunal is the judge of the probative value of the evidence and found that the alleged lack of jurisdiction due to inconformity of the investment with the laws of Kazakhstan was not evident on the face of the award. The *ad hoc* Committee could not find fault with the tribunal's appreciation of the evidence and dismissed the Annulment, see *Kazakhstan v Rumeli*, Annulment, paras 94-99.

Note that one commentator recently argued against a limitation of 'in accordance with host State law' clauses to fundamental principles, Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration," 533 et seq. In Hepburn's view (i) there is no foundation for a limitation in the treaty text, (ii) tribunals have merely referred to such limitation in *obiter dicta*, and (iii) there is no support in other cases.

[2034] See e.g. *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014 (hereinafter: "*Hochtief v Argentina*, Decision on Liability"), para 199. Note that this was not a corruption case, but the tribunal made a general statement that investments "*effected by fraud or corruption can be caught by a* [in accordance with host State law] *provision*".

[2035] *Saba Fakes v Turkey*, Award, para 119.

[2036] *Saba Fakes v Turkey*, Award, para 120. Note that the tribunal denied jurisdiction on the grounds that there was no investment, since none of the three objective criteria resulting from Article 25(1) of the ICSID Convention was satisfied. Thus, the tribunal refrained from examining the legality of the alleged investment.

[2037] *Mamidoil Jetoil v Albania*, Award, para 481. The tribunal summarised the notion as follows: "*Illegal conduct of the investor will not affect the investment insofar as it does not relate to its*

to strike a balance between the notion that the host State only waived its sovereignty for investment in accordance with its substantive and procedural legislation and the risk of the host State abusing this mechanism to avoid liability.[2038]

Applied to the case of corruption, only corrupt acts violating laws of the investment regime of the host State would be considered a violation of host State law for jurisdictional purposes. The concrete meaning and consequence of such notion applied to corruption is unclear. Interpreting it narrowly would require the laws and regulations governing the procurement of concessions and the admission of investments to prohibit corrupt practices. After more than a decade of the global fight against corruption, almost all countries will have laws and regulations in place condemning any corrupt behaviour with regard to the implementation or admission of foreign investment. Moreover, domestic law will prohibit any illicit acts with regard to the investment, which amount to criminal activity. Corruption will most certainly be one of them. In fact, corruption and its effects go directly against the very nature of what investment regulation is aimed at: transparent decision-making respecting the rule of law.

Note that commentators have also suggested that for the purposes of determining a violation of domestic law under the 'in accordance with host State law' clause, whether the anti-corruption law at issue is in fact enforced by the host State should also be taken into account.[2039] The underlying idea is that a host State, which is not engaged in the fight against corruption, should also not take advantage of such situation.[2040] The host State's failure to take the required measures to fight corruption is most certainly of relevance for the corruption defence, but it is a question of whether the host State is barred from raising such defence and not a question of whether the host State law was breached by the corrupt act of the investor.

5. Timing of illegality decisive

Tribunals have noted that the timing of illegality is relevant for the application of the 'in accordance with host State law' clause.[2041] In the view of the tribunal in

---

substance or procedural requirements but rather occurs without any material connection to the investment".

[2038] *Mamidoil Jetoil v Albania*, Award, para 483.

[2039] Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," n. 56. ("*Arguably, an anti-corruption law which is not enforced at all despite (i) the knowledge of the state about the law being 'lettre morte' and (ii) the state's ability to enforce it and which is (iii) openly contradicted by state-tolerated or even state-encouraged corruption should not be considered when interpreting the usual BIT formula 'in accordance with law'*.").

[2040] Ibid., 224.

[2041] See e.g. *Hamester v Ghana*, Award, para 127; *Fraport v Philippines*, Award, para 345; *Phoenix v Czech Republic*, Award, para 103.

ECT tribunals confirmed that only illegality at the time of the making of the investment could deny the investor the right to invoke the ECT, see e.g. *Khan Resources v Mongolia*, Decision on Jurisdiction, para 384; *Yukos Universal Limited v Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014 (hereinafter: "*Yukos v Russia*, Final Award"), para 1355.

Fraport v Philippines only illegality surrounding the initiation of the investment could amount to a bar to jurisdiction, while issues about illegal conduct in the course of the investment would only affect the substantive provision of the IIA.[2042] The tribunal in *Fraport v Philippines II* confirmed this approach.[2043] This distinction became relevant in *Hamester v Ghana*, where Ghana alleged that substantial fraud surrounded the initiation and the performance of the investment, and objected to the jurisdiction of the tribunal on the ground of the 'in accordance with host State law' clause contained in Article 10 of the BIT.[2044]

The tribunal identified the possibility of host States to expressly limit their consent to arbitration by including the legality requirement in the IIAs.[2045] Since the compliance with host State law generally refers to 'investment made', the tribunal confirmed the approach stated in *Fraport v Philippines* and made a distinction as to the timing of the illegality.[2046] For the jurisdiction of a tribunal, only issues of illegality at the 'initiation of the investment' could be considered, while all questions about the legality in course of the performance and operation of the investment were matters for the merits

> "[t]he Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ('made') and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the

[2042] *Fraport v Philippines*, Award, para 345. ("[*T*]*he effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.*") (emphasis added). Note that commentators have questioned the approach to treat a violation of domestic law differently only because it happened before or after the initiation of the investment, see Christian Borris and Rudolf Hennecke, "Fraport AG Frankfurt Airport Services Worldwide v. Republic of The Philippines - Compliance with National Laws: A Jurisdictional Requirement under BITS?," *Transnational Dispute Management* 4, no. 5 (2007): 14.
[2043] *Fraport v Philippines II*, Award, paras 331-333.
[2044] *Hamester v Ghana*, Award, para 99.
[2045] *Hamester v Ghana*, Award, para 125.
[2046] *Hamester v Ghana*, Award, paras 127-129. The tribunal referred to *Fraport v Philippines*, Award, para 345.

> investor's conduct during the life of the investment is a merits issue."[2047]

Focusing on the allegations of fraud in relation to the implementation of the investment, the tribunal emphasised that in order to decline jurisdiction, the alleged fraud must have 'induced' the investment.[2048] The approach taken by *Fraport* and *Hamester* was later confirmed by the tribunal in *Teinver v Argentina.*[2049]

Following this approach, only corrupt practices committed when making the investment might lead to being a bar to jurisdiction of the tribunal. The limitation to the early stage of the investment pays tribute not only to the textual wording of the IIA, but also to the requirement that corruption must have influenced the official decision which led to the investment in the first place. In other words, corruption must have a causal link to the granting of a concession or the relevant initial approval in order to make an investment.[2050] Any corrupt action committed after that initial stage and during the performance of the investment would nonetheless be significant for the IIA protection and the decision of an investment treaty tribunal; however, it would not amount to a bar to the jurisdiction of the tribunal, but might rather be an issue for the merits.

The approach taken in *Fraport* and *Hamester* appears to have been accepted by many commentators.[2051] Some commentators, however, reject the temporal dividing line for lack of any sound basis in principle.[2052] In their view the timing of the illegality would not change its essence and would thus lead to artificial results.[2053] And yet other commentators argue that in the special case of corruption, timing is not decisive, since in any case investment protection should be denied

---

[2047] *Hamester v Ghana,* Award, para 127.

[2048] *Hamester v Ghana,* Award, paras 135-137. Note that the tribunal finally found that fraud could not be established and rejected Ghana's objection to jurisdiction, see *Hamester v Ghana,* Award, paras 131-139.

[2049] *Teinver v Argentina,* Decision on Jurisdiction, para 317-323.

[2050] Note that Obersteiner refers to the statement made by the tribunal in *Niko v Bangladesh* (Decision on Jurisdiction, para 455) that a causal link between the corrupt act and the conclusion of the relevant agreement was required in order to deny recourse to ICSID arbitration. In Obersteiner's view from this statement the conclusion can be drawn that "*a sufficient causal relationship between a violation and the existence of the investment*" must be established, Obersteiner, however, fails to take into consideration that the statement made by the tribunal in *Niko v Bangladesh* was not made in connection with any 'in accordance with host State law' clause. In fact, the arbitration clause was not contained in an IIA, but in the joint venture agreement concluded between the parties.

[2051] Kriebaum, "Investment Arbitration - Illegal Investments," 329–334. Note that Kriebaum rightly raises the issue that investment is often a process, for which reason the precise moment in time of the establishment or initiation of the investment will be difficult to determine. See also Florian Haugeneder, "Corruption in Investor-State Arbitration," *The Journal of World Investment and Trade* 10, no. 3 (June 2009): 330; Thomas Obersteiner, "'In Accordance with Domestic Law' Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors," *Journal of International Arbitration* 31, no. 2 (2014): 278 et seq.; Ralph Alexander Lorz and Manuel Busch, "Investment in Accordance with Law - Specifically Corruption," in *International Investment Law,* ed. Marc Bungenberg et al., 1st ed. (Baden-Baden: Nomos, 2015), 584.

[2052] Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 175.

[2053] Ibid.

completely.[2054] It is however noteworthy that this last opinion fails to provide any reasons for its undifferentiated approach. In fact, it does not state any reasonable argument why the illegality resulting from corruption should be treated differently with regard to the 'in accordance with host State law' clause than other cases of illegality.[2055] It is merely based on the policy argument that a corrupt investor should not receive investment treaty protection. Such general and unsubstantiated statement is, however, not suitable to provide the necessary basis to ignore the tribunals' interpretation of the 'in accordance with host State law' clauses as merely referring to the time of implementation.

6. Violation must be caused by the investor

The tribunal in *Kardassopoulos v Georgia* introduced a new notion to the issue of 'in accordance with host State law' clauses. It found that the host State could not invoke its own illegal behaviour to deny jurisdiction on the basis of the 'in accordance with host State law' clause. Georgia argued that the relevant joint venture agreement between the investor and two State owned entities was inconsistent with Georgian law, since the latter were prohibited under domestic law from entering into such agreement.[2056] The tribunal acknowledged that a State retains the power to control foreign investment made in their territory by denying protection under the BIT for those investments that are not in accordance with the State's legislation.[2057] However, the tribunal held that the limits to protection granted in the relevant BIT could only relate to the investor's action in making the investment.[2058] Consequently, the tribunal established that a State is not allowed to

> "preclude an investor from seeking protection under the BIT on the ground that its own actions are illegal under its own laws. In other words, a host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with its domestic law".[2059]

Moreover, the tribunal referred to the law of State responsibility to substantiate its decision. In particular, it referred to Article 7 of the ILC Articles on State

[2054] Bottini, "Legality of Investments under ICSID Jurisprudence," 300.
[2055] The reference made to *World Duty Free v Kenya* and *Inceysa v El Salvador* are not convincing, since in both cases the illicit behaviour was made at the implementation stage of the investment. In addition, the relevant illicit behaviour in *Inceysa v El Salvador* was not corruption but egregious fraud. Moreover, *World Duty Free v Kenya* was an arbitration based on a contractual ICSID arbitration clause rather than consent given by an IIA containing an 'in accordance with host State law' clause. Finally, investment protection was denied under the argument that a contract procured by corruption cannot be enforced by arbitration, rather than rejecting jurisdiction.
[2056] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 183. Note that high public officials, including the President and the Prime Minister, assured that the joint venture agreement and the investment would be legal and protected under Georgian Law.
[2057] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 182. The tribunal refers to and quotes M Sornarajah, *The International Law on Foreign Investment*, 2nd ed. (Cambridge: Cambridge University Press, 2004), 106. "[N]*o State has taken its fervour for foreign investments to the extent of removing any controls on the flow of foreign investments into the host State*."
[2058] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 182.
[2059] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 182.

Responsibility, which states that even in cases where State agents under cover of their official character perform unauthorised acts or act *ultra vires*, the conduct is nevertheless attributable to the State.[2060] Furthermore, the tribunal found the overall conduct of the State to have given rise to the investor's legitimate expectation that his investment in Georgia complied with the relevant local laws.[2061] In the tribunal's view, the investor had reason to believe in the conformity of the agreement most notably since its content had been approved by Georgian government officials.[2062] Thus, the tribunal found the State to be estopped from raising any objections that the investment was in breach of local law.[2063]

The tribunal rightly found that protection under an IIA could not be denied on the grounds of a host State's own illegal actions. Certainly, to defeat jurisdiction, the illegality must be related to the investor's actions when entering into the investment, and not – and only this was the focus of the tribunal's examination – related solely to actions of the State itself. In *Kardassopoulos* the action leading to the illegality of the investment could be attributed without any doubt to the host State, while the investor had not contributed to the illegality. The application of this approach to corruption raises a crucial question: how to deal with the fact that both parties are involved in the illegal conduct? The tribunal's reasoning can be understood in both ways. On the one hand, it could be interpreted in such a manner that the State is not allowed to base its jurisdictional defence on illegal acts in which it is involved itself. On the other hand, the tribunal's reasoning can be interpreted that the only illegal action relevant for the limitation on jurisdiction is the one of the investor, thus leaving the involvement of the host State irrelevant for the analysis. While the tribunal in *Kardassopoulos v Georgia* provides no answer to this question, it strengthens the view that not *any* violation of domestic law falls under these provisions and that the preclusion of jurisdiction is not automatically triggered for any violation, but has to be measured in relation to the purpose and objective of the BIT.

In the similar case of *Inmaris v Ukraine*, the tribunal confirmed that the investment could not be declared inconsistent with host State law if it is not based on the investor's default, but rather on the counterparty, which in that case was a State institution.[2064] However, in *Anderson v Costa Rica* the tribunal rejected taking into

[2060] *Kardassopoulos v Georgia*, Decision on Jurisdiction para 190.

[2061] *Kardassopoulos v Georgia*, Decision on Jurisdiction, paras 185-194. The tribunal refers to representations and warranties set forth in the joint venture agreement and the concession by the Georgian authorities as to the investment's validity. Moreover, the Concession was signed by the Ministry of Fuel and Energy of Georgia and in the years following the execution of the joint venture agreement Georgia never claimed the illegality of the investment.

[2062] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 194.

[2063] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 194.

[2064] *Inmaris v Ukraine*, Decision on Jurisdiction, para 139. Ukraine argued that the payment scheme under the relevant contracts violated Ukraine laws on currency control, mainly since it required a licence. The tribunal found that the obligation to obtain a licence was on the Ukraine resident, thus on the State-owned counterparty and not the investor. See *Inmaris v Ukraine*, Decision on Jurisdiction, paras 137-140.

consideration the fact that the breach of domestic law was not caused by the investors, but rather by the counterparty to the financial transactions at question, a prominent family called the Villalobos. The tribunal found that the transactions at issue were induced by fraud and illegal financial intermediation by the Villalobos and for such reason in violation of domestic law.[2065] In the view of the tribunal, due to such violation of a third party, the investors did not legally own the assets resulting from this transaction under domestic law.[2066] Despite the illegality of the investment was not caused by the investor, the tribunal found that no investment was constituted under the IIA.[2067] This reasoning has been rightly subject to criticism by commentators.[2068]

The tribunal failed to take the purpose and objective of the legality requirement into consideration when applying the 'in accordance with host State law' clause. The host States shall be free to limit their consent in order to protect only the investment made by investors who respect the laws of the host State. In other words, the legality requirement is the means the host State has to safeguard that only investments where the investors complied with the relevant domestic regulations are granted protection. However, the purpose is not to automatically exclude investments for *any* violation of whatever domestic law committed by parties outside of the sphere of the investor.

The reasoning of the tribunal in *Anderson v Costa Rica* is flawed for many reasons. First, the tribunal ignored that the investors had complied with all their obligations under domestic law.[2069] The relevant violations of Costa Rican law were caused only by the Villalobos who failed to comply with the registration and authorisation requirements under the financial regulations only applicable to them and not the investors.[2070] Second, the illegality of the financial transactions between the investor and a private third party is not relevant for the legal relationship between the investor and the host State with regard to investment protection.[2071] They are two different and independent legal relationships. Third, the issue of the proceedings was whether Costa Rica had failed to provide full protection and security by actually failing to properly supervise and prevent the fraudulent conduct of a third party. The fraudulent behaviour of the third party was exactly what caused harm to the investors. Whether such transaction was legal or illegal was of no relevance for the potential breach of treaty of the host State. Strangely enough, the tribunal based its findings exactly on this committed fraud in order to argue that no investment was made in accordance with the laws of Costa Rica and to deny jurisdiction. Finally, it stressed the importance of the financial regulations by rightly finding that host States are free to seek the protection of the savings of

[2065] *Anderson v Costa Rica*, Award, para 52-59.
[2066] *Anderson v Costa Rica*, Award, para 55.
[2067] *Anderson v Costa Rica*, Award, para 57.
[2068] E.g. Schill, "Illegal Investments in International Treaty Arbitration," 306.
[2069] Ibid.
[2070] Ibid.
[2071] Ibid.

the public from fraud and other harms by regulating the financial service sector. However, it failed to acknowledge that the claimants were the victims of the same fraud that the domestic law sought to prevent. It is inconsistent with the tribunal's argumentation, with the purpose of the IIA and the financial regulations to deprive the investors from any chance to have the conduct of the host State revised before an international tribunal; in this case, where the investors were defrauded by a third party.

7. Tribunal's own assessment

Although the host State law determines the legality of the investment, various tribunals have clarified that they would not rely on any previous decision made by the host State with regard to the illegality. [2072] In order to establish jurisdiction, the tribunals have emphasised that they need to make their own assessment on the conformity of the investment with local laws.[2073] The main reason for this approach is to ensure that the State is refrained from subsequently influencing its scope of consent through its own State courts or other State authorities.

While some commentators suggest that tribunals should 'accord great weight' to decisions of local courts,[2074] the arbitral tribunal has the final discretion on deciding how much it will take local assessment into consideration. Especially in corruption cases it will be of advantage for both arbitral tribunals and local authorities to work together, in particular with regard to obtaining evidence of the corrupt practice.[2075] Nevertheless, it is the tribunal who has to be satisfied that corruption is established or not. The tribunal will not fulfil its duty of taking corruption seriously by merely referring to national investigations or decisions made by national authorities and courts. Moreover, the tribunal must take into account that the anti-corruption agencies and law enforcement authorities remain linked to the host State, which is party to the proceedings. In this context, the tribunal must be aware that anti-corruption measures may also be misused by host States to increase pressure on investors.[2076]

III. International public policy as jurisdictional objection

Some commentators base the jurisdictional objection to corruption-tainted investments on the violation of international public policy.[2077] This approach was recently confirmed by the tribunal in *Liman Caspian Oil v Kazakhstan*, which stated in an *obiter dicta* that it agrees with the cases referred to by the parties that

[2072] See *Inceysa v El Salvador*, Award, para 290; *Fraport v Philippines*, para 391. See also Diel-Gligor and Hennecke, "Investment in Accordance with the Law," 572.
[2073] See *Inceysa v El Salvador*, Award, para 290; *Fraport v Philippines*, para 391.
[2074] Bottini, "Legality of Investments under ICSID Jurisprudence," 314.
[2075] See also Ibid., 313.
[2076] See in general for such notion Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration."
[2077] Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 314.

"*it does not have jurisdiction over investments made in violation of international public policy*".[2078] Since the tribunal found that the host State, who had raised the corruption defence, had failed to satisfy the burden of proving the alleged fraud, the tribunal refrained from either providing any explanation for its conclusion or engaging in any kind of analysis of or discussion about the authorities cited by the parties.[2079]

However, the cases referred to by the tribunal and cited by the parties do not support such finding.[2080] In *Inceysa v El Salvador*, the tribunal expressly based its finding that it lacked jurisdiction on the 'in accordance with host State law' clause and the investor's violation of host State law by *inter alia* violating international public policy through fraudulent misrepresentation.[2081] Due to the explicit limitation of consent stated in the 'in accordance with host State law', an investment made in violation of host State law was not covered by the host State's consent.[2082]

In *World Duty Free v Kenya*, the arbitration was based on a contractual arbitration clause rather than on consent given in an IIA. The tribunal had expressly found to have jurisdiction and dealt with corruption as a matter of admissibility and merits. By finding that "*claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal*" it did not rule on the tribunal's lack of jurisdiction over the claim. Rather, its findings aimed at dismissing the claim due to its violation of international public policy as inadmissible.[2083]

In the last case cited by the tribunal – the probably most cited international arbitration case on corruption, ICC Case No. 1110 – Judge Lagergren found that the relevant intermediary contract had the purpose of channelling bribes to Argentine public officials. In his opinion the parties had "*forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes*".[2084] However, this case also does not support the notion that a violation of international public policy is an automatic objection to jurisdiction in investment treaty arbitration. First, the case concerned a commercial arbitration situation where the consent to arbitrate was provided in a separate agreement entered into by both parties. Second, the findings of Judge Lagergren concerned a contract *of* corruption and not a contract *tainted* by corruption. Contracts made with the mere purpose of performing a corrupt act are void *ab initio* while a

[2078] *Liman Caspian Oil v Kazakhstan*, Award, para 194.
[2079] *Liman Caspian Oil v Kazakhstan*, Award, paras 193-194.
[2080] The award names three exhibits that the tribunal took particular note on: *Inceysa v El Salvador*, *World Duty Free v Kenya*, and ICC Case No. 1110.
[2081] *Inceysa v El Salvador*, Award, paras 229-252. For an overview on the findings of *Inceysa v El Salvador* see above at B.II.2.a).
[2082] *Inceysa v El Salvador*, Award, paras 229-252.
[2083] The question of inadmissibility will be dealt with below at **C**.
[2084] See award in *Arbitration International* 1994, 277, with a note by Dr J. Gillis Wetter – "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case n° 1110".

transaction tainted by corruption is (only) voidable and challengeable. Thus, Judge Lagergren's decision that, in the specific circumstances before him, the case was not arbitrable is not comparable to the situation in investment treaty arbitration, where the investor made a generally legitimate investment, which to some extent may have been obtained by corrupt means.

There is neither a precedent in jurisprudence of international courts or tribunals nor a principle of international law that would automatically deny jurisdiction in an investment treaty arbitration due to a violation of international public policy.[2085] The question of a violation of international public policy may rather be relevant for the admissibility of the claim.

IV. Estoppel to accept consent of the host State

Commentators have suggested that an investor who engaged in corrupt conduct in connection with the implementation of the investment is prevented from relying on the host State's consent provided in the IIA.[2086] This view has first been presented by Cremades, who argues that

> "[w]here the investor has acted corruptly, the right to arbitrate can be treated in exactly the same manner as the other substantive rights, i.e. the investor lacks clean hands and is estopped from claiming the benefit of the right to arbitrate. […]
>
> According to the above analysis, corruption pertains to jurisdiction insofar as a corrupt investor is estopped by its corruption from accepting the open offer to arbitrate made by the host State in the BIT."[2087]

Lamm, Pham and Moloo advanced this notion and contend that the interpretation of the treaty provision containing the host State's consent must consider transnational public policy as a "*relevant* [rule] *of international law applicable in the relations between the parties*" within the meaning of Article 31(3)(c) VCLT.[2088] Due to the investor's failure to comply with transnational public policy, the investor is barred to accept the unilateral consent of the host State.[2089] As support for the general notion they make reference to (i) *Phoenix v Czech Republic* where the tribunal held that only legal and *bona fide* investments should be

[2085] This was recently also highlighted by Douglas, Douglas, "The Plea of Illegality in Investment Treaty Arbitration."
[2086] Cremades, "Corruption and Investment Arbitration," 215; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 720 et seq.; Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 322; Kreindler, "Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers," 385 et seq.
[2087] Cremades, "Corruption and Investment Arbitration," 215.
[2088] Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 720.
[2089] Ibid., 721.

protected by ICSID arbitration[2090] and (ii) to *Inceysa v El Salvador*, where the tribunal held that the fraudulent investor could not enjoy access to international arbitration due to its fraudulent behaviour.[2091]

In neither of these cases the tribunal referred to a specific bar for the investor from accepting the host State's consent. As discussed above, the tribunal in *Phoenix v Czech Republic* understood the notion of investment under Article 25 of the ICSID Convention as containing an unwritten legality and good faith requirement – a view that has been challenged by subsequent tribunals.[2092] In *Inceysa v El Salvador*, the tribunal analysed the principle *nemo auditur propriam turpitudinem allegans* as violation of domestic law under the 'in accordance with host State law' clause contained in the relevant BIT. In no way did it deal with a general estoppel of the investor of accepting the host State's consent offered in the BIT. Moreover, the tribunal in *Metal-Tech v Uzbekistan* did not mention this potential consequence of corruption. Thus, to date there is no precedent for this notion.

V. Bar to the host State's objection to jurisdiction

The different outcomes of the cases in *Fraport* and *Inceysa* on the one hand and *Kardassopoulos* on the other hand seem comprehensible when focusing on which party is in fact responsible for the illegality. Where illegality of the investment results from the illicit conduct of (only) the investor, then it is argued that it forfeits its investment treaty protection. However, where illegality is due to a failure on the side of the host State, such breach of host State law may not influence the treaty protection granted to the investor. The basis for such approach is the general principle that a party may not benefit from its own wrong.[2093] This notion is easily applicable when dealing with general issues of illegality. It suits any case of fraudulent behaviour on either side. However, the case becomes complicated when dealing with corruption. The particular characteristic of the phenomenon of corruption is that both sides may be involved in the illicit act: the investor seeking to invest and the public official exercising public authority over the investment. Against this background, the question arises whether the host State involved in the

---

[2090] See Ibid., n. 2137. Lamm, Pham and Moloo refer to *Phoenix v Czech Republic*, Award, para 100 ("*The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host state or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and bona fide investments.*").

[2091] *Inceysa v El Salvador*, Award, para 242 ("*Applying 'Ex dolo malo non oritur actio' to the case at hand, we can affirm that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, 'nobody can benefit from his own fraud'.*").

[2092] See above B.I.

[2093] This notion is the basis for many different principles in domestic and international law: e.g. *venire contra factum proprium non valet*; *nemo auditor propriam turpitudinem allegans*.

corrupt act should be barred from raising the corruption defence as an objection to jurisdiction.

At the same time the tribunal should also take into account any contradictory behaviour of the host State towards corruption.[2094] In *World Duty Free v Kenya*, for instance, Kenya relied on corruption as a defence against the investment arbitration brought by an investor, while it actually failed to take any measures against the corrupt public official who was the driving force of the corrupt practice, the former President Daniel arap Moi. The tribunal in *Wena v Egypt*, for instance, evaluated the fact that Egypt had never commenced proceedings against the public official that it accused of corruption in the arbitration.[2095] Due to such conduct, the tribunal felt "*reluctant to immunize Egypt from liability*".[2096]

From a policy perspective, the possibility of a host State to raise the corruption defence despite the fact that it contributed to the illicit act or failed to take the appropriate measures to prosecute it, has led to criticism in scholarship. Commentators have raised concerns that allegations of corruption might be abused to escape liability. While some commentators see an incentive for the host State to maintain a corrupt system,[2097] it must at least be acknowledged that a *carte blanche* for the host State creates no incentive to fight corruption.[2098] Questions of policy with regard to the approach against corruption will be analysed in detail in Chapter Nine. At this stage the focus is on the doctrinal and legal issues that arise from the corruption defence where the host State (i) endorses the investment despite knowing about the corrupt act (see below at **1.**); (ii) has contributed to the illegality of the investment by involvement in the corrupt act (see below at **2.**); and (iii) failed to take the required measures against the corrupt act (see below at **3.**).

1. Host State's endorsement of the corrupt investment

The host State may be barred from invoking the corruption defence if it endorsed the corrupt investment despite the fact of it being tainted by corruption. So far no investment treaty arbitration raised this question in connection with corruption. However, arbitral jurisprudence and commentators have dealt with the general issue whether a host State may be prevented from raising the illegality of an

[2094] This issue was raised by Bernardo Cremades, see Cremades, "Corruption and Investment Arbitration," 217.
[2095] *Wena v Egypt*, Award, para 116.
[2096] *Wena v Egypt*, Award, para 116.
[2097] Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," 220; Stephan Wilske and Todd J. Fox, "Corruption in International Arbitration and Problems with Standard of Proof," in *Liber Amicorum Eric Bergsten - International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011), 499.
[2098] See Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption."

investment as a jurisdictional objection where the host State was aware of such illegality and nonetheless endorsed the investment.[2099]

The majority in *Fraport v Philippines*, for instance, pointed to the principles of fairness and found that the endorsement of the knowingly illegal investment may amount to an informal acceptance preventing the host State from raising violations of its own law as a jurisdictional defence.[2100] In the circumstances of the case, the investor had concealed the illegality from the host State. Consequently, the investor could not have assumed in good faith that the host State – in form of the public official approving the investment – recognised such illegality as being legitimate.[2101] It is worth quoting the majority in full

> "[t]here is, however, the question of estoppel. Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.
>
> But a covert arrangement, which by its nature is unknown to the government officials who may have given approbation to the protect, cannot be any basis for estoppel: the covert character of the arrangement would deprive any legal validity (assuming that informal and possibly *contra legem* endorsements would have legal validity under them relevant law) that an expression of approbation or an endorsement might otherwise have had. There is no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law when Fraport first made its investment in 1999. […]
>
> As a matter of law, the Claimant is correct that the cumulative actions of a host government may constitute an informal 'acceptance' of a foreign investment that otherwise violates its law. […] The issue here, however, is fact. The Claimant, knowing of the violation of the ADL,

[2099] *Fraport v Philippines*, Award, paras 346, 347, 387; *Desert Line v Yemen*, Award, paras 119-120. See also *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 192 ("*Respondent cannot simply avoid the legal effect of the representations and warranties set forth in the JVA and the Concession by arguing that they are contained in agreements which are void ab initio under Georgian law. The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia* […] *were closely involved in the negotiation of the JVA and the Concession*.", emphasis added). See also e.g. Kriebaum, "Investment Arbitration - Illegal Investments," 329. ("[…] *an informal acceptance can cure a violation of host State law, if the host State knowingly tolerates the conduct of the investor for a certain time*."); Rahim Moloo and Alex Khachaturian, "The Compliance with the Law Requirement in International Investment Law," *Fordham International Law Journal* 34, no. 6 (2011): 1497 et seq. ("*In the context of international investment law, where the host state knew of the illegality but still endorsed the investment, it should be estopped from raising that illegality before the tribuna*l.").

[2100] *Fraport v Philippines*, Award, paras 346, 347, 387.

[2101] *Fraport v Philippines*, Award, para 387.

> consciously concealed it, such that any actions that might otherwise have been viewed by a foreign investor in good faith as endorsements by the Philippine government cannot be deemed to have cured the violation or estopped the Government."[2102]

The reasoning of the tribunal is based on principles governing unilateral acts. Unilateral acts comprise conduct of subjects of international law, which is not aimed at entering into an agreement, but nonetheless creates legal effects.[2103] While due to the variety of legal relations it is difficult to assign categories to each unilateral act,[2104] with regard to the host State's endorsement of illegal investments the general concepts of recognition or waiver may serve as guidance.

Recognition consists of an affirmative action or active conduct, which constitutes the declaration of a subject of international law that it "*acknowledges the existence of a fact, a situation or a claim and* […] *consider*[s] *them legitimate*".[2105] Such recognition obliges the State to act consistently with its declaration.[2106] From this it follows that a State that declares an illegal or invalid act as legitimate, is deprived from subsequently arguing the illegality or invalidity of the same act.[2107] Waiver is a declaration constituting the voluntary renunciation of a right after it has arisen.[2108] Guidance for the interpretation of conduct amounting to a unilateral act of State may be found in the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" (***Guiding Principles on Unilateral Acts***) and the Commentary thereto (***Commentary on Unilateral Acts***) prepared by the ILC and adopted by the United Nations General Assembly on 4 December 2006.[2109] In this context it must be noted that the principles of attribution for unilateral acts are different than the ones regarding State

---

[2102] *Fraport v Philippines*, Award, paras 346, 347, 387.
[2103] Crawford, *Brownlie's Principles of Public International Law*, 416.
[2104] Note that Crawford stresses that much will depend on the certain context and the circumstances, see Ibid.
[2105] Victor Rodríguez Cedeño, Sixth report on unilateral acts of States, UN A/CN.4/534, paras 48, 67.
[2106] Victor Rodríguez Cedeño, Sixth report on unilateral acts of States, UN A/CN.4/534, para 101.
[2107] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 115. See also Moloo and Khachaturian, "The Compliance with the Law Requirement in International Investment Law," 1497. ("*Affirmations or declarations by a state party are binding on it and entitle reliance by other parties, making it all but impossible for the state to then reverse those actions or its consequences*."). See also *Desert Line v Yemen*, Award, para 119 ("*As for the Claimant's detrimental reliance on the assurances from the highest organs of State, they are obvious an indeed uncontradicted*. […] *It would offend the most elementary notions of good faith, and insulting to the Head of State, to imagine that he offered his assurances and acceptance with his fingers crossed as it were making a reservation to the effect 'that we welcome you, but will not extend to you the benefits of our BIT with your country'*.").
[2108] Christian J. Tams, "Waiver, Acquiescence, and Extinctive Prescription," in *The Law of International Responsibility*, ed. James Crawford, Alain Pellet, and Simon Olleson (Oxford: Oxford University Press, 2010), 1037–1038. See also *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v Republic of Ecuador*, PCA Case No. AA 277, Interim Award, 1 December 2008, para 137 ("[Waiver has] *the effect that a right which existed at a certain time can no longer be relied upon or enforced by the holder of that right*.").
[2109] See UN A/RES/61/34 dated 18 December 2006.

responsibility.[2110] A unilateral act may only be attributable to the host State's will if it is performed by public officials with the public authority to bind the host State.[2111]

Lim applies the notion of recognition to corruption and argues with regard to the facts of *World Duty Free v Kenya* that "*the unilateral acts of approval of the corruptly procured investment, which are attributable to Kenya* […] *amount to recognition of the validity of the investment*."[2112] In his view, the host State's participation in the corrupt act through its corrupt public officials' solicitation and receipt of bribes[2113] must be interpreted as the host State's unilateral act of promising to disregard such illegality for investment protection and treatment purposes.[2114] Following such reasoning, the host State would be deprived from raising the illegality of the investment based on corruption.

The circumstances surrounding corruption will, however, most certainly be different than the facts in *Fraport v Philippines.* The public officials endorsing the investment will most likely be the ones involved in the corrupt act, for which reason they will be aware of the illegality. However, as pointed out by the tribunal in *Fraport v Philippines*, the interpretation of the conduct of the host State must be made in good faith.[2115] Against this background it is questionable whether the mere granting of a permit or a concession in exchange for a bribe may be viewed as including the declaration of making an active promise to disregard such illegality for investment protection purposes. This will be a question of fact as well as interpretation of the precise conduct and cannot be answered in a general manner. However, in order to amount to a recognition, the written or oral declaration or the

---

[2110] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," paras 92–97.

[2111] Article 4 of the Guiding Principles on Unilateral Acts:
"*A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence;* […]"

[2112] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 177. See also his detailed analysis at Ibid., paras 178–193. In Lim's view, "*host state conduct such as that exhibited in World Duty Free gives rise to a binding manifestation of will by the state to recognize a corruptly procured investment as being valid and entitled to protection and fair treatment*", see Ibid., para 193.

[2113] Lim finds corruption attributable to the host State as an act of will of the host State under the condition that corruption is considered the 'essence of the state policy' as it would be in a true kleptocracy. Note that he makes this statement with regard to the attribution of unilateral acts and not regarding internationally wrongful acts, see Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," paras 186 et seq. Lorz and Busch seem to favour the approach that "*attribution of acts of participation in or condonation of corruption can more convincingly be based on the doctrines of recognition, acquiescence and estoppel*", Lorz and Busch, "Investment in Accordance with Law - Specifically Corruption," fn 51.

[2114] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para. 181.

[2115] *Fraport v Philippines*, Award, para 387.

active conduct of the public official must be clear and interpreted restrictively.[2116] Moreover, the statements or representations must be aimed at being binding.[2117]

In the obscure circumstances of corruption, it is not likely that the public official makes any declaration about the investment protection of the investment tainted by corruption attributable to the host State.[2118] What is more, being aware of the illegality of corruption, the investor may most likely not view in good faith the corrupt conduct of the public officials as a declaration of future investment protection. Rather, the promise made by the public official in exchange for the bribe may be interpreted as merely consisting in the exercise of public authority to perform the specific corrupt act, e.g. granting the concession, without considering any implications in the future. Thus, only under specific circumstances such conduct may be understood as also including a binding promise to treat the investment as legitimate despite the illegality due to corruption. Moreover, it is unlikely that a public official will make a declaration of waiver with regard to the corrupt act.[2119]

2. Host State's participation in the corrupt act

In scholarship, the view is gaining ground that the host State should not benefit from its own participation in the corrupt act in order to escape liability for treaty breaches under the IIA.[2120] As examined in Chapter Five, the involvement of the public officials may be attributed to the conduct of the host State.[2121] In such case, the host State may be accountable for the participation in the corrupt act,

---

[2116] Article 7 of the Guiding Principles on Unilateral Acts:
"*A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated;* […]" (emphasis added).

[2117] Crawford, *Brownlie's Principles of Public International Law*, 421.

[2118] Note that Llamzon states in similar manner that "*there is little practical likelihood that any public official would contemporaneously and expressly consent to any official act where corruption tainted the official commitment*", Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 67; Llamzon, *Corruption in International Investment Arbitration*, 270. Note also that Llamzon made such statement in connection with 'consent' under Article 20 of the ILC Articles.

[2119] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 69; Llamzon, *Corruption in International Investment Arbitration*, 271 et seq.

[2120] See e.g. Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 79 et seq.; Kulick, *Global Public Interest in International Investment Law*; Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration"; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration"; Llamzon, *Corruption in International Investment Arbitration*; Stephan Wilske and Willa Obel, "The 'Corruption Objection' to Jurisdiction in Investment Arbitration - Does It Really Protect the Poor?," in *Poverty and the International Economic Legal System - Duties to the World's Poor*, ed. Krista Nadakavukaren Schefer (Cambridge et al.: Cambridge University Press, 2013), 177–88; Lorz and Busch, "Investment in Accordance with Law - Specifically Corruption," 588 et seq.

[2121] See Chapter Five D.

irrespective of whether the conduct in question may be viewed as a unilateral act binding the host State to provide investment protection. As consequence of the participation of the host State in the corrupt act, the illegality of the investment will *also* be a result of the illicit behaviour of the host State.

While the principle of good faith applied to the investor is the basis for the corruption defence, such principle applies to both parties. In the specific circumstances of corruption both parties are involved in the event causing the illegality of the investment. Thus, the general principle that no party may take advantage of its own wrongful acts (*nemo auditor propriam turpitudinem allegans*) as part of the principle of good faith is also applicable to the host State. Most certainly, the investor's involvement in corrupt practices surrounding the investment must have an effect on the scope of protection. However, at a jurisdictional stage it is for the host State to invoke the illegality of an investment in order to deprive the investor from investment treaty protection. Thus, a strong argument can be made that the host State may not base its jurisdictional objection where the objection also follows from the State's own illegal behaviour or conduct.[2122] Otherwise the host State would first benefit from the illegal investment and then, when convenient, raise its illegality in order to escape liability under the IIA, while it contributed to the illegality in the first place. In this context, whether corruption is alleged by the host State or by the tribunal itself cannot make any difference. The fundamental notion is that the host State shall not benefit from the corrupt act of its State officials by being granted the advantages of the corruption defence at the jurisdictional stage.

Where both parties are involved in a corrupt scheme surrounding the investment, the jurisdictional stage does not provide a suitable platform to consider the contribution of both parties to the illegality of the investment and comply with the general principle of *nemo auditor propriam turpitudinem allegans*. Commentators arguing for declining jurisdiction in such cases[2123] ignore that such principle applies to both parties.[2124]

[2122] For a general application of this principle see *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 182. See also Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals," 45. Carlevaris refers to the principle *nemo auditur propriam turpitudinem allegans* and finds that *Kardassopoulos v Georgia* stated such principle in the clearest terms.

[2123] See e.g. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine"; Richard Kreindler, "Die Internationale Investitionsschiedsgerichtsbarkeit Und Die Korruption: Eine Alte Herausforderung Mit Neuen Antworten," *Zeitschrift Für Schiedsverfahren - German Arbitration Journal*, no. 1 (2010): 2–13; Kreindler, "Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers."

[2124] See e.g. Mohamed Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," *ICSID Review - Foreign Investment Law Journal* 24, no. 1 (2009): 135.

3. Host State's condonation of the corrupt act

The view in scholarship is gaining ground that a host State that condones the corrupt acts committed by its public officials should not be allowed to raise the corruption defence.[2125] Sacerdoti, for instance, points at the fact that there is

> "an aspect of fairness to be considered which is expressed in the general principles of law "*nemo auditur propriam turpitudinem allegans*". There are reservations against a State which, on the one hand, is unwilling or unable to curb corruption of its public sector and, on the other hand, invokes its conduct which is in breach of its own law and of generally accepted principles in order to profit from its own illegal dealing, or repudiates its obligations on the grounds that the contract was affected by bribery."[2126]

While this question has been at the forefront of the discussions among commentators, it has not been subject to arbitral scrutiny in connection with the corruption defence at the jurisdictional stage. The arbitral case law has so far merely dealt with general conduct of host States towards illegal investment. The majority in *Fraport v Philippines*, for instance, found that the host State's failure to prosecute a violation of the host State law may lead to the obviating of the objection to jurisdiction.[2127] However, the tribunal seems to have based such result on the notion that an investor may reasonably infer the legitimacy of its investment from the host State's failure to prosecute any violation.[2128] Applying the facts of the case, the majority found that due to the concealment of the acts in question the host State was not able to initiate any legal actions.[2129] In the words of the majority

> "a failure to prosecute something of the order of a violation of the ADL, such that an investor reasonably inferred that it was acting lawfully and made further investments, could obviate an objection to jurisdiction *ratione materiae*. The issue here, however, is fact. […]. The Respondent could hardly have initiated legal action against the Claimant for violations which the Claimant had concealed."[2130]

In similar ways, the tribunal in *Kardassopoulos* emphasised that the failure of the host State to claim the illegality of the investment in the years following its

---

[2125] See e.g. Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," 585; Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread"; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 73 et seq.; Llamzon, *Corruption in International Investment Arbitration*, 275 et seq.; Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2009, 135; Lorz and Busch, "Investment in Accordance with Law - Specifically Corruption," 588 et seq.

[2126] Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," 585.

[2127] *Fraport v Philippines*, Award, para 387.

[2128] *Fraport v Philippines*, Award, para 387.

[2129] *Fraport v Philippines*, Award, para 387.

[2130] *Fraport v Philippines*, Award, para 387.

implementation, caused the investor to legitimately expect that the investment was legal.[2131] Similarly, the tribunal in *Tokios Tokelės* referred to the fact that no objections against the conformity were raised in the eight years following the registration of the relevant company.[2132] In *Saluka v Czech Republic*, the tribunal emphasised that the relevant Czech authorities had never questioned the legality of the relevant investments before the arbitral proceedings.[2133] However, the arbitral decisions were based on the principle of good faith and the notion of legitimate expectations, which will not come to the same result in corruption cases. Due to the bad faith on the side of the investor, it cannot rely on any expectation that its investment is in fact valid and legal in accordance with host State law.

The host State's condonation of corruption may nonetheless have an effect on the host State's right to raise the corruption defence. An initial question is whether the host State has knowledge of the corrupt act (see below at **a)**). Moreover, the host State's failure to take action against the corrupt act may be analysed from different doctrinal angles. On the one hand, such failure to prosecute may be viewed as a conduct that amounts to an expression of will of the host State to be bound not to invoke the illegality (see below at **b)**). On the other hand, the failure to comply with the international obligations to fight corruption may lead to the accountability of the State and depriving it from benefiting from its own wrongful conduct (see below at **c)**).

a) Host State's knowledge of the corrupt act

The host State's knowledge of the corrupt act is crucial for a tribunal to consider any consequence of the host State's failure to take action against such act. While the public official endorsing the investment in exchange of a bribe has by nature positive knowledge of the corrupt act, at this stage, the conduct and knowledge of the law enforcement agencies and the judiciary of the host State are at issue. Where the positive knowledge of these organs is unclear, the question of attribution of knowledge will arise.

The tribunal in *World Duty Free v Kenya* denied that the knowledge of the President – who in fact was the driving force behind the corrupt practices – could be attributed to Kenya.[2134] It is noteworthy that the tribunal only analysed the rules of attribution of knowledge under English and Kenyan law and did not rule on attribution to conduct of State under international law. The tribunal merely held that under English or Kenyan law there is no attribution of knowledge of the agent

[2131] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 192 ("*The Tribunal further observes that in the years following the execution of the JVA and the Concession by SakNavtobi and Transneft, respectively, Georgia never protested nor claimed that these agreements were illegal under Georgian law. In light of all of the above circumstances, the Tribunal is of the view that Respondent created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection*.").
[2132] *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, para 86.
[2133] *Saluka v Czech Republic*, Partial Award, para 217.
[2134] *World Duty Free v Kenya*, Award, para 185.

to the otherwise innocent principal.[2135] The findings of the tribunal based on such agent/principal rule under domestic law provide no guidance for investment treaty arbitration cases where international law is applicable. As examined in Chapter Five, under certain circumstances corrupt practices by public officials may be attributable to the host State. Note that in such cases, it is not the knowledge that is attributed to the host State, but the whole corrupt conduct.[2136] In such case the host State must be accountable for the corrupt act and may not deny its knowledge.

A few commentators argue against an attribution to the State of the knowledge a public official has about a corrupt act.[2137] It is contended that since corruption violates international public policy, a State should not be prevented from invoking the illegality of the investment.[2138] This reasoning is not convincing since it neglects that international public policy applies to both, the investor and the host State. In addition, the fact that the involved host State is deprived from invoking the corruption defence at the jurisdictional stage does not render the general prohibition against corruption defeated. The specific facts surrounding the corrupt acts would nevertheless be an issue at the merits, when examining the substantive protection.

b) Acquiescence

The condonation of corruption through the host State's failure to take the required actions against the persons involved in the corrupt act may amount to the unilateral act of acquiescence.[2139] Acquiescence is based on silence or inaction against a factual or legal state of affairs, which calls for a certain reaction in form of any kind of objection or clarification.[2140] In the words of the ICJ "*acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent*".[2141] However, in order for the other party to reasonably interpret the silence as consent, the State requires knowledge over the factual or legal state of affairs at issue. Thus, in order for an investor to view the host State's inaction as tacit recognition of the investment obtained by corruption, the host State must have knowledge of such corrupt act. At the same time in order for the investor to interpret the host State's failure to prosecute as condonation and

[2135] *World Duty Free v Kenya*, Award, para 185.
[2136] Note that the principles on attribution of conduct of State are aimed at (and thus only applicable to) the attribution of internationally wrongful acts and not at the attribution of mere knowledge.
[2137] See e.g. Bottini, "Legality of Investments under ICSID Jurisprudence," 309.
[2138] Ibid.
[2139] See Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," paras 194–213.
[2140] Ibid., para 123.
[2141] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, Judgment of 12 October 1984, ICJ Reports 1984, 246 (hereinafter: "*Gulf of Maine*"), 305.

tacit recognition, it needs to be aware of the host State having knowledge of the corrupt act, but willingly refraining from taking action.[2142]

Against this background Lim distinguishes two cases of condonation of corruption by the host State. In the first case the investor knows that the host State discovered the corrupt act and in the second case the investor has no knowledge of the suspicions or findings of the host State.[2143] In Lim's line of reasoning where the investor is aware of the host State's discovery of the corrupt act and the host State refrains from taking the appropriate action, such inaction "*clearly manifests the state's intention to disregard the investor's violation of domestic law, and to tacitly recognise the corruptly procured investment's validity and entitlement to fair treatment*".[2144] As a result the host State is bound by the principle of *pacta sunt servanda* and is subsequently deprived of arguing the illegality or invalidity of the investment.[2145]

In case the investor has no awareness of the host State's discovery, then the investor cannot view the inaction to prosecute the corrupt officials and the corrupt investor as a consent to the illegal investment obtained by corruption.[2146] Thus, according to Lim's view, the host State would remain free to raise the corruption defence as an objection to jurisdiction.

c) Estoppel

The host State's failure to take the required action against the corrupt act leading to a condonation of corruption may amount to an estoppel. Estoppel has its foundation on the principle of good faith[2147] and is considered a general principle of international law.[2148] Estoppel is not a unilateral act and the conduct subject to estoppel is not aimed at making a binding commitment. While estoppel is often applied in concert with other general principles or doctrine it has also an independent foundation in international law. Under the specific circumstances where a party relied on a statement of fact or the party making such statement took

---

[2142] Crawford notes that unilateral acts must be publicly manifested, Crawford, *Brownlie's Principles of Public International Law*, 421. Lim rightly notes that a State cannot be bound by its thoughts alone, Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 208.

[2143] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," paras 194–213.

[2144] Ibid., para 198.

[2145] Ibid.

[2146] Ibid., paras 207–213.

[2147] See *Gulf of Maine*, para 130 ("*The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principle of good faith and equity*.").

[2148] Crawford, *Brownlie's Principles of Public International Law*, 420. See also *Canfor Corporation v United States of America*, NAFTA/UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005 (hereinafter: "*Canfor v United States*, Order of the Consolidation Tribunal"), para 168; *Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006 (hereinafter: "*Pan American Energy*, Decision on Preliminary Objections"), para 159.

advantage of such situation, the latter may be precluded from denying its truth.[2149] Summarised by Crawford, estoppel is

> "(a) an unambiguous statement of fact;
>
> (b) which is voluntary, unconditional, and authorized; and
>
> (c) which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement."[2150]

Thus, under international law the core element of estoppel is reliance in good faith.[2151] Applying the notion of estoppel to corruption, commentators have argued that where the host State condones the corrupt act "*the investor is likely to commit resources to the investment in reliance on the state's acceptance of the corruptly procured investment*".[2152] However, a crucial question is whether the investor was entitled to rely on the host State's inaction in good faith, since the investor is aware of the illegality of its corrupt act.[2153] For Lim the investor's reliance would only amount to bad faith if the investor has no knowledge that the host State discovered the corrupt act and interprets the host State's inaction as mistaken belief that the investment was made legitimately.[2154] The distinction between the investor's mere knowledge of the host State's awareness of the corrupt act or lack of it fails to consider the issue of good faith. Being part of the corrupt act, it seems difficult to

---

[2149] See ICJ Case Concerning the *Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June 1962, ICJ Report 1962, 6 (hereinafter: "*Temple of Preah Vihear*, Merits"), 61 ("*The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other's advantage. The often invoked necessity for a consequent 'change of position' on the part of the party invoking preclusion or estoppel is implied in this. A frequent source of misapprehension in this connection is the assumption that change of position means that the party invoking preclusion or estoppel must have been led to change its own position, by action it has itself taken consequent on the statements or conduct of the other party. It certainly includes that: but what it really means is that these statements, or this conduct, must have brought about a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both.*").

[2150] Crawford, *Brownlie's Principles of Public International Law*, 420. See also *Pope & Talbot Inc. v Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 (hereinafter: "*Pope & Talbot v Canada*, Interim Award"), para 111.

[2151] See also *Canfor v United States*, Order of the Consolidation Tribunal, para 168 ("*Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party*.").

[2152] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 206. See also Lorz and Busch, "Investment in Accordance with Law - Specifically Corruption," 588 et seq.

[2153] Note that in *Arif v Moldova* the tribunal found that due to the good faith actions of both parties in reliance to the investment, the jurisdictional argument based on illegality was time barred. However, the tribunal expressly noted that in the present case the investment was not made on basis of corruption, from which it follows that in the view of the tribunal there could not have been a good faith reliance on both parties, see *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (hereinafter: "*Arif v Moldova*, Award"), para 376. See also Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration," 554 et seq.

[2154] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 212.

imagine that an investor may in good faith interpret the host State's reluctance to prosecute its own public officials as an unambiguous statement of fact that the investment obtained by corruption is protected under the investment treaty regime.[2155] Contrary to other cases of illegality, in corruption cases the investor involved in the corrupt act will in principle not be able to invoke a good faith reliance on the conduct of the host State.

d) *Nemo auditor propriam turpitudinem allegans*

At the same time, the failure of the host State to prosecute its own corrupt public officials and to seek recovery of the illicit proceeds may bar the host State from raising the corruption defence. As explained above, the principle of good faith and the notion that nobody should profit from its own wrong applies to both parties of the proceedings. The host State fails to comply with its obligations under the international fight against corruption to take all appropriate measures to combat corruption within its own ranks. The failure to prosecute its own corrupt public officials and the inaction to recover the bribe, amount to simple condonation of corruption and autonomous wrongful conduct.[2156] Thus, even in case the host State did not participate in the commission of the corrupt act, its subsequent wilful shortcomings towards the corrupt act deprive it from raising the corruption defence in good faith. Its contradictory conduct – condonation on the one side and raising the corruption defence to escape liability on the other side – amounts to *venire contra factum proprium.* In such case fairness calls for preventing the host State to plead the corruption defence.[2157]

VI. Conclusion: Jurisdiction

The cornerstone of the tribunal's jurisdiction is the consent to arbitration of both parties. It is an established principle in investment treaty arbitration that a host State is free to limit its consent to arbitration to specific conditions. The open invitation to arbitration granted in an investment treaty can, however, not be interpreted as implicitly containing the condition of only covering investment made in good faith or made in conformity with host State law. Rather an express treaty provision limiting the host State's consent is required. The 'in accordance

[2155] See however Lorz and Busch, "Investment in Accordance with Law - Specifically Corruption," 588 et seq. In the view of Lorz and Busch, the investor "*might well argue that he believed with good cause that his corrupt activities would not be held against him by the host State in order to completely deprive him of the promised recourse to an international tribunal, considering that the host State generally condones corruption*".

[2156] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 73; Llamzon, *Corruption in International Investment Arbitration*, 275. ("*Inaction in pursuing corruption can thus be considered a separate violation of international law engaging international responsibility*.").

[2157] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 73; Llamzon, *Corruption in International Investment Arbitration*, 274. ("*When a successor government becomes aware of the corruption of past public officials and invokes corruption as an affirmative defense, it is only fair that the host State, from that point at least, to be held to account for what they have not done in pursuing corruption*.").

with host State law' clause is in fact seen as such limitation of consent. Since corruption is prohibited in almost all countries, such conformity clauses play an essential role in how to deal with corrupt practices of the investor in investment treaty arbitration. Having in mind that the conformity requirement is aimed at preventing IIAs from "*protecting investments that should not be protected*"[2158], it appears logical and even necessary that host States protect themselves from investment procured by corruption.

The precise meaning of the relevant 'in accordance with host State law' clause is a question of interpretation of the IIA at issue taking into account the objective and purpose of the relevant BIT and the specific characteristics of corruption. As mentioned above, the clauses might have different wordings and different contexts in each IIA.[2159] The wording is usually of general nature and without any explicit reference to corruption. Each treaty has different terms and was concluded under individual circumstances, reasons for which the specific context of the singular IIA plays a prominent role. The diversity of the factual and legal contexts of the mentioned cases show that each situation has to be treated on a case by case basis. The former awards might offer guidance and assistance. However, they can neither substitute nor compromise the required interpretation of the relevant IIA. This is especially the case since the final wording of each provision in an IIA is the result of specific negotiations. Different wordings might be signs for different intentions regarding the specific legal effects of the conformity with host State requirement.[2160] The tribunal in *Inceysa v El Salvador*, for instance, put particular emphasis in the *travaux preparatoires* in order to assess the intentions of the parties when entering into the IIA.[2161]

Focusing on the illicit behaviour of an investor involved in corruption in connection with the investment, such corrupt conduct leads to more than a minor violation (*Tokios Tokelės v Ukraine*) of a fundamental principle (*Lesi v Algeria*), most notably the fundamental principle of good faith. From this it also follows that the corrupt investor will most likely not be able to plead the good faith exception (majority in *Fraport v Philippines*). Moreover, corrupt practices aimed at influencing the investment decision-making process most certainly constitute an investment related violation of host State law (*Saba Fakes v Turkey*). Corruption runs counter to the very nature of the objective and purpose of investment

[2158] *Salini v Morocco*, Decision on Jurisdiction, para 46.
[2159] E.g. in *Salini v Morocco*, the 'in accordance with host State law' clause was included in the provision stating the definition of investment of the relevant IIA; *Inceysa v El Salvador* the 'in accordance with host State law' requirement was linked to the promotion and admission as well as to the protection of the investment; in *Fraport v The Philippines*, the relevant clause was included in the provisions dealing with the definition, promotion and admission of investment.
[2160] See also Katharina Diel-Gligor and Rudolf Hennecke, "Investment in Accordance with the Law," in *International Investment Law*, ed. Marc Bungenberg et al., 1st ed. (Baden-Baden: Nomos, 2015), 571. Schill identifies the need to determine "*whether different wording is intended to result in different legal effects, or whether different wording merely results from different ways of expressing the same legal concept or legal effects.*"
[2161] *Inceysa v El Salvador*, Award, para 192.

regulation by the host State. However, only corrupt conduct at the time of the implementation and with causal link thereto will fall under the 'in accordance with host State law' clause (*Fraport v Philippines*, *Hamester v Ghana*, *Metal Tech v Uzbekistan*).

This being said, when dealing with corruption one fundamental point has to be taken into account: contrary to fraud, corruption requires the collaboration of both parties – it takes two to tango.[2162] Both sides are involved in the violation of the host State law. On the one hand this situation inherent to corruption may be considered in the good faith interpretation based on the object and purpose of the relevant IIA. Pursuant to such approach it can be argued that the 'in accordance with host State law' clause merely covers investment that is illegal *per se* rather than investment tainted by corruption with the involvement of the host State. A host State could, for instance, limit its consent granted in an IIA to not include investments in certain industries due to concerns of national security or aimed at direct purchase of real property and land. At the same time the host State law governs whether the investor acquired the investment at issue. However, when the nature of the investment is legal, but allegations of corruption exist that are directed at the misconduct of the investor when making the *per se* legal type of investment, then the appropriate means to examine the illegality of such investment is not to decline jurisdiction, but to proceed to a full analysis in the merits.[2163]

On the other hand, at the jurisdictional stage, the investor must contend that an investment pursuant to Article 25 of the Washington Convention has been made, while the respondent, the host State, bears the burden of challenging and rebutting that such investment has been made in conformity with host State law and thus proving its illegality. It is the host State that has to come forward and challenge the legality of the investment, when the host State itself has contributed to its

[2162] See Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption." The expression of "it takes two to tango" with regard to corruption has found followers among the commentators, see e.g. Lorz and Busch, "Investment in Accordance with Law - Specifically Corruption," 586; Sagar A. Kulkarni, "Enforcing Anti-Corruption Measures Through International Investment Arbitration," *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 47.

[2163] See also Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 172 et seq. Douglas understands the "in accordance with host State law" clause as mere reference to the *lex situs* rule, pursuant to which the host State law defines the types of assets that may qualify as investments and thus fall under the protection of the treaty. However, it does not amount to a limitation of jurisdiction for investments tainted by any sort of illegality. Douglas summarises the 'in accordance with host State law' requirement as follows: "*[...] for jurisdictional purposes it is sufficient that the claimant has acquired an asset that is cognizable by the law of the host State and the circumstances surrounding the acquisition satisfies the aforementioned economic characteristics of an investment*", Ibid., 178. This approach also seems to be favoured by Lorz and Busch, "Investment in Accordance with Law - Specifically Corruption," 583.
Note that Hepburn argues that the 'in accordance with host State law' clause covers *any* violation of *all* host State laws (with trivial violations as the only exception), Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration," 533 et seq.

illegality.[2164] Thus, it could be argued that the host State is prevented from invoking the illegality of an investment not only when the illegality results exclusively from the State's own illegal behaviour (*Kardassopoulos v Georgia*), but also when its illegal behaviour merely contributes to the illegality. The often-alleged principle that the investor cannot profit from a wrongful act must also be applied to the host State. Consequently, a host State should not take advantage of its own wrongful behaviour to deprive the investor of the possibility of having a tribunal decide on the specific circumstances of the investment. It is important to note that at the jurisdictional stage the question is not whether the investment protection is granted to the investor, but whether the arbitral tribunal may decide on the matter in the first place.

C. Corruption as objection to admissibility

Corruption may also amount to an objection to the admissibility of the claim.[2165] The concept of admissibility is neither mentioned in the ICSID Convention, nor the ICSID Rules. At the same time no unanimous approach to this concept has developed in international treaty arbitration. While doubts have been raised as to the benefit of applying this concept to international treaty arbitration,[2166] many

[2164] To apply the contract based principle of "*in pari delicto potior est conditio defenditis"* (where the guilt is shared, the defendant's position is stronger) to treaty based investment arbitration is not convincing. The tribunal in *World Duty Free v Kenya* emphasised that "*if Kenya were guilty of bribery and the claimant in this proceeding, it would likewise fall at the same hurdle*", which is a notion that is true for the contract based investment arbitration comparable to commercial arbitration. However, in treaty based investment arbitration the relationship between both parties is asymmetric. Investment arbitration is a platform for the investor to seek protection of the investment, but the host State generally is not granted the possibility to seek arbitration, particularly as the host State has the capacity to act unilaterally without the need of an arbitral tribunal.

[2165] For admissibility in general in investment treaty arbitration see Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility," in *International Investment Law*, ed. Marc Bungenberg et al., 1st ed. (Baden-Baden: Nomos, 2015), 1212–87; Jan Paulsson, ed., "Jurisdiction and Admissibility," in *Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in Honour of Robert Briner* (Paris: ICC Publishing, 2005). For a thorough analysis of corruption as an objection to admissibility in international investment claims see Cameron A. Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims," *Journal of International Dispute Settlement*, 2012, 1–41.

[2166] See e.g. *Micula et al. v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (hereinafter: "*Micula v Romania*, Decision on Jurisdiction and Admissibility"), para 63. ("*It is disputed whether the concept of admissibility is helpful in ICSID arbitration.*"). Some tribunals have expressed the view that the distinction between admissibility and jurisdiction is of no use in ICSID arbitration, since the ICSID Convention only refers to jurisdiction and competence, see e.g. *CMS v Argentina*, Decision on Jurisdiction, para 41; *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction 14 January 2004 (hereinafter: "*Enron v Argentina*, Decision on Jurisdiction"), para 33. Note that it has also been argued that an ICSID tribunal would not have the power to entertain objections to admissibility at all. An approach that has constantly been rejected by ICSID tribunals, see e.g. *Rompetrol Group N.V v Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 14 April 2008 (hereinafter: "*Rompetrol v Romania*, Decision on Jurisdiction and Admissibility"), para 112.

tribunals seem to nevertheless differentiate between jurisdiction and admissibility.[2167]

I. The concept of admissibility

Due to the difficulty of defining admissibility, it is often done by distinguishing it from jurisdiction. Put in simple words, objections to jurisdiction are directed at the power of the tribunal to hear the case, while objections to admissibility refer to the defectiveness of the claim itself and leave the jurisdiction of the tribunal intact.[2168] Thus, admissibility raises the question whether the claim itself is capable of being examined.[2169] The tribunal in *Hochtief v Argentina* put it in a nutshell

> "[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal."[2170]

Having in mind that a concise definition of admissibility does not exist, we will start the analysis with approaches taken in arbitral practice to make the distinction between jurisdiction and admissibility. As noted, objections to admissibility leave the power of the tribunal untouched to hear the case and focus merely on the conditions of the claim. In *SGS v Philippines*, for instance, the tribunal emphasised that its jurisdiction was determined by both the ICSID Convention and the BIT, but

---

[2167] See e.g. *Generation Ukraine v Ukraine*, Award, para 15.7; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004 (hereinafter: "*SGS v Philippines*, Decision on Jurisdiction"), para 154; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V v The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 (hereinafter: "*Bureau Veritas v Paraguay*, Decision on Jurisdiction"), para 132; *Waste Management, Inc. v United Mexican States, ICSID Case No. ARB(AF)/98/2*, Dissenting Opinion of Keith Highet, 8 May 2000 (hereinafter: "*Waste Management I*, Dissenting Opinion Keith Highet"), paras 57-58; *Abaclat et al. v The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (hereinafter: "*Abaclat v Argentina*, Decision on Jurisdiction and Admissibility"), paras 245-248; *Hochtief AG v The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 (hereinafter: "*Hochtief v Argentina*, Decision on Jurisdiction"), paras 90 et seq.

[2168] See e.g. *Waste Management I*, Dissenting Opinion Keith Highet, paras 57-58. See also *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 63. ("[…] *an objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction.*"). See also Paulsson, "Jurisdiction and Admissibility," 617. ("*Those are matters of admissibility: alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such.*").

[2169] See also *Abaclat et al. v The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion Georges Abi-Saab, 28 October 2011 (hereinafter: "*Abaclat v Argentina*, Dissenting Opinion Georges Abi-Saab"), para 18. ("*Generically, the admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court*.").

[2170] *Hochtief v Argentina*, Decision on Jurisdiction, para 90. Note that the tribunal in *Hochtief v Argentina* also distinguished between admissibility and receivability. ("*A distinction may also be drawn between questions of admissibility and questions of receivability. A tribunal might decide that a claim of which it is seised and which is within its jurisdiction is inadmissible (for example, on the ground of lis alibi pendens or forum non conveniens); or it might refuse even to receive and become seised of a claim that is within its jurisdiction because of some fundamental defect in the manner in which the claim is put forward*.")

could not be abrogated by contract.[2171] Preconditions for the claim set out in a contract could therefore only be considered as matters of admissibility rather than jurisdiction.[2172] Thus, essential for the question whether an objection affects jurisdiction or admissibility will be whether the objection affects a requirement of the consent given by the host State to solve the respective dispute under ICSID arbitration. The tribunal in *Micula v Romania* confirmed this approach and held

> "[t]he Tribunal is of the opinion that when an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection. If such requirement is not satisfied, the Tribunal may not examine the case at all for lack of jurisdiction."[2173]

From this it follows that in order to amount to an objection to admissibility rather than to jurisdiction, the consent to arbitration and the other requirements of jurisdiction such as jurisdiction *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione loci* must not be affected by the specific objection. The tribunal then has jurisdiction to hear the case, but dismisses the claim on other grounds.[2174] An enumeration of the issues amounting to such 'other grounds' for dismissal is neither possible nor would be apposite for our purposes. It is important to acknowledge that corruption may not only amount to a bar to jurisdiction in specific cases where the consent and the jurisdictional requirements are connected to a legality condition, but may also render the claim itself inadmissible.[2175]

The question may arise whether such differentiation even matters, since the dispute will be dismissed either way, no matter if the objections are classified as jurisdictional or admissibility matters. The tribunal in *Burlington v Ecuador*, for instance, held that the consequence of the inadmissibility of a claim would be the same as for the lack of jurisdiction under Article 25 of the ICSID Convention or the BIT: the tribunal could not exercise jurisdiction over the dispute.[2176] In the words of the tribunal in *Micula v Romania* "[i]*f a tribunal finds a claim to be inadmissible, it must dismiss the claim without going into its merits even though it has jurisdiction*".[2177]

[2171] *SGS v Philippines*, Decision on Jurisdiction, para 154.
[2172] *SGS v Philippines*, Decision on Jurisdiction, para 154.
[2173] *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 64.
[2174] Note that Judge Fitzmaurice described the objection to admissibility as a plea not at the competence of the tribunal to make a ruling, but 'that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits', Gerald Gray Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius, 1986), 438–439.
[2175] See most notably Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims." See also Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 326.
[2176] *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (hereinafter: "*Burlington v Ecuador*, Decision on Jurisdiction"), para 340.
[2177] *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 63.

While this notion is correct, the distinction will still matter.[2178] Paulsson attended to this question and noted that the right distinction between both concepts has serious consequences for the rest of the dispute.[2179] Decisions on jurisdiction may be challenged, while decisions on the admissibility of a claim are supposed to be final.[2180] This has recently been confirmed by arbitral case law. While a dismissal of a case based on lack of jurisdiction is subject to review by another body such as the *ad hoc* committee in an annulment proceeding, it is contended that a dismissal based on inadmissibility is not subject to further review.[2181] At the same time once the shortcomings causing the inadmissibility of a claim are corrected, the claim might be resubmitted,[2182] which would generally not be possible if the dismissal was based on lack of jurisdiction.[2183] In other words, the difference between jurisdiction and admissibility is that "[d]*efects in admissibility can be waived or cured by acquiescence; defects in jurisdiction cannot*".[2184]

A further and for the purposes of this study more important difference exists. From the outset it must be acknowledged that tribunals have referred to Article 41(2) of the ICSID Convention in order to argue that objection to admissibility of the claim may be dealt with as a preliminary question or joined to the merits.[2185] While some tribunals have analysed the objections to the admissibility of the claim as preliminary questions together with the objections to jurisdiction,[2186] generally there is a close link between admissibility of the claim and the relevant questions dealt with by the merits of the case. Since admissibility refers to the requirements of the claim as such, it is likely that the question of admissibility will have to be joined to the merits in order to allow a thorough examination of the claim.[2187] Within this line of reasoning, tribunals have held that a successful objection to admissibility would generally lead to a dismissal of the claim on grounds "*connected with the merits*".[2188]

[2178] See e.g. Kreindler, who concludes after reviewing arbitral jurisprudence that "*while jurisdiction and admissibility are not always distinguished or for that matter pleaded separately, clearly a basis should exist for doing so and for determining whether to maintain or to dismiss on the basis of admissibility – separate and apart from maintaining or dismissing on the basis of lack of jurisdiction*", Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 324.

[2179] Paulsson, "Jurisdiction and Admissibility."

[2180] Ibid.

[2181] *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility, para 247.

[2182] See e.g. *SGS v Philippines*, Decision on Jurisdiction, para 171.

[2183] *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility, para 247.

[2184] *Hochtief v Argentina*, Decision on Jurisdiction, para 95; see also para 94.

[2185] *Rompetrol v Romania*, Decision on Jurisdiction and Admissibility, para 112; *Bureau Veritas v Paraguay*, Decision on Jurisdiction, para 52.

[2186] See e.g. *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004 (hereinafter: "*LG&E v Argentina*, Decision on Jurisdiction"), para 46.

[2187] See also *Waste Management I*, Dissenting Opinion Keith Highet, paras 57-58.

[2188] *Enron v Argentina*, Decision on Jurisdiction, para 33; *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005 (hereinafter: "*Sempra v Argentina*, Decision on Jurisdiction"), para 109; *Camuzzi*

The tribunal in *Tecmed v Mexico*, for instance, differentiated between objections to jurisdiction and to (non)compliance with requirements concerning the admissibility of the claims.[2189] In the opinion of the tribunal, admissibility governs the "*access to the substantive protection regime*" under the IIA.[2190] This close connection to the relevant questions of the merits allows the tribunal to examine the admissibility objections within the substantial analysis of the merits after all relevant questions of fact have been thoroughly dealt with and a full picture of the case is available to the tribunal.[2191] Questions of jurisdiction, on the other hand, are mostly based on a preliminary examination of the case and focus on limited issues, such as the misconduct of the investor, leaving any misconduct of the host State outside of the analysis.

II. Objections to admissibility

Investment treaty tribunals have considered illegality of the investment or illegal conduct of the investor as objections to admissibility. In *Plama v Bulgaria*, the tribunal found an investment obtained by fraudulent misrepresentation to not deserve the substantial protection of the investment protection regime of the Energy Charter Treaty (ECT).[2192] A Cypriot company had purchased a large quantity of shares in a Bulgarian company that owned *inter alia* an oil refinery and a power plant. [2193] The purchase was conditioned under Bulgarian law on the approval of the Bulgarian privatisation agency. Initially, when negotiations started the investor was a consortium of two major international companies with the experience and financial resources to operate the refinery. Based on this representation the investor obtained the required approval. Subsequently, the consortium could not be established and the investor commenced operating the refinery as a sole investor and without notifying the privatisation agency about the change in its financial structure. Bulgaria argued that due to the misrepresentation the approval was null and void, and consequently the investor did neither lawfully control the shares nor the investment.[2194] In the view of the host State, the tribunal lacked jurisdiction over the claims.[2195]

International S.A. v The Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005 (hereinafter: "*Camuzzi v Argentina*, Decision on Jurisdiction"), para 98.

[2189] *Técnicas Medioambientales TECMED S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (hereinafter: "*TECMED v Mexico*, Award"), para 73.

[2190] *TECMED v Mexico*, Award, para 74.

[2191] See also Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims," 10.

[2192] *Plama v Bulgaria*, Award, paras 130-146.

[2193] For an overview on this case see Abby Cohen Smutny and Petr Polásek, "Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration," in *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought*, ed. Jacques Werner and Arif Hyder Ali (London: Cameron May, 2009), 290–293. Note that Smutny represented Bulgaria in this case and Mr Polásek served as a member of Bulgaria's defence team.

[2194] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (hereinafter: "*Plama v Bulgaria*, Decision on Jurisdiction"), para 88.

[2195] *Plama v Bulgaria*, Decision on Jurisdiction, para 101.

The tribunal rejected Bulgaria's argument that the misrepresentation would lead to a bar to jurisdiction.[2196] While the tribunal noted *inter alia* that the objection to jurisdiction based on the misrepresentation was presented at a belated stage and could thus not be considered, it also clarified that the misrepresentations were not directly affecting the consent of the parties to arbitrate provided in Article 26 ECT.[2197] In the absence of an explicit clause limiting the consent to arbitrate, the illegality of an investment was no concern for the jurisdiction. In the words of the tribunal,

> "not only are the dispute settlement provisions of the ECT, including Article 26, autonomous and separable from [the IIA] but they are independent of the entire […] transaction; so even if the parties' agreement regarding the purchase […] is arguably invalid because of misrepresentation by the Claimant, the agreement to arbitrate remains effective".[2198]

The tribunal examined the misrepresentation made by the investor along with the merits. However, before engaging in the analysis of the investor's claims on the merits,[2199] the tribunal analysed whether the investor was entitled to benefit from the substantive protection of the ECT.[2200] While the tribunal refrained from explicitly identifying this question as one of admissibility, as seen above, the issue whether a tribunal should grant support to a specific claim tainted by the illegal conduct of the investor is at the core of admissibility.

In the view of the tribunal, the investor's conduct was a "*deliberate concealment amounting to fraud*".[2201] While the ECT does not explicitly provide for a legality requirement, the tribunal referred to the introductory note to the ECT that the aim of the treaty is to "*encourage respect for the rule of law*", which in the tribunal's interpretation led to the conclusion that the substantive protection of the ECT would not cover investments made in violation of the law.[2202] In addition to the violation of domestic law, the tribunal also found applicable rules and principles of international law violated and based its conclusion on the reasoning in *Inceysa v El Salvador*[2203] and *World Duty Free v Kenya.*[2204] The main grounds for dismissing the claims due to the misrepresentation of the investor were the violation of (i) the

[2196] *Plama v Bulgaria*, Decision on Jurisdiction paras 128-130.
[2197] *Plama v Bulgaria*, Decision on Jurisdiction, para 130.
[2198] *Plama v Bulgaria*, Decision on Jurisdiction, para 130.
[2199] Note that the tribunal – in addition to rendering the claims inadmissible – also rejected all claims on the merits, *Plama v Bulgaria*, Award, paras 147 et seq.
[2200] *Plama v Bulgaria*, Award, paras 130-146.
[2201] *Plama v Bulgaria*, Award, paras 134-135. In the tribunal's view, the investor had an obligation to inform Bulgaria about the change in circumstances.
[2202] *Plama v Bulgaria*, Award, para 139. The relevant introductory note to the ECT reads:
"*The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues* […]." See Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, An Introduction to the Energy Charter Treaty, p. 14.
[2203] *Plama v Bulgaria*, Award, para 141.
[2204] *Plama v Bulgaria*, Award, para 142.

principle *nemo auditor propriam turpitudinem allegans*;[2205] (ii) the principle of good faith;[2206] and (iii) international public policy.[2207]

Before analysing the potential effects of corruption to the admissibility of the investor's claim, it is worth having a closer look at the possible objections to admissibility. Note, however, that commentators have rightly emphasised that tribunals should not merely "*proceed with a rote recitation of a series of high-minded principles and dismiss the claim*", but rather engage in a thorough analysis of the established principles of public international law.[2208]

1. (Un-)Clean hands doctrine

In connection with admissibility, the principle that no one should benefit from its own wrong (*nemo auditor propriam turpitudinem allegans*) is often referred to as the (un)clean hands doctrine,[2209] which is widely considered by commentators as a general principle of international law and has its roots in the principle of good faith.[2210] The general notion of the clean hands doctrine is summarised with the phrase "*He who comes to equity for relief must come with clean hands*".[2211] While the precise scope of the clean hands doctrine remains unclear, there are various maxims, notions and principles falling under it. Despite the maxim of *nemo auditur propriam turpitudinem allegans*, the clean hands doctrine also includes the *ex turpi causa non oritur* defence, which states that an action from a dishonourable cause does not arise.[2212]

[2205] *Plama v Bulgaria*, Award, para 143.

[2206] *Plama v Bulgaria*, Award, paras 144-145. ("*The principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment*.").

[2207] *Plama v Bulgaria*, Award, para 143.

[2208] Newcombe, "Investor Misconduct: Jurisdiction, Admissibility or Merits?," 199 et seq.

[2209] For a summary of the unclean hands doctrine in international law and its evolution see Rahim Moloo, "A Comment on the Clean Hands Doctrine in International Law," *Transnational Dispute Management* 8, no. 1 (2011): 1–10.

[2210] See e.g. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons Limited, 1953), 155. ("*A party who asks for redress must present himself with clean hands*."); Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 316 et seq.

[2211] Gerald Gray Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law," *Hague Academy of International Law: Recueil Des Cours* 92, no. 2 (1957): 119. Note that a similarly often cited phrase is: "He who seeks equity must do equity", see e.g. PCIJ *Case Concerning the Diversion of Water from the River Meuse (Netherlands v Belgium)*, Judgment of 28 June 1937, PCIJ Series A/B, No. 70, Separate Opinion of Judge Hudson, 73 (hereinafter: "*River Meuse (Netherlands v Belgium)*, Separate Opinion M. Hudson"), 77.

[2212] The tribunal in *Inceysa v El Salvador* provided an overview of different maxims connected to the principle of *nemo auditur propriam turpitudinem allegans*, *Inceysa v El Salvador*, Award, para 240:

"I*n connection with this principle, there are various maxims that clearly apply to the present case:*
a) 'Ex dolo malo non oritur actio' (an action does not arise from fraud).
b) 'Malitiis nos est indulgendum' (there must be no indulgence for malicious conduct).
c) 'Dolos suus neminem relevat' (no one is exonerated from his own fraud).

Whether the clean hands doctrine forms part of international law remains controversial in the practice of international courts and tribunals.[2213] While the ICJ has been reluctant so far to apply the clean hands doctrine,[2214] Judge Schwebel applied it in his seminal dissent in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.[2215] In Judge Schwebel's opinion the claims of Nicaragua should fail due to its unclean hands resulting from its intervention in El Salvador and the misrepresentations it made in Court.[2216] In the recent UNCLOS case *Guyana v Suriname* the tribunal emphasised that the application of the unclean hands doctrine in international law was sparse and inconsistent.[2217] It is worth quoting the tribunal

> "[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice (the "PCIJ"). […] These cases indicate that the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent."[2218]

---

d) 'In universum autum haec in ea re regula sequenda est, ut dolos omnimodo puniatur' (in general, the rule must be that fraud shall be always punished).
e) 'Unusquique doli sui poenam sufferat' (each person must bear the penalty for his fraud).
f) 'Nemini dolos suusprodesse debet' (nobody must profit from his own fraud).
All of the legal maxims indicated above are based on justice and have been created on the basis of decisions in concrete cases."

[2213] *See Niko v Bangladesh*, Decision on Jurisdiction, para 477.

[2214] Note however that the ICJ has also never rejected the doctrine of unclean hands, despite the occasions to do so, see Moloo, "A Comment on the Clean Hands Doctrine in International Law," 4; Gabrielle Dumas-Aubin and Patrick Dumberry, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law," *Transnational Dispute Management*, no. 1 (2013): 2.

[2215] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, I.C.J. Reports 1986, 259 (hereinafter: *Military and Paramilitary Activities (Nicaragua v United States)*, Merits, Dissenting Opinion Judge Schwebel").

[2216] *Military and Paramilitary Activities (Nicaragua v United States*), Merits, Dissenting Opinion Judge Schwebel, para 268 ("*Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible – but ultimately responsible – for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail*.").

[2217] *Guyana v Suriname*, PCA (UNCLOS), Award of 17 September 2007 (hereinafter: "*Guyana v Suriname*, Award"), para 418.

[2218] *Guyana v Suriname*, Award, para 418.

Analysing the cases dealing with the unclean hands doctrine, the tribunal in *Guyana v Suriname*, found that the doctrine was only applicable in specific circumstances and referred to three criteria for its application: (i) the violation must be of continuing nature; (ii) the remedy sought must be for a future violation; (iii) the considered obligations must be reciprocal.[2219]

Recently, the tribunal in *Yukos v Russia* held that the (un)clean hands doctrine "*does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case*".[2220]

2. General principle of good faith

As discussed above,[2221] while the principle of good faith governs the investor-State relationship, without any corresponding indication in the IIA, it does not lead to an implicit limitation of the notion of investment under Article 25 of the ICSID Convention or of the consent to arbitration. However, the principle of good faith plays an important role for the admissibility of claims in investment treaty arbitration.[2222]

The principle of good faith is considered a general principle of international law and has been recognised by the ICJ as "[o]*ne of the basic principles governing the creation and performance of legal obligations, whatever their source*".[2223] Tribunals have constantly confirmed the applicability of the principle of good faith to investment treaty arbitration.[2224] While the principle of good faith is the foundation for various other principles – e.g. the clean hands doctrine – it is a vague and open concept. In connection with the admissibility of a claim it is often related to the principle of abuse of process[2225] and abuse of rights.[2226]

[2219] *Guyana v Suriname*, Award, paras 420-421.
[2220] *Yukos v Russia*, Final Award, para 1363.
[2221] See above at B.I.
[2222] For tribunals having explicitly referred to a breach of the principle of good faith as ground for inadmissibility see e.g. *Quiborax v Bolivia*, Decision on Jurisdiction, para 298; *Vannessa Ventures v Venezuela*, Award, para 113.
[2223] *Nuclear Tests Case (New Zealand v France)*, Judgment, 20 December 1974, I.C.J. Reports 1974, 457 (hereinafter: "*Nuclear Tests Case (New Zealand v France)*, Judgment"), para 49. For further references on the principle of good faith see Chapter Six B.I.2.a).
[2224] See e.g. *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility, para 646 ("*The principle of good faith is a fundamental principle of international law, as well as investment law*."); *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011 (hereinafter: "*Malicorp v Egypt*, Award"), para 116 ("*It is indisputable, and this Arbitral Tribunal can do no more than confirm it, that the safeguarding of good faith is one of the fundamental principles of international law and the law of investments*."); *Phoenix v Czech Republic*, Award, para 113; *Hamester v Ghana*, Award, para 123.
[2225] *Phoenix v Czech Republic*, Award, para 113.
[2226] See e.g. *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility, para 646 ("*The theory of abuse of rights is an expression of the more general principle of good faith*."); *Mobil Corporation and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (hereinafter: "*Mobil v Venezuela*, Decision on Jurisdiction"), para 169.

In *Plama v Bulgaria*, the tribunal found that the principle of good faith obliged the investor to inform the host State about the relevant changes concerning the investor and the investment. In the view of the tribunal, the intentional withholding of information constituted a breach of the principle of good faith, which resulted in the dismissal of the claim.[2227]

3. International public policy

Another principle relevant to the determination of admissibility of a claim is the basic notion of international public policy or transnational public policy. Such notion has already been discussed in detail in Chapter Three, for which reason reference is made thereto. Against the background that corruption is considered to be contrary to international or transnational public policy, for the present purposes it suffice to note that the tribunal in *Plama v Bulgaria* dismissed the claims, *inter alia*, due to a violation of international public policy

> "[t]he Tribunal is of the view that granting the ECT's protections to Claimant's investment would […] also be contrary to the basic notion of international public policy – that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."[2228]

Commentators also find a violation of international public policy to amount to a ground of inadmissibility.[2229] In their views an investor who has bribed a public official has forfeited its rights to invoke international arbitration. In the words of Douglas

> "[t]he concept of international public policy vests a tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether it is specifically raised by one of the parties. That condemnation must entail that a party that has engaged in a violation of international public policy is not assisted in any way by the arbitral process in the vindication of any rights that are asserted by that party under any law."[2230]

[2227] *Plama v Bulgaria*, Award, para 145.
[2228] *Plama v Bulgaria*, Award, para 143.
[2229] See e.g. Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 180 et seq.; Newcombe, "Investor Misconduct: Jurisdiction, Admissibility or Merits?," 198 et seq.; Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims," 24 et seq.; Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 326 et seq.
[2230] Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 180.

III. Corruption and admissibility

So far there is no investment *treaty* case where corruption has explicitly been dealt with as a matter of admissibility. In *Metal Tech v Uzbekistan*, where corruption was established, the tribunal found on the basis of the 'in accordance with host State law' clause that it lacked jurisdiction and refrained from analysing to what extent corruption might have rendered the claims inadmissible. However, in *World Duty Free v Kenya*, a case not based on a treaty but on a contractual arbitration clause, the tribunal held that since corruption is contrary to international public policy, "*claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal*".[2231] While the tribunal fails to explicitly state 'inadmissibility' as ground for dismissal and it rather applies the general terminology of 'not upholding a claim', it is clear that corruption was seen as affecting the requirements of the claim rather than the jurisdiction of the tribunal.

At the same time the tribunal based its dismissal on English law as applicable law of the contract and applied the *ex turpi causa non oritur actio* defence as part of English public policy. Based on this domestic notion of the unclean hands doctrine, it found that the investor "*is not legally entitled to maintain any of its pleaded claims*".[2232] Showing concerns that the former President of Kenya had solicited the bribe and participated in the corrupt act, the tribunal felt nonetheless bound by the strict application of the unclean hands doctrine under English law under which "*where both are equally at fault, potior est condition* [sic] *defendentis*".[2233] The focus of such strict rule is the integrity of the administration of justice rather than justice between both parties.[2234]

In similar manner, Vicuña Ortega in his Dissenting Opinion in *Siag and Vecchi v Egypt* also referred to the unclean hands doctrine as a general objection for claims tainted by corruption

> "[w]hether the principle of *ex turpi causa non oritur actio*, the doctrine of unclean hands or the policy of eliminating corruption domestically and internationally are relied upon, the result is that an arbitration tribunal cannot find for a claim that is tainted by such practices."[2235]

The question however arises whether the strict application of the domestic principle *in pari delicto potior est condition possidentis* should also be applied at the admissibility stage in investment treaty arbitration. While the strict English public policy rule has been criticised at a domestic level,[2236] such approach has

[2231] *World Duty Free v Kenya*, Award, para 157.
[2232] *World Duty Free v Kenya*, Award, para 179.
[2233] *World Duty Free v Kenya*, Award, para 181.
[2234] See Lord Mansfield in *Holman v Johnson* as quoted in *World Duty Free v Kenya*, Award, para 181.
[2235] *Siag & Vecchi v Egypt*, Dissenting Opinion Orrego Vicuña, para 17.
[2236] The UK Law Commission (Law Com No. 320), "The Illegality Defence", 16 March 2010.

also found strong criticism in the investment treaty context.[2237] The policy arguments for a balanced approach will be discussed in detail in Chapter Nine, for the current purpose it is worth mentioning that under international law there seems to be room for a more flexible rule of unclean hands doctrine, which allows for a weighing of wrongdoings of both parties.[2238]

Judge Van den Wyngaert in her Dissenting Opinion in the *Arrest Warrant Case* engaged in a balancing test in order to find that due to the unclean hands of Congo, resulting from a failure of prosecuting war crimes, the claim should have failed.[2239] In her words

> "If there *was* an act constituting an infringement […] it was trivial in comparison with the Congo's failure to comply with its obligation under Article 146 of the IV Geneva Convention (investigating and prosecuting charges of war crimes and crimes against humanity committed on its territory). The Congo did not come to the International Court with clean hands, and its Application should have been rejected. *De minimis non curat lex.* […]
>
> The Court has not engaged in the balancing exercise that was crucial for the present dispute. Adopting a minimalistic and formalistic approach, the Court has de facto balanced in favour of the interests of States in conducting international relations, not the international community's interest in asserting international accountability if State officials suspected of war crimes and crimes against humanity."[2240]

Similarly, in the *La Grand Case* the unclean hands defence of the United States failed after a balancing test of the shortcomings of both parties. The case was concerned with a breach of the United States of the obligations under the Vienna Convention on Consular Relations by failing to notify two prisoners with German citizenship on a death penalty charge of their rights to consular assistance. The United States raised an objection to the admissibility of the claims since Germany had previously also failed to comply with such obligations. The court found that Germany's failures only occurred in connection with light criminal penalties while in the present case the arrested persons were facing the death penalty.[2241]

There seems to be a basis for the argument that the application of the unclean hands doctrine under international law should be rather flexible and grant

---

[2237] See e.g. Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption"; Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," paras 214 et seq.

[2238] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," 221 et seq.

[2239] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, Dissenting Opinion Judge van den Wyngaert, I.C.J. Reports 2002, 137 (hereinafter: "*Arrest Warrant*, Dissenting Opinion Judge van den Wyngaert").

[2240] *Arrest Warrant*, Dissenting Opinion Judge van den Wyngaert, 185.

[2241] *La Grand Case*, Judgment, 489.

discretion to the adjudicator to evaluate the wrongdoing at issue.[2242] Thus, while corruption may amount to an objection to the admissibility of the claim, the tribunal in investment treaty arbitration should have the discretion to take all relevant circumstances of the corrupt act into consideration in order to determine whether the claim should be held inadmissible. In particular, the tribunal should take into account to what extent the host State was involved in the participation or condonation of the corrupt act. To turn a blind eye on the wrongful conduct of the host State and thereby allow it to escape from liability on the basis of its own wrongful conduct appears even more detrimental to the integrity of the administration of justice by the tribunal and of the ICSID system.[2243] In fact, by dealing with the wrongful conduct of both parties, the integrity of the system is better served than by avoiding the contributions to illegality of the host State.[2244]

Moreover, the tribunal in *Niko v Bangladesh* applied the three criteria referred to by the tribunal in *Guyana v Suriname* and found that under the circumstances at hand, the unclean hands doctrine was not applicable

> "[a]pplying these considerations to the present case and the Respondents' objection based on the clean hands doctrine, it is obvious that this objection does not meet the criteria which Judge Hudson and the UNCLOS Arbitral Tribunal identified for the application of the doctrine in international law. Here the violation on which the Respondents rely is not continuing, but consisted in two acts that have been completed long ago; the remedy which the Claimant seeks does not concern protection against this past violation; and there is no relation of reciprocity between the relief which the Claimant now seeks in this arbitration and the acts in the past which the Respondents characterise as involving unclean hands."[2245]

According to this view, the clean hands doctrine under international law will not automatically render claims inadmissible, if the investor has to some extent committed a corrupt act. Rather the tribunal will have to analyse the circumstances of the case on the basis of the three criteria for the applicability of the doctrine. While the outcome of such analysis will depend on the circumstances of the case, bribes paid in the past may well be seen as violations of non-continuing nature. In addition, the applicability of the doctrine will depend on whether the tribunal finds the relief sought by the investor and the corrupt acts to be reciprocal.

[2242] See also Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 232.

[2243] Note that some commentators explicitly reject the argument that the involvement of the host State should also be considered. Douglas, for instance, states that in such context the conduct of the host State is irrelevant. In his view, the "*investor is simply unable to assert a claim in investment treaty arbitration by reason of its own misconduct*", Douglas, "The Plea of Illegality in Investment Treaty Arbitration," 180.

[2244] Note that a similar argument was made by the tribunal in *Niko v Bangladesh* in order to uphold jurisdiction, see *Niko v Bangladesh*, Decision on Jurisdiction, para 474.

[2245] *Niko v Bangladesh*, Decision on Jurisdiction, para 483, note that the tribunal analysed the clean hands doctrine in connection with the objections to jurisdiction (and not admissibility).

D. Corruption as defence on the merits

The fact that an investment is tainted by corruption may not only be relevant for the jurisdiction stage or admissibility of the claim, it may also – or even most relevantly – be a decisive factor in the merits. While the tribunal in *Phoenix v Czech Republic* emphasised that a manifest violation of law may amount to a denial of jurisdiction, it also clarified that the tribunal is free to analyse the legality at the merits stage if (i) the tribunal considers this the best approach; or if (ii) the illegality of the investment becomes an issue only after the jurisdictional stage.[2246] Especially in cases dealing with allegations of corruption the factual basis for such allegations are likely to be connected to the facts of the merits.[2247]

In *Malicorp v Egypt,* for instance, the tribunal expressly found the illegality of the investment to be a matter for the merits of the case due to the difficulty of analysing all relevant facts at the jurisdictional phase.[2248] Moreover, it referred to the principle of autonomy of the arbitration agreement under which the validity of the arbitration agreement does not depend on the validity of the substantive legal relationship.[2249] It clarified that a contract tainted by corruption does not impede the jurisdiction of the tribunal and emphasised that "[o]*nly defects that go to the consent to arbitrate itself can deprive the tribunal of jurisdiction*".[2250] In the view of the tribunal, consent to arbitrate encompasses all disputes arising out of the investment, including disputes over the validity of the investment.[2251] Similarly, in *TSA Spectrum v Argentina,* the tribunal noted that while it denied jurisdiction on other grounds,[2252] if it had to decide on the issue of corruption, it would join the matter to the merits of the case.[2253]

[2246] *Phoenix v Czech Republic*, Award, para 202.

[2247] See e.g. Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," 584 et seq. ("*This is because it appears difficult, as confirmed by the specific cases mentioned, that a tribunal would be able to determine whether there has been bribery in fact and in law without entering into merits of the dispute*.").

[2248] *Malicorp v Egypt,* Award, 119 b).

[2249] *Malicorp v Egypt,* Award, para 119 a).

[2250] *Malicorp v Egypt,* Award, para 119 a).

[2251] *Malicorp v Egypt,* Award, para 119 a). Note that the tribunal in *Liman Caspian Oil v Kazakhstan* took a similar approach to the question of validity of an investment. The tribunal distinguished between transactions that are void and voidable. In the view of the tribunal, voidable transactions do not fall outside of the host State's consent to arbitration. The tribunal emphasised that in general it could be argued that an investment was made and "[i]*n such a case, the question of legality might well be relevant to the merits, but it would not have preclusive effect at the level of jurisdiction*", *Liman Caspian Oil v Kazakhstan,* Award, para 187. The tribunal however clarified that in case of an investment made in violation of international public policy, it would not have jurisdiction, *Liman Caspian Oil v Kazakhstan,* Award, paras 193-194.

[2252] The tribunal dismissed the case on the grounds that TSA was not to be treated as national of the Netherlands for the purpose of establishing jurisdiction of the ICSID tribunal. It held that in application of Article 25(2)(b) of the ICSID Convention it is necessary to pierce the corporate veil and to determine whether the domestic company was objectively controlled by a foreign investor. The tribunal found that for this purpose the real source of control of the domestic juridical person had to be determined for which reason the tribunal could not stop to pierce the corporate veil after the first corporate layer, but had to proceed to identify the real source of control. Although all the shares of TSA were held by the Dutch company TSI, the latter was actually controlled by an

The tribunal in *Yukos v Russia* considered the question of illicit conduct of the investor and the allegation that it was an instrumentality of a criminal enterprise as a matter for the merits.[2254] In the view of the tribunal, the improper conduct of Yukos had contributed to the prejudice subsequently suffered by Russia's measures.[2255] On the basis of Article 39 of the ILC Articles, the tribunal made a decision on contributory fault and found that the investor's misconduct amounted to 25 percent of the total prejudice suffered and that Russia was therefore only responsible for 75 percent.[2256] The approach taken by the tribunal shows that the merits stage provides for an appropriate platform to weigh the illegal conduct of *both* parties.

In *Al-Warraq v Indonesia*, the host State raised the corruption defense in connection with alleged illegal and immoral conduct of the investor during the operation of the investment.[2257] The claim was based on the IIA of the Organisation of the Islamic Conference (***OIC Agreement***), which provides in Article 9 for a general obligation of the investor to comply with the law of the host State.[2258] Emphasising that Article 9 of the OIC Agreement would not provide for the concrete consequences of a breach of the law on the part of the investor and that the original investment was not disputed, it found that any effects of such provision would be a matter for the merits.[2259] In this context the tribunal noted that it had to review the potential illegal conduct of both the investor (allegations of corruption and money laundering) and the host State (allegations of solicitation of bribes). In the view of the tribunal

> "[t]his is not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration".[2260]

Once corruption is considered at the merits, the consequences will depend on the specific circumstances of the case. Contrary to the questions of jurisdiction and admissibility, the different potential implications on the investor's claim are manifold and fact specific. On the one hand, the legality requirements stipulated in

---

Argentine national named Jorge Justo Neuss. See *TSA v Argentina*, Award, paras 133-162, particularly paras 147, 153, 154, 162.

[2253] *TSA v Argentina*, Award, para 176.

[2254] *Yukos Universal Limited v Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (hereinafter: "*Yukos v Russia*, Interim Award on Jurisdiction and Admissibility"), para 436.

[2255] *Yukos v Russia*, Final Award, para 1634.

[2256] *Yukos v Russia*, Final Award, para 1637.

[2257] *Hesham Talaat M. Al-Warraq v The Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012 (hereinafter: "*Al-Warraq v Indonesia*, Decision on Jurisdiction").

[2258] Article 9 of the OIC Agreement reads:
"*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.*"

[2259] *Al-Warraq v Indonesia*, Decision on Jurisdiction, paras 97-99.

[2260] *Al-Warraq v Indonesia*, Decision on Jurisdiction, para 99.

an IIA may be interpreted as to constituting conditions for the substantive protection, rather than affecting the jurisdiction of the arbitral tribunal to decide the case or the admissibility of the claim. On the other hand, the corrupt conduct of the investor may directly have an effect on the substantive protection standards or on the validity of an investment contract.

In his Separate Opinion in *International Thunderbird Gaming v Mexico*, Professor Wälde linked the corrupt conduct of the investor with legitimate expectations and found that

> "[t]here can be no international treaty protection for rights obtained by illicit means. In such cases, there may be an expectation, but not a 'legitimate' one. "[2261]

Constituting a fundamental basis for the fair and equitable treatment standard, the tribunal may consider the corrupt conduct of the investor in connection with the question whether the circumstances of the case may have created legitimate expectations for the investor. Thus, corruption would have an effect on the substantive protection granted by the IIA. An investor who engaged in corrupt practices in order to influence the decision-making process on its investment may not rely on the full investment protection provided by the IIA.

In *Niko v Bangladesh* and *World Duty Free v Kenya*, the tribunal examined the consequences corruption had on the validity of the contract. Upfront it is important to distinguish the two different types of contracts in connection with corruption. In the first type of contracts the object is the corruption of public servants (i.e. contracts of corruption). The contract is therefore aimed at performing a corrupt act. In the second type, the contract has a valid object, but is tainted by corruption. While the contracts of corruption violate international public policy in a manner which renders them void and unenforceable, contracts tainted by corruption are not automatically void, but voidable and may be rescinded.[2262] This also follows from the fact that Article 34 of the United Nations Convention against Corruption encourages States to address the consequences of corruption, in particular the possibility to annul or rescind contracts procured by corruption. In this context the tribunal in *Niko v Bangladesh* emphasised that as a fundamental principle of fairness "*the innocent victim of an illegality must have the choice whether it accepts the otherwise legal transaction in the terms as concluded or wishes to avoid it*".[2263] While in *World Duty Free v Kenya*, Kenya duly voided the contract during the arbitration proceedings, in *Niko v Bangladesh*, Bangladesh refrained from voiding the contract and in fact continued to enjoy its benefits, for which reason the tribunal found the contract to remain valid.[2264]

[2261] *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 112.
[2262] See *World Duty Free v Kenya*, Award, para 117; *Niko v Bangladesh*, Decision on Jurisdiction, para 447.
[2263] *Niko v Bangladesh*, Decision on Jurisdiction, para 451.
[2264] *Niko v Bangladesh*, Decision on Jurisdiction, paras 462-464.

Moreover, where both parties are involved in the corrupt act at issue, the tribunal should have the discretion to consider all circumstances of the case to determine the validity of the contract or the investment. Sacerdoti points at the tension between the principle that a contract obtained by corruption may be voided, which even holds true for a treaty, and the principle under international law that a host State is responsible for the acts of its public officials.[2265] Thus, in his view, the host State should only be able to void the contract if it shows "*that it has not endorsed the corruptive conduct, has prosecuted the official and has attempted to recover the illicit profits*".[2266] Also putting special weight on the State responsibility for corrupt public officials, Raeschke-Kessler and Gottwald argue for a potential modification and adaption of the contract, which prevents the host State from rescinding the contract, but may lead to partial invalidation of specific provisions.[2267] In their view, declaring the nullity of the whole contract at an advanced stage of the contractual relationship may be unfair and unreasonable, for which reason only the corrupt element (e.g. kick-back elements in the agreed price) should be invalidated and modified.[2268]

E. Investor corruption: jurisdiction, admissibility or merits?

After having analysed the consequences corruption may have on the jurisdiction of the tribunal, admissibility of the claim or the merits of the case, the question remains which is the right approach to corruption. While the balanced approach favoured in this study is discussed in detail in Chapter Nine from a general policy perspective, at this stage we will examine this question from a practical point of view. From the outset, it is crucial to understand the consequences the distinction between objections to jurisdictions, to admissibility and to the merits has for the tactics of both parties to the arbitration. Host States will most certainly push to have corruption decided as a preliminary issue as a bar to jurisdiction of the tribunal in order to avoid the tribunal examining any misconduct of the host State in connection with the corrupt practice.[2269] If the tribunal follows this approach, it will dismiss the claim focusing merely on the misconduct of the investor. However, should the tribunal find that it has jurisdiction over the dispute involving allegations of corruption, it will most certainly analyse the issue in connection with the merits and disclose possible misconduct on the side of the host State, which it may take into consideration when deciding on admissibility or on the substantial issues of the investor's treaty claim.

[2265] Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," 585 et seq.
[2266] Ibid.
[2267] Raeschke-Kessler and Gottwald, "Corruption in Foreign Investment - Contracts and Dispute Settlement between Investors, States, and Agents," 598 et seq.
[2268] Raeschke-Kessler and Gottwald, "Corruption," 598 et seq.
[2269] Similarly Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims," 24.

In *Metal Tech v Uzbekistan*, the tribunal refrained from entering into any discussion and analysed the corruption issues as a matter of jurisdiction.[2270] The approach taken in *World Duty Free v Kenya* to discuss the issue of corruption as an admissibility and merits question does not serve as example for investment treaty cases, since the consent of the host State to arbitration was not contained in a treaty but in an investment contract. The questions at issue were neither whether an investment obtained by corruption was a protected investment under the ICSID Convention or an IIA, nor whether the consent of the host State to arbitration extended to illegal investments. The main jurisdictional question with regard to an arbitration clause in a contract obtained by corruption is rather whether such clause shares the fate of the contract, which due to corruption will often be void or voidable. The doctrine of separability isolates the arbitration agreement from the rest of the contract and only leads to lack of jurisdiction if the arbitration agreement itself was procured by corruption, but not if only the contract as such is tainted by corruption. Thus, although *World Duty Free v Kenya* is the seminal case for the notion that corruption is contrary to international public policy, it dealt with different jurisdictional hurdles than investment treaty cases concerning corruption.

The cases show that many arbitral tribunals have examined issues of illegality and corruption as a jurisdictional matter.[2271] This approach has also been favoured by various commentators.[2272] However, there is a debate on whether illegality generally and corruption in particular should be a matter for jurisdiction or rather for the admissibility or merits.[2273] From the outset, it must be considered that the

---

[2270] See above at A.2.

[2271] E.g. *Inceysa v El Salvador*, Award; *Fraport v Philippines*, Award; *Tokios Tokelės v Ukraine*, Decision on Jurisdiction; *LESI v Algeria*, Award; *Kardassopoulos v Georgia*, Decision on Jurisdiction.

[2272] Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration"; Bottini, "Legality of Investments under ICSID Jurisprudence"; Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals"; Knahr, "Investments 'in Accordance with Host State Law,'" September 2007; Knahr, "Investments 'in Accordance with Host State Law,'" 2008; Baltag, "Admission of Investments and the ICSID Convention."

[2273] See e.g. *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades. See also Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption"; Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims"; Douglas, "The Plea of Illegality in Investment Treaty Arbitration"; Borris and Hennecke, "Das Kriterium Der Einhaltung von Vorschriften Nationalen Rechts in ICSID-Schiedsverfahren - Anmerkungen Zum Schiedsspruch in Der Sache Fraport v. Philippines"; Borris and Hennecke, "Fraport AG Frankfurt Airport Services Worldwide v. Republic of The Philippines - Compliance with National Laws: A Jurisdictional Requirement under BITS?"; Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 99; Kulick, *Global Public Interest in International Investment Law*, 332 et seq. Without taking a clear position in this regard, some commentators have pointed to the fact that an analysis at the merits stage would provide the tribunal with the ability to "*differentiate any sanctions in reaction to the circumstances and weight of the investor's failure to comply with the host State's law*", Diel-Gligor and Hennecke, "Investment in Accordance with the Law," 570 et seq.
Note that for some commentators it seems irrelevant whether the illegality of an investment is treated as a jurisdictional or an admissibility issue, since in their view "*[i]n any event, the result will be the same, as no investor that is found to have made its investment through corruption, fraud or another serious violation of law be accorded the protections of ICSID arbitration*", Carolyn B.

arbitral tribunal is free to decide about jurisdictional objections as a preliminary matter or rather deal with the question at the merits stage.[2274] This discretion granted to the tribunal shows that instead of using a sledgehammer in order to come to a conclusion, it might often be more efficient, feasible or reasonable to deal with certain issues – which are also relevant for jurisdiction – at the merits stage.

As shown above, the particularity of corruption compared to any other illicit behaviour is that both parties of the arbitration proceedings may to some extent be involved in the action rendering the investment illegal. Examining corruption only at the jurisdictional stage closes the door for the tribunal to also consider the host State's misconduct and responsibility. Cremades summarised this issue in general terms in his dissenting opinion in *Fraport*

> "[i]f 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. […] As a matter of principle, therefore, the legality of the investor's conduct is a merits issue."[2275]

Following this approach, the legality of the conduct of both parties regarding the investment should generally be examined at the same stage. However, especially in corruption cases where both parties may be involved in the same illicit conduct, it would run counter to the mandatory procedural principles of fair process and equal treatment if the same corrupt conduct is examined at different stages of the arbitral proceedings. Such differentiated treatment would result in only the investor's conduct being scrutinised, with the host State's corrupt behaviour remaining untouched.

Moreover, as examined above, where corruption is attributed to the conduct of the host State, allowing the host State to invoke the illegality of an investment based

---

Lamm, Brody K. Greenwald, and Kristen M. Young, "From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption," *ICSID Review* 29, no. 2 (2014): 349.

[2274] See Article 41(2) of the ICSID Convention:
"*Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute*."

[2275] *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, paras 37-38. Cremades also emphasises that if any violation deprived the investor of the protection under the BIT, then the phrase 'according to the laws and regulations of the host State' bears the danger of becoming the "*Achilles Heel of investment arbitration if jurisdiction depends on the Claimant passing a full legal compliance audit*", *Fraport v Philippines*, Dissenting Opinion Bernardo Cremades, para 37. Note however that Cremades did not make this statement in connection with corruption, but in relation to illegality in general.

on corruption as jurisdictional objection in order to deprive the investor from investment treaty protection, would violate the general principle that no party shall profit from its own wrongful act. Thus, a strong argument can be made that in such cases the issue of corruption should rather be examined at the merits where the misconduct and responsibility of both parties may be considered.[2276]

Disregarding the host State's involvement in the corrupt behaviour would create a *carte blanche* for the host State.[2277] A corrupt host State would exclude any arbitral review of its conduct towards the investment by soliciting bribes in the first place, consequently creating a legal vacuum without responsibilities and liabilities towards the investment. The whole investment protection regime could be circumvented by promoting corruption. Any incentive to implement good governance is taken away.

In addition, it appears somehow doubtful that a comprehensive assessment of corruption can fully be performed at a jurisdictional stage.[2278] A more thorough investigation of all circumstances leading to the illegality of the investment might be better achievable at the merits phase, where all the different aspects can be taken into account for the necessary scrutiny. Direct evidence on corruption will hardly ever be available. In order to solve the issue of corruption with certainty, the tribunal would have to enter into a detailed examination and to some extent deal with the arguments originally reserved for the merits stage. There exists at least the possibility that issues concerning the merits are prejudged or even the investment protection denied too prematurely.[2279] Thus, it is well established that whenever a jurisdictional question depends on the facts, which were to be examined at the merits stage, then such issue may be joined to the merits.[2280] This is especially so when a detailed analysis of the evidence is required, which will then also be interdependent with the examination of the questions at the merits.[2281]

In this context it shall be recalled that in most circumstances corruption is not a clear-cut case and may even be mixed with local habits and customs. No

---

[2276] It is noteworthy that some commentators prefer to address the corrupt behaviour of the investor at the jurisdictional stage in order to avoid any kind of balancing. However, such opinions fail to provide any reasonable grounds for such statement, see e.g. Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?," 742 et seq.

[2277] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption." See also Michael A. Losco, "Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction," *Duke Law Journal* 63, no. 5 (2014): 1204. ("[...] *the corruption defense creates a perverse incentive that encourages states to expropriate investors' assets* [...]"), emphasis added.

[2278] See also Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," 584 et seq. ("*This is because it appears difficult, as confirmed by the specific cases mentioned, that a tribunal would be able to determine whether there has been bribery in fact and in law without entering into merits of the dispute*.").

[2279] See *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Jurisdiction, 8 May 2002 (hereinafter: "*Pey Casado v Chile*, Decision on Jurisdiction") para 118, where the tribunal finds that in general nothing can be said with certainty in the preliminary jurisdiction stage.

[2280] *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 260.

[2281] See *Generation Ukraine v Ukraine*, Award, 2003, para 6.4.

international convention has succeeded in providing complete certainty and assurance of what falls under bribery and corruption.[2282] Take as an example the exception for 'routine governmental action',[2283] which excludes facilitating and expediting payments for routine governmental actions. The line between facilitating and influencing a decision is not clear. At the same time where a 'routine governmental action' stops and an 'un-routine' governmental action begins is not transparent. The FCPA, for instance, provides that the term does not include any decision to award new business, however, actions *ordinarily and commonly* performed in obtaining permits, licences, or other official documents to qualify a person to do business are covered. The grey area is large, which emphasises the difficulties of classifying the investor's behaviour. This example demonstrates that due to the complexity of activities that could have a connection to corruption, it is not feasible to have a thorough examination at the jurisdiction stage.

In the same line of reasoning, the tribunal in *Phoenix v Czech Republic* found the conformity with law requirement to be relevant for the substantive protection under the IIA and thus primarily an issue for the merits.[2284] Only in cases where the violation is manifest, judicial economy would allow to deny jurisdiction. Similarly, in scholarship it is also accepted that the question of illegality should rather be dealt with in the merits when the illegality is not manifest from the beginning and becomes only apparent at a later stage of the arbitration proceedings.[2285] Corruption will hardly ever be manifest due to its secret character.[2286]

Similarly, the tribunal in *TSA Spectrum v Argentina* was faced with the objection of jurisdiction on the ground of inconformity of the investment with host State law due to allegations of corruption.[2287] While the tribunal avoided any discussion on the open issues regarding the 'in accordance with host State law' clause,[2288] it clarified that it would have joined the issue to the merits. Despite the lack of providing reasons for such approach, it seems as if the tribunal found the jurisdictional stage inappropriate to come to a conclusion.

[2282] See Chapter One, where the difficulty to define corruption is discussed.
[2283] 'Routine governmental actions' are unwritten exceptions in most International Conventions against bribery and have been codified in e.g. Foreign Corrupt Practices Act of 1977, 15 U.S.C §78dd-1 (b) *Exception for routine governmental action*.
[2284] *Phoenix v Czech Republic*, Award, para 104.
[2285] Kriebaum, "Investment Arbitration - Illegal Investments," 319.
[2286] The only case where corruption was manifest is *World Duty Free v Kenya*, where the investor admitted to have engaged in corruption to obtain the investment contract. Cases where corruption is clearly established are however rare and after the drastic outcome of *World Duty Free v Kenya* highly unlikely. For the general problem of proving corruption see Chapter on Evidence.
[2287] *TSA v Argentina*, Award, paras 174-176.
[2288] Due to the dismissal of the case on other grounds, the tribunal refrained from making precise statements on the requirement of conformity of investments with host State law in the specific context of corruption, *TSA v Argentina*, Award, paras 176.

In conclusion, where corruption is attributable to both parties, such issue should be reserved for the merits where a thorough examination on all relevant conduct may take place. To deal with the allegation of corruption at the jurisdictional stage might just be too one sided, too narrow. It would allow the host State to take advantage of its own wrongful conduct and deprive the investor from any protection too prematurely. This being said, it remains to be seen whether investment treaty tribunals will approach issues of corruption as a matter of jurisdiction, admissibility or the merits.

F. Concluding Remarks

As shown in this Chapter, the implications of investor corruption for the investors' treaty claim are manifold. In case the relevant IIA contains an 'in accordance with host State law' clause, an investment tainted by corruption may fall outside of the scope of consent of the host State to arbitrate or may be considered to fail to amount to a protected investment under the IIA. Moreover, constituting a violation of international public policy and leading to unclean hands of the investor, corruption may render the claims inadmissible. Finally, the violation of the general principle of good faith due to the investor's involvement in corrupt acts may have a detrimental effect on the substantial rights of the investor under the IIA, most notably as it may taint the expectations of the investor under the fair and equitable treatment standard with illegitimacy.

When it comes to the question of whether corruption is a matter for jurisdiction, admissibility or merits, this study shows that there is no 'one fits all' solution for corruption. The starting point is the notion that the illegal behaviour of the investor must have negative consequences on the investor's rights and the outcome of the case. However, the question remains, which phase of the proceedings may be best suited for the examination of corrupt conduct?

In order to provide an answer, it must be kept in mind that corruption is a wide concept and its forms are myriad. What is more, investor corruption with a causal link to the implementation of the investment will most certainly also involve the participation of a corrupt public official. In case such conduct is attributable to the host State, the particularity of corruption in contrast to other forms of illegality is that both parties are responsible for the corrupt act.

The trait of jurisdiction is however that it either exists or it does not, but there is no possibility to grant limited jurisdiction. Thus, a decision about jurisdiction is always an 'all or nothing' decision without tolerance to considering singular aspects.[2289] The jurisdictional stage does not offer the appropriate platform to fully

[2289] See also Newcombe, "Investor Misconduct: Jurisdiction, Admissibility or Merits?," 199. ("*Jurisdictional decisions are a very imperfect tool where there is misconduct of various shades on both sides.* […] *Although recent decisions have focused on jurisdiction as the 'control mechanism' for addressing investor misconduct, given its binary function, jurisdiction is 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*."). See also Diel-Gligor and Hennecke, "Investment in

assess the particular characteristics of corruption. A general 'in accordance with the host State law' clause shall thus not be interpreted to deprive the investor already at the jurisdictional stage of its rights to have the conduct of the host State scrutinised by an international tribunal.

Such drastic result would cause insecurity in the investment world by barring the tribunal from reviewing the particular circumstances and relevant facts, and would run counter to the IIA's objective and purpose of promoting investment by providing just protection. What is more, to decline jurisdiction for corruption where the host State is equally at fault would create a *carte blanche*[2290] for the host State: by soliciting and taking bribes the host State would secure the exclusion of any arbitral review of its investment treaty-violating conduct. The host State may circumvent any liability by just accepting corruption among its public officials. This would choke any incentive to fight corruption, to which the host State committed under several international instruments.

Moreover, based on the general principle that nobody should benefit from its own wrong, the host State's participation in the corrupt act or its failure to take the required action against it, may trigger its international responsibility and thus bar the host State from pleading the corruption defence.

Once the tribunal has found itself to have jurisdiction over the dispute, it may enter into a full-fledged examination of all relevant circumstances of the corrupt act at issue and the conduct of both parties. In this context it is important to note that the tribunal should use its discretion to apply a flexible approach to admissibility. In other words, the tribunal should consider all circumstances of the case in order to decide whether the claim is admissible rather than only scrutinising the wrongful conduct of the investor. The aim of such approach is to hold both parties accountable for their illicit conduct by finding a fair and balanced solution.

Since the tribunal dealing with investor corruption must have jurisdiction over the dispute before proceeding to the admissibility or the merits, it is crucial that the alleged corruption does not already amount to a bar to jurisdiction. Consequently, corruption might be examined as objection to admissibility or considered at the merits in the following cases:

(i) First, when the consent of the host State to arbitration in the IIA is not limited to investment made in conformity with host State law. Since the definition of investment pursuant to Article 25 of the ICSID Convention does not contain an immanent legality requirement, investment tainted by corruption does not automatically fall outside the concept of protected investment with regard to

---

Accordance with the Law," 570 et seq. ("*Where an arbitral tribunal considers the investor's compliance with domestic law a jurisdictional requirement, its options in deciding the question are narrowed down to a digital decision: the tribunal can either assume jurisdiction, or deny it entirely - in the latter case denying the investor any protection under the BIT in a neutral, international forum."*).

[2290] See Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 81.

jurisdiction of the tribunal if no 'in accordance with host State law' clause is incorporated into the text of the consent.

(ii) Second, when the IIA includes a limitation of the consent of the host State to merely cover legal investment, but the alleged corrupt practice affected the investment post the implementation stage. As explained above, the conformity requirement only comprises illegal conduct at the time the investment was made. Once the investment has been implemented and is being operated, an illegal conduct in relation to the already made investment cannot affect the jurisdiction of the tribunal.

(iii) Third, when the respective IIA contains an 'in accordance with host State law' clause, but the alleged corrupt practice has no connection to the investment. In current IIAs, illegal conduct of the investor, which has no direct relation with the investment, does not fall under the relevant conformity requirements for the investment.

(iv) Fourth, when the relevant IIA contains an 'in accordance with host State law' clause, and the tribunal interprets this requirement not to bar jurisdiction, but rather as a general requirement for the validity of the investment with relevance for the substantive standards.

(v) Fifth, when the tribunal finds that the host State's involvement in the corrupt act or other failures to deal with corruption leads to a bar to raise the corruption defence.

In conclusion, it is the author's opinion that especially when corrupt practices are alleged the appropriate stage to scrutinise the conformity of the investment with local law is the merits stage. This is the basis of the balanced approach to corruption in investment treaty arbitration. How tribunals shall conduct such assessment and what aspects have to be taken into consideration for the final decision will be the matter of the final chapter.

CHAPTER EIGHT:
EVIDENCE OF CORRUPTION IN INVESTMENT TREATY ARBITRATION

A. Introduction

A general principle in international litigation and arbitration is that something that is not proven does not exist – *idem est non probari non esse* –, at least not as basis for the tribunal to decide the case upon.[2291] The key to a successful claim involving allegations of corruption is therefore to present sufficient evidence to persuade the tribunal of the existence of the corrupt practice.[2292] In this context, it is noteworthy that in international arbitration the term evidence has a broader meaning than under the stricter common law or civil law rules and encompasses all means by which the veracity of an alleged fact is proved or disproved.[2293]

Before dealing in depth with the evidentiary issues of corruption in investment treaty arbitration, we will start with two important introductiory observations. First, for many years the only published[2294] ICSID case, in which a tribunal made positive findings of corruption was *World Duty Free v Kenya*. Important to note is, however, that the factual existence of corruption in this contract-based arbitration was not disputed, but merely its consequences for the outcome of the case. Only recently, the first investment treaty award was published where a tribunal found corruption established: *Metal Tech v Uzbekistan.* However, as mentioned before neither party alleged corruption and it was only the tribunal that became suspicious and look into the issue *sua sponte*. Thus, in order for the burden of proof and the standard of proof to become relevant in investment treaty arbitration, it seems that the issue of corruption must be alleged and disputed by the parties (see below at **I.**).

[2291] It is needless to say that in theory only facts have to be proven, since the tribunal is supposed to know the law (*iura novit curia*).

[2292] Case law and scholarship agree that the issue of proving corruption most notably plays a decisive role in international arbitration proceedings involving corruption issues. See e.g. Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 545; Haugeneder, "Corruption in Investor-State Arbitration," 332 et seq.

[2293] See *Faber Case*, German/Venezuelan Commission, 1903, RIAA Vol X, 438 (hereinafter: "*Faber v Venezuela*"), 459, where the umpire quoted different cases to establish that international tribunals are not constraint by common law or civil law rules of evidence and confirmed a wider and universal interpretation of evidence.

[2294] Although one of the most prominent features of ICSID Arbitration is the transparency of the proceedings by making the awards, decisions and briefs available to the public. Under Article 48(5) of the ICSID Convention and Rule 48 (4) of the ICSID Arbitration Rules "*the Centre shall not publish the award without the consent of the parties*", which creates the possibility for the parties to opt for the non-publication of the award. Corruption seems to be a prominent reason – in particular when both parties were involved in corrupt practices - to oppose the publication of the insights of such case. In a few instances awards dealing in a significant part with corruption have only been published in a redacted manner, see e.g. *Liman Caspian Oil v Kazakhstan*, Award, and *Oostergetel v Slovak Republic*, Award.
Note that on 1 April 2014 the UNCITRAL Rules of Transparency in Treaty-based investor-State Arbiration became effective, which comprise a set of procedural rules that provide transparency and accessibility to the public of investment treaty arbitration.

Secondly, the fact that to date there are only two investment arbitration cases in the public domain that have established corrupt conduct[2295] is in itself an indication for the difficulty of proving corrupt practices. The intrinsic difficulty to prove corruption will therefore also need to be taken into consideration when dealing with the evidentiary issues of corruption (see below at **II.**).

I. Corruption allegations must be disputed by the parties

World Duty Free v Kenya is an exceptional case in investment arbitration with limited value for the discussion of evidentiary issues in connection with corruption allegations. Since the claimant submitted convincing evidence of corruption itself, and the question of corruption was not disputed by the respondent, but even turned into the crucial point of defence, corruption became an established fact. There was neither a debate on the weighing of the evidence, nor disagreement on the burden of proof and the standard of proof. The investor admitted fully the paying of bribes to the public official.[2296] *World Duty Free* is highly likely to remain the only case where the claimant itself provides evidence of corruption it was involved in. Since the tribunal dismissed the claim on grounds of corruption, it can be expected that the lesson is learned and no investor will admit its involvement in corruption with regard to the investment when seeking protection from the arbitral tribunal for such – in fact corruption-tainted – investment.[2297] Thus, it is most likely that in future cases the party accused of corrupt practices will deny the allegations due to the expected detriment to its case.

The need for the investor to distance itself from any involvement in corrupt practices is illustrated in the change of procedural tactics of the investor in *Azpetrol v Republic of Azerbaijan* after its association with corrupt practices had emerged during the proceedings.[2298] During cross-examination the director of one of the investor's companies revealed the payment of bribes to public officials in Azerbaijan in 2006.[2299] The investor's involvement in bribery led the host State to

---

[2295] For cases where corruption could not be established see e.g. *EDF v Romania*; *Methanex v USA*, *Wena v Egypt*, *TSA Spectrum v Argentina*, *Liman Caspian Oil v Kazakhstan*, *Oostergetel v Slovak Republic*.

[2296] Partasides, who had worked on the case as counsel for the Respondent, rightly said about this situation: "[t]*his was not so much a 'smoking gun', as a Technicolor video of the gun being fired*", Constantine Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 50.

[2297] See also Haugeneder, "Corruption in Investor-State Arbitration," 332.

[2298] *Azpetrol v Azerbaijan*, Award.

[2299] See *Azpetrol v Azerbaijan*, Award, para 6.
Note that the witness stated that the bribes were not paid to make the investment, but to protect unnamed persons in Azerbaijan. In addition, Azerbaijan suffers from widespread corruption and is ranked on 127 out of 177 States with a score of 28 (1 point being highly corrupt and 100 points being very clean); see Transparency Corruption Perception Index 2013. The political circumstances surrounding the case are unclear and obscure. The investors' companies were thought to have a sort of link with the former Minister of Azerbaijan Farhad Aliyev, who was arrested in 2005. Human Rights Watch and Amnesty International see political motives behind his arrest. Azerbaijan on the other hand believes him, together with his brother, to be part of the organised crime. See Luke Eric

file an application to dismiss the claim on grounds of international public policy.[2300] This in turn led both parties to engage in settlement negotiations.[2301] At the same time, the witness statement admitting bribery was withdrawn with the explanation of not having reflected the truth.[2302] Thus, the tribunal was denied the opportunity to rule on the corruption allegations and the only issue remaining for the tribunal to decide was whether a 'legal dispute' existed between the claimants and the respondent as required by Article 25(1) of the ICSID Convention.[2303] The tribunal found that the parties were bound by their settlement agreement and dismissed the claim for lack of jurisdiction.

The engagement in settlement negotiations after the disclosure of the alleged bribes and the retraction of the testimony show that the investor was aware of the detrimental impact of the testimony for its case. It can be concluded that the revelation of corrupt practices will be harmful for the case of at least one party of the arbitration proceedings. Thus, the party expecting prejudice for its claim will most certainly deny the allegations of corruption,[2304] making it necessary for the party alleging the illegal behaviour to prove its assertion.

II. Intrinsic difficulty to prove corruption

As corruption is a criminal offence around the world,[2305] the parties involved will not only deny their involvement, but will also make every effort not to create any evidence of their reprobate behaviour or manage to conceal or eliminate any marks and tracks of such action. In economically substantial investments and transactions that are subject to investor-State disputes, the public officials involved in corruption are usually those who have the authority and position to exert influence on the project. Those senior public officials often use their public power and political entanglement with other authoritative institutions to hinder investigations

---

Peterson, "Bribery testimony is not examined further as claim against Azerbaijan concludes", in IAReporter 19 September 2009.

[2300] The application to dismiss was filed on 28 August 2008. Azerbaijan presented three expert witness statements to show that a claim tainted by corruption must be dismissed. The three experts were Carolynn Lamm, Pierre Lalive, and Richard Kreindler.

[2301] Ms Blanch, the investor's counsel, stated that it was the witness' testimony about the bribery, which let her to consider a settlement. See *Azpetrol v Azerbaijan*, Award, para 85.

[2302] See *Azpetrol v Azerbaijan*, Award, fn. 3. The tribunal was not persuaded that the original testimony was not true. It emphasised that the witness statement was retracted by simple letter written by the witness to the tribunal. Such simple letter, in the view of the tribunal, does not have the weight of a testimony given under declaration of truth. Nevertheless, as in most corruption cases the only evidence for corruption was the testimony, once retracted, all possibilities of proving a corruption case vanished.

[2303] The parties agreed that with the email exchange on 16 December 2008 and 19 December 2008 they reached a binding agreement. However, the exact scope of that agreement was disputed. The claimants asserted that it was merely a standstill agreement, while the respondent argued that besides a standstill agreement, they had also agreed on settling the case.

[2304] Since corruption is a criminal offence in almost every country, a party admitting corruption will have to expect - besides forfeiting the arbitration proceeding - also criminal investigations.

[2305] The author is not aware of any jurisdiction where corruption is not criminal under national law. Whether corrupt practices are indeed prosecuted is a different question.

and destroy any kind of pressing and burdening evidence.[2306] In addition, a party engaging in corruption will endeavour to disguise the illegality of their actions by cloaking them with an apparently legal business.

A written document stating a solicitation for a bribe or confirming the receipt of a bribe does not seem very probable.[2307] In addition, bribes are often paid in cash without leaving hints of any bank transaction.[2308] Corrupt payments are also often channelled through offshore shell corporations to blur any connection between the briber and the public official. Tracking such concealed payments is almost impossible, making the existence of such payments difficult to demonstrate. Thus, often the only evidence to show that a public official extorted a bribe or that an investor paid a bribe will be a witness statement.

What is more, the causal link between a payment and the abuse of public authority is even harder to prove. The mere payment made by an investor to a public official is not sufficient to constitute corruption. As identified by the definition of corruption,[2309] such payment or advantage must be in exchange for the exercise of public authority.[2310] Since such causal relationship is based on the underlying reason and motive for the exercise of governmental authority, there will hardly be direct evidence proving the corrupt motives. In most cases additional reasons or explanations for the governmental act at issue are readily available.[2311] Moreover, the agreement of corruption between both parties will hardly ever be in writing.

In conclusion, it is an established fact that allegations of corruption are difficult to prove[2312] when denied by the other party.[2313] An textbook example for the intrinsic

---

[2306] See e.g. United Nations Office on Drugs and Crimes, *UN Anti-Corruption Toolkit*, 3rd ed. (Vienna, 2004), 464. ("*Senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value becomes problematic at best. Corruption at the highest levels can also corrupt the law itself* […]")

[2307] See also *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 112, ("*It is generally very difficult to prove bribery as there is usually little if any paper trail*.").

[2308] In *World Duty Free v Kenya*, the money was hidden in a briefcase, which the CEO of World Duty Free took to a meeting with the President Daniel arap Moi. After the meeting the briefcase was filled with corn.

[2309] See Chapter One B.III.2.

[2310] Note that in case the investor alleges a treaty breach based on corruption the investor will have to prove that the public official exercised its governmental authority to the detriment of the investment due to (causal link) the bribe of a third person (*Methanex v United States*) or the refusal of the investor to correspond to the solicitation or extortion of a bribe (*EDF v Romania*).

[2311] In *Metalclad v Mexico* and *Wena v Egypt*, for instance, payments made to public officials were proven, however, the causal link to the exercise of public authority at question could not be established.

[2312] That corruption allegations are difficult to prove has often been repeated in literature and case law. Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," 51; Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 544; Ahmed S. El Kosheri and Philippe Leboulanger, "L'arbitrage Face a La Corruption et Aux Trafics D'influence," *Revue de l'Arbitrage* 3 (1984): 5 et seq.; Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct

difficulty of proving corruption is the already analysed case of *EDF v Romania*,[2314] where the investor claimed that the relevant joint venture agreement was not prolonged merely due to its refusal to pay a bribe of USD 2.5 million solicited by senior government officials on behalf of the Prime Minister of Romania, Adrian Nastase.[2315] To cap the main facts, the investor alleged that in August 2001, the Chairman and CEO of EDF, Mr Weil, met at the parking lot of the Hilton Hotel in Bucharest with the Chief of Cabinet to the Prime Minister, Mr Tesu, where the latter requested the bribe, which Mr Weil refused.[2316] In addition, the claimant submitted that the State Secretary, Mrs Iacob, repeated the request on behalf of the Prime Minister to the operational manager of ASRO, Mr Katz, which was once more rejected by Mr Weil after having been informed about the meeting.[2317] An audiotape allegedly recording part of this conversation was not admitted into evidence by the tribunal *inter alia* on the ground that it was illegally obtained, since it was recorded without Mrs Iacob's consent and thus in breach of her right to privacy.[2318] The only remaining available evidence to prove the bribe request by the Romanian high public officials was the testimonies of Messrs Weil and Katz. Romania denied the allegations and presented the counter testimonies of Mr Tesu and Mrs Iacob negating the allegations of the bribe request in its entirety.[2319]

The case demonstrates exemplarily the main evidentiary issues when dealing with corruption in international arbitration proceedings, which are all linked to the core problem of lack of direct evidence of corruption. First, the tribunal found the claimant to bear the burden of proving the allegations of corruption (the burden of proof – see below at **B.**). Secondly, the tribunal emphasised the difficulty of proving corruption "*since, typically, there is little or no physical evidence*".[2320] Nevertheless, due to the seriousness of the accusation and the alleged involvement

---

of Arbitration Relating Thereto," 129; Martinez, "Invoking State Defenses in Investment Treaty Arbitration," 328; Scherer, "Circumstantial Evidence in Corruption Cases Before International Arbitration Tribunals."
See also *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 112; *EDF v Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, 29 August 2008 (hereinafter: *EDF v Romania*, Procedural Order No. 3"), para 27; *Liman Caspian Oil v Kazakhstan*, Award, para 423; *Niko v Bangladesh*, Decision on Jurisdiction, para 424.

[2313] In *EDF v Romania*, the tribunal pinpointed the problem well: "*Proving corruption is a challenging task in the absence of admission of liability by the accused person*." *EDF v Romania*, Procedural Order No. 3, para 27 (emphasis added).

[2314] *EDF v Romania*, Award.

[2315] See *EDF v Romania*, Award, paras 69-73 ("*This change of policy resulted from no other reasons than EDF's refusal to comply with demands for bribes from senior Romanian Government officials in August and October 2001.* […] *Following this refusal, the Romanian State engaged in a concerted attack on EDF's business in Romania resulting in the total loss of its operation in the country.*").

[2316] *EDF v Romania*, Award, para 71.

[2317] *EDF v Romania*, Award, para 72.

[2318] *EDF v Romania*, Procedural Order No. 3, para 38.

[2319] Romania also presented the decisions of the Romanian Anti-Corruption Authority, which investigations in 2003 and 2006 concluded without sufficient proof of corruption; *EDF v Romania*, Award, para 228.

[2320] *EDF v Romania*, Award, para 221.

of senior public officials, it demanded 'clear and convincing evidence'[2321] (the standard of proof – see below at **C.**). Finally, the tribunal found the unlawfully obtained evidence of corruption inadmissible (the admission and handling of evidence – see below at **D.**). Consequently, the only remaining pieces of evidence were the witness statements, which were rebutted by counter statements denying the allegations. Encountering a situation of one's words against another's, the tribunal found the evidence not to be clear and convincing.[2322] Thus, the investor failed to discharge the burden of proving the allegations by not meeting the high standard of proof. Since the investor bore the risk of not proving its case, its claim was dismissed. This Chapter questions such strict approach to evidentiary issues and advocates for a more flexible approach to prove corruption.

B. Burden of proof for corruption

The terminology of burden of proof and standard of proof is not used uniformly in international arbitration. Confusion arises from the two different concepts of burden of proof found in common law and civil law.[2323] In this study the burden of proof shall be understood as the question of which party bears the responsibility of proving the relevant facts. In other words, it covers the allocation of the onus of persuading the tribunal that the facts are true.[2324] The question of what degree of proof is necessary to discharge the burden of proof is referred to as standard of proof.[2325] In the words of the tribunal in *Rompetrol v Romania* the distinction can be made as follows: "*the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole*".[2326]

[2321] *EDF v Romania*, Award, para 221. The heightened standard of proof chosen by the tribunal will be dealt with *infra*.

[2322] *EDF v Romania*, Award, para 221. It is noteworthy that the testimonies of Romania's witnesses denying the allegations were also found not to be clear and convincing, *EDF v Romania*, Award, para 227.

[2323] Note that in common law jurisdictions there are two different types of burden of proof: the legal burden and the evidential burden. See Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (The Hague; London; Boston: Kluwer Law International, 1996), 24 et seq.

[2324] Ibid., 30, 367.

[2325] In Waincymer's words: "*Burden of proof simply deals with responsibility, but does not indicate the level of proof that is required. Standard of proof deals with the degree of conviction that the adjudicator must have to be satisfied that the burden has been met*.", Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), 766.
Note that Waincymer differentiates between 'burden of proof' and 'onus of proof'. The latter concept refers to the party, which at a certain stage of the proceedings has weaker evidence and needs therefore to provide further evidence to convince the adjudicator. Such onus of proof may change back and forth during the proceedings, while the burden of proof never changes, see Ibid., 773. Acknowledging this distinction, in this study both terms are to be understood interchangeably as the concept that a party bears the responsibility to tip the balance of evidence into its favour to supersede.

[2326] *Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/2, Award, 6 May 2013 (hereinafter: "*Rompetrol v Romania, Award*") para 278.

After a brief description of the provisions governing the burden of proof (see below at **I.**), a general overview on the burden of proof is provided (see below at **II.**). Subsequently the allocation of the burden of proof in corruption cases is analysed in detail (see below at **III.**). Finally, the relevance of the burden of proof in corruption cases, in which the tribunal engages in *ex officio* investigations, is examined (see below at **IV.**).

I. Provisions governing the burden of proof

The ICSID Convention and the ICSID Rules – like most arbitration rules and frameworks – do not contain any provisions about the burden of proof. For arbitration proceedings under the UNCITRAL Rules, Article 24 (1) provides guidance by stating that "[e]*ach party shall have the burden of proving the facts relied on to support his claim or defense*". Tribunals arbitrating under UNCITRAL have based their decisions on the rule stated in this Article.[2327]

Moreover, any rule stipulated in arbitration rules must be seen as a starting point of the allocation of burden of proof and will depend on the specific provisions contained in the relevant substantive law, the *lex causae*.[2328] IIAs as source of the substantive law do, however, generally not contain any rules on the burden of proof.[2329]

II. Burden of proof in general

Generally speaking, the burden of proof indicates, which party of the arbitration proceedings has the responsibility to prove the relevant facts at issue. In the words of the tribunal in *Middle East Cement v Egypt*, the party who has the burden of proof is the party "*who has to show the elements required as conditions for the claim, and – insofar as they are disputed – has to prove them to the satisfaction of the Tribunal*".[2330] Or as the tribunal in *Noble Ventures v Romania* describes the burden of proof, it is "*the risk of non-persuasion of the Tribunal*".[2331] Thus, the party who bears the burden of proof and fails to discharge such onus will not succeed in establishing the facts of her case.[2332]

[2327] See e.g. *International Thunderbird Gaming v Mexico*, Award, paras 94, 176; *Grand River v United States*, Award, para 237. Note that Article 19 (1) of the American International Arbitration Rules also contains the same rule on the burden of proof as Article 24 of the UNCITRAL Arbitration Rules.

[2328] See e.g. Waincymer, *Procedure and Evidence in International Arbitration*, 764. See also Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 545. For case law see e.g. *Metal-Tech v Uzbekistan*, Award, para 238.

[2329] In *Metal-Tech v Uzbekistan*, the tribunal pointed at the fact that the BIT had no provision on the burden of proof and concluded that the tribunal had "*relative freedom in determining the standard necessary to sustain a determination of corruption*", *Metal-Tech v Uzbekistan*, Award, para 238.

[2330] *Middle East Cement v Egypt*, Award, para 88.

[2331] *Noble Ventures v Romania*, Award, 12 October 2005, para 100.

[2332] How decisive the allocation of the burden of proof may be for the success of a claim can be seen, for instance, in the case of *Plama v Bulgaria*, where the investor presented evidence showing the host State's failure to provide protection and security to the investor with regard to worker riots.

In line with the Roman formula *actori incumbit onus probandi*[2333], tribunals have constantly confirmed that the claimant carries the burden of proof for her claim.[2334] This general principle in international law[2335] applies to all facts corresponding to the necessary conditions to establish the claimant's case. This rule is however not to be misunderstood as referring only to the party initiating the proceedings; 'claimant' (*actori*) rather means the party alleging the fact.[2336] This may be the investor asserting her claim or the host State advancing defences.[2337] The notion that the party who asserts a fact bears the burden of proving it has constantly been confirmed by the ICJ[2338] and arbitral tribunals.[2339] In conclusion, the general rule in

---

The conflicting evidence presented by the host State made it impossible for the tribunal to decide which evidence was more persuasive. It finally dismissed the claim stressing that the burden of proof lied on the investor, *Plama v Bulgaria*, Award, para 249.

[2333] 'The claimant bears the burden of proof'. Waincymer names additional Roman law maxims with the same notion: *ei qui affirmat non ei qui negat incumbit probation* (the onus of proof is on the person who affirms not on the one who denies); *actore non probante reus absolvitur* (if the claimant cannot prove the case the respondent is absolved); *reus excipiendo fit actor* (the respondent, by raising an exception or pleading becomes claimant), Waincymer, *Procedure and Evidence in International Arbitration*, 763.

[2334] See *AAPL v Sri Lanka*, Award, para 56, citing Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 327. See also *Tradex v Albania*, Award, para 74, stating that "*it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim"* and referring to *AAPL v Sri Lanka*; *Middle East Cement v Egypt*, Award, paras 89-90, using the same language as *Tradex* and also referring to *AAPL v Sri Lanka*; *Generation Ukraine v Ukraine*, Award, paras 19.1, 19.4; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award 29 December 2004 (hereinafter: "*CSOB v Slovakia*"), paras 225-226 with regard to damages; *Noble Ventures v Romania*, Award, para 100; *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006 (hereinafter: "*Salini v Jordan*, Award"), paras 70-75 with further references; *Tokios Tokelės v Ukraine*, Award, para 121, citing *AAPL v Sri Lanka*, para 56, and *Tradex v* Albania, para 74; *Parkerings v Lithuania*, Award, para 393; Cementownia *"Nowa Huta" S.A. v Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, para 114, with regard to jurisdiction ("*The investor must evidence all the necessary conditions for the Arbitral Tribunal to affirm jurisdiction*"); *Kardassopoulos v Georgia*, Award, para 224; *Tza Yap Shum v Peru*, Award, para 151; *Metal-Tech v Uzbekistan*, Award, para 237. See also Schreuer et al., *The ICSID Convention*, Art. 43, p. 669.

[2335] Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 327 et seq. ("*With regard to the incidence of the burden of proof in particular, international judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant, and that this principle is applicable to international judicial proceedings.*"). Many arbitral tribunals have confirmed this principle as general principle of law, mainly by referring to Cheng as cited. See e.g. *AAPL v Sri Lanka*, para 56; *Tradex v Albania*, para 74. See also *Metal-Tech v Uzbekistan*, Award, para 237.

[2336] This was already clarified by the tribunal in *AAPL v Sri Lanka*, para 56, Rule (H), referring to Bin Cheng, p. 332. See also Waincymer, *Procedure and Evidence in International Arbitration*, 763 et seq.

[2337] See Baiju S. Vasani and Timothy L. Foden, "Burden of Proof Regarding Jurisdiction," in *Arbitration under International Investment Agreements - A Guide to the Key Issues, Katia Yannaca-Small (ed.)* (Oxford; New York: Oxford University Press, 2010), 271.

[2338] See e.g. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Reports 1984, 392 (hereinafter: "*Military and Paramilitary Activities (Nicaragua v United States)*, Jurisdiction and Admissibility"), 437, para 101 ("*it is the litigant seeking to establish a fact who bears the burden of proving it*"); and for a more recent example *Case concerning Avena and other Mexican Nationals (Mexico v United States of America)*, Judgment of

arbitration is that the claimants carry the burden of proving all facts alleged with regard to their claims, while respondents bear the onus of proof for the facts establishing their defences.[2340]

In addition, having the responsibility of proving the facts upon which one's claim or defence is based means on the one hand to provide supporting evidence and on the other hand to persuade the tribunal of the veracity of such evidence and the truth of the allegations.[2341] Moreover, the burden of proof may be different in the different stages of the proceedings. In this context, tribunals have found that the threshold in the merits phase might be significantly higher than in the jurisdictional stage.[2342]

III. Allocation of burden of proof

The allocation of the burden of proof will be critical when the presented evidence is in equipoise, since then the party bearing the burden of proof will fail in proving the alleged facts.[2343] Applying the general rule when allocating the burden of proof means that the investor as claimant carries the burden of proving corruption if such allegations were the basis of its claim, i.e. corruption as breach of a protection standard. In turn, the host State as respondent bears the burden of proving

---

31 March 2004, ICJ Reports 2004, 12 (hereinafter: "*Avena Case*, Judgment"), 41, paras 55-57, referring to the Nicaragua case.

[2339] *Feldman v Mexico*, Award, 16 December 2002, para 177, citing the Appellate Body of the WTO in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report adopted by Dispute Resolution Body on 23 May 1997, WT/DS33/AB/R (hereinafter: "*United States - Wool Shirts*, Appellate Body Report"), 14; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004 (hereinafter: "*Soufraki v UAE*, Award"), paras 58, 81; *International Thunderbird Gaming v Mexico*, Award, para 95, citing Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 302 et seq.; *Saipem v Bangladesh*, Decision on Jurisdiction, para 83; *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 229, applying this principle without further explanation; *Siag & Vecchi v Egypt*, Award, para 315; *Saipem v Bangladesh*, Award, para 113; *Azurix v Argentina*, Annulment, para 215, rejecting Argentina's assertion that there exists "*a general principle of law that the party that is in a better position to prove a fact bears the burden of proof*"; *Kardassopoulos v* Georgia, Award, paras 224, 229-230; *Alpha v Ukraine*, Award, paras 235-238; *Tza Yap Shum v Peru*, Award, para 71. For an example of ICJ jurisprudence see: *Avena Case*, Judgment, 41, paras 55-57, referring to *Military and Paramilitary Activities (Nicaragua v United States)*, Jurisdiction and Admissibility, 437, para 101. See also Charles N Brower, "Evidence Before International Tribunals: The Need for Some Standard Rules," *International Lawyer* 28 (1994): 49.

[2340] See e.g. *Siag & Vecchi v Egypt*, Award, para 315, referring to Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof," 335. See also *RosInvest v Russia*, Final Award, para 250, using different language, but meaning the same.

[2341] *AAPL v Sri Lanka*, Award, para 56, quoting Cheng, *General Principles of Law as Applied by International Courts and Tribunals*. ("*A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof*."). See also *Middle East Cement v Egypt*, Award, para 90.

[2342] See e.g. *Plama v Bulgaria*, Decision on Jurisdiction, para 167.

[2343] Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof," 337. See also Karl-Heinz Böckstiegel, "Presenting, Taking and Evaluating Evidence in International Arbitration," in *Handbook on International Arbitration and ADR*, 2nd ed. (Juris, 2010), 81; Ali Z. Marossi, "Shifting the Burden of Proof in the Practice of the Iran-United States Claims Tribunal," *Journal of International Arbitration* 28, no. 5 (2011): 442.

corruption allegations raised in connection with its defences, i.e. corruption as affirmative defence.[2344]

The question arises whether the general rule of burden of proof is able to cope with the evidentiary problems intrinsic to corruption and whether the application of such rule leads to satisfying results. The general rule might just be the starting point for the allocation of the burden of proof. This study starts with an overview on the burden of proof applied in arbitral case law (see below at **1.**). Then a potential shifting of the burden of proof for allegations of corruption will be discussed (see below at **2.**), before the burden of proof for jurisdictional issues is analysed (see below at **3.**). Finally, the burden of proof for substantive matters is presented (see below at **4.**).

1. Burden of proof for corruption in arbitral practice

In the investment treaty arbitration case law, the allocation of burden of proof in corruption cases has not been a major point of dispute or discussions. It seems as if the issue of burden of proof for corruption is treated as established issue. In the words of the tribunal in *EDF v Romania* "[t]*he party raising the charge has, indisputably, the burden of proof*".[2345] Basing its claim of treaty breach on corruption, the investor as claimant was unquestionably found to bear the burden of proving the allegations of corruption.[2346] Similarly, the tribunal in *ECE v Kazakhstan* where the investor made corruption allegations found that "[t]*he burden of proof is undoubtedly on the party alleging corruption.*[2347]

In *Wena v Egypt*, it was Egypt as respondent that made serious allegations of corruption. The tribunal held that since Egypt brought such allegations as affirmative action, it also bore the burden of proof.[2348] In *Oil Field of Texas v Iran*, the Iran-United States Claims Tribunal also dealt with corruption allegations raised by the host State as respondent and confirmed that it bore the burden of proof for establishing the alleged bribery as defence.[2349]

Similarly, arbitral tribunals have held that the burden of proof for fraud lies on the person alleging the fraudulent behaviour. In *Noble Venture v Romania*, for instance, the investor alleged that the host State breached the international law standard of treatment as well as the principle of good faith by fraudulent

[2344] See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 700.
[2345] *EDF v Romania*, Procedural Order No. 3, para 28, emphasis added.
[2346] *EDF v Romania*, Award, para 232, ("*The burden of proof lies with the Claimant as the party alleging solicitation of a bribe.*").
[2347] *ECE v Czech Republic*, Award, para 4.873.
[2348] *Wena v Egypt*, Award, paras 77, 117, 132.
[2349] *Oil Field of Texas, Inc. v Government of the Islamic Republic of Iran, National Iranian Oil Company*, Award No. 258-43-1, 8 October 1986, Iran-U.S.C.T.R. 1988, Vol. 12, 308 (hereinafter: "*Oil Field v Iran*, Award"), paras 24 et seq.

misrepresentations concerning the investment agreement.[2350] The tribunal made clear that the burden of proving fraudulent misrepresentation rested on the investor as claimant.[2351] Likewise, the tribunal in *RSM v Grenada* held that the burden of proof for fraud lies on the party alleging the fraud.[2352]

It seems that in arbitral practice the general rule that *the party who asserts a fact bears the burden of proving it* is applied without reservation. In scholarship, it has even been contended that the burden of proof does not cause any substantial problems in corruption cases.[2353] The general rule that a party has the burden of proving facts relied on to support her claim or defence shall also apply to allegations of corruption.[2354] Thus, the host State relying on corruption as a defence has the burden to prove that the investor was engaged in corrupt practices in relation to the investment, while the investor relying on corruption as a cause of action and violation of a protection standard must prove the corrupt practices of the State. However, it is noteworthy that there is no case so far in investment *treaty* arbitration where the party alleging corruption has been successful in discharging its burden of proof. In fact, in the only investment *treaty* arbitration case where corruption was established, *Metal Tech v Uzbekistan*, neither party had raised the issue.[2355] Rather the tribunal became suspicious in the course of the arbitration and requested explanations and additional documentation. Due to the *ex officio* exercise, the tribunal found the rules of burden of proof not relevant.[2356]

2. Shifting the burden of proof

The difficult task for the party alleging corruption to actually prove the underlying facts leads to the question whether a change in the allocation of the burden of proof is advisable for corruption allegations. Mills suggested in 2002 to encounter the difficulty of proving corruption by shifting the burden of proof when "*a reasonable indication of corruption*" exists.[2357] The allegedly corrupt party would then have to provide evidence that the transaction was legal and that the party

[2350] *Noble Ventures v Romania*, Award, paras 89-92. In particular, the investor argued that the host State failed to disclose that certain assets were subject to a partnership agreement and that litigation with regard to certain agreements existed before the conclusion of the investment agreement.
[2351] *Noble Ventures v Romania*, Award, para 100.
[2352] *RSM v Grenada*, Award, para 431. Note however that the tribunal based its decision on English and Grenadian law on fraudulent misrepresentation.
[2353] See Haugeneder, "Corruption in Investor-State Arbitration," 333.
[2354] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 545.
[2355] *Metal-Tech v Uzbekistan*, Award, para 239.
[2356] *Metal-Tech v Uzbekistan*, Award, para 239.
[2357] Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 130; Mills, "Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto," 295. ("*Because of the near impossibility to 'prove' corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met.*").

complied with all good faith requirements.[2358] Similarly, Abdel Raouf mentions the shifting of burden of proof as one potential solution to overcome the evidentiary challenges in corruption cases.[2359]

Such shifting of the burden of proof is very controversial in scholarship and arbitration practice.[2360] As argued by Haugeneder and Liebscher, without a proper basis in the relevant substantive or procedural law a shifting of the burden of proof would run counter the general principle of law that the party who asserts a fact bears the burden of proving it.[2361] Mourre similarly states that a reversal of the burden of proof would not be "*acceptable or compatible with the right to a fair trail*" without providing further explanation for his notion.[2362] Partasides also rejects a change in the allocation of the burden of proof, since it would be an 'all in one go' move, although he shows some sympathy with Mills's motivation to shift the burden.[2363] In the view of Partasides, the difficulty of proving allegations of corruption should rather be addressed by adapting the standard of proof.[2364] Hwang and Lim in similar terms reject a shifting of the burden of proof and refer to the good reason of the general rule, which is "*to prevent parties from making baseless assertions and to secure the integrity of the fact finding process*" and "*that it avoids the presumption that a fact exists when evidence is not sufficiently probative to demonstrate such*".[2365]

While the concerns raised in scholarship against Mills's suggestion are valid, it seems worth taking a closer look at the basic concept behind her proposition. Mills ties the shifting of the burden of proof to a "*reasonable indication of corruption*".[2366] Unfortunately, she refrains from elaborating under which specific conditions such shifting shall be triggered. She also fails to further explain what is

[2358] Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 130.
[2359] Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2009, 135. ("*One solution would be to provide for a certain flexibility in terms of burden of proof, like the one suggested in the ICC Case No. 6497, according to which the burden of proof could be reversed under certain circumstances; i.e., if the alleging party brought forth relevant evidence without it being conclusive, the tribunal could request the other party to bring counter evidence*.").
[2360] See e.g. Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 547; Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," 53; Hwang and Lim, "Corruption in Arbitration - Law and Reality," 28 et seq.; Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," 221. Note that Wilske merely states that "[t]*o ensure a level playing field, any such burden of proof shifting would need to work in both directions*" without providing further explanation, see Ibid., 221.
[2361] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 547.
[2362] Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 103.
[2363] Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," 53.
[2364] Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World."
[2365] Hwang and Lim, "Corruption in Arbitration - Law and Reality," 29.
[2366] Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 130.

to be understood as a 'reasonable indication of corruption'. The given examples of disclosing information of a challenged tender or of a pricing mechanism are also not helpful in this regard; they rather present situations that show how the shifting of the burden of proof would look like once triggered. However, the idea behind the shifting of the burden of proof is that the party accused with corruption may – most of the times at least – have it easier to produce evidence showing the real circumstances of the case.[2367] In this context it must be noted that the onus of proving corruption only passes to the other party when credible evidence has been presented inducing reasonable grounds for suspecting that the relevant transaction has not been conducted in good faith, but rather with corrupt means.

The concept of shifting the burden of proving the alleged facts is neither unknown nor unusual in international arbitration, while no investment treaty tribunal has so far applied such approach to allegations of corruption. Thus, it seems apposite to analyse the general approach of arbitral tribunals toward shifting the burden of proof (see below at **a)**) before examining its application to corruption allegations (see below at **b)**).

a) Shifting of burden of proof in general

The concept of shifting the burden of proof is not unknown in international litigation and international arbitration. Commentators have argued that once a party has provided *prima facie* evidence, the burden of proof shifts to the other party who then requires to rebut such *prima facie* evidence. Basing such conclusion on the jurisprudence of international tribunals, Amerasinghe summarises that

> "[p]rima facie evidence shifts the burden of evidence from the proponent of the burden of proof to the other party. This is the effect in all instances. Before this stage the opposing party is not bound to respond to the allegation, and its silence would not result in the tribunal's holding that the alleged fact has been proved. In effect after one party has provided prima facie evidence, it has in fact discharged the burden of evidence laid upon it, and it is not required to carry its burden of proof any further before the other party rebuts the prima facie evidence already established by the proponent. Consequent upon this, if the adversary rebuts the prima facie evidence, then undoubtedly the burden of evidence will shift back to the proponent, and it has to carry the burden further. This is apparently the approach followed by international tribunals."[2368]

The notion of shifting the burden of proof when the party alleging the facts provided *prima facie* evidence has also been applied by various investment treaty

[2367] See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 701.
[2368] Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Leiden et al.: Martinus Nijhoff Publishers, 2005), 251.

tribunals. In *AAPL v Sri Lanka*, the tribunal stated that "*in case a party adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent*".[2369] Many arbitral tribunals, *inter alia* the tribunals in *Tradex v Albania*[2370] and *Middle East Cement v Egypt*[2371], have referred to *AAPL v Sri Lanka* when applying this principle.[2372] The *Feldman v Mexico* tribunal also followed this approach and cited the findings of the Appellate Body of the WTO[2373]

> "[…] various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[2374]

The tribunal in *Thunderbird v Mexico* referred to both the *Feldman v Mexico* tribunal and the WTO Appellate Body and confirmed that if the party bearing the burden of proof adduces *prima facie* evidence, "*the burden of proof may shift to the other Party, if the circumstances so justify*".[2375] The tribunal in *Kardassopoulos v Georgia* also made clear that the burden of proof might shift in special circumstances – such as a *prima facie* evidentiary showing.[2376]

[2369] *AAPL v Sri Lanka*, Award, para 56, Rule (L). The tribunal also refers *inter alia* to *Parker v Mexico* of the Mexico/United States General Claims Commission. Note that the Commission did not establish a rule to shift the burden of proof, it rather clarified that "[…] *when the claimant has established a prima facie case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is encumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be*." *William A. Parker (U.S.A.) v United Mexican States*, Mexico/United States General Claims Commission, 31 March 1926, RIAA Vol IV, 35 (hereinafter: "*Parker v Mexico*"), 39.
[2370] *Tradex v Albania*, Award, para 84.
[2371] *Middle East Cement v Egypt*, para 94.
[2372] See e.g. *Tza Yap Shum v Peru*, Award, para 73.
[2373] *Feldman v Mexico*, Award, para 177. Note that the tribunal additionally also referred to *AAPL v Sri Lanka.*
[2374] *United States - Wool Shirts*, Appellate Body Report, p. 14, emphasis added.
[2375] *International Thunderbird Gaming v Mexico*, Award, para 95, referring to *Feldman v Mexico*; and to the WTO case *United States - Wool Shirts*, Appellate Body Report, p. 14.
[2376] *Kardassopoulos v Georgia*, Award, paras 228, 230. In fact, the tribunal only stated that the burden may shift "*in certain circumstances*". However, it explicitly referred to the assertion of the claimant, which presented the 'circumstance' of a *prima facie* showing.

This principle has been applied throughout all stages in arbitration proceedings.[2377] The *Methanex* tribunal for instance relied on this principle for its decision on the admissibility of evidence. The tribunal found that the United States had demonstrated *prima facie* that the evidence offered by *Methanex* was obtained unlawfully, for which reason the burden of proving admissibility had shifted to Methanex.[2378] In *Tecmed v Mexico*, the tribunal applied this principle to the evaluation of compensation and transferred the burden of proving the investment's market value to the respondent once the claimant had submitted *prima facie* evidence supporting its allegation.[2379]

Against this background, there seems to be support in investment treaty arbitration case law that when the party alleging the facts presents a *prima facie* case, the burden of proof may shift to the opponent. Note that even in cases where the particular shift of burden was rejected for the specific case, the general principle was not challenged.[2380] The tribunal in *Bayindir v Pakistan*, for instance, denied such shifting of the burden of proof to the respondent, although it recognised the present difficulty for the investor as claimant to meet the burden of proof.[2381] However, the tribunal made clear that in this specific case the investor had failed to show the similarity of situations required to establish a breach of a 'most favoured nation' standard.[2382] In the view of the tribunal, a shift of burden demands a "*higher degree of substantiation*" than actually provided by the claimant.[2383] Thus, since the investor had failed to present a potential comparator for the 'alike situation' essential for an allegation of breach of the most favoured nation standard, the tribunal's reasoning may be understood as merely finding that the investor failed to present a *prima facie* case.[2384]

The principle of shifting the burden of proof when *prima facie* evidence supports the asserted facts goes hand in hand with another general principle stated by Cheng[2385] and confirmed by the tribunal in *AAPL v Sri Lanka.*[2386] Accordingly, a tribunal may take into consideration that a specific fact is particularly difficult to

[2377] See e.g. *Glamis v United States*, para 512. The tribunal was satisfied with the '*prima facie* showing' of the claimant of the requirement to post certain financial assurances prior to the commencement of the relevant mining operation and shifted the burden of proof to the respondent which failed in rebutting such showing.
[2378] *Methanex v United States*, Award , Part II, Chapter I, para 55.
[2379] *TECMED v Mexico*, Award, para 190.
[2380] *Bayindir v Pakistan*, Award, para 419.
[2381] *Bayindir v Pakistan*, Award, para 419.
[2382] *Bayindir v Pakistan*, Award, para 419.
[2383] *Bayindir v Pakistan*, Award, para 419.
[2384] Note that the *Bayindir* tribunal did indeed not challenge the principle of shifting the burden of proof for *prima facie* showings, but it did also not confirm it. It left the question open by stating that a "*shift of such burden, if at all permissible, would, however, have required a higher degree of substantiation* […]". (Emphasis added).
[2385] Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 323–325.
[2386] *AAPL v Sri Lanka*, Award, para 56 Rule (M). "*In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e., prima facie evidence*."

prove and may be persuaded by less probative evidence.[2387] Considering that the tribunal is the 'judge' of the probative value of the evidence, it has enough leeway to determine the weight of the available evidence and the consequence of the fact that more conclusive evidence is missing.[2388] In this line of reasoning, the Iran-United States Claims Tribunal recognised that a *prima facie* case was sufficient, especially in those circumstances where evidence was extremely difficult to obtain.[2389]

b) Shifting of burden of proof for allegations of corruption

A consequent application of the approach of shifting the burden of proof, once the claimant has presented evidence of its claim, was conducted by arbitrator Daniel M. Price in his dissenting opinion in *Tokios Tokelės*.[2390] In his view, the investor had provided credible evidence about the arbitrary and politically motivated initiation of criminal proceedings against the manager of the investor's company.[2391] Thus, the burden should have shifted to the host State, which in turn would then have been required to present a justification for the conduct of criminal proceedings against the investor, i.e. the host State had to show that there was a legal justification for its actions.[2392] Since the host State refused to provide explanation for its conduct, according to Price it failed to discharge its burden and the decision of the tribunal should thus be based on the evidence offered by the investor.[2393] Hence, Price concluded that the host State sought to punish the investor's company for having supported the campaign of the opposition.[2394] Note that the majority of the tribunal chose a totally different approach to the evidentiary problem and did not demand counter evidence by the State, it merely focused on the fact that there was a "*plausible alternative to the hypothesis of a nayizd*".[2395]

Translating the approach of the dissenting opinion in *Tokios Tokelės* to a corruption scenario where the investor bases its claim on a violation of an investment standard due to corruption on side of the host State, once the investor

---

[2387] This principle has also been accepted by Sandifer, see Durward V. Sandifer, *Evidence before International Tribunals*, Rev. ed. (Charlottesville: University Press of Virginia, 1975), 173.
[2388] See Article 34(1) of the ICSID Arbitration Rules:
"*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*"
See also Article 25.6 of the UNCITRAL Rules:
"*The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.*"
[2389] *Rockwell International Systems, Inc. v Government of the Islamic Republic of Iran*, Award No. 438-430-1, 5 September 1989, Iran-U.S.C.T.R. Vol. 23, 150 (hereinafter: "*Rockwell v Iran*, Award"), 188.
[2390] *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price.
[2391] *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price, paras 19-20.
[2392] *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price, paras 19-20.
[2393] *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price, paras 19-20.
[2394] *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price, para 5.
[2395] *Tokios Tokelės v Ukraine*, Award, para 136. Note that '*nayizd*' is the Ukraine term for a politically motivated campaign against a company that the Ukraine government dislikes.

has presented *prima facie* evidence of corruption, the burden would lie on the host State to convince the tribunal that its actions were legitimately reasoned and not influenced by corruption. Likewise in case the host State alleges corrupt conduct on the side of the investor and provides *prima facie* evidence thereof, then the investor would have to rebut such evidence and show that it acted legitimately and that its investment is legal.

Professor Wälde acknowledged in his separate opinion in *Thunderbird v Mexico* that more recent arbitral jurisprudence uses presumption rather than full evidence since the latter is difficult to obtain in the first place.[2396] In this case, the host State had insinuated that a high success fee paid to two Mexican lawyers acting as lobbyists were in fact means of bribery. This led Wälde to make general comments on how to approach the issue of proving corruption. He found that first the party alleging corruption needs to present evidence to cause a certain degree of suspicion.[2397] As soon as such 'red flag'[2398] emerges from the questionable transaction, it is the responsibility of the party in control of the suspicious transaction to prove that the action was legal.[2399] Thus, the burden of proving the allegations of corruption "*can be discharged in an easier way by evidence of sufficient* '*red flag indicators*'".[2400] From this follows that in Wälde's opinion a *prima facie* case is established when evidence leads to 'red flag signals'.[2401] At the end, this approach could not be applied to the facts since the host State failed to substantiate its insinuations and make proper allegations of corruption.[2402]

Note however that in the commercial arbitration case ICC No. 6497, where the tribunal considered shifting the burden of proof for the corruption allegations, the tribunal made clear that "*the arbitral tribunal may exceptionally request the other party to bring some counter-evidence, if such task is possible and not too burdensome*".[2403] The tribunal therefore specifically took into account whether

[2396] See also *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 112. Note that Prof. Wälde only refers to International Commercial Arbitration cases.
[2397] *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 112. Note that Wälde referred to the approach taken in the practice of the U.S. Foreign Corrupt Practices Act.
[2398] 'Red flags' are indicators of corruption developed by the domestic and international fight against corruption. Various 'red flag' lists have been published by different institutions and for different purposes, which mostly have similar content. The tribunal in *Metal-Tech v Uzbekistan*, for instance, referred to such red flag list from Lord Woolf, see *Metal-Tech v Uzbekistan*, Award, para 293, referring to Woolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in Bae Systems Plc 25-26 (2008).
[2399] Prof. Wälde refers *inter alia* to Sayed, *Corruption in International Trade and Commercial Arbitration*. Note that Wälde also cites *Methanex* to confirm that inferences may be used by a tribunal where direct evidence is not available, see *Methanex v Mexico*, Award, Part III, B, para 57.
[2400] See *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 117.
[2401] *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 118.
[2402] *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 113. ("[…] *in the end the insinuation remained what it was – an insinuation* […]."
[2403] ICC Case No. 6497, 73. The tribunal also emphasised that "*such change in the burden of proof is only to be made in special circumstances and for very good reasons*".

such counter-evidence was easily available to the other party. In fact, it is often more difficult to produce negative evidence to prove that a fact did not occur than otherwise – an issue that needs to be considered by the tribunal.[2404] In other words, under specific circumstances it might be more difficult to prove that a conduct is not tainted by corruption than proving that such conduct might have been corrupt. In particular in corruption cases where the parties' contributions to the corrupt act may have various different forms and involve ulterior motives, it appears difficult to establish that a payment was not made or an ulterior motive not present.

The difficulty of providing negative evidence was also discussed in *Siag & Vecchi v Egypt*, where the tribunal pointed at the potential implications on due process, which have to be considered when shifting the burden of proof.[2405] One of the claimants had provided *prima facie* evidence that he had acquired the Lebanese nationality. The burden then shifted to Egypt to challenge the acquisition of the nationality. After presenting its objection to the acquisition by alleging fraud, Egypt argued that the burden had shifted again to the claimant. The tribunal disagreed and emphasised

> "[b]ecause negative evidence is very often more difficult to assert than positive evidence, the reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards. It is for this reason that Tribunals have rarely shifted the burden of proof. There are no special circumstances or good reasons for doing so in this case."[2406]

The tribunal in *Liman Caspian Oil v Kazakhstan* emphasised the intrinsic difficulty of proving corruption, but found that this was no reason to "*depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption*".[2407] The tribunal clarified that it was not sufficient to provide evidence indicating that corruption was 'probable'.[2408] In similar terms, the tribunal in *Oostergetel v The Slovak Republic* held that "[t]*he burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State*".[2409] However, it is not clear from the tribunal's findings whether it would have considered shifting the burden of proof in case of concrete indications of corruption.

In conclusion there may be reasonable grounds in favour of shifting the burden of proof in corruption cases when the party alleging the corrupt practice has presented sufficient evidence in form of red flags leading to a *prima facie* case. Most notably, an allegedly corrupt party may not hide behind the strict burden of proof, but it

[2404] See also Waincymer, *Procedure and Evidence in International Arbitration*, 772.
[2405] *Siag & Vecchi v Egypt*, Award, para 317.
[2406] *Siag & Vecchi v Egypt*, Award, para 317.
[2407] *Liman Caspian Oil v Kazakhstan*, Award, para 423.
[2408] *Liman Caspian Oil v Kazakhstan*, Award, para 424.
[2409] *Oostergetel v Slovak Republic*, Award, para 296.

also bears responsibility to shed light on the obscure transaction. However, such shift may cause due process implications on the other party. A general and automatically applied shift of burden of proof in case *prima facie* evidence of corruption has been provided seems therefore not apposite for corruption cases in investment treaty arbitration. This being said, a tribunal is free to examine the particular circumstances of the case and may find that in the specific case due process is preserved despite a shift of the burden of proof.[2410] In particular, the tribunal needs to ensure that the rebutting evidence would be easily available for the party facing the corruption allegations in case such allegations were not true.

3. Burden of proof for jurisdictional issues

The general rule that 'the party who asserts a fact must prove it' is also the starting point for the burden of proof for jurisdictional issues. Thus, the investor as claimant must prove that its claim falls under the jurisdiction of the tribunal. Most likely the host State will challenge the jurisdiction. In cases involving allegations of corruption this leads to two main scenarios. First, the investor bases the breach of the protection standard on corruption committed by the host State.[2411] Most likely the latter will deny such allegations and argue that its behaviour is not able to amount to a treaty breach. Second, the investor brings a case of breach of treaty on any allegation other than corruption, however the defence of the host State is based on the allegations that the investor was involved in corruption. The host State will most likely assert that the investment tainted by corruption is not protected under the IIA leading to lack of jurisdiction or that the illicit behaviour of the investor bars it from bringing its claim.[2412] In this context, it must be kept in mind that even after a full presentation of the evidence it is difficult to establish corruption; at a jurisdictional stage where a full examination of all the available evidence will not have taken place yet, the task becomes even harder.[2413]

Tribunals in principle take their duty to examine whether they have jurisdiction over the claim seriously. The tribunal in *Micula v Romania* highlighted that the duty of the tribunal to determine jurisdiction would also include an examination *sua sponte* where reasonable grounds exist.[2414] In the same line of reasoning, the

[2410] Note that while due process must be observed, the general notion that a shift of the burden of proof in corruption cases automatically violates the right to fair trial cannot be upheld. This will rather depend on the specific circumstances of the case. For such general notion see Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator," 103.
[2411] For corruption as basis for a treaty breach see Chapter Six.
[2412] For the corruption defence see Chapter Seven.
[2413] Note that it has become common in investment treaty arbitration to bifurcate the jurisdiction and the merits phase if the circumstances of the case allow so. In such case the decision whether the tribunal has jurisdiction to proceed to the merits is made before a full hearing of all the available evidence on the merits takes place, see e.g. Audley Sheppard, "The Jurisdictional Threshold of a Prima-Facie Case," in *The Oxford Handbook of International Investment Law, Muchlinski, Ortino and Schreuer (ed.)* (Oxford; New York: Oxford University Press, 2008), 933.
[2414] *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 65. Note that the tribunal clarified that this duty "*does not include an obligation to re-open the evidentiary proceedings, far less to launch its own investigation, unless compelling reasons to do so (such as where it has been*

tribunal in *Saipem v Bangladesh*, found it "*is undisputable that the Tribunal determines its jurisdiction without being bound by the arguments of the parties*".[2415] Thus, mere assertions made by the claimant will not suffice to establish jurisdiction.[2416] In fact, many tribunals have emphasised that it was upon the tribunal to decide whether jurisdiction was given and not upon the parties.[2417] Note also that – as for the valuation of evidence at all stages of the proceedings – it is upon the tribunal to decide over the probative value of the evidence presented by the parties.[2418] At the same time tribunals have shown an objective approach to jurisdiction. The applied test to establish jurisdiction is aimed at being neither too restrictive nor too liberal.[2419]

The question that remains is what in particular has to be alleged and proven by each party at this early stage. Will the investor have to prove that the tribunal has jurisdiction for its corruption claim, or will the host State have to prove the lack of jurisdiction?[2420] A distinction is made between the different issue that become relevant at the jurisdictional stage (see below at **a)**). While a *prima facie* case will suffice to prove the alleged treaty breach (see below at **b)**), the genuine jurisdictional issues must be fully proven (see below at **c)**). This leads to corruption being asymmetrically dealt with at the jurisdictional stage. Corruption allegations made by the investor (see below **d)**) require a different burden of proof from those of the host State challenging jurisdiction on the corruption defence (see below at **e)**).

a) Genuine jurisdictional issues versus alleged treaty breach

When it comes to the burden of proof, a distinction has to be made between the genuine jurisdictional issues and the requirement of showing a treaty breach at the jurisdictional stage. The first group of issues concerns the requirements stipulated

---

impossible for a party to have made such an investigation itself or where the other party has concealed relevant facts or evidence)." See also *Hamester v Ghana*, Award, paras 94-95, where the tribunal decided to examine whether it was detrimental to its jurisdiction that the claimant had sold its shares in the respective company, although the parties had not raised that issue.

[2415] *Saipem v Bangladesh*, Decision on Jurisdiction, para 90.

[2416] Vasani and Foden, "Burden of Proof Regarding Jurisdiction," 284.

[2417] *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002 (hereinafter: "*UPS v Canada*, Award on Jurisdiction"), para 34. See also *Canfor v USA*, Jurisdiction, para 171.

[2418] See e.g. *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 25 April 2005 (hereinafter: "*AES v Argentina*, Decision on Jurisdiction"), paras 83-84, where the tribunal referring to Arbitration Rule 34 stated that it was satisfied at that stage with the provided evidence to show the ownership of the relevant companies.

[2419] *Amco v Indonesia I*, Decision on Jurisdiction, paras 14 and 18. See also *SPP v Egypt*, Decision on Jurisdiction, para 63 ("[…] *jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant*".) See also *Waste Management I v Mexico*, Dissenting Opinion Keith Highet, para 9, where Highet emphasised that a tribunals should not "*arrive precipitously at the drastically preclusive effect of denial of jurisdiction*".

[2420] See Vasani and Foden, "Burden of Proof Regarding Jurisdiction," 271.

in the IIA or, if applicable, also Article 25 of the ICSID Convention to establish the jurisdiction of the tribunal (and the Centre). The questions will generally focus on

> (i) whether the claimant is a qualified investor under the treaty and has the required nationality under the ICSID Convention (jurisdiction *ratione personae*);[2421]
>
> (ii) whether the investment is a qualified investment under the definition of the treaty or the notion of investment under Article 25 of the ICSID Convention (jurisdiction *ratione materiae*);[2422]
>
> (iii) whether a valid consent was provided by both parties, which cover the dispute at issue (jurisdiction *ratione voluntatis*);[2423] and
>
> (iv) whether the investment was made or the legal dispute arose after the entry into force of the IIA (jurisdiction *ratione temporis*).[2424]

As discussed in Chapter Seven, in corruption cases the main focus of the corruption defence is on the question whether the dispute over an investment tainted by corruption falls within the given consent or whether such tainted investment is a protected investment pursuant to the treaty or the ICSID Convention.[2425]

At the same time a tribunal only has jurisdiction over the dispute if it concerns a breach of the relevant protection standards and provisions of the treaty. In order to have jurisdiction based on the arbitration clause in the treaty, the investor's claims must fall within its scope. From this follows that in corruption cases where the investor's claim is based on host State corruption, the investor must show that the corruption alleged constitutes a breach of a protection standard granted in the underlying IIA.

b) *Prima facie* test for alleged treaty breach

At the jurisdictional stage the tribunal has the difficult task of determining whether it has jurisdiction over the treaty claim as presented by the investor without having the possibility of relying on a full-fledged taking and hearing of evidence. The tribunal cannot be certain when evaluating whether the facts alleged by the investor are true, which is a task for the merits stage. To examine whether the claim is well-founded would anticipate the examination of the merits. Thus, the burden of proof for a jurisdictional question over the alleged claim may be lower

[2421] See e.g. *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility.
[2422] See e.g. *Fraport v Philippines*, Award.
[2423] See e.g. *Inceysa v El Salvador*, Award.
[2424] See e.g. *Lucchetti v Peru*, Award.
[2425] Note that corrupt acts may also affect jurisdiction *ratione personae*. In *Siag & Vecchi v Egypt*, Egypt had alleged that the investor had obtained the required nationality by corrupt means. It can also not be ruled out that corruption may affect the jurisdictional *ratione temporis*.

than for an issue on the merits.[2426] However, a decision on jurisdiction based only on the investor's description of its claim, would put too much weight on the investor's statements, making the tribunal's determination almost superfluous. Hence, in order to establish an approach that strikes a balance between both extremes, the arbitral tribunals have relied on the *prima facie*[2427] test developed by the jurisprudence of the ICJ.[2428] In fact, tribunals have referred to the tests applied in the different opinions in the *Oils Platform* case, i.e. the majority decision,[2429] the

[2426] See e.g. *Plama v Bulgaria*, Decision on Jurisdiction, para 167.

[2427] Note that the term *prima facie* is used in all stages of the proceedings (provisional measures, jurisdiction and merits) with different meaning and different focus. It does not comprise a freestanding standard with a general and universal content. With regard to provisional measures the term '*prima facie* jurisdiction' means that the tribunal has the authority to issue preliminary measures without having ruled over the jurisdiction to proceed to the merits. In the jurisdictional phase, the '*prima facie*' requirement explains that the claimant has sufficiently proven that her claim could be successful. In the context of the merits in turn, the term '*prima facie*' is applied to the situation where evidence shows sufficiently that a fact might be true with the result of a shifting of the burden of proof.

[2428] On the *Prima Facie* Test with regard to jurisdiction see among others: *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 28 June 1999 (hereinafter: "*Wena v Egypt*, Decision on Jurisdiction"), paras 62-64; *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 (hereinafter: "*Maffezini v Spain*, Decision on Jurisdiction"), paras 69-70; *UPS v Canada*, Award on Jurisdiction, paras 33-37; *CMS v Argentina*, Decision on Jurisdiction, para 35; *SGS v Pakistan*, Decision on Jurisdiction, para 145; *Azurix Corp. v The Argentine Republic*, Decision on Jurisdiction, 8 December 2003 (hereinafter: "*Azurix v Argentina*, Decision on Jurisdiction"), para 76; *SGS v Philippines*, Decision on Jurisdiction, para 26; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004 (hereinafter: "*PSEG v Turkey*, Decision on Jurisdiction"), paras 64-65; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (hereinafter: "*Siemens v Argentina*, Decision on Jurisdiction"), para 180; *Joy Mining v Egypt*, Award on Jurisdiction, paras 29-30; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, (hereinafter: "*Salini v Jordan*, Decision on Jurisdiction"), 136-151; *Plama v Bulgaria*, Decision on Jurisdiction, paras 118-120, 132; *Impregilo S.p.A v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (hereinafter: "*Impregilo v Pakistan*, Decision on Jurisdiction"), paras 237-254, 263; *Bayindir v Pakistan*, Decision on Jurisdiction, paras 187-200; *Duke v Peru*, Decision on Jurisdiction, para 87-90; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006 (hereinafter: "*Continental Casualty v Argentina*, Decision on Jurisdiction"), paras 59-64; *El Paso v Argentina*, Decision on Jurisdiction, paras 40-45, 109; *Telefónica S.A. v The Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Jurisdiction, 25 May 2006 (hereinafter: "*Telefónica v Argentina*, Decision on Jurisdiction"), paras 53-58; *Jan de Nul v Egypt*, Decision on Jurisdiction, paras 69-71; *LESI v Algeria*, Decision on Jurisdiction, para 84(iv); *Pan American Energy v Argentina*, Decision on Preliminary Objections, paras 43-51, 131; *Total v Argentina*, Decision on Jurisdiction, paras 52-57; *Telenor v Hungary*, Award, para 68; *Helnan v Egypt*, Decision on Jurisdiction, para 81; *Saipem v Bangladesh*, Decision on Jurisdiction, paras 83-91, 129-134, 144-147, 149; *Siag & Vecchi v Egypt*, Decision on Jurisdiction, paras 139-141; *Kardassopoulos v Georgia*, Decision on Jurisdiction, paras 103-104; *MCI v Ecuador*, Award, paras 162-170; *Desert Line v Yemen*, Award, paras 129-131; *Phoenix v Czech Republic*, Award, paras 58-64; *Bureau Veritas v Paraguay*, Decision on Jurisdiction, paras 106, 107, 112, 117, 120; *Burlington v Ecuador*, Decision on Jurisdiction, para 110; *Inmaris v Ukraine*, Decision on Jurisdiction, paras 56-59.

[2429] The Court in the *Oil Platforms* Case established that it had to "*ascertain whether the violations of the Treaty* […] *pleaded by* [the claimant] *do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain* […]." *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of*

separate opinion of Judge Higgins,[2430] or the separate opinion of Judge Shadabuddeen[2431]. The explicit wording of the *prima facie* test has been different throughout the cases. However, the following general notions – deduced from the relevant arbitral awards – will be relevant to the allegations of corruption as a treaty breach.

America), Preliminary Objection, Judgment of 12 December 1996, ICJ Reports 1996, 803 (hereinafter: "*Oil Platforms*, Preliminary Objections"), 810, para 16.
For cases referring to the majority decision see *SGS v Philippines*, Decision on Jurisdiction, para 26; *Salini v Jordan*, Decision on Jurisdiction, para 141; *Impregilo v Pakistan*, Decision on Jurisdiction, para 239; *Continental Casualty v Argentina*, Decision on Jurisdiction, fn. 4; *El Paso v Argentina*, Decision on Jurisdiction, para 42; *Canfor Corporations et al. v United States of America* (Consolidated NAFTA case under UNCITRAL Rules), Decision on Preliminary Question, 6 June 2006 (hereinafter: "*Canfor v Argentina*, Decision on Preliminary Question"), para 168; *Pan American Energy v Argentina*, Decision on Preliminary Objections, para 44.

[2430] In Judge Higgins' view "[t]*he only way in which* […] *it can be determined whether the claims of* [the claimant] *are sufficiently plausibly based upon the* […] *Treaty is to accept pro tem the facts as alleged by* [the claimant] *to be true and in that light interpret* [the relevant articles] *for jurisdictional purpose – that is to say, to see if on the basis of* [the claimant's] *claims of fact there could occur a violation of one or more of them*". Judge Higgins also emphasised that the Court went too far when stating that in order to establish jurisdiction it was necessary that the relevant claim 'would' involve a violation of the Treaty. Thus, a tribunal shall examine whether the facts alleged by the claimant ***might*** breach the relevant Treaty provision. She made clear that when deciding over jurisdiction the Court shall not deal with the final determination of the facts, the actual breach of treaty and existence of defences for such violation – such issues are reserved for the merits. See *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment of 12 December 1996, Separate Opinion Judge Higgins, ICJ Reports 1996, 847 (hereinafter: "*Oil Platforms*, Preliminary Objections, Separate Opinion Higgins"), 856, para 33.
For cases referring to the separate opinion of Judge Higgins see e.g. *Plama v Bulgaria*, Decision on Jurisdiction, 2005, para 118; *Desert Line v Yemen*, Award, paras 129-131; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (hereinafter: "*Methanex v United States*, Partial Award"), para 118; *Impregilo v Pakistan*, Decision on Jurisdiction, fn. 103, in addition the tribunal adopted part of the formulation used by Judge Higgins in her separate opinion, see para 263; *Continental Casualty v Argentina*, Decision on Jurisdiction, fn. 4; *Canfor v United States*, Decision on Jurisdiction, para 168, fn. 178; *Jan de Nul v Egypt*, Decision on Jurisdiction, para 70; *Saipem v Bangladesh*, Decision on Jurisdiction, para 85; *Siag & Vecchi v Egypt*, Decision on Jurisdiction, para 139; *Inmaris v Ukraine*, Decision on Jurisdiction, para 56, fn. 37.

[2431]See *Telenor v Hungary*, Award, para 68, fn. 17 Note that the tribunal in *Telenor v Hungary* referred neither to the majority decision of the *Oils Platforms* case nor to the separate Opinion of Judge Higgins, but to the separate opinion of Judge Shadabuddeen who introduced the test of "reasonable connection" between the claim and the treaty. Judge Shadabuddeen summarised the task of the tribunal to reach a balance between the issues at stake when taking a decision at such early stage in the following manner:
"*The question before the Court is whether the Applicant has a right to have its claim adjudicated. The Respondent says there is not such a right. The objection presents the Court with the delicate problem of ensuring, on the one hand, that the Respondent is not given cause to complain that it has been brought before the Court against its will, and, on the other hand, that the Applicant is not left to feel that it has been needlessly driven from the judgment seat. It is necessary to navigate carefully between these perils*." *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment of 12 December 1996, Separate Opinion Judge Shahabuddeen, ICJ Reports 1996, 822 (hereinafter: "*Oil Platforms*, Preliminary Objections, Separate Opinion Judge Shahabuddeen").

(1) No findings on the merits

The first notion for the determination of jurisdiction is that in order to decide over facts or legal issues in a definite way, an adequate debate is necessary. Since such ample examination of the treaty claim will barely be possible at jurisdictional level, the alleged facts have to be established primarily in the merits.[2432] Thus, at a jurisdictional stage the tribunal will not examine whether the claims are 'correct'[2433], or 'well-founded'[2434], or amount to a breach of the protection standard provided in the IIA[2435] – all tasks reserved for the merits. In the words of the tribunal in *Impregilo v Pakistan*, the tribunal "*must not make findings on the merits of those claims, which have yet to be argued, but rather must satisfy itself that it has jurisdiction over the dispute, as presented by the Claimant*".[2436] In conclusion, a tribunal will refrain from making a detailed examination of the claim, but will rather test whether the claim "*is within the jurisdictional mandate of ICSID arbitration of this Tribunal*" at a *prima facie* level.[2437]

(2) Alleged facts 'fall within' or are 'capable of'

Against the background that a definitive finding of the treaty claim is reserved for the merits, the majority of the investment arbitration tribunals have confirmed the *prima facie* test established by Judge Higgins and held – with different wording – that the facts alleged by the claimant, if true[2438], proved[2439], established[2440], or well founded[2441] must be 'capable of'[2442] constituting a violation of the invoked obligations, or 'fall within'[2443] the invoked treaty provisions.[2444]

[2432] See e.g. *Helnan v Egypt*, Decision on Jurisdiction, para 81, where the tribunal held that in order to discover the truth of the factual situation the tribunal would have to enter further into the merits.
[2433] *Siemens v Argentina*, Decision on Jurisdiction, para 180.
[2434] See *Bayindir v Pakistan*, Decision on Jurisdiction, para 188; *Continental Casualty v Argentina*, Decision on Jurisdiction, para 60; *Saipem v Bangladesh*, Decision on Jurisdiction, para 142.
[2435] *Continental Casualty v Argentina*, Decision on Jurisdiction, para 63.
[2436] *Impregilo v Pakistan*, Decision on Jurisdiction, para 237.
[2437] *Amco v Indonesia I*, Decision on Jurisdiction, para 38. This passage was also quoted in *Wena v Egypt*, Decision on Jurisdiction, para 63.
[2438] *El Paso v Argentina*, Decision on Jurisdiction, para 45.
[2439] *Bayindir v Pakistan*, Decision on Jurisdiction, para 197; see also *Saipem v Bangladesh*, Decision on Jurisdiction, para 91 ("*proven*"); *Continental Casualty v Argentina*, Decision on Jurisdiction, para 63 ("*proved to be true*"); *Total v Argentina*, Decision on Jurisdiction, para 55 ("*proven to be true*"); *Burlington v Ecuador*, Decision on Jurisdiction, para 110 ("*proven*").
[2440] *Salini v Jordan*, Decision on Jurisdiction, para 151; *Impregilo v Pakistan*, Decision on Jurisdiction, para 254.
[2441] *Pan American Energy v Argentina*, Decision on Preliminary Objections, para 51.
[2442] *SGS v Pakistan*, Decision on Jurisdiction, para 145.
[2443] *Impregilo v Pakistan*, Decision on Jurisdiction, para 263; *El Paso v Argentina*, Decision on Jurisdiction, paras 45,109; *Saipem v Bangladesh*, Decision on Jurisdiction, para 91. See also *Pan American Energy v Argentina*, Decision on Preliminary Objections, para 51. The two last tribunals comprised Caflisch (President) and Stern. Note that both tribunals also clarified that this leads not to the situation where the characterisation made by the claimant is the only conclusive and decisive one.
[2444] *Impregilo v Pakistan*, Decision on Jurisdiction, para 254. See also para 263 ("[…] *the question remains whether* […] *Impregilo's Treaty Claims fall within the scope of the BIT, assuming pro tem that they may be sustained on the facts*".) *SGS v Pakistan*, Decision on Jurisdiction, para 145.

The particular wording chosen by the different tribunals differs from case to case; however, the test remains the same. The tribunal in *UPS v Canada* confirmed that there was no significant difference between the two phrasings.[2445] Thus, it is comprehensible that tribunals have used different phrasing interchangeably or simply used both terms. For instance, the tribunal in *Bayindir v Pakistan* concluded that it had "*to assess whether the facts alleged by* [the claimant] *fall within* [the invoked] *provisions or are capable, if proved, of constituting breaches of the obligations they refer to*".[2446] Some tribunals have even merged the different formulations and demanded that the alleged facts, if established, are "*capable of falling within*"[2447] or "*capable of coming within*"[2448] the invoked provision of the treaty.

Moreover, the *prima facie* test for jurisdictional purposes is applied to both the legal interpretation of the treaty provisions that are alleged to be violated and to the alleged facts.[2449] In other words, the *prima facie* test refers to both the 'factual subject matter at issue' and 'the legal norms' presented as applicable.[2450]

Referred to by e.g. *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 104. *Saipem v Bangladesh*, Decision on Jurisdiction, para 91. *Burlington v Ecuador*, Decision on Jurisdiction, para 110 ("*Claimant's allegations of fact are subject to a prima facie standard according to which the alleged facts should be susceptible of constituting a breach of the Treaty if they were ultimately proven.*" Emphasis added.); *SGS v Philippines*, Decision on Jurisdiction, para 157 ("*Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim.*" Emphasis added.); *CMS v Argentina*, Decision on Jurisdiction, para 35 with different wording (*"For the time being, the fact that the Claimant has demonstrated prima facie that it has been adversely affected by measures adopted by the* [Respondent] *is sufficient for the Tribunal to consider that the claim, as far as this matter is concerned, is admissible and that it has jurisdiction to examine it on the merits.*").

[2445] *UPS v Canada*, Decision on Jurisdiction, para 36 ("*The reference to the facts alleged being 'capable' of constituting a violation of the invoked obligations, as opposed to their 'falling within' the provisions, may be of little or no consequence*."). Also quoted by *Saipem v Bangladesh*, Decision on Jurisdiction, para 86; *Canfor v United States*, Decision on Jurisdiction, para 170.

[2446] *Bayindir v Pakistan*, Decision on Jurisdiction, para 197 (emphasis added). Referred to in *Jan de Nul v Egypt*, Decision on Jurisdiction, para 71; *Helnan v Egypt*, Decision on Jurisdiction, para 81, fn. 24; *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 104.

[2447] *Continental Casualty v Argentina*, Decision on Jurisdiction, para 63; *Total v Argentina*, Decision on Jurisdiction, para 55, emphasis added. Note that Sacerdoti was President of the tribunal in both cases. The relevant paragraphs of both awards are literally equally worded.

[2448] *Salini v Jordan*, Decision on Jurisdiction, para 151. Note that this phrasing is also used in ICJ Case *Concerning Legality of Use of Force (Yugoslavia v Italia)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 481 (hereinafter: "*Use of Force (Yugoslavia v Italia*), Order"), 491, paras 27-28, a case that dealt with preliminary proceedings. Judge Guillaume, the President of the *Salini* tribunal had also been involved as judge in the *Legality of Use of Force* case. Many tribunals confirmed the findings of the *Salini* tribunal, see e.g. in *Plama v Bulgaria*, Decision on Jurisdiction, para 119; *Telenor v Hungary*, Award, para 68; *Siag & Vecchi v Egypt*, Decision on Jurisdiction, para 140; *Bureau Veritas v Paraguay*, Decision on Jurisdiction, para 112.

[2449] *Bayindir v Pakista*n, Decision on Jurisdiction, para 197. See also *Saipem v Bangladesh*, Decision on Jurisdiction, para 91.

[2450] *Continental Casualty v Argentina*, Decision on Jurisdiction. Note that the tribunal mentioned that also the 'relief sought' had to pass the *prima facie* test. See also *Telefónica v Argentina*, Decision on Jurisdiction, para 53; *Total v Argentina*, Decision on Jurisdiction, para 52. It is noteworthy that Sacerdoti was President of the tribunal in all three cases.

(3) Facts as alleged by the claimant as starting point

The parties will hardly agree on the facts, for which reason they are often disputed from the beginning. The question at the jurisdictional stage is therefore, upon what alleged facts should the tribunal base its jurisdictional determination. Considering that the purpose of the jurisdictional threshold is mainly to assess whether the claimant has presented a claim that is '*reasonably arguable on its face*',[2451] it appears comprehensible to use the facts alleged by the investor as a basis for the examination. Hence, various tribunals found the facts as presented by the investor to be decisive.[2452] Thus, for jurisdictional purposes – and for those purposes only – the facts alleged by the investor are provisionally considered true.[2453] The tribunal in *SGS v Philippines*, for instance, stated that it was "*for the Claimant to formulate its case*".[2454] In the similar case of *SGS v Pakistan*, the tribunal also confirmed this approach and concluded that at the jurisdictional phase "*it is for the Claimant to characterize the claims as it sees fit.*"[2455] However, the tribunal included a disclaimer that there might be circumstances in which a more detailed analysis of the facts alleged by the claimant might be necessary.[2456]

Starting from the notion that the facts as alleged by the claimant will be decisive at the jurisdictional stage if they refer to the alleged breach of treaty, some tribunals have found that this would not necessarily mean that the facts as presented by the claimants could not be challenged at all. However, there might be situations in which a further examination is justified and where the evidence brought forward by the host State as respondent deserves acknowledgement.[2457] Thus, if the host State provides "*evidence showing that the case has no factual basis even at preliminary scrutiny*", the tribunal has to consider such evidence as well.[2458] However, it must always be kept in mind that the evaluation of the evidence of both parties at the jurisdictional stage will only amount to a preliminary examination, and will not have the thorough scrutiny available at the merits phase.

The tribunal in *Joy Mining v Egypt* confirmed the *prima facie* approach to establish jurisdiction and acknowledged the usefulness of such rule.[2459] It referred to the

---

[2451] Wording used e.g. in *Saipem v Bangladesh*, Decision on Jurisdiction, para 91.
[2452] E.g. *UPS v Canada*, Decision on Jurisdiction, para 32; *Canfor v United States*, Decision on Jurisdiction, para 171; *SGS v Pakistan*, Decision on Jurisdiction, para 145; *SGS v Philippines*, Decision on Jurisdiction, para 157.
[2453] E.g. *UPS v Canada*, Decision on Jurisdiction, para 32; *Canfor v United States*, Decision on Jurisdiction, para 171.
[2454] *SGS v Philippines*, Decision on Jurisdiction, para 157.
[2455] *SGS v Pakistan*, Decision on Jurisdiction, para 145. Note that the tribunal also stated (fn. 165) that "*the Tribunal cannot subject the Request for Arbitration to too rigorous a standard of review at this stage as the Claimant is not obliged to set out extensive allegations of fact and arguments as to how the acts complained of might give rise to a breach of the Treaty*".
[2456] *SGS v Pakistan*, Decision on Jurisdiction, para 145.
[2457] See *Continental Casualty v Argentina*, Decision on Jurisdiction, para 61; *Total v Argentina*, Decision on Jurisdiction, para 53.
[2458] *Continental Casualty v Argentina*, Decision on Jurisdiction, para 61; *Total v Argentina*, Decision on Jurisdiction, para 53.
[2459] *Joy Mining v Egypt*, Award on Jurisdiction, para 30.

prima facie test as formulated by *UPS* and *Methanex*, where "*for the limited purpose of determining jurisdiction, the Claimants' factual contentions are prima facie deemed to be correct.*[2460] However, the tribunal articulated the need to adapt the *prima facie* rule to the specific circumstances of the case.[2461] In the opinion of the tribunal, the pronounced divergence of views of the parties made it necessary to also consider the views expressed by the respondent.[2462] The same approach was taken by the tribunal in *PSEG v Turkey*.[2463] The tribunal recognised the *prima facie* test applied in many cases as a reasonable general approach for jurisdictional purpose.[2464] However, due to the different views of the parties it would not be appropriate to only rely on the facts as alleged by the claimants.[2465] Finally, the tribunal decided to take the assertions of the host State into account, without dealing with those facts reserved to the examination of the merits.[2466]

In conclusion, while it is established case law in investment treaty arbitration to start from the premise that for jurisdictional purposes the decision is based on the *prima facie* evidence presented by the claimant, in various occasions tribunals have emphasised that in particular circumstances, the tribunal should take all available evidence into consideration. Especially where the investor makes corruption allegations against the host State, the latter will rigorously deny them and most likely already provide counter evidence at the jurisdictional stage. While a conclusive examination of such facts must be reserved for the merits, the tribunal should consider all available evidence to reach its preliminary decision on whether the alleged facts, if proven, would fall within the relevant treaty provisions.

(4) Potential challenges against *prima facie* test

Host States have often challenged – and will most likely in the future challenge – the *prima facie* approach developed from the *Oil Platforms* judgment and from the separate opinion of Judge Higgins by referring to the *Fisheries Jurisdiction* case.[2467] One statement of the Court that caused much confusion and is particularly referred to by host States aiming to contest the *prima facie* test, is the Court's finding that there is no burden of proof at the jurisdictional stage and that the Court would consider all facts and all arguments for its determination of jurisdiction.[2468]

However, the approach taken by the ICJ in *Fisheries Jurisdiction* has to be evaluated within the context and the broader picture of the case. It cannot be

[2460] *Joy Mining v Egypt*, Award on Jurisdiction, para 30
[2461] *Joy Mining v Egypt*, Award on Jurisdiction, para 30.
[2462] *Joy Mining v Egypt*, Award on Jurisdiction, para 30.
[2463] *PSEG v Turkey*, Decision on Jurisdiction, paras 64-65. Note that Orrego Vicuña presided both tribunals *Joy Mining v Egypt* and *PSEG v Turkey*.
[2464] *PSEG v Turkey*, Decision on Jurisdiction, 64.
[2465] *PSEG v Turkey*, Decision on Jurisdiction, 64.
[2466] *PSEG v Turkey*, Decision on Jurisdiction, 65.
[2467] See e.g. *Saipem v Bangladesh*, Decision on Jurisdiction, para 90.
[2468] *Fisheries Jurisdiction Case (Spain v Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, ICJ Reports 1998, 432 (hereinafter: "*Fisheries Jurisdiction*, Judgment"), paras 38.

understood as the precedent where the Court decided to abolish the *prima facie* test for jurisdiction. The Court did not even mention the *prima facie* test and also refrained from referring to the previous judgments in this regard. The situation and the scope of the examination of the Court in this particular case are not comparable to the ones dealt with in the *Oil Platforms* case. In *Fisheries Jurisdiction*, the question was whether the dispute was within the terms of a reservation made by Canada to the declaration upon which the consent to confer jurisdiction to the ICJ was based. The consent is an essential requirement for jurisdiction and must be definitely established by the Court already at this stage. Therefore, the findings of the Court merely focused on determining the real subject matter of the claim in order to examine whether the required consent existed. The *Fisheries Jurisdiction* case did, however, not rule over how to deal at a jurisdictional level with the facts alleged by the claimant with regard to a potential breach of treaty. Hence, both ICJ cases do not conflict with each other.[2469]

In addition, the Court acknowledged that it was for the claimant to present its case as it wishes and that the Court would give "*particular attention to the formulation of the dispute chosen*" by the claimant.[2470] However, it made clear that it is not "*bound by the claims*" of the claimant and that it is for the Court to determine jurisdiction and not for the parties.[2471] Note that this notion is not disputed in investment arbitration[2472] and is also the conclusion of this study.

c) Genuine jurisdictional issues must be fully proven

The *prima facie* test may only be applied to the factual and legal issues relevant for proving a breach of the treaty. The facts essential to establish jurisdiction will nevertheless have to be fully proven. In such cases, the tribunals will consider all available evidence.[2473]

The tribunal in *Phoenix v Czech Republic* pointed out that the role that the facts play either at the jurisdictional phase or at the merits must be considered in order to establish the exact burden of proof.[2474] The tribunal did not challenge the *prima facie* test as formulated by case law and confirmed that the facts alleged by the

[2469] The tribunal in *Plama v Bulgaria* noted that there were no reasons for finding the approach taken by Judge Higgins in her separate opinion in *Oil Platforms* to be 'controversial', *Plama v Bulgaria*, Decision on Jurisdiction, para 119. See also *Siag & Vecchi v Egypt*, Decision on Jurisdiction, para 140. Likewise, the tribunal in *Saipem v Bangladesh* emphasised that the *Fisheries Jurisdiction* decision does not contradict the approach favoured by most of the recent arbitral tribunals, *Saipem v Bangladesh*, Decision on Jurisdiction, para 90. Note however that the tribunal cited the relevant passage of the *Fisheries Jurisdiction* case, but did not provide any explanation for its reasoning why the ICJ approach did not contradict the final approach taken by the tribunal.
[2470] *Fisheries Jurisdiction*, Judgment, para 30.
[2471] *Fisheries Jurisdiction*, Judgment, paras 30, 37.
[2472] See *Saipem v Bangladesh*, Decision on Jurisdiction, para 90; see also *UPS v Canada*, Decision on Jurisdiction, para 34; *Canfor v United States*, Decision on Jurisdiction, para 171.
[2473] *Phoenix v Czech Republic*, Award, para 63. See also *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7 Decision on Annulment, 5 June 2007 (hereinafter: "*Soufraki v UAE*, Decision on Annulment"), paras 108-109.
[2474] *Phoenix v Czech Republic*, Award 2009, para 60.

claimant that would amount to a breach of the relevant IIA provision, once established, would have to be assumed to be true at a jurisdictional level, until definitely examined in the merits.[2475] In other words, the *prima facie* test applies only to the alleged facts referring to an issue at the merits. However, the alleged facts on which the jurisdiction of the tribunal is based on must be decided already at the jurisdictional stage.[2476] Thus, it concluded that not all facts alleged by the claimant can be taken as granted.[2477] The tribunal in *Inmaris v Ukraine* confirmed that the tribunal is required to "*make definitive findings of any facts that are directly determinative of its jurisdiction*".[2478]

In *Inceysa v El Salvador*, the tribunal dealt with allegations of fraud and made clear that the tribunal had to analyse facts and substantive normative provisions that are essential to determine the competence of the tribunal.[2479] The tribunal in *Hamester v Ghana* specifically distinguished between facts relevant to establish the alleged breach of the IIA and those facts upon which jurisdiction is based.[2480] While the first group of facts had to be proven at jurisdictional stage, the second group had to be taken as alleged for jurisdictional purposes and examined at the merits.[2481] The tribunal in *Micula v Romania* confirmed that in order to establish jurisdiction, the tribunal shall only make a *prima facie* determination whether the facts alleged by the claimant are capable of amounting to a breach of the invoked treaty, but excluded explicitly those facts necessary for the determination of jurisdiction.[2482] In his dissenting opinion arbitrator Berman also acknowledged that at the jurisdictional stage facts should be temporarily accepted, since they will be examined later at the merits, but he emphasised that those facts that are "*a critical element in the establishment of jurisdiction itself*" had to be proven.[2483]

[2475] *Phoenix v Czech Republic*, Award 2009, para 61.
[2476] *Phoenix v Czech Republic*, Award, para 61. Note that Vasani and Foden refer to two cases of the Iran-United States Claims Tribunal with regard to a heightened burden of proof on the claimant to establish jurisdiction Vasani and Foden, "Burden of Proof Regarding Jurisdiction," 276 et seq. *George W. Drucker, Jr. v Foreign Transaction Company et al.*, Iran-US Claims Tribunal, Award No. 379-121-2, 22 July 1988, 19 Iran-US CTR 1988-II, 257, paras 34-35, the claimant had provided evidence on its ownership of the allegedly damaged company, however the tribunal was not convinced by such evidence and examined the issue in detail and found the burden of proof not met by the claimant. From the reasoning of the tribunal it is not clear which standard was applied, however, the *prima facie* standard was not mentioned. In *Creditcorp International, Inc. et al. v Iran Carton Company*, Award No. 443-965-2, 12 October 1989, 23 Iran-US CTR 1989-III, 265, para 5-6, the claimant had failed totally to provide any evidence upon which the tribunal could base a finding of jurisdiction. Again, it is not clear which standard was applied by the tribunal, it merely found the non existing evidence to be 'insufficient'. Thus it is hard to understand how this case could be reference for a heightened standard of proof.
[2477] *Phoenix v Czech Republic*, Award 2009, para 60.
[2478] *Inmaris v Ukraine*, Decision on Jurisdiction, para 57.
[2479] *Inceysa v El Salvador*, Award, para 155.
[2480] *Hamester v Ghana*, Award, para 143.
[2481] *Hamester v Ghana*, Award, para 143.
[2482] *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 66.
[2483] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.) v Republic of Peru*, ICSID Case No. ARB/03/4, Decision on

Sometimes the specific matter related to establishing the jurisdiction might be so closely related to the merits that it seems unreasonable or even impossible to separate the examination for jurisdictional purposes from the one reserved for the merits. Pursuant to Article 41(2) ICSID Convention, the tribunal is free to deal with objections to jurisdiction as preliminary issues or to join them to the merits.[2484] Thus, despite the bifurcation of the proceedings, tribunals may join the particular analysis of the jurisdictional questions to the merits.[2485] This is mostly pursued in absence of sufficient evidence at the early stage of the proceedings to definitively determine the facts that are essential for establishing jurisdiction.[2486] Moreover, tribunals are free to reject bifurcation and deal with the specific jurisdictional question once the full pleading of the parties is available.[2487]

In conclusion, at the jurisdictional stage the tribunal must ensure that the specific requirements to establish jurisdiction stipulated in the IIA or the ICSID Convention such as protected investment,[2488] nationality[2489] or valid consent[2490] are in fact satisfied. In particular circumstances tribunals will join the question to the merits due to its close connection to the merits or due to the lack of sufficient evidence at the early stage.

d) Corruption allegations by the investor

As explained above, the burden of proof in the jurisdictional stage is different from the one demanded at the merits. At this stage the objective of the tribunal shall not

---

Annulment, Dissenting Opinion Franklin Berman, 13 August 2007 (hereinafter: "*Lucchetti v Peru*, Annulment, Dissenting Opinion Franklin Berman"), para 17.

[2484] Article 41(2) ICSID Convention reads:
"*Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.*"

[2485] See e.g. *Tradex v Albania*, Decision on Jurisdiction, para 185; *Kardassopoulos v Georgia*, Decision on Jurisdiction, para 260; *World Duty Free v Kenya*, Award, para 102; *Saluka Investments B.V v Czech Republic*, UNCITRAL, Decision on Jurisdiction, 7 May 2004 (hereinafter: "*Saluka v Czech Republic*, Decision on Jurisdiction"), para 11; *Generation v Ukraine*, Award, para 6.1-6.4; see also *TSA v Argentina*, Award, para 176, where the tribunal states that it would have joined the specific jurisdictional objection to the merits, had the case not been dismissed.

[2486] See *Inmaris v Ukraine*, Decision on Jurisdiction, para 58.

[2487] See e.g. *Hamester v Ghana*, Award, para 146.

[2488] See e.g. *Saba Fakes v Turkey*, Award, 210, where the tribunal examined in detail whether the claimant had in fact ownership over the shares of the relevant company in order to find whether there was an investment. See also *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 (hereinafter: "*Mihaly v Sri Lanka*, Award"), paras 55-61, where the tribunal denied jurisdiction without even referring to the *prima facie* test. However, the tribunal had clarified upfront that it had to examine in detail whether an investment protected under the US-Sri Lanka BIT existed.

[2489] See *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 91. The tribunal clarifies that nationality is an objective requirement for jurisdiction and must be established in the jurisdictional phase. The tribunal continues that nationality obtained by fraud (therefore also arguably by corruption) would be inconsistent with international law and thus cannot be considered for jurisdictional purposes.

[2490] See *Inceysa v El Salvador*, Award.

be to determine whether a claim is well founded, but rather to examine whether the tribunal has the competence to judge over the merits.[2491] For such analysis the tribunal must focus on the corruption claim as presented by the investor and assess whether the alleged facts would lead to the alleged breach of the norms referred to.[2492]

An investor alleging that the host State engaged in corrupt practices and thus breached a protection standard provided in an IIA will have to show a *prima facie* case of corruption in order to discharge the burden of proof for establishing jurisdiction.[2493] Whether corruption can fully be established will remain the task of the merits. Hence, the claimant must present facts that once proven at the merits stage (i) could amount to corruption and (ii) could be capable of constituting a breach of the treaty provision referred to.

Note that this leaves unaffected the burden of proof for the facts essential to establishing jurisdiction, such as 'nationality' and 'investment', which must fully be proven once objected. However, they will generally not depend directly from the investor's allegations of corruption.

e) Corruption allegations by host State

The application of the *prima facie* evidence rule does not lead to the result that the host State is prevented from objecting to the jurisdiction.[2494] However, the burden of proof with regard to all objections to the jurisdiction of the tribunal lies with the respondent.[2495] The tribunal in *Rompetrol v Romania* confirmed that the host State carries the burden of proving the facts upon which its jurisdictional objections are based.[2496] The tribunal in *Canfor v USA* added that the host State also bore the burden of proving that an alleged provision in fact excluded jurisdiction.[2497]

[2491] See also *Telefónica S.A. v Argentina*, Jurisdiction, 2006, para 53, in the words of the tribunal: "*The investigation must not be aimed at determining whether the claim is well founded, but whether the Tribunal is competent to pass judgment upon it*."

[2492] In the words of the tribunal in *Telefónica S.A. v Argentina*, Jurisdiction, 2006, para 53: "*The object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, as to the 'factual subject matter' at issue, as to the 'legal norms' referred to as applicable and alleged to have been breached, and as to the 'relief sought'*."

[2493] *Rumeli and Telsim v Kazakhstan*, Award, para 302. See also *Siag & Vecchi v Egypt*, Award, para 317, where the tribunal confirms that after *prima facie* evidence is provided the burden of proof shifts to the other party.

[2494] See also *Telefónica v Argentina, Decision on Jurisdiction*, para 54, as stated by the tribunal, the *prima facie* rule "*does not rule out the possibility that a respondent may submit, already at the jurisdictional stage, such 'prima facie' evidence as to show that the claim, or some claims, are 'manifestly without merit' at a preliminary examination*".

[2495] *Siag & Vecchi v Egypt*, Award, paras 316, 318. See also *Hamester v Ghana*, Award, para 132, where the tribunal found that the respondent had failed to discharge the burden of proving fraud as jurisdictional objection.

[2496] *Rompetrol v Romania*, Decision on Jurisdiction and Admissibility, para 75. Note that the tribunal examined in detail the issues of law and dismissed the respondent's objections without the need to examine the facts alleged by the respondent (para 110).

[2497] *Canfor v United States*, Decision on Jurisdiction, paras 171, 176.

In *Siag & Vecchi v Egypt*, Professor Michael Reisman stated in his expert opinion that the host State "*as party advancing the objections to jurisdiction following a prima facie showing by the Claimants, bears the burden to prove their elements*".[2498] The tribunal did not directly refer to Reisman's opinion, but applied the *prima facie* evidence test to the investor's claim to establish jurisdiction. It held that the investor had presented *prima facie* evidence to show its Italian nationality, whereas the host State did not meet its burden of proving the alleged objections.[2499] Similarly, in *Desert Line v Yemen*, the tribunal concluded that the host State had not convinced the tribunal of the illegality of the investment.[2500] From this it follows that in the view of the tribunal, the burden of proof lies on the respondent making the objection to the jurisdiction.

Keith Highet, in his dissenting opinion in *Waste Management v Mexico* argued differently. In his view the burden of proof would shift back to the investor as soon as the host State made a "*prima facie credible claim that jurisdiction does not exist*".[2501] Then, it would be upon the investor to provide sufficient evidence and arguments to show by a reasonable preponderance of the evidence that the tribunal has jurisdiction over the claim.[2502] This view was however not followed by subsequent tribunals.

Merely casting a doubt on the legality of a jurisdictional requirement – such as nationality or investment – will not suffice.[2503] The tribunal in *Micula v Romania* specified that the host State failed to make the 'necessary showing' of fraud regarding the nationality requirement.[2504] In *Hamester v Ghana*, the host State alleged fraudulent behaviour of the investor when concluding the joint venture agreement, for which reason the investment was supposedly illegal from the beginning. After considering all evidence, the tribunal found that the host State had failed to discharge its burden of proof.[2505] In similar terms, the tribunal in *Liman Caspian Oil v Kazakhstan* found that "*the burden of proving fraud and bribery regarding the making of the original investment lies with* [the host State]", which in the view of the tribunal had failed to satisfy such burden of proof.[2506]

4. Burden of proof for substantive matters

In contrast to the jurisdictional stage, at the merits only one type of burden of proof applies to the substantive matters. The party alleging the facts must fully prove

[2498] Expert Opinion by W Michael Reisman, 31 July 2006, para 5, quoted in *Siag & Vecchi v Egypt*, Decision on Jurisdiction, para 99.
[2499] *Siag & Vecchi v Egypt*, Decision on Jurisdiction, paras 152-153.
[2500] *Desert Line v Yemen*, Award, paras 104-105.
[2501] *Waste Management I v Mexico*, Dissenting Opinion Keith Highet, para 9.
[2502] *Waste Management I v Mexico*, Dissenting Opinion Keith Highet, para 9.
[2503] See *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 95, with regard to the nationality requirement.
[2504] *Micula v Romania*, Decision on Jurisdiction and Admissibility, para 95. Note that the tribunal demanded 'convincing and decisive' evidence.
[2505] *Hamester v Ghana*, Award, para 132.
[2506] *Liman Caspian Oil v Kazakhstan*, Award, para 194.

them. Thus, an investor bringing its treaty claim on the basis that the public officials of the host State extorted or solicited bribes which refusal by the investor let to a detriment to its investment, must provide the evidence to establish such corrupt act. Likewise, a host State alleging corrupt conduct of the investor as an objection to the substantive protection rights, e.g. challenging the legitimate expectations of the investor, must in turn provide sufficient evidence to prove such corrupt conduct.

Whether *prima facie* evidence of corruption may lead to a shift of the burden of proof will depend on the tribunal's discretion and the particular circumstances of the case, but may only take place if it has no due process implication on the other party.[2507] The concrete standard of proof will be dealt with below (see below at **C.**) as well as the dealing with evidence in corruption cases (see below at **D.**).

IV. Burden of proof in *ex officio* cases

As discussed in Chapter Four due to the violation of international and transnational public policy, the tribunal has a duty not to turn a blind eye on suspicious facts, but engage in an *ex officio* examinations of the real circumstances of suspicious transactions. The most recent and prominent example for such active approach of an investment treaty tribunal is the case of *Metal Tech v Uzbekistan*. In this case neither the investor nor the host State alleged facts concerning corrupt conduct. Rather the tribunal became suspicious at the oral hearing, where the principal witness for the investor admitted that approx. USD 4 million had been paid to consultants in connection with the investment.[2508] Subsequently, the tribunal requested further information and documentation from the parties and called for additional testimony and evidence in connection with the real purpose of the payments.[2509] Against the background that the tribunal itself requested the necessary evidence and finally concluded that corruption was established, the tribunal found that it was not required to apply the rules of burden of proof to resolve the present dispute.[2510] Thus, in cases where the tribunal engages in *ex officio* investigations, the burden of proof may well be irrelevant. In the words of the tribunal

> "the present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments. Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty".[2511]

[2507] See above at B.III.2.b).
[2508] See *Metal-Tech v Uzbekistan*, Award, paras 86, 240
[2509] See *Metal-Tech v Uzbekistan*, Award, paras 87-103, 241.
[2510] See *Metal-Tech v Uzbekistan*, Award, para 239.
[2511] See *Metal-Tech v Uzbekistan*, Award, para 243.

In different circumstances, but with similar results, the tribunal in *Grand River v United States* refrained from deciding on the burden of proof, although both parties had strongly disputed about who bore it. Since both parties had provided "*extensive evidence to support their positions*" the tribunal found it unnecessary to make a decision on the burden of proof.[2512]

In conclusion, the discussion on the allocation of the burden of proof may in particular circumstances be superfluous, since the tribunal will want to take all available evidence – and if not sufficient even request more – into account and by exercising its discretion to discover the true circumstances of the case rather than abiding by strict burden of proof rules – as recently evidenced by the tribunal in *Metal Tech v Uzbekistan*.

[2512] *Grand River Enterprises Six Nations, Ltd, et al. v United States of America*, NAFTA, Decision on Objections to Jurisdiction, 20 July 2006 (hereinafter: "*Grand River v United States*, Decision on Jurisdiction"), para 37.

C. Standard of proof for corruption

The degree of proof required in order to establish the alleged corrupt practice will most likely be decisive for the outcome of the corruption case.[2513] As stated before, only two ICSID tribunals – *World Duty Free v Kenya* and *Metal Tech v Uzbekistan* – have rendered an award based upon a positive finding of corruption. Since the facts establishing that the investor had paid a bribe to the President of Kenya in order to ensure the execution of a concession agreement were introduced by the investor itself and not disputed by Kenya, the tribunal in *World Duty Free v Kenya* was not challenged with the normally difficult task of evaluating inconclusive evidence. The tribunal had 'no doubt' that the payments made had to be considered bribes.[2514] The standard of proof was exceptionally not decisive for the case and the tribunal refrained from making any statements as to which standard of proof it would have applied.[2515] Likewise, the tribunal in *Metal Tech v Uzbekistan* determined to be independent from any specific standard of proof and found that on the basis of the evidence requested *ex officio*, it could establish corruption "*with reasonable certainty*".[2516]

In all other circumstances the applied standard of proof will however be crucial for the corruption case. A clear example where the standard of proof was critical for the claimants' allegation of corruption is *EDF v Romania*. Witness statements, newspaper articles, internal investigations and unconventionally obtained evidence created much room for suspicion that senior public officials had solicited bribes from the investor. Nevertheless, the investor failed to meet the high evidentiary threshold set by the tribunal. Despite acknowledging the difficulty of obtaining direct evidence in such situations, the tribunal found that the standard of proving corruption had to be demanding and required 'clear and convincing' evidence.[2517] The stressing of the difficulty to prove corruption and the nevertheless enhanced standard of proof appears somewhat contradictory.[2518] The conclusion of finally heightening the standard of proof seems not comprehensible.[2519]

[2513] With regard to corruption cases see Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 546. Regarding arbitration in general see Andreas Reiner, "Burden and General Standards of Proof," *Arbitration International* 10, no. 3 (1994): 340.
[2514] *World Duty Free v Kenya*, Award, para 136.
[2515] *See World Duty Free v Kenya*, Award, para 166 ("[…] *this is not a case which turns on legal presumptions, statutory deeming provisions or different standard of proof* […]. *Indeed the decisive evidential materials came from the Claimant itself*.").
[2516] *Metal-Tech v Uzbekistan*, Award, para 243.
[2517] *EDF v Romania*, Award, para 221. Note that the tribunal does not cite any arbitral case law, but refers merely to the cases brought forward in the Respondent Rejoinder without naming such cases.
[2518] Partasides phrases the – for the reader difficult to understand – message of the tribunal as follows: "*Dear investor, you will inevitably find the allegation almost impossible to prove, but we are nonetheless going to raise the evidential hurdle to make it even harder*." Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," 56.
[2519] In Partasides words: "*In my view, a reader of the Award has no reasonable basis upon which to take issue with the Tribunal's ultimate conclusion that the bribery demand had not been adequately proven*." Ibid., 55.

So far, the high standard of proof for corruption, where applied, has not been met in investment arbitration cases. The question arises whether this applied standard of proof is suitable for the evidentiary peculiarities and difficulties intrinsic to corruption. In order to determine the appropriate standard of proof for corruption in investment arbitration, it appears appropriate to first give an overview of the standard of proof as applied in international arbitration in general, with reference to the different approaches taken in domestic law (see below at **I.**); secondly, the standard of proof for corruption so far applied in investment arbitration cases will be discussed (see below at **II.**); thirdly, a brief overview of the standard favoured in international commercial arbitration concerning corruption is provided (see below at **III.**); fourthly, the discussion in scholarship on the standard of proof in corruption cases will be analysed (see below at **IV.**). Finally, this sub-chapter concludes with an evaluation of the different arguments and the determination of what standard of proof is most appropriate to deal with allegations of corruption in investment treaty arbitration (see below at **V.**).

I. Standard of proof in general

A uniform standard of proof has so far not been established in international arbitration.[2520] The arbitration rules, arbitration conventions and most of the national arbitration laws do not contain rules in this regard.[2521] In addition, in general neither the ICJ nor other international tribunals have put the necessary emphasis on making clear what exact standard of proof they applied in their findings.[2522] The two main approaches in international arbitration reflect the different concepts of the standard of proof in the domestic legal systems. In order to assess the preferable standard of proof, the starting point shall be a brief overview of the concepts in the common law and the civil law systems, not without recalling that the rules of evidence of international arbitration are detached from the procedural rules of domestic litigation (see below at **1.**).[2523] Subsequently, the question will shortly be raised whether the standard of proof is governed by procedural or substantive law (see below at **2.**), before finally analysing the approaches to the standard of proof taken in arbitral practice (see below at **3.**).

[2520] Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.93; Robert Pietrowski, "Evidence in International Arbitration," *Arbitration International* 22, no. 3 (2006): 379.
[2521] See e.g. Pietrowski, "Evidence in International Arbitration," 379.
[2522] See Amerasinghe, *Evidence in International Litigation*, 232. In Amerasinghe's view "*both the ICJ and other international tribunals, including arbitral tribunals, which have adjudicated numerous international claims have usually not discussed in detail the matter of the standard of proof to be applied to the evaluated evidence and have not clearly explained the underlying standard they have applied in their decisions*".
[2523] A disclaimer must be made. The division of the manifold legal systems of the world into only two groups is an over-simplification. Each jurisdiction might share essential differences with jurisdictions of its own system, just as much as with jurisdictions of the other system. Each national jurisdiction will provide different specific provisions, exceptions and presumptions. However, for the purposes of this study the gross distinction between common law and civil law systems suffices.

1. The two main approaches in domestic law

The two main approaches in domestic law are the common law approach (see below at **a)**) and the civil law approach (see below at **b)**).

a) Common law approach

In common law, mainly two standards of proof exist. The first standard is the 'preponderance of evidence', which is applied in civil litigation and contains a balance of probabilities. The alleged fact must be more probable than not in order to be considered proven.[2524] In the words of Chief Justice Denning, "[i]*f the evidence is such that the tribunal can say 'We think it is more probable than not,' the burden is discharged, but if the probabilities are equal, then it is not*".[2525] The second standard is used for criminal cases, where a higher standard is required and a fact must be established 'beyond reasonable doubt'. However, for serious allegations in civil law matters some common law cases introduced a third standard, which elevates the normal 'preponderance of evidence' standard to a higher level but not as demanding as the criminal standard.[2526] Thus, for allegations of corruption and fraud in common law a higher standard would be required, which in the Anglo-Saxon context has been identified as the 'clear and convincing evidence' standard.[2527]

b) Civil law approach

In civil law neither preponderance nor probability are used as guidance, instead the focus is on whether the judge is persuaded of the veracity of an alleged fact.[2528]

[2524] Amerasinghe, *Evidence in International Litigation*, 233.

[2525] *Miller v The Minister of Pensions*, [1947] 2 All ER 372.

[2526] See the often cited statement by LJ Denning in the Court of Appeal case *Bater v Bater*, 29 June 1950:
"[I]*n civil cases the case must be proved by a preponderance of probability, but there may be degrees of probabilities within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion*." [1951] P 35 at 37 (emphasis added). Cited in Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 547 et seq.; Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 223.
For recent U.K. case law stating a higher standard for serious allegations in civil law matters see *R(N) v Mental Health Review Tribunal* [2006] 2 WLR 850; *Campbell v Hamlet*, Privy Council (Trinidad and Tobago), 25 April 2005, [2005] 3 All E.R. 1116.

[2527] For the 'clear and convincing evidence' standard for serious allegations see the U.S. Supreme Court decision of *Addington v Texas* 441 U.S. 418 (1979). For U.K. case law requiring a higher standard for allegation of corruption see *Mohammad Jafari-Fini v Skillglass Ltd & Ors, Court of Appeal* (Civil Division) [2007] EWCA Civ 261, Lord Carnwath, paras 38-41, referring to the review of authorities for a higher standard of proof for serious allegations in *R(N) v Mental Health Review Tribunal* [2006] 2 WLR 850.

[2528] Bernard Hanotiau, "Satisfying the Burden of Proof: The Viewpoint of a 'Civil Law' Lawyer," *Arbitration International* 10, no. 3 (1994): 350; Kevin M. Clermont and Emily Sherwin, "A

The perspective taken by the civil law approach is the one of the 'inner conviction' of the adjudicator.[2529] In the civil law approach there is no different legal standard of proof between civil and criminal cases.[2530] Thus, for allegations of corruption the normal standard of proof is applied: the adjudicator must be convinced by the evidence that the facts relied upon are true. However, while the civil law jurisdictions do not set an objective threshold, it is argued that the 'inner conviction' is actually quite demanding, especially in criminal cases.[2531] Some commentators even contend that also in corruption cases in civil law matters the inner conviction amounts to a higher threshold.[2532] In fact, it might be more difficult to persuade an adjudicator of a serious allegation than of a less severe one. Thus, even in civil law systems an allegation of corruption might require more evidence than others in order to convince the trier of facts. However, in civil law jurisdictions there is not officially a different standard of proof for allegations of corruption.[2533]

2. Governed by procedural or substantive law

The standard of proof might be a matter of procedural law as well as of substantive law. Again, the different approaches depend on the two main distinctive legal schools of thought, but also from specific provisions in the different jurisdictions. It has been argued that in international arbitration the substantive law should govern the standard of proof due to the parties' expectation that all main issues relevant for their claims are governed by the chosen substantive law.[2534] However, in international investment arbitration, neither the IIA, nor the applicable procedural law will provide rules on the standard of proof. Customary international law is also of no guidance.[2535]

Comparative View of Standards of Proof," *The American Journal of Comparative Law* 50, no. 2 (2002): 243, 245 et seq.

[2529] Pietrowski, "Evidence in International Arbitration," 379; Clermont and Sherwin, "A Comparative View of Standards of Proof," 246; Reiner, "Burden and General Standards of Proof," 335; Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof," 347.

[2530] Clermont and Sherwin, "A Comparative View of Standards of Proof," 246.

[2531] Ibid.

[2532] Reiner, "Burden and General Standards of Proof," 336; Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof," 347. See also George M. von Mehren and Claudia T. Salomon, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide," *Journal of International Arbitration* 20, no. 3 (2003): 291. Stating that both legal systems will require an elevated standard of proof for allegations of corruption.

[2533] Haugeneder, "Corruption in Investor-State Arbitration," 333.

[2534] Reiner, "Burden and General Standards of Proof," 331 et seq. See also Robert B. von Mehren, "Burden of Proof in International Arbitration," in *International Council For Commercial Arbitration*, vol. 7 (The Hague: Kluwer Law International, 1996), 126, 128.

[2535] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 547.

3. The approaches in arbitral practice

In order to determine the standard of proof for allegations of corruption in investment arbitration, in a first step it is essential to analyse which approach of standard of proof is followed by the tribunals in general. This will serve as starting point to further assess whether the standard of proof for corruption must be higher, lower or equal in comparison to the normal standard of proof applied in investment arbitration.

a) Following the preponderance of evidence

The majority of the tribunals dealing with the standard of proof refer to the 'preponderance of the evidence' or the 'balance of probabilities' standard. In *Tokios Tokelės v Ukraine*, the tribunal found that the usual standard of proof is the 'balance of probabilities' standard, where the party alleging a fact must persuade the tribunal that "*it is more likely than not to be true*".[2536] The tribunal in *Kardassopoulos v Georgia* recently confirmed the 'balance of probabilities' standard as the general standard of proof in international arbitration and referred to in the vast majority of arbitral awards.[2537] The tribunal in *Tza Yap Shum v Peru* used the wording of 'preponderance of evidence' and referred *inter alia* to *Fraport v Philippines*, where the tribunal discussion on a possible elevation of the standard of proof clarified that the usual standard of proof in civil law matters was the 'preponderance of evidence'.[2538] Some tribunals have also used the expression of 'balance of evidence',[2539] which alludes to the same standard of proof as the 'balance of probabilities' or 'preponderance of evidence' standard.[2540]

In addition, most commentators agree that the general standard of proof applicable in international arbitration can be described as 'preponderance of evidence' or the 'balance of probabilities'.[2541]

[2536] *Tokios Tokelės v Ukraine*, Award, para 124.

[2537] *Kardassopoulos v Georgia*, Award, para 229, note that the tribunal stated that a more demanding standard of proof may be imposed on a party alleging a fact, however, that in the specific case there were no reasons to depart from the general rule. For tribunals also applying the 'balance of probabilities' standard see also *Siag & Vecchi v Egypt*, Award, para 316; *Desert Line v Yemen*, Award, para 159; *Methanex v United States*, Final Award, Part IV, Chapter E, para 18.

[2538] *Tza Yap Shum v Peru*, Award, para 73. *Fraport v Philippines*, Award, para 399. Note that the tribunal in *Tza Yap Shum v Peru* strangely also referred to *EDF v Romania*, although that tribunal did not apply the 'preponderance of evidence' standard but the higher 'clear and convincing evidence' standard. For tribunals also applying the 'preponderance of evidence' standard see *Lemire v Ukraine*, Award, para 369.

[2539] See e.g. *GEA v Ukraine*, Award, para 192; *Bayindir v Pakistan*, Award, para 123.

[2540] Note that 'preponderance of the evidence' and 'balance of probabilities' are different descriptions of the same standard of proof.

[2541] Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.93; Alan Redfern, "The Practical Distinction Between the Burden of Proof and the Taking of Evidence - An English Perspective," *Arbitration International* 10, no. 3 (1994): 321; Reiner, "Burden and General Standards of Proof," 335; Brower, "Evidence Before International Tribunals: The Need for Some Standard Rules," 49; von Mehren, "Burden of Proof in International Arbitration," 127; Mojtaba Kazazi and Bette E. Shifman, "Evidence before International Tribunals - Introduction,"

b) Following the inner conviction approach

Some commentators refer to the inner conviction of the international arbitral tribunal as the standard of proof. Hence, it has been contended that it would normally be sufficient for a tribunal to be 'reasonably convinced' that a fact is true.[2542] This concept is attended by the statement made by a former president of the Iran-United States Claims Tribunal that "*the burden of proof is that you have to convince me*".[2543]

Similarly, over a century ago umpire Duffield in the *Faber* case of the German-Venezuelan Commission quoted a former justice of the Supreme Court of the United States who participated in the arbitration case of *Pelletier* that the evidentiary rules of the common law were not applicable at arbitration proceedings and that "*he would feel disposed to act upon whether evidence satisfied his mind as to the actual facts*". [2544] This shows that the inner conviction of the arbitrators also plays an important role at the evidentiary stage in international arbitration.

c) Difference between the two approaches

The reason for these distinctive approaches is the difference in the legal systems.[2545] The common law system is an adversarial one. The judge plays the role of a referee overlooking the proceedings and deciding over the case based on the presentations of the parties.[2546] In addition, in common law jurisdictions a jury may decide over civil law matters. Thus, there is the need to give specific guidance to the jury members by describing the exact threshold they have to apply when making their decision.[2547] When a matter is tried without a jury, references to standard of proof are often missing.[2548]

In civil law jurisdictions at least, the evidentiary process is somewhat inquisitorial.[2549] The judge has a more active role in the proceedings and leads the

---

International Law FORUM Du Droit International 1, no. 4 (1999): 195; von Mehren and Salomon, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide," 290 et seq.; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 702.

[2542] Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects," 497.

[2543] Jamison M. Selby, "Fact-Finding Before the Iran-United States Claims Tribunal: The View from the Trenches," in *Fact-Finding Before International Tribunals*, ed. Richard B Lillich (New York: Transnational Publishers, 1992), 144. Also quoted by Brower, "Evidence Before International Tribunals: The Need for Some Standard Rules," 52; von Mehren and Salomon, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide," 291.

[2544] *Faber v Venezuela*, 458 et seq.

[2545] For a brief comparison of the American and the German system regarding the standard of proof see Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (The Hague: Kluwer Law International, 1998).

[2546] Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.84.

[2547] Claude Reymond, "The Practical Distinction Between the Burden of Proof and Taking of Evidence - A Further Perspective," *Arbitration International* 10, no. 3 (1994): 324.

[2548] Edward Eveleigh, "General Standards of Proof in Litigation and Arbitration Generally," *Arbitration International* 10, no. 3 (1994): 354.

[2549] Hanotiau, "Satisfying the Burden of Proof: The Viewpoint of a 'Civil Law' Lawyer," 344.

taking of the evidence in order to come to a sound decision.[2550] The judge does not depend on the presentations of the parties, but will take the initiative to dig deeper into open issues and questions, regardless of whether that was intended by the parties. In addition, juries do not exist for civil law cases; the judge itself delivers the verdict. In such a situation the judge's evaluation is determining enough for the case. Due to the more active role of the judge and the lack of a jury that requires instructions, specifications about the objective threshold evidence needs to meet are in principle not required.

Which approach should be followed in international arbitration? The presumption that international arbitrators most likely apply the standards and principles of their domestic legal system is often made.[2551] However, that has also been often contested.[2552] It is believed that arbitrators would even take advantage to freely decide which criteria are opportune.[2553] In fact, much has been written about the different approaches of common law and civil law jurisdictions. For this study it is sufficient to note that both approaches are not mutually exclusive. Indeed, both standards depart from a different starting point.[2554] The preponderance of evidence/balance of probabilities is an objective description of what degree of certainty is required to establish that a fact exists. The theoretical question an arbitrator will ask is "*Which party has presented the most convincing evidence*?".[2555] On the other hand, the inner conviction approach applied in the civil law jurisdiction does not specify any objective threshold. The question to be asked is more "*Am I convinced by the available evidence?*".[2556] However, a different starting point does not mean that they cannot reach the same outcome.

It has been contended that there is a natural convergence between both standards since the preponderance of evidence can actually serve as a basis for an arbitrator to be persuaded.[2557] At the same time it must be acknowledged that each objective standard will be influenced by some degree – as little as it may be – of personal conviction when being applied by an arbitrator. Thus, the same criteria applied by

[2550] Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.85.
[2551] See e.g. Pietrowski, "Evidence in International Arbitration," 379.
[2552] Reymond, "The Practical Distinction Between the Burden of Proof and Taking of Evidence - A Further Perspective," 323; Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof," 336.
[2553] Reymond, "The Practical Distinction Between the Burden of Proof and Taking of Evidence - A Further Perspective," 323.
[2554] See also Waincymer, *Procedure and Evidence in International Arbitration*, 767. In Waincymer's opinion both approaches are difficult to compare since each formulation is incomplete. On the one hand, in common law adjudication, the adjudicator needs to be convinced that the objective standard is met, while on the other hand in civil law adjudication, the adjudicator requires something that she is convinced of.
[2555] Reymond, "The Practical Distinction Between the Burden of Proof and Taking of Evidence - A Further Perspective," 326.
[2556] Ibid.
[2557] See e.g. Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008), 163 et seq.

two arbitrators might also come to a different conclusion.[2558] This will also work *vice versa*, each arbitrator will be influenced by the different degrees of persuasion of evidence which might be linked to the preponderance of evidence.[2559] Thus, the argument that the different approaches would have a similar outcome is not surprising.[2560]

This being said, in international arbitration the authority and power of the arbitral tribunal is more comparable to the role of a judge in common law jurisdictions. It lacks effective subpoena authority and will take a more passive role in the evidentiary process by deciding the case based on the evidence presented by the parties.[2561] In order for the parties to consider beforehand which evidence will be required to persuade the arbitrator, it will be essential to have an objective description of the required evidentiary threshold. Having found that regardless of the different approaches, the result of the case may be similar, it is uncontroversial to conclude that the general standard of proof in international arbitration closely resembles the objective test of 'preponderance of the evidence'.

II. Standard of proof in investment arbitration

Taking the 'preponderance of the evidence' as a starting point, the question arises whether the elevated standard of proof for allegations of corruption prevailing in common law jurisdictions and also argued for civil law jurisdictions shall be transferred to international investment arbitration. First, the investment treaty arbitration case law regarding the standard of proof for corruption will be analysed (see below at **1.**). Subsequently, the investment treaty cases dealing with fraud and similar allegations will be examined for guidance (see below at **2.**), before concluding which standard of proof is predominant in investment treaty arbitration (see below at **3.**).

1. Standard of proof for corruption

A uniform standard of proof for allegations of corruption in investment arbitration has not yet been established. However, some tribunals have recently emphasised that the standard of proof for allegations of corruption and also for other similar allegations should be higher than the normal standard, and referred to the 'clear and convincing evidence' standard (see below at **a)**). Other tribunals refrain from addressing which standard of proof they apply or simply avoid taking a stand in this delicate issue (see below at **b)**). Finally, it seems that some tribunals prefer to

[2558] Reiner, "Burden and General Standards of Proof," 340.
[2559] See Ripinsky and Williams, *Damages in International Investment Law*, 163.
[2560] Pietrowski, "Evidence in International Arbitration," 379; Reiner, "Burden and General Standards of Proof," 335; Paola Michele Patocchi and Ian L. Meakin, "Procedure and the Taking of Evidence in International Commercial Arbitration," *International Business Law Journal*, no. 7 (1996): 889; Waincymer, *Procedure and Evidence in International Arbitration*, 766; Arthur L. Marriott, "Evidence in International Arbitration," *Arbitration International* 5, no. 3 (1989): 283.
[2561] Note that the active role taken by the tribunal in *Metal-Tech v Uzbekistan* cannot be understood as being common, it is rather extraordinary.

apply the normal standard regardless of the seriousness of the allegations (see below at **c)**).

a) Elevated standard of proof for corruption

A clear definition of the standard of proof for corruption was provided by the tribunal in *EDF v Romania*, where the tribunal referred to the general consensus among international tribunals and arbitrators that the standard to prove corruption needs to be high and demanded "clear and convincing evidence".[2562] However, the tribunal failed to cite any reference for the asserted consensus, nor did it examine and evaluate the different opinions and notions regarding the standard of proof. It solely referred to the respondent's rejoinder. Without further discussion on the matter, the tribunal based its decision of heightening the standard of proof merely on the seriousness of the allegation of corruption arising from the involvement of senior public officials.[2563]

The tribunal in *Fraport v Philippines II* also found that where corruption is alleged, the evidence must be "clear and convincing".[2564] The tribunal refrained from referring to any authorities, but merely stated that such heightened standard of proof required "*in view of the consequences of corruption on the investor's ability to claim the BIT protection*".[2565]

The tribunal in *Liman Caspian Oil v Kazakhstan* refrained from using the term 'clear and convincing', but clarified that the standard of proof in corruption cases is "*a high one*".[2566] The only reason provided for the tribunal's approach is the seriousness of the allegation of corruption.[2567] The tribunal found the evidence submitted by the investor showing that corruption was probable not sufficient and held that the standard was not met.[2568] Also the tribunal in *Niko v Bangladesh* refrained from identifying the precise standard of proof it applied.[2569] However, it appears to have based its analysis on a higher standard than usual, since it clarified that while corruption is difficult to prove, "*findings of corruption are a serious matter which should not be reached lightly*".[2570] The tribunal even emphasised that it could not base its decision on inferences.[2571]

[2562] *EDF v Romania*, Award, para 221. Note that the tribunal does not cite any arbitral case law, but refers merely to the cases brought forward in the Respondent Rejoinder without naming such cases.
[2563] *EDF v Romania*, Award, para 221.
[2564] *Fraport AG Airport Services Worldwide v Republic of Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 (hereinafter: "*Fraport v Philippines II*, Award"), para 479. It is noteworthy that in both cases *EDF v Romania* and *Fraport v Philippines II* the presiding arbitrator was Piero Bernardini.
[2565] *Fraport v Philippines II*, Award, para 479.
[2566] *Liman Caspian Oil v Kazakhstan*, Award, para 422.
[2567] *Liman Caspian Oil v Kazakhstan*, Award, para 422.
[2568] *Liman Caspian Oil v Kazakhstan*, Award, para 424.
[2569] *Niko v Bangladesh*, Decision on Jurisdiction, para 424.
[2570] *Niko v Bangladesh*, Decision on Jurisdiction, para 424.
[2571] *Niko v Bangladesh*, Decision on Jurisdiction, para 424.

A similarly high threshold was demanded by the tribunal in *African Holding v Democratic Republic of Congo*, but for a different reason, since the allegations of corruption were brought forward by the host State as defence. The tribunal was concerned with host States using allegations of corruption too easily in order to bar the investor from bringing its claim and thus argued for a particularly high standard of proof.[2572] Thus, it acknowledged the seriousness of any corrupt practice and was ready to consider such allegations during the proceedings. However, in order to do so the tribunal stressed that it would require 'strong evidence' of such practice, "*such as those resulting from criminal prosecution in countries where corruption is a criminal offense*".[2573]

The Iran-United States Claims Tribunal has also preferred a higher standard of proof for allegations of corrupt conduct. In *Oil Field of Texas v Iran*, the Iran-United States Claims Tribunal emphasised that "[i]*f reasonable doubts remain, such* [corruption] *allegation cannot be deemed established*".[2574] The host State alleged bribery in connection with the investment contract as a defence. However, the evidence presented in form of a letter was held not to be unambiguous, since it was not authenticated and the investor was able to present counter evidence by witness statements.[2575] The tribunal was also not ready to infer bribery from the favourable conditions the contract provided for the investor, since that could have also been the result of a strong bargaining power of the investor during the negotiations.[2576]

These few cases present a good overview of the reasons why tribunals choose to elevate the standard of proof for allegations of corruption. In *EDF v Romania*, the tribunal had diplomatic concerns due to the involvement of high-level public officials, a motive similar to the principle of comity between States, while the tribunal in *Liman Caspian Oil v Kazakhstan* merely referred to the seriousness of the allegation. In *African Holding v Congo*, the tribunal was concerned with the abuse of allegations of corruption in order to deprive claimants too easily of their rights to bring a claim, while in *Oil Fields v Iran*, the tribunal was uneasy to base its conclusion on vague evidence.

b) No specific standard

Most of the times, tribunals prefer not to take a stand on which standard of proof shall apply to allegations of corruption. In *TSA v Argentina*, for instance, the host State alleged that the investor had bribed an Argentine public official to receive tailor-made bidding conditions for its investment. The investor denied such accusations and argued that allegations of corruption demanded the "*most rigorous*

[2572] *African Holding v Congo*, Decision on Jurisdiction and Admissibility, para 55.
[2573] *African Holding v Congo*, Decision on Jurisdiction and Admissibility, para 52, original in French, translation by the author.
[2574] *Oil Field v Iran*, Award, para 25.
[2575] *Oil Field v Iran*, Award, para 25.
[2576] *Oil Field v Iran*, Award, para 25

level of proof" and referred to the 'clear and convincing' evidence standard.[2577] However, the tribunal in *TSA v Argentina* did not add any finding to this debate. The tribunal found corruption not established, but refrained from stating the standard of proof applied.[2578]

In *Wena v Egypt,* the tribunal did not discuss the standard of proof when finding that the allegations of Egypt that the investor had sought to bribe Egyptian officials were not substantiated for lack of evidence presented to the tribunal.[2579] The tribunal emphasised the failure of Egypt to present any evidence regarding the investigations of the allegation of corruption that might have taken place in connection with the relevant consultancy agreement.[2580]

Methanex v United States is another example where it appears as if the tribunal purposely refrained from establishing a rule of standard of proof in relation to corruption. The tribunal avoided using legal terms such as evidence, standard of proof, burden of proof or presumption and instead introduced the analogy of 'connecting the dots'.[2581] By labelling the unknown with 'dots', the tribunal avoided going out on a limb in regard to a new matter such as corruption. Nevertheless, that the tribunal analysed and examined the allegation closely and precisely is noteworthy. The tribunal in *ECE v Kazakhstan* followed this approach and explicitly stated that it was willing to 'connect the dots'.[2582] At the same time it made clear that the dots "*must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it*".[2583]

As discussed before, in the exceptional case of *World Duty Free*, there was no need for the tribunal to deal with the standard of proof. The tribunal had 'no doubt' that the payments made by the investor to the Kenyan President had to be considered bribes.[2584] Since the claimant had admitted having paid a high amount in cash in order to do business with Kenya, the factual matter of the case was established and clear. Likewise, due to the *ex officio* investigation in *Metal Tech v Uzbekistan* the tribunal found that it was not bound by any standard of proof but was able to establish corruption "*with reasonable certainty*".[2585]

The tribunal in *Flughafen Zürich v Venezuela* recently took a similar approach. The tribunal noted the absence of applicable rules on the standard of proof under public international law, the relevant IIA and the ICSID Convention to determine

[2577] *TSA v Argentina*, Award, paras 172-173
[2578] *TSA v Argentina*, Award, para 175.
[2579] *Wena v Egypt*, Award, para 74.
[2580] *Wena v Egypt*, Award, para 74.
[2581] *Methanex v United States*, Final Award, Part III, Chapter B.
[2582] *ECE v Czech Republic*, Award, para 4.879.
[2583] *ECE v Czech Republic*, Award, para 4.879.
[2584] *World Duty Free v Kenya*, Award, para 136.
[2585] *Metal-Tech v Uzbekistan*, Award, para 243.

the existence of corruption and found that it enjoys ample liberty ("*goza de amplia libertad*") to assess the evidentiary value of the evidence.[2586]

c) Normal standard of proof

There is no corruption case in international investment arbitration where a tribunal has explicitly stated that the standard of proof for allegations of corruption shall be the same as for any other allegation. However, in *Kardassopoulos v Georgia* – a case not dealing specifically with corruption – the host State argued for a higher standard of proof for allegations of illegality. The investor countered that to demand a heightened standard of proof would be 'antithetical' to the equality of arms principle prevailing in treaty-based investment arbitrations.[2587] The tribunal refrained from picking up this argument and held that the standard of proof is not higher than a balance of probabilities.[2588]

2. Standard of proof for similar allegations

The few cases in investment arbitration involving corruption matters are not conclusive to deduce an established practice. However, the standard of proof has more often been discussed with other allegations that are similar to corruption such as fraud (see below at **a)**), as well as bad faith, conspiracy and collusion (see below at **b)**).

a) Standard of proof for fraud

Some tribunals have explicitly held that the standard of proof for fraud is a demanding and high standard. In *Siag & Vecchi v Egypt*, for instance, the host State alleged fraud with regard to the nationality of the investor. The investor argued that the standard of proof for fraud was the American 'clear and convincing evidence' standard.[2589] The tribunal confirmed that the applicable standard of proof to establish fraud lies between the 'preponderance of the evidence' and 'beyond a reasonable doubt'.[2590] It found that in most jurisdictions and in international proceedings, the standard of proof for fraud was a high one and demanded 'clear and convincing evidence'.[2591] Note that in his dissenting opinion, Orrego Vicuña agreed that the allegations of fraud made by Egypt had to be proven, however he disagreed with the standard applied by the majority of the tribunal.[2592] In his view,

[2586] *Flughafen Zürich v Venezuela*, Award, para 142.
[2587] See *Kardassopoulos v Georgia*, Award, para 226.
[2588] *Kardassopoulos v Georgia*, Award, para 229. However, the tribunal acknowledged that in certain circumstances a higher standard of proof may be demanded.
[2589] *Siag & Vecchi v Egypt*, Award, para 325.
[2590] *Siag & Vecchi v Egypt*, Award, para 326. Note that Egypt failed to submit that a lesser standard than 'clear and convincing evidence' was required. It merely focused on the submission that the burden of proof was on Mr Siag, which was rejected by the tribunal for the objections to jurisdiction.
[2591] *Siag & Vecchi v Egypt*, Award, para 326, the tribunal also refers to *Wena v Egypt.*
[2592] *Siag & Vecchi v Egypt*, Award, Dissenting Opinion Orrego Vicuña, para 13.

an international tribunal has the freedom to apply the most suitable standard to the specific situation resulting from the particular type of facts.[2593] He preferred a standard where inferences could be drawn by circumstantial evidence.[2594]

In *Saba Fakes v Turkey*, the host State challenged the authenticity of certain documents, alleging that they were post-dated in order to bring the particular arbitration. The tribunal found that the standard for proving "*impropriety is particularly heavy*".[2595] The host State failed to provide direct evidence and merely relied on findings of other arbitration proceedings, which were based on indirect evidence.[2596] For the tribunal such mere assumptions were not sufficient to discharge the burden of proof.[2597]

In many cases the tribunals failed to specifically mention the applied standard of proof. Sometimes the reason for the omission was that the result would have been the same no matter which standard was applied, since either the factual matter was clear or the evidence could not even meet the lowest standard of proof. In *Noble Ventures v Romania*, for instance, it was the investor that alleged fraudulent misrepresentation by the host State. The tribunal found the evidence presented by the investor not persuasive and held that even on a balance of probabilities, fraud could not be established.[2598] The chosen wording suggests that the tribunal would have probably preferred the higher standard, had it been necessary to decide for a specific standard of proof. Since the evidence did not even overcome the minimum hurdle, such determination was unnecessary.

In *Inceysa v El Salvador*, the tribunal did not use conventional legal terms to evaluate which threshold was applied in order to consider fraud established. The tribunal referred to the analysis of the arguments and evidence[2599] and concluded that fraud had been "*fully proven*"[2600], "*fully demonstrated*"[2601], and that fraudulent misrepresentations were "*clear*"[2602] and "*obvious*" [2603]. The factual situation in this case seemed clear. The tribunal was convinced that the investor had committed fraud in order to gain the relevant investment and no specific determination of the standard of proof was necessary.

In *Fraport v Philippines*, the host State alleged that the investment was not made in accordance with the host State law due to fraud. In the opinion of the tribunal,

[2593] *Siag & Vecchi v Egypt*, Award, Dissenting Opinion Orrego Vicuña, para 13.
[2594] *Siag & Vecchi v Egypt*, Award, Dissenting Opinion Orrego Vicuña, para 13. Note that Orrego Vicuña referred to the discretion of an arbitrator to consider circumstantial evidence for the finding of corruption presented in Sayed, *Corruption in International Trade and Commercial Arbitration*, 93–94.
[2595] *Saba Fakes v Turkey*, Award, para 131.
[2596] *Saba Fakes v Turkey*, Award, para 130.
[2597] *Saba Fakes v Turkey*, Award, para 130.
[2598] *Noble Ventures v Romania*, Award, para 101.
[2599] *Inceysa v El Salvador*, Award, para 103.
[2600] *Inceysa v El Salvador*, Award, paras 112, 118. See also para 108 ("*duly proven*").
[2601] *Inceysa v El Salvador*, Award, para 108.
[2602] *Inceysa v El Salvador*, Award, para 104.
[2603] *Inceysa v El Salvador*, Award, paras 113, 118.

the facts were indisputable, for which reason it was unnecessary to decide over the applicable standard of proof.[2604] It merely clarified that even the 'beyond reasonable doubt' standard would have been met.[2605] However, it emphasised that although the alleged act was a criminal act under domestic law, the issue before the tribunal was not whether the alleged acts amounted to a crime but whether the jurisdictional threshold of the economic transaction was met.[2606] It can only be guessed that if the tribunal had to decide on the standard of proof, it would have applied the general standard for the civil matters.

In *Hamester v Ghana*, the host State alleged fraudulent conduct of the investor in manipulating invoices of machinery in order to secure the relevant joint venture agreement. After taking all evidence into account, it acknowledged that the behaviour of the investor was not totally sound, however it could not find proof that the investor's illegal conduct was crucial for entering into the joint venture agreement.[2607] It emphasised that it could merely "*decide on substantiated facts, and cannot base itself on inferences*".[2608] Without stating which standard of proof it applied to the allegations of fraud made by the host State, the tribunal found that the host State had not fully discharged its burden of proof.[2609]

The tribunal in *Libananco v Turkey* rejected the application of a higher standard for fraud and other similar wrongdoings. [2610] Citing Judge Higgins with her general proposition "*the graver the charge, the more confidence there must be in the evidence relied on*", it clarified that

> "this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.[2611]

In *Rompetrol v Turkey*, the tribunal referred to the approach taken by the *Libananco* tribunal and finds that an ICSID tribunal has wide "*discretion over how the relevant facts are to be found and to be proved*".[2612] Against this background, in the view of the tribunal it is not "*bound in advance to expect or to require specific levels of proof or of rebuttal in respect of particular factual allegations*".[2613] In this context, the tribunal accepted that in particular

[2604] See *Fraport v Philippines*, Award, para 399 ("*even assuming*").
[2605] *Fraport v Philippines*, Award, para 399.
[2606] *Fraport v Philippines*, Award, para 399.
[2607] *Hamester v Ghana*, Award, para 135. See also para 136: "[…] *there is insufficient basis for the Tribunal to conclude that there was an overall scheme of deceit orchestrated by the Claimant in the initiation of its investment*".
[2608] *Hamester v Ghana*, Award, para 134. Note that the tribunal in *Niko v Bangladesh* cited this statement, *Niko v Bangladesh*, Decision on Jurisdiction, para 424.
[2609] *Hamester v Ghana*, Award, para 131.
[2610] *Libananco v Turkey*, Award, para 125.
[2611] *Libananco v Turkey*, Award, para 125.
[2612] *Rompetrol v Romania*, Award, para 181.
[2613] *Rompetrol v Romania*, Award, para 182.

circumstances "*an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence*", but it rejected to codify such standard beforehand and preferred to remain flexible.[2614]

In *Dadras v Iran*, the Iran-United States Claims Tribunal relied on the enhanced standard of proof applied in Anglo-Saxon law for fraud or any other crime alleged in civil proceedings.[2615] Since the tribunal referred to the grave implications of allegations of fraud, these findings may also serve as guidelines for other issues of illegal conduct such as corruption.[2616] Applying the 'clear and convincing evidence' standard the tribunal found no forgery and fraud.[2617] However, the tribunal clarified that the outcome of the particular case would have been the same with the preponderance of evidence standard.[2618]

b) Standard of proof for bad faith, conspiracy and collusion

In few occasions, tribunals in investment arbitration dealt with allegations of bad faith and conspiracy. At least two tribunals demanded an elevated standard of proof for such allegations. In *Bayindir v Pakistan*, for instance, the investor alleged a conspiracy orchestrated by the host State in order to expel the investor. The investor presented a series of facts from which it wanted the tribunal to establish conspiracy.[2619] However, the tribunal found that in order to prove bad faith, the threshold was a demanding one,[2620] and was not satisfied by the evidence provided by the investor.[2621] The tribunal in *Chemtura v Canada* confirmed the demanding standard of proof for allegations of bad faith or 'disingenuous behaviour'.[2622] The investor alleged that a Canadian federal agency had launched a special review of a certain pesticide as a result of a trade irritant instead of the presumed health and environmental considerations.[2623] The evidence provided was found insufficient by the tribunal, which held that the agency's actions had been undertaken due to the international obligations of Canada and were within the mandate of the agency.[2624] It must, however, be noted that both tribunals do not provide an explanation why bad faith requires a higher standard than the usual one.

[2614] *Rompetrol v Romania*, Award, paras 182-183.
[2615] *Dadras International v Islamic Republic of Iran*, Case. Nos. 213/215, Award No. 567-213/215-3, 7 November 1995, 31 Iran-U.S. C.T.R. 127 1995, 127 (hereinafter: "*Dadras v Iran*, Award"), at paras 123-124.
[2616] See also Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 552.
[2617] *Dadras v Iran*, *Award*, para 124. ("*The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as 'clear and convincing evidence', although the Tribunal deems that precise terminology is less important than the enhanced proof requirement that it expresses*". In addition, the tribunal referred to *Oil Field v Iran* for the higher standard of proof.
[2618] *Dadras v Iran*, Award, para 241.
[2619] *Inter alia*, it alleged that General Musharraf had taken early on the decision to terminate the relevant contract.
[2620] *Bayindir v Pakistan*, Award, paras 143 and 223.
[2621] *Bayindir v Pakistan*, Award, paras 256, 258.
[2622] *Chemtura v Canada*, Award, para 137.
[2623] *Chemtura v Canada*, Award, para 133.
[2624] *Chemtura v Canada*, Award, para 138.

In at least one instance, a tribunal has analysed the different approaches to serious allegations and decided to apply the general standard of proof. In *Tokios Tokelės*, the investor alleged that State agencies of Ukraine entered into a campaign against its investment with the intent and goal of damaging it.[2625] When determining the standard of proof for such allegation of gross misconduct of high public officials, the tribunal considered three possible approaches: first, to apply the usual standard requiring that the alleged fact is "*more likely than not to be true*";[2626] secondly to lower the standard because direct evidence of the conduct of entities with high public authority is difficult to find;[2627] and thirdly to apply a higher standard than the balance of probabilities.[2628] The tribunal made clear that the mere fact that direct evidence is not available and a decision has to be based on circumstantial or secondary evidence, does not lead to the conclusion that the standard of proof itself has to be lowered.[2629] Moreover, the tribunal saw the grounds for heightening the standard merely in deference or comity, and did not accept such grounds for increasing the barrier to prove an allegation.[2630] Refusing to make any assumption, the tribunal determined the standard of proof to be the usual one.[2631] Interesting to note is that the tribunal did not consider that the standard might be higher due to the fact that the alleged conduct also amounted to a criminal behaviour, which is one of the most prominent grounds why other tribunals have sought to heighten the standard. Finally, the tribunal found that the standard was that the "*assertion is more likely than not to be true*" and thus chose the 'balance of probabilities' standard.[2632]

Often, when the decision of a tribunal does not depend on a certain issue, tribunals prefer to leave the question open. In *Saipem v Bangladesh*, the host State asserted that the standard of proof for any criminal acts such as conspiracy and collusion would be a higher one and thus would lead to the criminal standard of 'beyond reasonable doubt'.[2633] However, the tribunal refrained from making a finding in this regard, since in its opinion it was of no need for the present case.[2634] In *Waste*

[2625] See *Tokios Tokelės v Ukraine*, Award, paras 12-14.
[2626] *Tokios Tokelės v Ukraine*, Award, para 124.
[2627] *Tokios Tokelės v Ukraine*, Award, para 124.
[2628] *Tokios Tokelės v Ukraine*, Award, para 124.
[2629] *Tokios Tokelės v Ukraine*, Award, para 124, "[…] *this does not dispense with the need for evidence of one kind or another sufficient to take the proof over the barrier*".
[2630] *Tokios Tokelės v Ukraine*, Award, para 124. For the tribunal there is no assumption that high public official will not misbehave, for which reason it rejects the principle that an "*inherently unlikely allegation requires stronger than usual supporting evidence before it is accepted*".
[2631] Note that the three Arbitrators agree with regard to the standard of proof, but come to a different conclusion when assessing the evidence. The majority (Lord Mustill and Professor Piero Bernardini) was not convinced by the evidentiary record that Ukraine engaged in activities aimed at harming the claimant's investment, while dissenting Arbitrator Daniel M. Price found it established that Ukraine "*engaged in a deliberate and targeted course of conduct*" in order to punish the company for supporting the opposition. See *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price, in particular paras 3-5.
[2632] *Tokios Tokelės v Ukraine*, Award, para 124.
[2633] See *Saipem v Bangladesh*, Award, para 114.
[2634] *Saipem v Bangladesh*, Award, para 114.

Management v Mexico, the investor alleged a conspiracy between numerous Mexican agencies to defeat the investment. The tribunal merely stressed that such allegations needed to be proven, but failed in providing the threshold for such task.[2635] Finally, it found the allegations "*unsupported by solid evidence*".[2636]

3. Conclusion

In conclusion, a unanimous approach to what degree of certainty is required to prove corrupt practices has not yet been established. The approach to demand 'clear and convincing' evidence for corruption and similar disingenuous conduct appears to be gaining ground, but has not been universally accepted. However, it must be noted that many tribunals are reluctant to take a definite stand on this delicate issue. Thus, in many cases tribunals will make sure not to decide the case by relying on the specific standard. In fact, various tribunals that held that the higher standard had not been met often emphasised – to be on the safe side – that the preponderance standard would not have changed the outcome of the case.[2637]

III. Standard of proof in commercial arbitration cases

Allegations of corruption have frequently been an issue in international commercial arbitration and have also been discussed with such focus in scholarship.[2638] Since many investment arbitration tribunals have referred to the approaches and principles applied in international commercial arbitration,[2639] it is essential to have an overview of the most prominent corruption cases in commercial arbitration. However, it must be noted once more that the circumstances of the cases investment treaty arbitration deals with are different to those in international commercial arbitration. In international commercial arbitration cases, the tribunal will focus on the agreement itself, the subject matter is the contract. There are two scenarios from which only the second one is comparable to the situation in investment arbitration. First, the claimant pursues payment of a commission based on an agency agreement and the tribunal will have

---

[2635] *Waste Management II v Mexico*, Award, para 139.
[2636] *Waste Management II v Mexico*, Award, para 139.
[2637] Haugeneder and Liebscher find that the specific standards applied in commercial arbitration are "*often not determinative since either the seemingly higher standards are also fulfilled or a claim of corruption fails under any standard*". Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 553.
[2638] For a detailed analysis of the evidentiary issues of corruption in international commercial arbitration see Sayed, *Corruption in International Trade and Commercial Arbitration*, 89 et seq. See also Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2009, 119–128; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration"; Timothy Martin, "International Arbitration and Corruption: An Evolving Standard," *Transnational Dispute Management* 1, no. 2 (2004); Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence."
[2639] See e.g. *World Duty Free v Kenya*, Award, paras 148-156. Note that in *EDF v Romania*, the host State relied upon commercial arbitration case law to argue a demanding standard of proof for corruption. The tribunal merely referred to the Respondent's Rejoinder without citing the therein provided case law, *EDF v Romania*, Award, para 221.

to examine the legality of such contract, i.e. whether such contract was a vehicle to actually bribe a public official and therefore is void. The amount assigned in the contract to be paid as a bribe is usually disguised as commissions, which are often uncommonly high compared to normal commissions for similar transactions. The second case is where the main contract is challenged due to the involvement of the claimant in corruption.

Two often-cited cases, which demanded the 'clear and convincing evidence' standard for allegations of corruption, are *Himpurna v PLN*[2640] and *Westinghouse*[2641]. In *Himpurna v PLN*, the tribunal stated that a "*finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof*".[2642] As explanation for such high threshold, the tribunal stated that a too relaxed standard to invalidate contracts would weaken the reliability of agreements and pointed at the harm it would cause to the system of "*international funding, technology, and trade*".[2643] Finally, the tribunal found that evidence of corruption did not exist.[2644]

In the *Westinghouse* case, the tribunal also demanded 'clear and convincing evidence' amounting to "*more than a mere preponderance*".[2645] However, it must be noted that the tribunal applied the standards of proof of the laws applicable to the dispute. Since the laws applicable to the merits of the case – the US state laws of Pennsylvania and New Jersey, and the law of the place of performance of the contract, the Philippines – required the higher standard of proof, the tribunal's conclusion is comprehensible. The tribunal held that the standard was not met by the provided evidence, and again with the intention of dissipating all doubts, clarified that the lower standard would not change the outcome.

In *Hilmarton*[2646], the sole arbitrator even required corruption to be proven 'beyond doubt'.[2647] The issue at question was whether the agency agreement was in fact a bribery agreement. There were some indications of illicit payments and the consultant failed to prove the performance of the agency agreement. However, this evidence could finally not meet the high hurdle of 'beyond doubt'. A similarly high standard was demanded by the tribunal in the ICC Case No. 6497, where

[2640] *Himpurna California Energy Ltd. (Bermuda) v PT. (Persero) Perrusahaan Listruik Negara (Indonesia)*, UNCITRAL, Award, 4 May 1999, Yearbook of Commercial Arbitration Vol. XXV, 2000, 13 (hereinafter: ("*Himpurna v PLN*, Award").
[2641] *Westinghouse International Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v National Power Corp. and The Republic of the Philippines*, ICC Case No. 6401, Preliminary Award, 19 December 1991 (hereinafter: "*Westinghouse*, Preliminary Award").
[2642] *Himpurna v PLN*, Award, para 116.
[2643] *Himpurna v PLN*, Award, para 114.
[2644] *Himpurna v PLN*, Award, para 118.
[2645] *Westinghouse*, Preliminary Award, paras 33-35. For further analysis see also Sayed, *Corruption in International Trade and Commercial Arbitration*, 103.
[2646] *Hilmarton Ltd. v Omnium de Traitment et de Valorisation S.A.*, ICC Case No. 5622, Yearbook of Commercial Arbitration Vol. XIX, 1994, 105-123 and ASA Bulletin 1993, 247 (hereinafter: "*Hilmarton*").
[2647] *Hilmarton*, para 23.

although the tribunal found that the circumstances of an agency agreement indicated to a 'high degree of probability' that the purpose of such agreement was to engage in corruption, it found the evidence 'not conclusive'.[2648]

Various commercial arbitral tribunals refrained from clarifying which objective threshold needs to be met; sometimes without any further reason, other times because they based their decisions on their personal convictions. In the famous ICC Case No. 1110, the sole arbitrator Judge Lagergren concluded that although the presented documents had an initially legal appearance, "*in* [his] *judgment*" the evidence showed the corrupt purpose of the relevant agreement.[2649] In the *Westacre* case, the tribunal relied on its own conviction and stated that the applicable standard of proof was that the tribunal must be convinced of bribery and that mere suspicion was not enough.[2650] The claimant pursued payment of the commission agreed upon in an agency agreement relating to a transaction of military tanks. The commission was unusually high, and the claimant failed to prove the performance of the services agreed on in the agency agreement. Nonetheless, the tribunal denied investigating further into the issue of corruption. It is, however, difficult to assess whether the standard applied by the tribunal was demanding or whether the tribunal refrained from a deeper analysis due to the late raising of the bribery defence by the respondent.[2651] In ICC Case No. 3913, the tribunal also refrained from referring to any specific standard of proof and emphasised that it was convinced by several witnesses that the purpose of the agency agreement was to engage in corruption.[2652] Similarly, the tribunal in ICC Case No. 3916 based its conviction of the contract's corrupt purpose on the circumstances surrounding the execution, without providing further information on the applied standard.[2653] Finally, the tribunal in ICC Case No. 6248 merely stated that the corrupt practice would follow "*from the evidence presented in this arbitration*".[2654]

This range of cases show that also in commercial arbitration there is no unanimous approach to apply a certain standard of proof for allegations of corruption. While commentators have contended that only a small number of international commercial arbitration cases have required a 'clear and convincing evidence' standard,[2655] it must be noted that in most cases the tribunals do not mention the standard of proof at all. It remains therefore unanswered which standard of proof

[2648] ICC Case No. 6497, 71.
[2649] ICC Case No. 1110, para 17.
[2650] *Westacre*, para 54. ("*If the claimant's claim based on the contract is to be voided by the defense of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere 'suspicion' by any member of the arbitral tribunal* […] *is entirely insufficient to form such a conviction of the arbitral tribunal.*")
[2651] See Haugeneder, "Corruption in Investor-State Arbitration," 337.
[2652] ICC Case No. 3913, 497 et seq.
[2653] ICC Case No. 3916, 507.
[2654] *Consultant v Contractor,* ICC Case No. 6248, Yearbook of Commercial Arbitration Vol. XIX, 1994, 124 (hereinafter: "ICC Case No. 6248"), 137, para 51.
[2655] Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 702.

was in fact applied. Nevertheless, a tendency has to be acknowledged that in international commercial arbitration allegations of corruption demand a higher standard of proof, also when the reasoning may change in each situation.[2656]

It is important to note that the two main reasons for elevating the standard of proof for allegations of corruption in international commercial arbitration are not transferable to investment arbitration without further ado. First, as seen in *Westinghouse*, the tribunals apply the standard of proof of the applicable law to the relevant contract. In treaty-based investment arbitration the applicable law with regard to the investment standards will mostly be international law. Second, tribunals in commercial arbitration – e.g. *Himpurna* – are reluctant to invalidate contracts and agreements due to the fear of weakening the reliability of agreements, since *pacta sunt servanda* is one of the pillars of international commerce.

IV. Standard of proof of corruption in scholarship

The majority opinion in the literature is that in international arbitration a higher standard of proof is required for corruption and fraud.[2657] One reason given for the heightened standard is the sensitivity of the allegations, especially for behaviour *contra bonos mores.*[2658] A leading commentary in international arbitration states the general rule that fraudulent behaviour must be conclusively proven.[2659] The argument given is that the more startling an allegation is, the more demanding will the tribunal be with the evidence.[2660] In the same line of reasoning it has been argued that allegations of illegality have to be dealt with particularity.[2661] In addition, when the nullity of a contract is concerned, the principle of *pacta sunt servanda* is brought forward to argue for a heightened standard of proof.[2662]

However, some commentators argue against an elevated standard of proof for corruption in international arbitration in general[2663] and in international investment

---

[2656] See also Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2009, 122.

[2657] E.g. Rosell and Prager, "Illicit Commissions and International Arbitration: The Question of Proof," 347; Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 223 et seq.; Pietrowski, "Evidence in International Arbitration," 380; Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.95; Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 83.

[2658] Pietrowski, "Evidence in International Arbitration," 379.

[2659] Blackaby et al., *Redfern and Hunter on International Arbitration,* para. 6.95.

[2660] Ibid.

[2661] Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts," 225.

[2662] Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts."

[2663] Hwang and Lim, "Corruption in Arbitration - Law and Reality," 29 et seq.; Cecile Rose, "Questioning the Role of International Arbitration in the Fight against Corruption," *Journal of International Arbitration* 31, no. 2 (2014): 216 et seq.; Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects," 497 et seq.; Waincymer, *Procedure and Evidence in International Arbitration*, 769. ("*The preferred view should be to apply uniform standards in the context of the available evidence and the seriousness of the allegations and not attempt to set up multiple standards of proof depending on the circumstances. Because*

arbitration in particular.[2664] There is mainly a handful of reasons asserted for such approach:

First, the elevated standard results in a disadvantage to the party alleging corruption.[2665] This would run counter to the general principles of due process and equality of the parties prevailing in international arbitration.[2666]

Secondly, commentators stress that arbitral proceedings are not criminal proceedings for which reason a heightened standard is not justified.[2667] Arbitral proceedings do not deal with criminal matters, but only with issues of liability.[2668] Moreover, it is argued that there is no difference in the legal outcome of the case between a breach of treaty resulting from corruption or from any other conduct of the State.[2669]

Thirdly, the difficulty of proving corruption must be taken into account when assessing the standard of proof.[2670] Partasides, for instance, refers to *inter alia* the International Criminal Court and the United Nations Compensation Commission, which take into consideration the difficulty that parties encounter to substantiate their claims.[2671] Especially the lack of power of a tribunal to order the production

---

allegations of bad faith and illegality require sufficient proof of a particular mental state, uniform standards rigorously applied will protect against unmeritorious claims.").

[2664] See e.g. Llamzon, *Corruption in International Investment Arbitration,* 236–237; Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World"; Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 555 et seq.; Haugeneder, "Corruption in Investor-State Arbitration," 338 et seq.; Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects," 497 et seq.; Wilske and Fox, "Corruption in International Arbitration and Problems with Standard of Proof."

[2665] Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects," 497 et seq.; Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 556 et seq.; Haugeneder, "Corruption in Investor-State Arbitration," 338.

[2666] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 556 et seq.

[2667] Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects," 497 et seq.; Haugeneder, "Corruption in Investor-State Arbitration," 338; Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 557; Hwang and Lim, "Corruption in Arbitration - Law and Reality," 29 et seq.

[2668] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 557. ("*While a high or very high standard of proof for corruption may be justified in criminal cases, investment arbitration only deals with the civil consequences of corruption. The consequences of a finding of liability for the host state for corrupt practices are no different than a finding of liability for a breach of contract, or any other standard applicable to foreign investments.*"). See also Hwang and Lim, "Corruption in Arbitration - Law and Reality," 30. ("*A tribunal does not impose criminal sanctions, which renders it unnecessary and undesirable for it to proceed with the same degree of caution as a criminal court would apply in ascertaining the facts of the case before it.*").

[2669] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 557.

[2670] Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," 57.

[2671] Partasides gives the examples that (i) the International Criminal Court does not apply the "beyond reasonable doubt" standard in reparation cases to victims, and that (ii) United Nations

of evidence makes it difficult for the arbitrators to appropriately deal with allegations of corruption.[2672] Considering these arguments, Partasides proposes to look at both parties' evidence when 'plausible' evidence has been brought forward,[2673] and to increase the willingness to draw inferences when direct evidence is not available.[2674]

Fourthly, commentators have challenged the notion that the standard of proof is raised under common law – as often taken for granted – when dealing with serious allegations like fraud and corruption.[2675] Reference is made to the British House of Lords Case of *Secretary of State for the Home Department v Rehman*, where Lord Hoffmann demanded cogent evidence to prove fraudulent behaviour, but held on to the 'more probable than not' standard for civil cases.[2676] In his statement a higher degree of probability is only required in criminal law.[2677]

Fifthly, commentators have referred to the international instruments against corruption, in particular the Civil Law Convention on Corruption, to deduce the obligation to ensure effective civil remedies and consequentially the 'reasonable opportunity' to present a corruption case.[2678]

V. Balanced standard of proof

After having presented the different approaches to the standard of proof made by tribunals in international investment arbitration and international commercial arbitration as well as in scholarship, it seems essential to critically scrutinise the different arguments in order to reach a conclusion of which standard of proof

---

Compensation Commission demands only evidence demonstrating a "reasonable minimum" in certain cases.

[2672] Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," 62. ("*Deprived of the court powers of evidentiary compulsion to subpoena witnesses and to require the production of documents, a failure to take account of the challenges in proving corruption will in the long term expose our process to the charge that it is a soft touch on corruption in an increasingly unaccommodating modern world*."). See also Rose, "Questioning the Role of International Arbitration in the Fight against Corruption," 216 et seq.

[2673] Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World," 59–60. ("[…] *once a certain prima facie threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate – given the nature of the allegation – for the defendant to sit back and not contribute to the evidentiary exchange on that issue.* […] *plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation*.")

[2674] Ibid., 61. ("[…] *where an inference is a reasonable conclusion to draw from the known or assumed facts, Tribunal should be willing to draw the inference to determine allegations of illegality as they would any other allegation – indeed more so given often deliberately concealed nature of an illegality.")*

[2675] Ibid., 57.

[2676] *Secretary of State for the Home Department v Rehman*, 2001, UKHL 47, paras 140-141. This case has been cited and brought into the discussion by Partasides, see Ibid.

[2677] *Secretary of State for the Home Department v Rehman*, 2001, UKHL 47, paras 140-141. Note that the UK case law is not unanimous whether serious allegations lead to a higher standard of proof or whether the seriousness should rather be evaluated in the balance of probabilities.

[2678] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 557; Haugeneder, "Corruption in Investor-State Arbitration," 338.

should be preferred in corruption cases. The following analysis starts with the arguments brought in favour of a high standard of proof (see below at **1.**). Subsequently the arguments in favour of a normal standard of proof are analysed (see below at **2.**), before concluding the issue (see below at **3.**).

1. Arguments for heightening the standard

The reasons for preferring a high standard of proof in corruption cases are mainly the respect towards States and senior State officials (see below at **a)**), the criminal connotation of corruption (see below at **b)**) and the seriousness of such allegations (see below at **c)**). However, tribunals have also based their decisions on the particular applicable law (see below at **d)**) and the potential abuse of such severe allegations (see below at **e)**).

a) Diplomatic reason

One reason for demanding a higher threshold for allegations of corruption is a diplomatic policy consideration.[2679] Many tribunals are reluctant to make positive findings on serious charges such as corruption against the State or a senior official. The tribunal in *EDF v Romania*, for instance, considered the allegations of corruption to be serious only due to the involvement of senior public officials.[2680]

This respect towards States and senior State officials amounts almost to comity and deference, two principles of international law, which are applied in relationships between States. However, in investment treaty arbitration there is no room for such comity. The main idea in investor-State disputes is to create a levelled playing field between the host State and the investor. In order to achieve such goal, the host State requires to take off its crown as sovereign and with it all its privileges. The State consents to put itself on a par with the investor for purposes of the arbitration proceedings. This is actually an important factor in the investor's assessment of risk before taking the investment decision. It would be contradictory to first attract the investor by promoting equality in the proceedings and then receiving favourable conditions merely for being a State party.

In addition, to call for a higher standard due to accusations against the State or senior State officials would equal to providing the State with a presumption of 'not being involved in corruption'. Such presumption would not apply for allegations of corruption made by the State against the investor. This would lead to the application of two different standards for the same allegations – only depending on whether a senior State official is involved or 'only' a private investor. Such

[2679] See Reiner, "Burden and General Standards of Proof," 336. Note that Reiner does not refer directly to corruption, but to criminal offences as such.
[2680] *EDF v Romania*, Award, para 221.

approach would distort the equality of parties and violate due process, which are two fundamental pillars of international arbitration.[2681]

b) Criminal connotation of corruption

The particularity of the phenomenon of corruption is that the behaviour amounting to corruption may be relevant in both civil law matters and criminal law matters. Due to the criminal connotation of corruption it is argued that a higher standard of proof is required. In fact, in criminal proceedings sensitive values such as freedom of the accused person and its integrity are at stake. However, such external factors cannot blur the limits of what is actually dealt with at investment arbitration proceedings. In investment arbitration, the subject matter is the State responsibility for violating a protection standard established in an IIA. The investor seeks restitution or compensation, which if successful will lead to a monetary award. In case the investor is allegedly involved in corrupt practices, the only potential consequence of such accusations is the dismissal of its claim. For the opposite case, that a public official of the host State is held to have committed corruption, then the only relevant result in the arbitration proceedings is State liability for a breach of treaty. Both situations are not comparable to criminal proceedings. The freedom of the accused is at no time in danger. There is no other consequence to the factual finding of corruption in investor-State disputes than winning or losing the case, which is similar to any other allegation.

In addition, the findings of corruption by the tribunal will only be relevant for the investor-State dispute at issue. The tribunal must evaluate the evidence with the perspective to reach a sound decision for the present proceedings about monetary compensation. The arbitral awards are only binding to the parties of the arbitration. Thus, the decisions on burden of proof, standard of proof and admissibility of evidence will not have any direct impact on the criminal prosecutions and thereby on the freedom or personal rights of the accused. The difference between the subject matter and scope of the investment arbitration proceedings and parallel criminal proceedings in the host State was recently highlighted by the tribunal in *Flughafen Zürich v Venezuela*. The tribunal confirmed that the standard of proofs of both proceedings are different and emphasised that the outcomes needed not to be the same.[2682]

There might be a chance that the allegations made in the arbitration proceedings cause suspicion to local anti-corruption authorities or domestic prosecutors who then in turn commence criminal investigations. It is imaginable – also not likely – that evidence before the arbitral tribunal is even handed over and used in such investigations. However, no evidentiary decision of the tribunal will have an

[2681] See also Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 557. ("[A] *presumption in investor-state arbitrations that no corruption occurred for 'diplomatic reasons' has no basis in the applicable substantive or procedural standards and would violate due process*.").
[2682] *Flughafen Zürich v Venezuela*, Award, paras 140-141.

influence on the outcome of such investigations. The findings of the tribunal will not have any evidential value for domestic corruption investigations or criminal proceedings. National authorities and courts are bound by national criminal procedure and apply their own laws and rules in order to evaluate evidence. In addition, an arbitral tribunal has less investigative power than any local authority for which reason it will be less likely that, of all things, the arbitration proceedings will provide more evidence. Although an accusation of corruption might have consequences outside the arbitral proceedings, such effect is incidental and not within the arbitration proceedings, for which reason it has no bearing on the determination of the evidentiary standards for the arbitration proceedings.

c) Seriousness of allegation

Due to the criminal and reprobate connotation of corruption discussed above, a gloom of seriousness is created, which leads to a sort of a cautiousness when dealing with the issue, which at the end has led tribunals to treat it with kid gloves. As seen above, the seriousness of accusations of corruption is used as a ground to raise the standard of proof for such allegations.

Where allegations refer to a serious conduct, the tribunal will surely also consider the elements of seriousness. Accusations of corruption will not be taken too easily and lightly. In addition, it is a matter of course that the tribunal should be convinced that the facts are true. However, this should not affect the standard of proof, but the internal approach of an arbitrator how to deal with such accusation. This notion was even confirmed in English law, which is usually referred to as requiring a higher standard of proof. LJ Morris in *Hornal v Neuberger Products Ltd* stated over 50 years ago

> "[t]hough no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities."[2683]

This statement shows that while the seriousness of the circumstances will have to be considered, this does not lead to a change in the standard of proof.[2684] Similarly, Lord Munby after reviewing the British judicial authorities on the standard of proof made clear that only one standard of proof existed in civil matters, the balance of probabilities.[2685] The application of this standard would however be flexible and take the seriousness of the allegation and the consequences into

[2683] *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 266.
[2684] See also Lord Nicholls in In Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] A.C. 563, 586; In re Dellow's Will Trusts [1964] 1 WLR 451, 454-455.
[2685] *The Queen v The Mental Health Review Tribunal*, Court of Appeal (Civil Division), 21 December 2005, [2005] EWHC 587 (Admin), para 63.

consideration.[2686] In a similar line of reasoning, it has been argued that instead of referring to a higher standard of proof, it is more appropriate to describe the approach to evidence in corruption cases as 'the degree of satisfaction must be greater'.[2687]

Moreover, the seriousness of the allegations is due to the seriousness of the consequences if the allegations are proven.[2688] As with the criminal connotation of corruption, in investment arbitration the point of reference cannot be any incidental effect outside of the arbitration proceedings, but only what is at stake at the present dispute. The consequences of established corruption are either compensation for a breach of treaty or the dismissal of the claim.

Furthermore, there are two types of seriousness that have to be taken into account: the seriousness of the charge of corruption and the seriousness of the corrupt act itself. The relevance of both must be balanced. In conclusion, the reference to the seriousness of the charge is not a compelling reason to raise the standard of proof for the corruption situation in investment arbitration.

d) Higher Standard required by applicable law

It is often argued that in both civil law jurisdictions and common law jurisdictions the standard of proof for corruption is also raised in civil law matters, a statement that has already been challenged above. However, even if such higher standard existed in domestic litigation, that does not mean that it shall be transferred to international arbitration.

There are two groups of cases where the notion of the higher standard is transferred to international arbitration. The first group of tribunals explicitly applies the standard of proof of the applicable substantive law to the dispute. The second group merely refers to the general notion that the standard of proof is higher in civil litigations. Both groups of tribunals appear to feel obliged to apply such standard of proof without considering the reasons why civil litigation might call for a different threshold. The main reason for a jurisdiction to require a higher standard of proof in litigation is a public policy consideration due to the similarity of the allegations to criminal accusations.[2689] Especially in common law jurisdictions with jury trials for civil matters such considerations are comprehensible. However, those public policy reasons do not apply to investment

[2686] *The Queen v The Mental Health Review Tribunal*, Court of Appeal (Civil Division), 21 December 2005, [2005] EWHC 587 (Admin), para 63.
[2687] Eveleigh, "General Standards of Proof in Litigation and Arbitration Generally," 354 et seq.
[2688] This is the main ground why in U.K. case law a higher degree of probability is required for serious allegations. See *R(N) v Mental Health Review Tribunal* [2006] 2 WLR 850, Lord Justice Richards, para 59; *Campbell v Hamlet, Privy Council* [2005] UKPC 19, Lord Brown, para 17; *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213, Lord Philips MR, para 90; *R (McCann) v Manchester Crown Court*, House of Lords, [2003] 1 AC 787, Lord Hope, para 82.
[2689] von Mehren, "Burden of Proof in International Arbitration," 127.

arbitration, where three highly specialised arbitrators decide over the dispute.[2690] The similarity of corruption to a criminal offence is of no relevance for the tribunal that will merely judge over the liability of the host State and the potential consequences. As already mentioned, the potential legal consequences of the allegation of corruption as breach of a protection standard are not different to any other allegations of treaty violation.

This will also apply when corruption is alleged as defence due to illegality of the investment. In such context, respondent States often rely on the frequent IIA requirement that the investment must be 'made in accordance with host State law'. The question arises whether such reference to the host State law also includes the standard of proof of the domestic law. Thus, investors have argued that in order to prove a violation of domestic law, the same thresholds will apply.[2691] In their opinion, when the allegations of illicit behaviour amount to a crime, then even proof beyond a reasonable doubt would have to be met. Again, the issue before the tribunal is not comparable to the one at national litigation or criminal proceedings. In the words of the tribunal in *Fraport v Philippines*

> "[…] whatever standard of proof is required under Philippine law to prove a criminal act, the jurisdictional question before this Tribunal, which is seized of an international investment dispute, is not a determination of a crime but whether an economic transaction by a German company was made 'in accordance' with Philippine law and thus qualifies as an 'investment' under the German-Philippine BIT."[2692]

Thus, with regard to 'in accordance with the host State law' analysis, the focus of a tribunal must be to assess whether from the point of view of the tribunal, the substantive law of the host State has been breached. For such assessment the tribunal enjoys wide discretion and freedom. It is neither bound by the findings of national authorities nor limited by the standard of proof prevailing in the national jurisdiction.

e) Abuse of allegations of corruption

Some tribunals have called for a higher standard in order to encounter potential abuse by respondent States aiming to defeat jurisdiction.[2693] In fact, the danger exists that host States get off the hook too easily by simply alleging corruption. Thus, it has been argued that a tribunal may not make a decision on merely general considerations of corruption. In *African Holding,* for instance, the host State pointed at the illegal practices of the Mobutu regime without submitting any

[2690] Ibid., 128. ("*The arbitrator might* […] *deviate from the higher standard where he finds that the reasons which explain its use in litigation do not apply to arbitration.*")
[2691] See e.g. *Fraport v Philippines*, Award.
[2692] *Fraport v Philippines*, Award, para 399. Note that the tribunal did finally not decide on the standard of proof since the facts were 'incontrovertible'.
[2693] See e.g. *African Holding v Congo*, Decision on Jurisdiction and Admissibility, para 55.

evidence.[2694] It appears obvious that, even when it is common knowledge that a country suffers from widespread corruption and the corrupt practices of public officials and businessmen are publicly assumed, these general allegations cannot be considered by the tribunal without any further substantiation.[2695] Thus, it is a matter of course that evidence is required in the first place – be it direct or circumstantial. However, this does not explain why the standard of proof should be elevated to a "particularly high" level[2696]. Unsubstantiated allegations are already appropriately dealt with by the general standard of 'balance of probabilities'. There is no need and thus no reasonable justification to depart from the general rule to encounter abuse.[2697]

2. Arguments for normal standard

As just discussed, the grounds brought forward for an elevated standard of proof for allegations of corruption are not compelling. At the same time, reasonable grounds exist for applying one uniform standard of proof to all types of allegations in investment arbitration, including allegations of corruption. In particular in corruption cases the equality of the parties (see below at **a)**) as well as the full opportunity to present one's case (see below at **b)**) must be warranted. At the same time tribunals have to take the intrinsic difficulty to prove corruption (see below at **c)**) and the requirement under the international fight against corruption to provide effective measures against corrupt behaviour (see below at **d)**) into consideration. Finally, only a normal standard of proof can safeguard the integrity of the investment arbitration regime and prevent abuse by corrupt investors or corrupt host States (see below at **e)**).

a) Equality of the parties

One of the prevailing principles in international arbitration is the equality of the parties.[2698] Due to the lack of detailed procedural rules in investment arbitration

[2694] See *African Holding v Congo*, Decision on Jurisdiction and Admissibility, para 53.

[2695] Note that in ICC Case No. 3916, the endemic nature of corruption in Iran has been considered to establish corruption. However, this circumstantial evidence was merely one single factor of many to conclude that the transaction involved corruption. Thus, it can be argued that the reference to widespread corruption was substantiated by further evidence.

[2696] This is what the tribunal in *African Holding* demanded. The original phrasing by the tribunal was "*être particulièrement élevée*", *African Holding v Congo*, Decision on Jurisdiction and Admissibility, para 55.

[2697] See also Waincymer, *Procedure and Evidence in International Arbitration*, 769. ("*The preferred view should be to apply uniform standards in the context of the available evidence and the seriousness of the allegations and not attempt to set up multiple standards of proof depending on the circumstances. Because allegations of bad faith and illegality require sufficient proof of a particular mental state, uniform standards rigorously applied will protect against unmeritorious claims*."), emphasis added.

[2698] See e.g. Article 18 of the UNCITRAL Model Law on International Commercial Arbitration:
"*The parties shall be treated with equality and each party shall be given full opportunity of presenting his case*." Emphasis added.
See also Article 17(1) of the UNCITRAL Arbitration Rules (as revised in 2010):
"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it

this principle becomes even more striking in order to ensure fairness and due process. However, the equality of the parties is at danger when the party alleging corruption will have to overcome a high burden to prove its allegations, since this party would experience disadvantages to plead its case.

b) Full opportunity of presenting one's case

Another general principle international arbitration is based on is that each party shall have the full opportunity of presenting its case.[2699] To create an additional obstacle to the party alleging corruption by heightening the standard of proof without compelling reason would prevent it from reasonably arguing its case. It would be deprived of a fair chance to present and prove its case based on allegations of corruption.[2700]

c) Difficulty of proving corruption

The already discussed difficulty of gathering direct evidence in corruption cases must be taken into account when assessing the standard of proof. The flexibility of a tribunal to adjust the proceedings to the specific circumstances of the case and the freedom to judge over the probative value of the evidence enable the tribunal to make such considerations.[2701]

d) International conventions against corruption

The several international instruments against corruption presented in Chapter Two show the collective international condemnation of corruption. A result from the conventions is that international corruption has become a criminal offence in almost all countries of the world. As shown, some conventions go even further. The Civil Law Convention on Corruption and the United Nations Convention Against Corruption require the State parties to provide effective remedies for persons who have suffered damages as a result of acts of corruption.[2702] In

---

considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." Emphasis added.
See also *Metalpar v Argentina*, Award, paras 153-155. See also Redfern, "The Practical Distinction Between the Burden of Proof and the Taking of Evidence - An English Perspective," 321.

[2699] See Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, fn. 2698

[2700] See Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 557. ('*reasonable opportunity*').

[2701] See also Amerasinghe, *Evidence in International Litigation*, 138. ("*International tribunals have, where a party has genuinely encountered problems beyond its control in securing evidence, more frequently than not recognized its hardship.*").

[2702] See Civil Law Convention on Corruption:
"*Article 1 – Purpose*
Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage." (Emphasis added).
See also: "*Article 5 – State responsibility*

addition, the Civil Law Convention on Corruption demands the State Parties to create 'effective' mechanisms to obtain the evidence needed to bring a claim for damages.[2703]

The conventions are only binding to the signatory States and are not self-enforcing, but require the member States to implement national legislation to provide the promised mechanism. Nevertheless, the international conventions show a general international consensus to create effective mechanisms to prove corruption and make claims of compensation available. Such notion can be transferred to investor-State disputes. States have signed up on international level to ensure the possibility of bringing a civil claim against the damages caused by corruption and facilitate such endeavour. In addition, as discussed in Chapter Three such international consensus to fight corruption and to provide effective mechanisms to receive compensation have an impact on the general notion of international and transnational public policy. Such impact cannot be overlooked by the tribunal when deciding over the standard of proof.[2704]

e) Abuse of investment arbitration

A higher standard of proof for corruption and the resulting higher threshold to demonstrate the illicit behaviour would make it possible to abuse the mechanism of investment arbitration. Corrupt practices in international trade and investment are not a behaviour that should be protected by international tribunals. By making the determination of corruption extremely difficult, the high standard of proof would also jeopardise the integrity of investment arbitration proceedings. Thus, it is in the public interest that a tribunal chooses an efficient standard of proof to tackle corruption.

Each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities." (Emphasis added).
See also United Nation Convention against Corruption:
"*Article 35*
Compensation for Damages
Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." (Emphasis added).

[2703] See Civil Law Convention on Corruption:
"*Article 11 – Acquisition of evidence*
Each Party shall provide in its internal law for effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption." (Emphasis added).

[2704] Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 557. ("*If effective civil remedies are understood as part of the public policy against corruption, the standard of proof applied in cases of corruption should provide reasonable opportunity to prove an allegation of corruption*."). See also Rose, "Questioning the Role of International Arbitration in the Fight against Corruption," 217. ("*If we ascribe the same goal of effectiveness to arbitral tribunals, then lowering the standard of proof becomes especially important because it appears to impede the ability of arbitral tribunals to fulfil their role in resolving disputes regarding foreign direct investment.*").

3. Conclusion

It can be noted in arbitral practice that tribunals often circumvent the question of standard of proof and decide the case upon their evaluation of the evidence. Such reluctance of tribunals to define the applied standard of proof before evaluation of the evidence might result from the notion that the actual evaluation of evidence is more important than the abstract definition.[2705] At first sight, this practice is sound since the arbitrators are the judges of the probative value of the evidence. In situations where the factual matter is clear or where the evidence is not able to meet even the lowest threshold, such approach is harmless. However, in circumstances where the evidence is ambiguous, the parties are left in doubt on what specific threshold was expected by the tribunal. Hence, in order to preserve the fundamental principle of due process of law it must be clear to the parties what threshold they have to meet before presenting their evidence. This is not new to arbitration.[2706] Thus, the communication between the tribunal and the parties is essential.

A too strict standard of proof for allegations of corruption will make it impossible to the party alleging corruption to present its case. On the one hand, this would lead to depriving investors from any adequate protection against a corrupt host State. On the other hand, investors engaged in corrupt behaviour would be able to abuse the investment arbitration mechanisms. At the same time there is no compelling reason for increasing the standard of proof for corruption allegations. The mere fact that senior State officials may be involved is of no relevance in arbitration proceedings, which are based on the notion of creating a levelled playing field. Moreover, the criminal connotation of corruption and potential subsequent investigations by law enforcement agencies have no link to the standard of proof in arbitral proceedings aimed at making a finding over a treaty breach. Most notably, the tribunal's findings have no evidentiary weight on criminal proceedings which will be based on their own evidence, procedural rules and standard of proof. As a matter of course, mere suspicion of corruption and unsubstantiated allegations cannot be sufficient to deprive the investor from her treaty rights or to establish a claim against the State. Surely, the tribunal must be convinced of the facts showing corrupt practices. However, that refers to the approach found in civil jurisdictions of the inner conviction of the adjudicator and is not to be confused with the 'clear and convincing evidence' used mainly in the Anglo-American jurisdictions amounting to a higher standard of proof. In other words, the adjudicator must be convinced, however, the evidence does not necessarily need to meet the high 'clear and convincing' standard of proof.

[2705] Haugeneder, "Corruption in Investor-State Arbitration," 338.
[2706] Reymond, "The Practical Distinction Between the Burden of Proof and Taking of Evidence - A Further Perspective," 327; Reiner, "Burden and General Standards of Proof," 340; Hanotiau, "Satisfying the Burden of Proof: The Viewpoint of a 'Civil Law' Lawyer," 350; Böckstiegel, "Presenting, Taking and Evaluating Evidence in International Arbitration," 81.

Arbitrators are not bound by strict rules. This freedom to decide over the way the arbitral proceedings are conducted is the big advantage of bringing disputes before international tribunals. This flexibility to deal with the evidential problems has to be taken advantage of.[2707] The best way to deal with serious allegations is to weigh all evidence and the specific circumstances of the case in order to find in which direction the scale tips – on the balance of probabilities.

[2707] See also Llamzon, *Corruption in International Investment Arbitration*, 237. ("*Tribunals are given the freedom and burden of choice, which they should not abdicate by rote reference to an abstract 'heightened' standard of proof*.").

D. Handling of evidence

Another crucial issue for a successful corruption case is how the tribunal will handle and evaluate the different pieces of evidence. In the abstract it is not feasible to identify all potential pieces of evidence that might become relevant in corruption cases, but there are at least a few very typical ones which require special attention (see below at **I.**). Since the parties involved in corruption will try to leave no trace of the illicit conduct or will even destroy available evidence, it is often difficult to obtain lawful evidence. Thus, in particular in corruption cases the tribunal will have to decide whether unlawfully obtained evidence is admissible (see below at **II.**). Moreover, due to the intrinsic difficulty to prove corruption with direct evidence, mostly only circumstantial evidence will be available (see below at **III.**) and the tribunal will have to resort to presumption and inferences in order to establish corruption (see below at **IV.**). This sub-chapter will conclude with the balanced approach to admissibility of evidence (see below at **V.**).

I. Typical evidence presented in corruption cases

Each corruption case will depend on its specific circumstances. As seen before, a corrupt act may be performed in manifold ways. Therefore, a concluding list of potential evidence cannot be provided. However, there are some pieces of evidence that have often been relied on in corruption cases.

1. Witness statements

The most common type of evidence in corruption cases is witness statements. The tribunal enjoys a large discretion in weighing the probative value of such testimony by taking the credibility of the witness into account.[2708] Important for such evaluation is whether the provided information is first-hand personal knowledge or mere hearsay. While the latter is generally considered to be admissible, it has only little probative value, since the statement made by the declarant is originally from another person.[2709] However, in most corruption cases witness statements are often found to have little weight due to the link with the party, an interest in the outcome of the arbitration, or the challenge by the other party with a testimony stating exactly the opposite.

The common situation is that the witness statements of the party alleging corruption support the allegations, while the opposite party will present the person

[2708] Sayed, *Corruption in International Trade and Commercial Arbitration*, 96.

[2709] The tribunal in *EDF v Romania* clarified that hearsay evidence is admissible in international arbitration, but that some additional confirmatory evidence is necessary. *EDF v Romania*, Award, para 224. See also *Military and Paramilitary Activities (Nicaragua v United States)*, Merits, 40, para 68 ("*An opinion expressed by a witness is a mere persona1 and subjective evaluation of a possibility,* […] *but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight*."); *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of 9 April 1949, ICJ Reports 1949, 4 (hereinafter: "*Corfu Channel Case*, Merits"), 16-17.

accused with corruption denying such accusations. The tribunal in *EDF v Romania* dealt with the testimonies of both the addressee of the extortion of a bribe and the public officials accused with having solicited the bribe. After the hearing the tribunal emphasised that neither side was convincing.[2710] In such deadlock situation the mere witness statements are of no guidance for the tribunal to reach a decision.

In addition, the tribunal is free to consider the party's omission to present a certain witness statement and make decisive inferences. In *Methanex v United States*, the tribunal highlighted that the investor failed to present relevant partners of an unnamed DC law firm as witnesses to shed light on the open questions.[2711] The tribunal was therefore unwilling to follow the argumentation of the claimant.

2. Video and audio recordings

EDF v Romania is a good example for a case where the only effective piece of evidence of corruption was a secretly recorded audiotape. The question then arises whether (i) such secretly obtained evidence is unlawful and (ii) whether the unlawfulness leads to the inadmissibility of such evidence.[2712]

In *Lucchetti v Peru* the evidence of corruption also comprised secretly recorded videos of the act of bribery.[2713] The videos showed that the Chief of the Secret Service under President Fujimori, Vladimiro Montesinos Torres, had bribed national judges involved in the domestic judicial proceedings pursued by the investor in Peru.[2714] Finally, the tribunal dismissed the case on a different ground than corruption, for which reason the admission and evaluation of the evidence showing corruption did not have to be conducted.[2715]

3. International Press

Often the first suspicion that a transaction is odd or dubious is raised by the national or international press.[2716] In *SGS v Pakistan*, an article by the *New York Times* published on 9 January 1998 revealed obscure practices by the Prime Minister Benazir Bhutto and raised the issue whether there was corruption

[2710] *EDF v Romania*, Award, paras 223, 227.
[2711] *Methanex v United States*, Final Award, Part II, Chapter I, para 55.
[2712] See below at D.II.
[2713] See *Lucchetti v Peru*, Award, para 51. See also Consejo Metropolitano de Lima, Acuerdo de Consejo No. 259, 16 August 2001, *Revocan licencia municipal de funcionamiento a Lucchetti Perú S.A. y disponen la clausura definitiva de su establecimiento industrial*, published in El Peruano, p. 209094, 22 August 2001.
[2714] See *Lucchetti v Peru*, Award, para 51.
[2715] *Lucchetti v Peru*, Award, para 57.
[2716] See also Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," 129. ("*Often a study of* […] *the local and international press which tends diligently to police such situations in its role as purveyors of transparency can enlighten us to the reality of the situation when the evidence produced by the parties is lacking.*")

involved in the relevant investment.[2717] In *EDF v Romania*, an article in the German newspaper *Die Welt* published on 15 November 2002 reported about the alleged solicitation of the bribe.[2718] In both examples the inquiry by the press was conducted before the arbitration proceedings commenced.

The influence of a press article on the arbitration proceedings – along with the delicacy of the topic of corruption – are shown by the reaction of Romania during the *EDF v Romania* proceedings to the publication of a newspaper article in the *Financial Times* where details of the dispute were revealed.[2719] The same day the article was published, Romania requested provisional measures to order the claimant to "*refrain from disclosing to the public and particularly to the press*" any information about the case.[2720] The Financial Times articles made comments on the allegedly corrupt political and judicial system in Romania. It quoted e.g. Monica Macovei, the Romanian minister of justice from 2005 to 2007, pointing out that "*high political corruption is still present in Romania and the anti-corruption prosecutors are under strong pressure from the current political class*".[2721] Moreover, Ms Macovei was also cited to emphasise the political interference in the judicial cases concerning corruption where judges of the constitutional and supreme court who were appointed by the Prime Minister's party made "*clearly political decisions and lack*[ed] *independence*".[2722] In addition, the article mentioned three investigations of corruption against Mr Nastase, the Prime Minister, who had allegedly solicited the bribes from EDF through two senior officials.[2723]

The question arises what impact such information might have on the tribunal and whether such articles may be admitted as evidence. It must be noted that the tribunal must take into account that investigatory journalism often relies on secret sources, whose authenticity cannot be examined by the tribunal, or merely reproduces statements of persons that are not directly testifying before the tribunal.

[2717] See Burns, "House of Graft: Tracing the Bhutto Millions - A Special Report; Bhutto Clan Leaves Trail of Corruption."
[2718] See *EDF v Romania*, Award, para 222
[2719] Neil Barnett and Stefan Wagstyl, "Romania faces $100m corruption suit", Financial Times Europe, www.FT.com, 2 May 2008.
[2720] For Romania's request see *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2, 30 May 2008 (hereinafter: "*EDF v Romania*, Procedural Order No. 2"), para 19. The tribunal refrained from restricting the public discussion of the case as long as it did not exacerbate the dispute. Finally, the tribunal recommended that "[b]*oth Parties shall refrain from taking any steps which might undermine the integrity of the arbitral process or its orderly working and/or that more generally might aggravate or exacerbate the dispute*", *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2, 30 May 2008, para 54.
[2721] Neil Barnett and Stefan Wagstyl, "Romania faces $100m corruption suit", Financial Times Europe, www.FT.com, 2 May 2008.
[2722] Neil Barnett and Stefan Wagstyl, "Romania faces $100m corruption suit", Financial Times Europe, www.FT.com, 2 May 2008.
[2723] Note that Adrian Nastase's responds to the allegations made in the Financial Times article "Romania faces $100m corruption suit" were published on 12 May 2008 in the Financial Times (online) under the title "Romania's former PM is not aware of any illegal", where he denies any knowledge of corrupt acts of his government.

In addition, revealing stories might also start from anonymous information, which could easily be put out there by the party alleging corruption. All this makes international press articles very doubtful evidence. They are unlikely to be accepted by a tribunal as direct evidence to establish a fact.[2724] Press articles should rather be acknowledged as a starting point for a suspicion of corruption and for further investigations.[2725] Where other evidence exists, they might have probative value as additional evidence with corroborative weight, at most.[2726]

4. Domestic Investigations by police or special anti-corruption authorities

In many occasions national corruption authorities will have started or even completed investigations before or in parallel to the arbitration proceedings. In such cases the question arises whether the tribunal may rely on the findings of such authorities.

In *EDF v Romania*, for instance, the Romanian National Anti-Corruption Directorate investigated the corruption allegations at issue and concluded that they were without merits. In addition, the Bucharest Court of Appeals held on 27 September 2007 not to prosecute the two allegedly corrupt public officials, which was a final and irrevocable decision.[2727] Should this decision be used as evidence that there was no corruption?

In *TSA v Argentina*, the host State also based part of its defence on allegations of corruption.[2728] The tribunal emphasised that the investigations of corruption by the local authorities were still ongoing and that corruption could not be established on the basis of the available materials.[2729] It appears as if the tribunal would have relied on the outcome of such investigations, or at least it would have taken the findings into consideration.

[2724] See *Military and Paramilitary Activities (Nicaragua v United States)*, Merits, 40, para 62 ("[…] *the Court has been careful to treat them with great caution ; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, Le., as illustrative material additional to other sources of evidence*."

[2725] Note that the same applies to the different corruption indices provided by international organisations and NGOs such as Transparency International. The fact that a country is ranked low in such an index cannot by itself be evidence for corruption of a transaction performed in that country. Such negative performance of a country in a corruption index can merely add to the suspicion of the tribunal and lead to more investigations.

[2726] *Military and Paramilitary Activities (Nicaragua v United States)*, Merits, 40, para 62. See also Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (London: British Institute of International and Comparative Law, 2009), 276.

[2727] *EDF v Romania*, Procedural Order No. 2, para 14.

[2728] *TSA v Argentina*, Award, para 174-176.

[2729] The tribunal had found that the case had to be dismissed on other grounds, for which reason it refrained from making a decision with regard to the corruption issue. It merely stated that it would have joined the question to the merits since the domestic investigations and proceedings were still in process, see *TSA v Argentina*, Award, para 174-176.

In *Niko v Bangladesh*, the tribunal pointed to the fact that the alleged acts of corruption were committed in territory of the host State for which reason its authorities "*were best placed to investigate and collect proof of corruption relevant for the present case*".[2730] Relying on the lack of evidence found by the anti-corruption authority and the want of any conviction, the tribunal concluded that it could not establish corruption.[2731] Similarly, the tribunal in *Wena v Egypt* noted that while Egypt based its corruption defence on a consultancy agreement between the investor and the CEO of the contracting State agency, it had failed to prosecute the public official despite its knowledge of such agreement.[2732] While naming different possible grounds for such behaviour, the tribunal also mentioned that one reason might have been that there was simply no corruption.[2733] Thus, the tribunal seems to have relied on the non-production of evidence by domestic anti-corruption authorities at least to some extent.

Recently, the tribunal in *Flughafen Zürich v Venezuela* took a similar approach by stating that an important element that tribunals would take into account when determining the existence of corruption is the findings of criminal investigations and proceedings.[2734] Reviewing such domestic proceedings, it found it conspicuous that despite the issuance of an indictment by the public prosecutor[2735] there existed no evidence that the competent criminal court ever adopted any measures against the investor.[2736] Consequently, when finding that there was not sufficient evidence to prove corruption, the tribunal also based its decision on the fact that the national courts with their superior investigative powers refrained from pursuing such allegations.[2737] It is noteworthy that in all three cases the corruption allegations were raised by the host State.

National authorities have a wider range of powers to investigate illicit behaviour and to secure evidence. Thus, local criminal investigations might shed light on a situation that is obscure to the tribunal.[2738] Despite such investigative power, it must be kept in mind that one reason for choosing arbitration over the judicial branch of the host State might be the independence and impartiality of the tribunal. The national agencies in charge of the investigation might, in some instances, be influenced by the host State's Government. At least the necessary independence

[2730] *Niko v Bangladesh*, Decision on Jurisdiction, para 425.
[2731] *Niko v Bangladesh*, Decision on Jurisdiction, para 428.
[2732] *Wena v Egypt*, Award, para 116.
[2733] *Wena v Egypt*, Award, para 116.
[2734] *Flughafen Zürich v Argentina*, Award, para 143.
[2735] Note that the tribunal also emphasised that the public prosecutor issuing the indictment was under the control of Venezuela and could not be seen as an independent entity to administer justice, *Flughafen Zürich v Argentina*, Award, para 150.
[2736] *Flughafen Zürich v Argentina*, Award, paras 148-155.
[2737] *Flughafen Zürich v Argentina*, Award, para 154.
[2738] See also Rose, "Questioning the Role of International Arbitration in the Fight against Corruption," 220.

might often not be guaranteed.[2739] In this context it might be relevant whether the findings of the anti-corruption agencies support the case of the investor or the host State.

Hence, while tribunals are not bound by the conclusions of domestic criminal investigations, they must acknowledge and exercise their freedom to determine the probative value of the relevant findings of criminal investigations in each particular case.[2740] In fact, the tribunal must make sure that it is the tribunal and not the host State's authorities that makes the final findings about the allegations of corruption in the arbitration proceedings.[2741]

5. Findings of other proceedings

Parties might seek to introduce findings of corruption made in a different proceeding as evidence for the present dispute. In such case, the tribunal needs to evaluate external findings with particular care. The circumstances of the referred proceeding might be slightly different than the ones before the tribunal. Distinctions, no matter how little, might be crucial for the inference that might be drawn from the evidence. In addition, the tribunal is the judge of the probative value of evidence, this may not only be understood as a freedom of the tribunal but as a duty, which it cannot discard and leave to another authority. As mentioned above, the tribunal is not bound by findings of courts or other tribunals. Thus, the tribunal may look at the evidence provided in different proceedings, but it must analyse, evaluate and weigh it itself.

In *Rumeli and Telsim v Kazakhstan*, the host State presented a judgment of the US District Court in *Motorola v Uzan* to prove fraudulent behaviour of the Uzan family, the original owners of the investment.[2742] The tribunal assessed the particular findings of the court judgment and agreed that it found that Motorola was fraudulently induced to make loans to one of the claimants.[2743] At the same time the tribunal acknowledged that such illegal conduct – crucial for the litigation between Motorola and the Uzan family – was not the subject matter of the dispute before the arbitral tribunal. The question at issue was rather whether the investment itself was induced illegally. Thus, the tribunal concluded that the judgment of the court "*does not bring any evidence that the two Motorola loans*

[2739] The investor in *TSA v Argentina* explicitly stated that "[t]*here is also a regrettable lack of independence of the Argentine judicial branch"; TSA v Argentina*, Award, para 171. The tribunal refrained from taking a stand on this allegation and merely found that there was not enough evidence to prove corruption, see *TSA v Argentina*, paras 174-176.
[2740] See also Joe Tirado, Matthew Page, and Daniel Meagher, "Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship," *ICSID Review - Foreign Investment Law Journal* 29, no. 2 (2014): 513. For an overview of the potential interaction between anti-corruption investigations by government agencies and investment arbitration proceedings see Ibid., 500–512.
[2741] *TSA v Argentina*, Award, para 169. This notion was also contended by the investor, however not addressed by the tribunal.
[2742] *Rumeli v Kazakhstan*, Award, para 320.
[2743] *Rumeli v Kazakhstan*, Award, para 320.

made in relation to KaR-Tel were used improperly or for illegal purposes".[2744] In addition, Kazakhstan relied on the judgment of the Almaty City Court in *Telecom Invest LLP v Rumeli*, which found that Telsim had overcharged KaR-Tel for cellular equipment. Again, the tribunal evaluated the particular decision and found that even if an overcharge was proven, it could not be concluded that an actual fraud was committed with regard to the specific transaction before the arbitral tribunal.[2745]

Tribunals have also clarified that convictions of criminal offences in other contexts are no proof for criminal or illegal activity in the specific case before the tribunal.[2746] In the words of the tribunal in *Methanex v United States*

> "The Tribunal has no legal basis for concluding that one unlawful activity of a corporation which leads to a criminal conviction of some of its officers transforms that entity into a criminal organisation for all purposes – either tainting *per se* all other actions by any division, subsidiary or other vehicle, no matter how separate or remote its activities from those upon which the conviction was based; or creating a presumption of unlawful behaviour in all other areas and thereby shifting the burden of proof."[2747]

II. Admission of Evidence

The illegality surrounding any corrupt practice and the inherent effort by the involved parties to avoid any signs of illegal behaviour often leads to extraordinary means to obtain evidence. How to prove the extortion of a bribe when no public official would approve taking pictures, making recordings, or giving written confirmation of the illegal solicitation or acceptance of a bribe? Likewise, what official statement would prove the actual payment of a bribe? Against this background, in most cases the only manner to obtain evidence is by unconventional and unusual means under exceptional circumstances such as collecting evidence without the knowledge or against the will of the other party. The affected party in turn will most certainly deny its approval and challenge the admission of such evidence.[2748]

The tribunal's decision whether to admit unlawfully obtained evidence might be crucial for the outcome of the corruption case, since due to the lack of lawful

---

[2744] *Rumeli v Kazakhstan*, Award, para 320.
[2745] *Rumeli v Kazakhstan*, Award, para 321. ("[…] *the record does not contain conclusive evidence that Claimants defrauded KaR-Tel by causing it to enter into transactions with Telsim at excessive prices.*")
[2746] See e.g. *Methanex v United States*, Award, Part III - Chapter B, para 15; *ECE v Czech Republic*, Award, para 4.885.
[2747] *Methanex v United States*, Award, Part III - Chapter B, para 15.
[2748] Note that the party raising the objection of illegality of the piece of evidence bears the burden of proving that it was obtained unlawfully. See Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 208. ("[…] *the party alleging the illegality should naturally first prove its claim.*")

evidence, the only basis to prove bribery or a request for bribes will be such unlawful evidence. The issue whether such evidence is admissible or not remains unsolved. Article 34(1) of the ICSID Arbitration Rules states that the tribunal is "*judge of the admissibility of any evidence adduced and of its probative value*".[2749] This confirms the general principle in international arbitration that the tribunal has the authority to determine the admissibility and enjoys full discretion in assessing the probative value of the presented evidence.[2750]

EDF v Romania is a vivid example of the challenging questions regarding the admissibility of illegally obtained evidence. Less than two weeks before the scheduled hearing, the claimant filed for an "Emergency Submission of New Evidence", in order to present as evidence an audiotape received that very same day from a journalist of the Financial Times, allegedly revealing a conversation between Mrs Liana Iacob, the allegedly corrupt public official and Mr Marco Katz, the representative of the investor.[2751] The hearing was postponed in order to give both sides sufficient time to evaluate the new evidence.

The tape was the main and crucial evidence of the investor to show the request of a bribe by a public official. Finally, the tribunal rendered the tape inadmissible, which made it impossible for the investor to prove its case. Although the tribunal stressed that generally international tribunals take a liberal approach to the admissibility of evidence, it found its own discretion limited by the international principles of good faith and procedural fairness.[2752] The tribunal's analysis shows the typical issues arising from presented evidence in corruption cases and will be scrutinised below. The decision on inadmissibility of the audiotape was based on three grounds: (i) the unlawful creation of the tape (see below at **1.**), (ii) the uncertainty of authenticity (see below at **2**.), and (iii) the late production of the evidence (see below at **3.**).

1. Unlawful creation of the evidence

The tribunal in *EDF v Romania* based its decision of inadmissibility of the audiotape on the unlawful creation of the evidence.[2753] Since the audiotape was secretly recorded in Ms Iacob's home and without her consent, the tribunal found it

[2749] Rule 34(1) ICSID Arbitration Rules:
"*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*"
See also Art. 25(6) UNCITRAL Arbitration Rules:
"*The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.*"
[2750] See e.g. *Tradex v Albania*, Award, paras 77, 83, 84; *Middle East Cement v Egypt*, Award, para 84; *Soufraki v UAE*, Award, para 61; *Saipem v Bangladesh*, Award, para 112; *Rumeli v Kazakhstan*, Annulment Decision, paras 95, 104.
[2751] *EDF v Romania*, Procedural Order No. 2, para 15. Along with the audiotape, claimant presented a transcript in Romanian and English.
[2752] *EDF v Romania*, Procedural Order No. 3, para 47.
[2753] *EDF v Romania*, Procedural Order No. 3, paras 36-38.

to be obtained unlawfully due to the breach of privacy.[2754] In the tribunal's view, it would be contrary to the principles of good faith and fair dealing if such evidence were admitted.[2755]

Both parties referred to the *Corfu Channel Case* of the ICJ, which was labelled by the tribunal as the leading case with regard to the admissibility (or inadmissibility) of unlawfully obtained evidence and is frequently cited by commentators. In the *Corfu Channel Case*, the ICJ had to decide over the State responsibility of Albania for the destruction of two British ships by mines in Albanian territorial waters. In order to obtain supporting evidence to prove its claim, the United Kingdom swept those waters against Albania's expressed will. The ICJ found therein a violation of Albania's sovereignty under international law, without basing its decision on unlawfully obtained evidence,[2756] which the Court did however not render inadmissible.[2757] Important to note is that Albania had never raised an objection in order to exclude the evidence, while Romania in *EDF v Romania* strongly requested to render the audiotape inadmissible. Due to this different situation, the tribunal decided not to rely on the *Corfu Channel Case*.[2758]

In scholarship it remains unclear what conclusion shall be drawn from the *Corfu Channel Case*, since commentators have interpreted it inconsistently. Sandifer refers to this case to argue that the ICJ held the evidence obtained in violation of international law inadmissible, since it "*declined to consider* [the] *evidence*".[2759] It is true that the Court did not rely on the unlawful evidence.[2760] However, the ICJ did not explicitly exclude the unlawfully obtained evidence and had not even

[2754] *EDF v Romania*, Procedural Order No. 3, para 38.
[2755] *EDF v Romania*, Procedural Order No. 3, para 38. With regard to the general duty of good faith the tribunal cites the *Methanex* tribunal, which held that "*it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of a general duty of good faith imposed by the UNCITRAL Rules and, indeed, incumbent on all who participate in international arbitration, without which it cannot operate*"; *Methanex v United States*, Award, Part II, Chapter I, para 58.
[2756] See *Corfu Channel Case*, Merits, 32-34.
[2757] Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 204; Riddell and Plant, *Evidence before the International Court of Justice*, 157.
[2758] *EDF v Romania*, Procedural Order No. 3, para 36.
[2759] Sandifer, *Evidence before International Tribunals*, 139. Note that Riddell and Plant argue that Reisman and Freedman found in *Corfu Channel Case* the confirmation that illegally obtained evidence should be inadmissible, Riddell and Plant, *Evidence before the International Court of Justice*, 156. In fact, Reisman and Freedman criticise the decision of the ICJ in the *Corfu Channel Case* for admitting the evidence obtained under violation of international law; W. Michael Reisman and Eric E. Freedman, "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication," *The American Journal of International Law* 76, no. 4 (1982): 748. ("[…] *the only practical interpretation of this aspect of the Corfu Channel judgment would seem to be that certain unlawful collections of evidence will be declared violations of international law, yet no sanction will be imposed on the gatherer, nor will the illegally gained evidence be deemed inadmissible*.")
[2760] Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 204; Riddell and Plant, *Evidence before the International Court of Justice*, 157.

discussed the issue of admissibility at all.[2761] Thus, a general rule that unlawfully obtained evidence is inadmissible cannot be inferred from this case.

Reisman and Freedman make the 'practical interpretation' of the *Corfu Channel Case* that unlawfully obtained evidence will most likely not be declared inadmissible.[2762] Highet concludes that "*in the future* […] *the Court will consider any such evidence on its own footing and weigh it accordingly, but will not exclude it from consideration on the ground of alleged 'illegality' alone*".[2763] While this approach might be followed by the ICJ in the future, due to the lack of objection to exclude the evidence in violation of international law and due to the lack of discussion of the issue, a general rule establishing admissibility for unlawfully obtained evidence cannot be drawn from the *Corfu Channel Case* either.[2764] Thus, Kazazi's conclusion based on the *Corfu Channel Case* is that international tribunals will most likely not exclude illegally obtained evidence in the "*absence of an objection to the admissibility*".[2765] From this it follows that the often cited *Corfu Channel Case* can in fact not be used as a reference to argue for the admissibility

---

[2761] Riddell and Plant, *Evidence before the International Court of Justice*, 156; Amerasinghe, *Evidence in International Litigation*, 177; Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 204; Hugh Thirlway, "Dilemma or Chimera? - Admissibility of Illegally Obtained Evidence in International Adjudication," *The American Journal of International Law* 78, no. 3 (1984): 632, 635.

[2762] Reisman and Freedman, "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication," 748.

[2763] Keith Highet, "Evidence, the Court, and the Nicaragua Case," *The American Journal of International Law* 81, no. 1 (1987): 46.

[2764] On the absence of Albania's objection see also Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 206; Riddell and Plant, *Evidence before the International Court of Justice*, 157; Thirlway, "Dilemma or Chimera? - Admissibility of Illegally Obtained Evidence in International Adjudication," 632.

[2765] Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 206. Note that Kazazi also mentions the "*absence of a specific reference to the power of international tribunals*" to render illegally obtained evidence inadmissible as a condition for his conclusion of the reluctance of international tribunals to refuse such evidence. An example for an explicit reference to inadmissibility is contained in Rule 95 of the Rules of Procedure and Evidence of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991 (U.N. Document IT/32/Rev 45, 8 December 2010):
"*Rule 95 Exclusion of Certain Evidence*
No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."
Note that the original text explicitly only referred to violations of internationally protected human rights (U.N. Document IT/32, 14 March 1994). The text changed in 1995 to the present text, but the title still referred to "Evidence Obtained by Means Contrary to Internationally Protected Human Rights" (U.N. Document IT/32/Rev 3, 30 January 1995). In 1997, the title was finally changed into "Exclusion of Certain Evidence" deleting any reference to the more limited term of "Internationally Protected Human Rights (U.N. Document IT/32/Rev 12, 12 November 1997). This evolution of Rule 95 shows the intention to broaden the scope of declaring evidence inadmissible, moving away from a strict rule encompassing only human rights violations such as torture, to a more flexible provision expanding the discretion of the tribunal. However, from this specific provision no general conclusion can be drawn with regard to investment treaty arbitral tribunals, which have no explicit reference concerning the inadmissibility of illegally obtained evidence at hand.

or inadmissibility of unlawfully obtained evidence.[2766] The only conclusion that can be made is that there is no strict rule in international law governing the admissibility of unlawfully gathered evidence.[2767]

Another example where an investment tribunal dealt with the admissibility of unlawfully created evidence is the case of *Methanex v USA*. In its distress to find any piece of evidence to support its claim, the claimant had multiple times entered an office building without permission and searched documents in waste containers.[2768] The tribunal found the evidence obtained through acts of trespass to be unlawful.[2769] Referring to the principles of equality of the parties and procedural fairness it held that the illegally obtained documents violated the general duty of good faith and rendered the evidence not admissible

> "[…] the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules. As a general principle, therefore, just as it would be wrong for the USA ex hypothesi to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully."[2770]

In conclusion, the tribunal in *EDF v Romania* found the recording without consent inadmissible due to breach of privacy, while the tribunal in *Methanex v USA* refrained from admitting evidence obtained by trespassing. For both tribunals the illicit conduct involved in order to create or reveal the evidence was a violation of the principles of good faith and procedural fairness. These findings are in line with Article 9(2)(g) of the IBA Rules, which states that evidence may be excluded in the presence of "*considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*".[2771] However, the question arises

[2766] See also Amerasinghe, *Evidence in International Litigation*, 178; Thirlway, "Dilemma or Chimera? - Admissibility of Illegally Obtained Evidence in International Adjudication," 635. However, Thirlway makes it clear that in his opinion it is not desirable that international tribunals have the power of rendering evidence gathered by unlawful means inadmissible; Ibid., 639.
[2767] Riddell and Plant, *Evidence before the International Court of Justice*, 158. ("*In conclusion, it would appear that the ICJ has no rule excluding evidence obtained in violation of international law*."). See also Waincymer, *Procedure and Evidence in International Arbitration*, 797.
[2768] Note that sometimes the doors to the waste-area were closed, sometimes just ajar. However, the claimant failed to distinguish between the evidence gathered in the two different situations.
[2769] *Methanex v United States*, Award, Part II – Chapter I, 54
[2770] *Methanex v United States*, Award, Part II – Chapter I, para 54 (emphasis added). The tribunal emphasised that the claimant had failed to provide evidence that the documents were secured lawfully. However, the claimant refrained from calling decisive witnesses, see paras 55, 58.
[2771] This provision was also referred to by the *EDF v Romania* tribunal; *EDF v Romania*, Procedural Order No. 3, para 47.

whether such finding is absolute and whether it takes the characteristics of a corrupt action into account.

The lack of a general rule under international law provides a wide scope of possibilities for arbitral tribunals to deal with unlawfully obtained evidence in corruption cases. Each tribunal will have to decide about the admissibility of unlawfully obtained evidence according to the specific circumstances[2772] and the rights at stake. The difference of international arbitration to municipal litigation is the flexibility of establishing appropriate means and tailor-made approaches to the specific issues arising out of the particular circumstances of a case.[2773]

No person engaging in a corrupt act will approve the taking of evidence; likewise no party alleged with corruption will consent to the admission of incriminating evidence. To rely on the consent of the recorded person, as demanded by the tribunal in *EDF v Romania*, leads to an absurd result. The party accused of corrupt practices would have to give its consent to allow the recording of its unlawful act or to consent to the admission of the evidence that proves its illegal practices. This requirement can only be complied with in theory. It does not reflect the reality prevailing in corruption cases. The only pieces of evidence, which would most likely remain available, are the witness statements of the persons who attended the alleged performance of the corrupt action. However, as seen in *EDF v Romania* such witness statements are hardly helpful due to its little probative value.

Thus, the test of admissibility of evidence in corruption cases should not be a static test but more a balanced one. All relevant factors have to be taken into consideration and weighed. Since every case will be under different and very specific circumstances, a roadmap to the evaluation of the factors cannot exist beforehand. This being said, the starting point is the flexibility and freedom of an arbitral tribunal to admit evidence.[2774] Surely, the principles applicable in international arbitration such as good faith, procedural fairness, and the notion that no one should take advantage of its own wrong doing[2775] will play an important role in the analysis.[2776] However, the severity of the violation of international law, the values and issues at stake as well as the behaviour of both parties in meeting their obligation to contribute evidence must be taken into consideration. The tribunal must use the flexibility granted to it to admit unlawfully obtained evidence

[2772] The *EDF v Romania* tribunal calls for an evaluation "*in light of the particular circumstances of the case*"; *EDF v Romania*, Procedural Order No. 3, para 38.
[2773] See Böckstiegel, "Presenting, Taking and Evaluating Evidence in International Arbitration," 82.
[2774] The tribunal in *EDF v Romania* acknowledged the liberal approach taken by international tribunals to the admissibility of evidence. *EDF v Romania*, Procedural Order No. 3, para 47.
[2775] See Amerasinghe, *Evidence in International Litigation*, 178 ("ex injuria non oritus ius"); Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 206 ("nullus commodum capers de sua injuria propria").
[2776] Note that the rules of fairness are the limit to the flexibility principle. See e.g. Edoardo F. Ricci, "Evidence in International Arbitration: A Syntetic Glimpse," in *Liber Amicorum Bernardo Cremades* (Madrid: La Ley, 2010), 1029 et seq.

in such cases where it would lead to injustice if not considering such evidence.[2777] In other words, the principle of fairness and equality of the parties goes in both directions. Holding a piece of evidence inadmissible might affect the fairness in a way that the claimant is deprived from presenting its case or the host State of raising its affirmative defence.[2778]

Applying such balanced approach to the facts of the *EDF v Romania* case, it has to be taken into account that the subject matter of the recorded conversation was the prolongation of the duty-free concessions and thus had an official character. In addition, as described in Chapter One, bribery of public officials is directly linked to a detrimental effect on the population of the country. For this reason there is a high public interest in finding out the circumstances surrounding the concession negotiations. A conversation with an official core does not deserve as much protection as a private conversation. The indefeasible privacy – in *strictu sensu* – of the former minister was not affected.

2. Lack of authenticity of the evidence

The tribunal in *EDF v Romania* also found the doubt about the authenticity of the piece of evidence to be a ground for inadmissibility.[2779] In the words of the tribunal "[a]*n obvious condition for the admissibility of evidence is its reliability and authenticity*".[2780] In order to prove the authenticity of the recording, the tribunal demanded the original tape together with the original recorder, which the claimant was unable to retrieve. In fact the provided audiotape was only a copy. In addition, the tribunal stressed that the recorded conversation was not complete since the beginning and the end had been removed. Interesting to note is the efficiency motive of the tribunal, which emphasised that to admit such not authenticated evidence "*would be a waste of time and money*".[2781] It must be acknowledged that the claimant failed to satisfy the burden of proving the authenticity of the recorded conversation. However, considering the difficulty of such task, the following question appears at least justifiable: Should the threshold of authenticity be that high?

In order to satisfy the authenticity requirements of the tribunal, the claimant would have had to provide the original tape and the original recorder of the conversation that took place approximately 7 years in the past. In addition, the recording would have had to include the whole 90-minute conversation. The decisive importance of

[2777] See also Amerasinghe, *Evidence in International Litigation*, 179. Amerasinghe stated that even if there were a presumption not to admit unlawfully obtained evidence due to the principle that no one should be able to have an advantage from its own wrongdoing, the arbitrator must be able to admit evidence to avoid injustice that would happen when the evidence is held inadmissible.
[2778] The argument that the claimant would be deprived of presenting its case was also pled by the investor, but not dealt with by the tribunal. See claimant's position in *EDF v Romania*, Procedural Order No. 3, para 17.
[2779] *EDF v Romania*, Procedural Order No. 3, paras 29-35.
[2780] *EDF v Romania*, Procedural Order No. 3, para 35.
[2781] *EDF v Romania*, Procedural Order No. 3, para 35.

the missing information is doubtful. The recorded part of the conversation gave sufficient hints about the solicitation of bribes. It is not clear why the rest of the conversation would be essential in order to find its authenticity. In addition, there was no evidence proving the manipulation of the tape, while in turn the claimant could also not prove 100 per cent that there was *no* manipulation – a typical situation of a draw where the party bearing the burden of proof finally loses.

For purposes of admissibility, it should be taken into account that the determination of the probative value of the evidence lies fully in the hands of the tribunal. It is not bound by binding local procedure and evaluation rules, but has the authority to take all the relevant circumstances into consideration. Against this background, the tribunal is urged to evaluate the probative value of the even doubtful evidence. In case it finds such evidence not convincing or satisfactory it might just be one little piece of the puzzle leading to the final conclusion. Applying such notion to the facts in *EDF v Romania*, the tribunal might have admitted the audiotape – despite the fact that its authenticity could not be fully proven – since it is free to evaluate such evidence as not fully persuasive.

There should not be an 'all or nothing', 'black or white' decision when it comes to admissibility of evidence. Due to the often-mentioned exceptional circumstances of corrupt behaviour many of the available hints will be in a 'grey' area. The arbitral tribunals shall adapt to such vague territory and acknowledge that in most circumstances corrupt actions may only be tracked down with circumstantial evidence that draws merely a sketch of the big picture. In *EDF v Romania* the origin of the tape was unknown since it was leaked by a reporter from the *Financial Times*. Such scenario is typical for corruption cases. The claimants came into the possession of an interesting piece of evidence with no further information on the details of its creation.

3. Responsibility for late production of the evidence

Another ground for excluding evidence is late production. Where clear and direct evidence is not available, new pieces of evidence often appear in the course of the proceedings. The question then arises whether the tribunal should admit evidence presented at an advanced stage of the proceedings. In *EDF v Romania*, for instance, the audiotape was only presented two weeks before the original date of the oral hearing. The tribunal believed that the audiotape had been in the possession of the claimant before, which had "*delayed its production to gain an unfair advantage*".[2782] The origin of the audiotape could not be traced back. The witness denied having possessed the tape beforehand, but also asserted not having created the recording, a statement that was unsound with the expert opinions favouring the version that the recordings were probably made with a body-worn microphone on the person that was apparently the claimant's witness.[2783] This

[2782] *EDF v Romania*, Procedural Order No. 3, para 40.
[2783] *EDF v Romania*, Procedural Order No. 3, paras 40-43.

discrepancy along with the relationship between the claimant's witness and the claimant led the tribunal to construe an unfair behaviour and made it believe that the claimant knew about the recordings all along. Thus, the tribunal found the late production of the tape to amount to a violation of procedural fairness.[2784] In doing so, the tribunal refrained from determining what kind of unfair advantage could the claimant have sought with the late production. Moreover, it should be noted that the unfair disadvantage of the opposing party suffered by such late production might be overcome by granting sufficient time for both parties to respond to the newly introduced evidence – which the tribunal in *EDF v Romania* certainly did by postponing the hearing.

III. Direct and circumstantial evidence

Evidence can be divided in direct and circumstantial evidence. The evidence is direct when it is capable of proving an alleged fact in itself. It is circumstantial when it merely proves circumstances surrounding the alleged fact, but not the fact itself. In order to find the disputed fact established, additional reasoning by the tribunal is necessary.[2785]

While the general approaches taken in arbitral practice will provide guidance for the following analysis, particular emphasis is given to the approach taken by the tribunal in *Metal Tech v Uzbekistan* to establish corruption.

1. Circumstantial evidence in general

Due to the predominant scarcity of direct evidence of corrupt practices, the only available evidence will often be of a circumstantial nature. A leading case for the use of such circumstantial evidence is the *Corfu Channel Case*. The ICJ dealt with the situation where it was impossible for the alleging party to have access to evidence supporting its claim of State responsibility since such direct evidence was located in the domain of the respondent. Although the difficulty to gather direct evidence arose from the very State-specific issue of exclusive territorial control, the reasoning of the Court shows the willingness to find a solution to the general problem of absence of direct evidence by focusing on circumstantial evidence. In the words of the ICJ

[2784] *EDF v Romania*, Procedural Order No. 3, para 48.

[2785] In the words of Judge Badawi Pasha:
"*In a system of evidence which is based upon free appraisal by the judge, as is the case* […] *in international law, circumstantial evidence means facts which, while not supplying immediate proof of the charge, yet make the charge problable* [sic] *with the assistance of reasoning. The elements of such circumstantial evidence must be interpreted and associated in order to draw the relevant inferences and reconstruct the data on which the hypothesis of responsibility is founded.*" *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits*, Judgment of 9 April 1949, Dissenting Opinion Judge Badawi Pasha, I.C.J. Reports, 1949, 58 (hereinafter: "*Corfu Channel Case*, Merits, Dissenting Opinion Judge Badawi Pasha"), 59.

> "[b]y reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[2786]

Confirming that the "*proof may be drawn from inferences of fact*" the Court also made clear that this was only the case where such inferences "*leave no room for reasonable doubt*".[2787] In a similar line of reasoning Judge Badawi Paha[2788] in his often overlooked dissenting opinion acknowledged the need to refer to circumstantial evidence, but also emphasises the caution a tribunal must have when interpreting such evidence. He stresses the risk of error resulting from the process of interpretation and identifies the danger to let the imagination of the trier of fact go too far

> "[i]n this process of interpretation and association, there is a risk of committing errors of appreciation, of letting the imagination fill in the gaps in the evidence, or of reasoning in a specious manner. This method of evidence, which seeks or pretends to arrive at certainty, most often attains only a high degree of probability. The fact remains that under some legislations, circumstantial evidence must be weighty, accurate and concordant. On the other hand, the most reliable doctrine takes the view that 'proof by circumstantial evidence is regarded as successfully established only when other solutions would imply circumstances wholly astonishing, unusual and contrary to the way of the world'. These rules must be a constant guide in weighing evidence."[2789]

Many investment tribunals have referred to the *Corfu Channel Case* and showed the willingness to consider circumstantial evidence. In *Rumeli v Kazakhstan*, the tribunal dealt with allegations of collusion on the side of the organs of Kazakhstan and emphasised that "*it is in the nature of such an allegation that direct evidence of a conspiracy is unlikely to be available*".[2790] Referring to the *Corfu Channel Case* and to Article 34(1) of the ICSID Rules the tribunal took circumstantial

---

[2786] *Corfu Channel Case*, Merits, 18. This case has been cited by many arbitral tribunals, see as example for many, *Rumeli v Kazakhstan*, Award, para 444; *Bayindir v Pakistan*, Award, paras 142 et seq.
[2787] *Corfu Channel Case*, Merits, 18.
[2788] Abdel Hamid Badawi Pasha was Egyptian ICJ judge from 1946 to 1965. From 1955 to 1958, he was Vice-President of the ICJ.
[2789] *Corfu Channel Case*, Merits, Dissenting Opinion Judge Badawi Pasha, 59-60.
[2790] *Rumeli v Kazakhstan*, Award, para 709. Note that the whole evaluation of the circumstantial evidence was challenged by Kazakhstan in an annulment proceeding. The *ad hoc* Committee upheld the findings of the tribunal, see *Kazakhstan v Rumeli*, Annulment, paras 94-99, 103-106.

evidence into account.[2791] Although indirect evidence was pointing at an improper collusion aimed at terminating the relevant contract, it rendered itself unable to determine "*with the necessary degree of conviction*" on such evidence that a wider conspiracy attributable to the host State existed.[2792] It emphasised that circumstantial evidence had to be considered with particular care and it had to lead "*clearly and convincingly to the inference that a conspiracy has occurred*".[2793] The tribunal in *Bayindir v Pakistan* also referred to the *Corfu Channel Case* and similarly to *Rumeli v Kazakhstan* took a cautious approach. The tribunal highlighted that it had to assess whether the circumstantial evidence produced was sufficient to exclude any reasonable doubt.[2794]

The tribunal in *Tokios Tokelės v Ukraine* held that since direct evidence was not available, it had to base its findings of the alleged arbitrary campaign against the investor on secondary and circumstantial evidence.[2795] In *Siag Vecchi v Egypt*, Professor Orrego Vicuña stated in his dissenting opinion that the difficult evidentiary evidence is best dealt with by "*inferring from a collection of concordant circumstantial evidence (faisceau d'indices) the facts at which the various indices are directed*".[2796] In *Europe Cement v Turkey*, the tribunal let the circumstantial evidence suffice to prove the fraudulent behaviour with regard to the ownership of shares.[2797] The tribunal refrained from stating any signs of cautious approach. However, since the evidence was 'overwhelming' and pointed 'strongly to the conclusion', such considerations were unnecessary.[2798] Many other investment tribunals have included circumstantial evidence in their analysis to prove a fact.[2799]

At the same time some investment tribunals expressly rejected to take circumstantial evidence into account. The tribunal in *Hamester v Ghana*, for instance, clarified that with regard to allegations of fraud the tribunal "*can only decide on substantiated fact, and cannot base itself on inferences*".[2800]

[2791] *Rumeli v Kazakhstan*, Award, paras 443, 444.
[2792] *Rumeli v Kazakhstan*, Award, para 715.
[2793] *Rumeli v Kazakhstan*, Award, para 709.
[2794] *Bayindir v Pakistan*, Award, para 142. See also para 143 ("[…] *the standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence*").
[2795] *Tokios Tokelės v Ukraine*, Award, para 14; also cited by *Alpha v Ukraine*, Award, para 373. See also *Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price, para 4.
[2796] *Siag & Vecchi v Egypt*, Award, Dissenting Opinion Orrego Vicuña, para 13. Note that Orrego Vicuña quoted Sayed, *Corruption in International Trade and Commercial Arbitration*, 93 et seq.
[2797] *Europe Cement v Turkey*, Award, para 167. The tribunal based its conclusion on many different little discrepancies in the documents, which together pointed at a fabrication of the evidence.
[2798] See *Europe Cement v Turkey*, Award, para 167.
[2799] Some tribunals found the provided circumstantial evidence sufficient to infer the alleged fact, see e.g. *Lemire v Ukraine*, Award, paras 370, 400.
[2800] *Hamester v Ghana*, Award, para 134. See also *Saba Fakes v Turkey*, Award, paras 130, 134 ("*no* […] *presumption* [of sham or fraudulent conveyance] *should be entertained without convincing evidence to the contrary*").

2. Circumstantial evidence for corruption in international commercial arbitration

In commercial arbitration, circumstantial evidence has often been subject to scrutiny of tribunals in connection with corruption allegations.[2801] The question of corruption usually arises with regard to the legality of the agency agreement as potential contract *of* corruption or the main agreement tainted by corruption. In most cases the focus of the tribunal was on the consultancy or agency fees. In this context commercial tribunals will take the concrete amount of the fees into account in order to assess whether they are proportional to the overall transaction and the services rendered.[2802] A disproportionally high commission will most likely be a 'red flag' for its illegitimacy.[2803] The tribunal will however take all circumstances of the case into consideration before concluding that a commission is suspiciously high.[2804] In fact, even commissions over 25 per cent have been considered sound after taking all circumstances into account.[2805]

Moreover, commercial tribunals have also found the refusal to provide information on a specific transaction and to produce corresponding evidence, e.g. bank records or details on group structure, to be circumstantial evidence for the illegitimacy of the payments.[2806] Where corruption is endemic in a certain region such circumstantial evidence may also add to the suspicion of the tribunal,[2807] while it is seems clear that such evidence cannot by itself establish corruption, but requires additional evidence.[2808]

[2801] For an overview of circumstantial evidence in international commercial arbitration see Scherer, "Circumstantial Evidence in Corruption Cases Before International Arbitration Tribunals"; Sayed, *Corruption in International Trade and Commercial Arbitration*, 89 et seq.
[2802] See ICC Case No. 1110.
[2803] Scherer, "Circumstantial Evidence in Corruption Cases Before International Arbitration Tribunals," 32.
[2804] Ibid., 32–33.
[2805] See ICC Case No. 6497; *Agent (North Africa) v Contractor (France)*, ICC Case No. 9333, ASA Bulletin, 2001, 757 (hereinafter: "ICC Case No. 9333).
[2806] See ICC Case No. 6497; ICC Case No. 3916.
[2807] ICC Case No. 3916. The tribunal accepted the fact that corruption was widespread in Iran as on piece of the circumstantial evidence of the alleged corrupt practice involving the relevant contract. Note that this was not the only circumstantial evidence relied upon. The tribunal in fact based its finding of corruption on many difference circumstantial pieces of evidence such as the rapidness with which the agent obtained the official order etc. Note however that the investment treaty tribunal in *Oostergetel v Slovak Republic* explicitly rejected that general reports about widespread corruption in a host State could amount to circumstantial evidence, *Oostergetel v Slovak Republic*, Award, para 303; see below at D.III.3.
[2808] Scherer, "Circumstantial Evidence in Corruption Cases Before International Arbitration Tribunals," 32.

3. Circumstantial evidence for corruption in investment treaty arbitration

Contrary to commercial arbitration, it seems that tribunals in investment treaty arbitration are to some extent less willing to base their findings of corruption on circumstantial evidence. To date, there has only been one positive finding of corruption based on such indirect evidence: *Metal Tech v Uzbekistan*. In *World Duty Free v Kenya*, the factual matter of bribery was clear through the investor's own statement, for which reason the tribunal had no necessity to rely on circumstantial evidence.

Most investment tribunals faced with allegations of corruption seem to have refrained from relying on circumstantial evidence. In *Metalclad v Mexico,* Mexico alleged that a former federal environmental officer received a commission for his role in arranging the sale of the Mexican company to Metalclad and that his wife received Metalclad stock to the value of approximately USD 150,000 and two payments of USD 10,000.[2809] While these payments seem to have been proven and an extensive discussion of corruption took place in public, the tribunal's decision lacks any reference to the corruption allegations.[2810] It can only be assumed that the tribunal was not convinced by the circumstantial evidence that a causal link existed between the payments and the abuse of governmental authority.[2811] In *Wena v Egypt*, the existence of a consultancy agreement between the investor and the CEO of the contracting public sector company was established.[2812] The circumstantial fact that the consultancy agreement was entered into at approximately the same time as the performance of the transaction[2813] was however not sufficient evidence for the tribunal to prove a causal link[2814] – despite its apparent corrupt connotation.

With regard to corruption allegations against the judiciary in the Slovak Republic, the tribunal in *Oostergetel v The Slovak Republic* emphasised that "*corruption can*

[2809] Note that these allegations are not mentioned in the award, see *Metalclad v Mexico,* Award. The Supreme Court of British Columbia reviewed the corruption allegations of Mexico in an setting aside proceeding brought by Mexico, *see Mexico v Metalclad*.
[2810] The Supreme Court of British Columbia noted that the tribunal had failed to directly deal with the allegations of corruption, *Mexico v Metalclad*, para 109.
[2811] Note that the Supreme Court of British Columbia found that Mexico failed to prove any corruption in which Metalclad participated. The Supreme Court concluded that the evidence did not establish that the transactions were bribes on behalf of Metalclad. The Metalclad stock and the two payments of USD 10,000 appeared to have been consideration for the transfer of shares in the Mexican company to Metalclad. In the Supreme Court's opinion although the initial acquisition of the shares in the Mexican company may have been improper, since the acquisition was prior to Metalclad's involvement no participation of Metalclad in a corrupt scheme could be established, see *Mexico v Metalclad*, paras 106-112.
[2812] *Wena v Egypt*, Award, para 112. The investor had made a payments of approx. GBP 52,000.
[2813] The first payment appears to have been made ten days after the execution of the first hotel lease and the last payment two days after the second hotel lease at issue, see *Wena v Egypt*, Award, para 113.
[2814] *Wena v Egypt*, Award, para 117.

also be proven by circumstantial evidence".[2815] The investor had, however, only submitted general reports about widespread corruption in the Slovak judicial system without providing any evidence of a concrete link to the claim.[2816] Against this background, the tribunal clarified that general reports about widespread corruption in the host State fail to constitute circumstantial evidence and only have policy implications.[2817] Similarly, the investor in *ECE v Czech Republic* relied on reports of NGOs to show a general presence of corruption within the Czech Republic. The tribunal clarified that it "[r]*eference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific event giving rise to the claim*".[2818]

In the seminal case of *Metal Tech v Uzbekistan*, the tribunal made the first positive finding of corruption in investment treaty arbitration – and in fact on the basis of circumstantial evidence. The tribunal thoroughly analysed all circumstances of the case and in particular of the payments made based on a consultancy agreement.[2819] While the tribunal was unable to base its conclusion on direct evidence of bribery (a bribe paid to a public official in exchange for an undue advantage in connection with the investment), it relied on various circumstantial facts which considered together would lead to the conclusion that the consultancy agreements were in fact a sham and the payments made to the consultants were part of a corrupt scheme in connection with the implementation of the investment.

The first circumstantial evidence considered by the tribunal was the high sums paid to the consultants, which amounted to approximately USD 3.5 million and thus nearly 20% of the entire costs of the project.[2820] The tribunal also emphasised that payments made to the consultants were higher than the initial (USD 500,000) and the subsequent capital contributions to the investment (USD 2 million).[2821] Moreover, the tribunal pointed at the disproportionate monthly consultancy fee (USD 5,000), which was 50 times higher than the general monthly salary of the consultant (USD 100).[2822]

Another circumstantial evidence was the investor's failure to provide evidence for the services performed by the consultants in exchange of the payments.[2823] In particular, the tribunal took note that the investor had refrained from providing a requested specification of rendered services in return for each payment made to the

[2815] *Oostergetel v Slovak Republic*, Award, para 303.
[2816] *Oostergetel v Slovak Republic*, Award, para 302.
[2817] *Oostergetel v Slovak Republic*, Award, para 303.
[2818] *ECE v Czech Republic*, Award, para 4.879.
[2819] *Metal-Tech v Uzbekistan*, Award, paras 194-227.
[2820] *Metal-Tech v Uzbekistan*, Award, paras 199-203.
[2821] *Metal-Tech v Uzbekistan*, Award, para 199.
[2822] *Metal-Tech v Uzbekistan*, Award, para 200.
[2823] *Metal-Tech v Uzbekistan*, Award, paras 204-207.

consultants.[2824] Moreover, the consultant agreements required no proof of services submitted by the recipients in exchange for the payments.[2825]

The tribunal also found suspicious that the consultants lacked the qualification and expertise required to perform the alleged services e.g. market investigations, assistance in technical and financial matters, consulting regarding legislation and statutory acts. The consultants in fact lacked any skills to render such services. One consultant was a senior official in the Presidential office with mere experience in human resources,[2826] while the other was a retired police investigator with no prior experience in the required field.[2827]

An additional circumstantial fact that formed the basis for the tribunal's decision was the lack of transparency of the payments made to companies in Switzerland, Tashkent and British Virgin Islands with no physical presence.[2828] Finally, the tribunal also relied on the circumstantial fact that the consultants "*had significant connections with Uzbek Government officials responsible for the approval, establishment and operation of the Claimant's investment*".[2829] As a senior official at the Presidential office with influence over the appointments of public positions, one of the consultants had close contact to Government officials.[2830] The other consultant was the brother of the Prime Minister, who was in charge of monitoring the investment.[2831]

Considering all pieces of circumstantial evidence together, the tribunal was convinced that the consultants did not perform legitimate services in exchange of the high sums and that such payments were rather aimed at obtaining a benefit in connection with the implementation of the investment. In this context the tribunal was satisfied that such payments were made to a public official and a family member of a public official, which under Uzbek anti-corruption law was sufficient to establish corruption.

In conclusion the tribunal in *Metal Tech v Uzbekistan* broke with the general reluctance of investment tribunals to base their findings of corruption on circumstantial evidence. Due to the lack of direct and clear evidence, tribunals should in fact engage in dealing with all types of available evidence. An investment tribunal should use its freedom to evaluate indirect and circumstantial evidence in a manner that nevertheless allows it to come to a conclusive decision on corruption.[2832]

[2824] *Metal-Tech v Uzbekistan*, Award, para 206.
[2825] *Metal-Tech v Uzbekistan*, Award, para 204.
[2826] *Metal-Tech v Uzbekistan*, Award, para 209.
[2827] *Metal-Tech v Uzbekistan*, Award, para 210.
[2828] *Metal-Tech v Uzbekistan*, Award, paras 219-223.
[2829] *Metal-Tech v Uzbekistan*, Award, para 225.
[2830] *Metal-Tech v Uzbekistan*, Award, para 225.
[2831] *Metal-Tech v Uzbekistan*, Award, para 226.
[2832] See also Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 704.

IV. Presumptions and inferences

A powerful instrument for arbitral tribunals to take advantage of their flexibility in dealing with particular evidentiary difficulties is the use of presumptions and inferences. A presumption is a conclusion based on the existence of a proven basic fact about the presumed existence of an unknown fact.[2833] Presumptions governed by law or legal principles are usually referred to as legal presumptions. An example for such presumption is the conclusion drawn by a tribunal of the existence of a fact when a *prima facie* case is not rebutted.[2834] Presumptions based on the specific circumstances of the case in order to find the existence of a fact on the basis of other proven facts are called inferences.[2835]

When seeking tailor-made solutions to the evidentiary problems of corruption where direct evidence is not available, a tribunal may find it useful to infer from both the conduct of a party at the proceedings and from indirect evidence.[2836] Note that inferences and circumstantial evidence are linked, since both are essential elements for the reasoning of the tribunal to find a fact where direct evidence is not available.

1. Conduct of the party at the arbitration proceedings

In scholarship it is established that a tribunal may take into consideration the cooperation of the parties in producing evidence when evaluating the evidence. Where countervailing evidence is easily available for a party but is withheld, an adverse inference may be drawn from such non-production.[2837] Thus, when a party

[2833] For an overview of presumption and inferences in international litigation and arbitration see Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 239; Amerasinghe, *Evidence in International Litigation*, 211.

[2834] Note that there exist rebuttable and irrebuttable presumptions.

[2835] They are also often called 'judicial presumptions'.

[2836] See *Rumeli v Kazakhstan*, Award, para 444. See also Brower, "Evidence Before International Tribunals: The Need for Some Standard Rules," 56 et seq. Note that Judge Brower suggests to establish standardised rules of evidence in international arbitration, however, he emphasises that the flexibility should persist.

[2837] Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 324 et seq. ("*Where the opposite party can easily produce countervailing evidence, its non-production may be taken into account in weighing the evidence before the Commission* […] *The situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation.*")
See also IBA Rules on the Taking of Evidence in International Arbitration, adopted on 29 May 2010, International Bar Association:
"*Article 9 Admissibility and Assessment of Evidence*
If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."

fails to comply with its obligations in the arbitration, the tribunal may take this refusal into account when weighing the evidence.[2838]

Investment tribunals have confirmed such notion. The tribunal in *Rumeli v Kazakhstan*, for instance, stated that tribunals enjoy the authority to draw adverse conclusions from the party's failure to comply with certain obligations such as producing requested documents and witnesses.[2839] In *Thunderbird v Mexico*, the tribunal dealt with insinuations made by Mexico that a certain success fee for two lawyers was part of a corrupt practice. In his dissenting opinion Professor Wälde criticised that the majority did not draw inferences from the failure of Mexico to provide the key witnesses and officials for its allegations of corruption.[2840] In *European Cement v Turkey*, the claimant failed to produce counter-evidence to the allegations of fraud made by the respondent with regard to the claimant's alleged purchase of shares. The claimant refrained from presenting the transfer agreements and the share certificates, although it had claimed its possession before.[2841] The tribunal inferred from such omission that the claimant did not own the documents or that such documents would not resist the examination by the tribunal once provided.[2842] From this it concluded that the transfer of shares was a scam and the claim was fraudulent.[2843] Similarly, in the Iran-United States Claims Tribunal case of *Levitt v Islamic Republic of Iran*, Judge Allison held "*that a party's deliberate non-compliance with Tribunal orders gives rise to an inference that the production of the requested documents would not have supported that party's arguments*".[2844] Such inference would strengthen the credibility of the claim presented by the other party, provided it is consistent with the remaining evidence.[2845]

Recently, the tribunal in *Metal Tech v Uzbekistan* confirmed such notion with regard to corruption. The tribunal had repeatedly requested from the investor to provide evidence in order to show the legitimacy of the services rendered in exchange of the payments made to consultants.[2846] On the basis of the investor's failure to comply with such request and due to the lack of substantiation provided

---

[2838] Cremades and Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud," 84; Reiner, "Burden and General Standards of Proof," 338; Waincymer, *Procedure and Evidence in International Arbitration*, 775, 794.
[2839] *Rumeli v Kazakhstan*, Award, para 444.
[2840] *International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde, para 113. Prof. Wälde referred to F. A. Mann who pointed out that the ICJ Chamber in the *ELSI* case failed to draw an inference from Italy's omission to call key witness. F. A. Mann, "Foreign Investment in the International Court of Justice: The ELSI Case," *The American Journal of International Law* 86, no. 1 (1992): 94, 99.
[2841] See *European Cement v Turkey*, Award, paras 150-164. The investor merely excused the non-production of the requested evidence as a 'circumstantial hindrance', but did refrain from providing a reasonable explanation.
[2842] *European Cement v Turkey*, Award, paras 152, 164, 166.
[2843] *European Cement v Turkey*, Award, para 163.
[2844] *William J. Levitt v Islamic Republic of Iran et al.*, Award No. 520-210-3, 29 August 1991, Concurring and Dissenting Opinion Judge Allison, 27 Iran-U.S. C.T.R. 145 ("hereinafter: "*Levitt v Iran*, Opinion Judge Allison"), 188.
[2845] *Levitt v Iran*, Opinion Judge Allison, 188.
[2846] *Metal-Tech v Uzbekistan*, Award, paras 244-266.

by the investor, the tribunal made the inference that there were no legitimate services in exchange of the payments.[2847]

Note that the adverse inference might apply to both parties. On the one hand, if the party alleging corruption fails to provide important evidence requested by the tribunal such as key witnesses or documentary evidence, then the conclusion itself suggests that the allegations are without substance. On the other hand, if a party alleging corruption provides sufficient indicia of such illegal action, but the other party fails to present counter-evidence to show that the transaction complied with good faith requirements and is unable to present a reasonable explanation for such omission, then corruption might be inferred; provided that such reasoning is consistent with the other facts and is logically connected to the probative value of the evidence withheld.[2848]

2. Indirect Evidence

As stated above, in the past investment treaty tribunals showed some reluctance to make inferences of corruption from indirect evidence.[2849] In *Niko v Bangladesh*, for instance, the tribunal acknowledged that corrupt acts are difficult to prove, but stated that it would "*only decide on substantial facts, and cannot base itself on inferences*".[2850] It is noteworthy that it refrained from providing any explanation for such notion and merely referred to the tribunal in *Hamester v Ghana*.[2851]

In *Methanex v United States*, the tribunal showed its willingness to draw certain conclusions from indirect evidence, but came to a negative finding of corruption. The investor alleged that the decision to ban a certain product in California was induced by corrupt practices.[2852] As the investor offered only some parts of the puzzle and not enough evidence to show the whole picture, the tribunal used the analogy of 'connecting the dots'. The tribunal went on to consider the 'dots' "*one by one and then together with certain events (essentially additional, noteworthy dots)*"[2853]. In doing so the tribunal clarified that "*inference is an appropriate mode of decision in circumstances in which firmer evidence is not available*".[2854] However, by considering many events and circumstances, the tribunal found

[2847] *Metal-Tech v Uzbekistan*, Award, para 265.
[2848] See Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 706; Rose, "Questioning the Role of International Arbitration in the Fight against Corruption," 214. See also W. Laurence Craig, William W. Park, and Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed. (New York: Oceana Publications, 2000), 451. (" [...] *logical nexus between the probable nature of the documents withheld and the inference derived therefrom.*").
[2849] See above at D.III.3.
[2850] *Niko v Bangladesh*, Decision on Jurisdiction, para 424.
[2851] *Niko v Bangladesh*, Decision on Jurisdiction, para 424, referring to *Hamester v Ghana*, Award, para 134.
[2852] Methanex alleged that the Governor of California Gray Davis had taken the decision of banning the product at issue (MTBE) based only on undue influence by large political contributions from Archer-Daniels-Midland (ADM), the principal U.S. producer of ethanol, which was a competitive product to MTBE.
[2853] *Methanex v United States*, Award, Part III – Chapter B, para 3.
[2854] *Methanex v United States*, Award, Part III – Chapter B, para 57.

alternative reasons for the official decision and held it was "*impossible plausibly to connect these dots in such a way as to*" prove undue influence and corruption.[2855]

The tribunal in *Metal Tech v Uzbekistan* is an example of how inferences may be drawn from indirect evidence.[2856] From the circumstantial evidence that (i) the payments were extraordinarily high,[2857] (ii) no proof of services in exchange for the high payments was required,[2858] (iii) the consultants had neither expertise nor skills to perform the alleged services,[2859] (iv) the payments were disguised in off-shore transactions, and (v) the recipients of the payments had close ties to governmental officials in charge of the monitoring of the investment,[2860] the tribunal inferred that payments were bribes paid in violation of Uzbek anti-corruption laws.[2861] Recently, the tribunal in *Flughafen Zürich v Venezuela* confirmed that it was willing to draw adverse inferences in cases of corruption.[2862]

V. Balanced approach to admissibility

Due to the scarcity of direct evidence in corruption cases, unconventional means will often be the only way to obtain evidence. When such measures breach international law such evidence is unlawfully created. The tribunal will have to evaluate whether unlawful evidence should be admitted. Such assessment is not a strict test, but will consist of balancing the principles of good faith and procedural fairness with specific circumstances of the case. The severity of the violation of international law or the particular values at stake will have to be taken into account. In general, the tribunal's discretion to judge over the probative value will be sufficient to find a tailor-made solution. A rigid exclusion of any unlawful evidence would overlook the specific difficulties of corruption cases.

Investment tribunals still show some reluctance to base a positive finding of corruption on circumstantial evidence. The threshold will surely be somewhat more demanding than when relying on direct evidence, however, in order to appropriately deal with the evidentiary peculiarities of corruption, the tribunals should engage in a more flexible approach to inferences from circumstantial evidence.[2863] Certainly, some circumstantial pieces of evidence such as allegations made in international press, findings of other tribunals and courts, or even evidence

[2855] *Methanex v United States*, Award, Part III – Chapter B, para 3.
[2856] See above at D.III.3.
[2857] *Metal-Tech v Uzbekistan*, Award, paras 199-201.
[2858] *Metal-Tech v Uzbekistan*, Award, paras 204-207
[2859] *Metal-Tech v Uzbekistan*, Award, paras 208-211.
[2860] *Metal-Tech v Uzbekistan*, Award, paras 225-226.
[2861] *Metal-Tech v Uzbekistan*, Award, paras 327, 352. Note that the tribunal made its findings on the basis of the Uzbek Criminal Code ("in accordance with host State law") rather than making a finding of corruption in general.
[2862] *Flughafen Zürich v Venezuela*, Award, para 154.
[2863] More and more commentators favour a flexible use of arbitral tribunals of inferences and circumstantial evidence when dealing with corruption, see e.g. Hwang and Lim, "Corruption in Arbitration - Law and Reality," 34 et seq.; Rose, "Questioning the Role of International Arbitration in the Fight against Corruption," 214 et seq.

provided in domestic investigations have to be treated with particular care, however, many unclear pieces and bits of the puzzle might end up creating a bigger picture.

E. Concluding Remarks

The clandestine circumstances of corrupt practices lead to the problem of obtaining evidence and the consequential difficulty to prove such allegations. While it will be difficult to provide evidence for the solicitation or the giving of a bribe, it is even more problematic to establish the causal link between a payment and the exercise of public authority. Generally, the party alleging corruption will bear the burden of proving such allegation.

At the jurisdictional stage, an investor alleging corruption as a breach of treaty will only have to present a *prima facie* case of corrupt practices. The tribunal will rely on those facts at the preliminary stage since the question whether corruption can in fact be established as a breach of treaty is a matter of the merits. However, the facts essential for establishing jurisdiction such as 'nationality' or 'investment' have to be proven. The respondent alleging corruption as objection to jurisdiction bears the burden of proof for each objection.

At the merits stage, the normal burden of proof applies. This being said, in order to address the intricacy of providing evidence in corruption cases, tribunals should not hide behind strict rules of burden of proof, but rather make use of their wide discretion and evaluate all available evidence. In some cases, it might be appropriate or even necessary for the tribunal to use its authority to request additional evidence and to try to shed more light on the obscure circumstances. In other cases, it might be appropriate to shift the burden of proof when the party alleging the corrupt practice has presented sufficient and reasonable indications leading to a *prima facie* case of corruption, provided that there are no specific due process implications on the other party. Whether such *prima facie* case has been established will depend on the circumstances of the case.

Moreover, in investment arbitration there are no compelling reasons for heightening the standard of proof for corruption. The subject matter of the proceedings is the alleged breach of treaty of the host State. Allegations of corruption have no more implications than allegations of violations of a protection standard or a defence to such claim. In order to preserve the equality of the parties and secure a full opportunity to present one's case, the tribunal may take all the relevant circumstances into account when weighing the evidence on a balance of probabilities.

The available evidence will most likely be unlawfully obtained and only of circumstantial value. The flexibility and wide discretion granted to the tribunal in evidentiary issues will allow it to admit such evidence and evaluate the probative value depending on the specific situation and circumstances. In doing so the

tribunal needs to take advantage of its wide discretion on evidentiary matters and consider drawing inferences and making presumptions.

CHAPTER NINE:
A BALANCED APPROACH TO CORRUPTION

The present study has highlighted the detrimental effects that corruption has on *inter alia* the economic development, trade and investment and presented a basis for the notion that corruption violates universal public policy and needs to be fought against on a global level. Applying these findings to investment treaty arbitration, we concluded that the investment treaty arbitrator has a duty to deal with the topic of corruption and explored the different stages in the arbitration proceedings where corruption may become relevant – either invoked as a sword or as a shield. In that context, we have analysed the available approaches to the issues arising from a doctrinal perspective.

This final chapter takes a step back to the original question of 'how to deal with corruption in investment treaty arbitration' by scrutinising the two available basic or general approaches towards corruption in investment treaty arbitration. At the same time, this chapter goes a step further by filling the – in this study favoured – balanced approach with life and providing guidance for future cases.

It must first be clarified that the starting point and the ultimate goal of both approaches are actually the same: corruption needs to be curbed. However, the implementation of this objective cannot be more opposite. The zero tolerance approach favoured by many commentators[2864] parts from the premise that any investor, who engaged in a corrupt practice with regard to the investment, forfeits its rights to seek investment protection under the relevant IIA, irrespective of (i) to what extent the host State was involved in the corrupt practices, (ii) whether the host State failed to comply with its international obligations to fight corruption or (iii) the specific circumstances of the illicit action.

The past chapters with their specific focuses on the relevant issues of corruption in investment treaty arbitration have shown *inter alia* the complexity of this topic as well as the difficulties encountered in so many different levels when dealing with this phenomenon. As identified in this study, corruption has a myriad of different forms and comes in many nuances, which require tailor-made solutions. In particular, the peculiar characteristic of corruption as a reciprocal or mutually committed act requires consideration. Thus, the apparent conclusion of this study is that there is no "*one-size-fits-all solution*"[2865] to corruption in general and to

[2864] Antonio Crivellaro, "The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption," *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 1–22; Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?"; Bottini, "Legality of Investments under ICSID Jurisprudence"; Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine"; Andrea J. Menaker, "The Determinative Impact of Fraud and Corruption on Investment Arbitrations," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 67–75; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration."

[2865] The expression is borrowed from Doak Bishop, "Toward a More Flexible Approach to the International Legal Consequences of Corruption," *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 63.

corruption in investment arbitration in particular. The most appropriate way to deal with corruption in investment treaty arbitration is, therefore, in a legally reasonable and sophisticated case-by-case approach rather than applying a strict and rigid rule disregarding the particular circumstances at issue.[2866] In fact, the group of commentators questioning the zero tolerance approach has grown in the past few years.[2867] However, so far commentators have focused on singular or at least limited issues and analysed this topic from specific perspectives.

This chapter takes a broader view in order to develop a holistic approach, taking into account the objectives of both the international anti-corruption regime and the international investment protection regime. While the zero tolerance approach leads to a direct conflict or a mutually exclusive relationship between both, the aim of this study is to reconcile the fight against corruption with the investment treaty regime – the means to do so being the balanced approach.

A. Potential approaches to corruption in investment treaty arbitration

There are mainly two strands of how to approach corruption in investment treaty arbitration: the zero tolerance approach and a more flexible or balanced approach.

[2866] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 84 et seq. See also Bishop, "Toward a More Flexible Approach to the International Legal Consequences of Corruption," 66.

[2867] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption"; Jason Noah Summerfield, "The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions," *Transnational Dispute Management (TDM)* 6, no. 1 (2009): 1–18; Bishop, "Toward a More Flexible Approach to the International Legal Consequences of Corruption"; Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?"; Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration"; Kulick, *Global Public Interest in International Investment Law*; Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread"; "International Investment Law and the Fight Against Corruption" (Vale Columbia Center on Sustainable International Investment Open Society Justice Initiative, 2009); Wilske and Obel, "The 'Corruption Objection' to Jurisdiction in Investment Arbitration - Does It Really Protect the Poor?"; Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption"; Tamar Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration," *Journal of International Arbitration* 30, no. 3 (2013): 267–81; Kulkarni, "Enforcing Anti-Corruption Measures Through International Investment Arbitration"; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration"; Llamzon, *Corruption in International Investment Arbitration*. Other commentators have to some extent questioned the results of the zero tolerance approach; see e.g. Haugeneder and Liebscher, "Corruption and Investment Arbitration: Substantive Standards and Proof," 562.

Commentators have also argued for a flexible approach with regard to the validity of corruption-tainted investment contracts between investors and host States; see Kevin Davis, "Civil Remedies for Corruption in Government Contracting: Zero Tolerance versus Proportional Liability" (Institute for International Law and Justice (IILJ) Working Paper 2009/4, 2009); Raeschke-Kessler and Gottwald, "Corruption"; Raeschke-Kessler and Gottwald, "Corruption in Foreign Investment - Contracts and Dispute Settlement between Investors, States, and Agents"; Hilmar Raeschke-Kessler and Dorothee Gottwald, "Korruption Und Internationales Vertragsrecht - Rechtliche Aspekte Der Korruption Im Bau- Und Infrastruktursektor Mit Auslandsbezug," in *Festschrift Für Hans-Jochem Lüer Zum 70. Geburtstag*, ed. Wilhelm Moll (C.H. Beck, 2008), 39–56; Raeschke-Kessler, "Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects."

While corruption had played a negligible role in investment treaty arbitration before the turn of the millennium, it quickly gained prominence in arbitral case law and scholarship ever since. The definite turning point was the seminal arbitral award in *World Duty Free v Kenya*, where the question of how to deal with corruption became the crucial point for the outcome of the case and the dismissal of the claim. Although the arbitration was contract based and therefore dealt with significantly different legal issues as encountered in treaty based investment arbitration, the general approach taken by the tribunal and its reasoning has been the basis or starting point of every analysis conducted on this topic so far and will most certainly continue to carry weight in the future. The strict approach against corruption taken by the tribunal, applied to investment treaty arbitration, would likewise lead to a dismissal of the claim; although probably on different legal basis. Consequently, arbitral tribunals and commentators have argued for such zero tolerance approach in investment treaty arbitration. The recent decision in *Metal-Tech v Uzbekistan*,[2868] which is the first investment treaty arbitration case where corruption was established, appears also to have applied the zero tolerance approach when denying jurisdiction due to corruption. In recent years, however, critical views have increased in scholarship, questioning whether a strict approach towards corruption is appropriate in investment treaty arbitration.

First, the zero tolerance approach is summarised with its different scopes of application in investment treaty arbitration (see below at **I.**), secondly, the concept of the balanced approach is presented in general terms (see below at **II.**) before both approaches are compared on the basis of the relevant issues of corruption in investment treaty arbitration (see below at **III.**).

I. The zero tolerance approach

The zero tolerance approach stands for the notion that an investment tainted by corruption loses any investment protection under an IIA. By having some involvement with a corrupt action, the investor forfeits its right to pursue its claims before an international arbitral tribunal. The treaty provisions are interpreted in a manner that leaves no room for any other consideration or evaluation of the specific circumstances of the case. A positive finding of corruption leads to the result of 'no treaty protection'.

The tribunals and commentators favouring this approach do not necessarily engage in discussions about the applicable approach, but mostly limit their scrutiny to the effect of a finding of corruption on the confined issues regarding jurisdiction and admissibility. The arbitral case law (see below at **1.**) and the views in scholarship (see below at **2.**) representing the zero tolerance approach will be presented next.

[2868] *Metal-Tech v Uzbekistan*, Award.

1. The zero tolerance approach in arbitral practice

The most comprehensive analysis on the approach taken towards corruption was conducted by the tribunal in *World Duty Free v Kenya* (see below at **a)**). While – until the recent case of *Metal-Tech v Uzbekistan* – no other arbitral tribunal in investment arbitration came to a positive finding of corruption, several tribunals have nonetheless made comments reflecting their approach on how corruption should have been dealt with if it had been proven (see below at **b)**).

a) *World Duty Free v Kenya*

The decision in *World Duty Free v Kenya* has already been analysed in connection with other corruption issues relevant to this study. Preceded by a brief summary of the facts and the decision of the tribunal, this section focuses on the particular approach of the tribunal towards the particularities of corruption.

(1) Facts of the case

At the core of the dispute was an investment contract between a company registered in the Isle of Man owned by a Dubai businessmen, Mr Ali, and Kenya for the operation of two duty-free stores at Nairobi and Mombasa International Airports. Due to the lack of a BIT between the claimant's home country, United Arab Emirates, and the Republic of Kenya, the proceedings were based on the ICSID arbitration clause included in the investment contract.

During the hearing, the investor brought to light that he had paid USD 2,000,000 to the President of Kenya, Daniel arap Moi, in order to gain approval for the project.[2869] After having developed the airport facilities to a high-class standard[2870] and after having run the duty-free stores for some time, the operation of the investment encountered various hindrances, which ended up in the expropriation of the duty-free facilities. It appears that a close counsellor to President Moi, Mr Pattni, misused the name of World Duty Free without Mr Ali's awareness in order to commit massive fraud and to raise funds for President Moi's re-election campaign.[2871] Moreover, it seems probable that Mr Pattni finally took control over

[2869] See *World Duty Free v Kenya*, Award, para 130. The staff of the President hat requested from Mr Ali to bring USD 500,000 in cash in a brown briefcase to a meeting with the President of Kenya. The money only represented a portion of the requested USD 2 million. While entering the room an intermediary placed the briefcase on the wall. After the meeting Mr Ali collected the briefcase and found the money replaced by fresh corn.

[2870] According to Mr Ali, he spent approximately USD 27 million to construct and equip the duty free complexes at both airports and to renovate and upgrade their passenger facilities. See *World Duty Free v Kenya*, Award, para 67.

[2871] See *World Duty Free v Kenya*, Award, para 68. Mr Pattni acted through Goldenberg International Ltd (Goldenberg) and forged documents to pretend the export of gold and diamonds to foreign consignee. By presenting those false documents to the Treasury and the Central Bank of Kenya, Goldenberg received export compensation. According to Mr Ali the fraud could amount to USD 438 million.

World Duty Free to cover up the fraud.[2872] In addition, the investor alleged that the judgments of Kenyan courts supporting these measures were based on forged documents.[2873] Appeals regarding those judgments were initially declined.[2874]

(2) Tribunal's decision

After having established that the investment contract had been obtained by corruption, the tribunal dismissed the claim on two grounds. First, the tribunal concluded that corruption is contrary to international public policy or transnational public policy,[2875] for which reason "*claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld*".[2876] Secondly, it analysed the consequence of the findings of corruption under English and Kenyan law. Due to the violation of Kenyan and English public policy, the contract obtained by corruption was voidable and formally set aside by Kenya in its Counter-Memorial.[2877] In the view of the tribunal, Kenya had only gained knowledge of the corrupt payment during the proceedings and was therefore not able to waive its right to avoid the contract or to affirm it.[2878] In this context, it emphasised that under English or Kenyan law, the knowledge of the President of Kenya could not be attributed to Kenya.[2879]

(3) Tribunal's approach towards corruption

The tribunal acknowledged that the burden of the public policy implications in the present case was one-sided and merely affected the investor as claimant. It therefore discussed the submission of the claimant to exert discretion and adjust the application of the domestic public policy by balancing the misconduct of both parties and to take the misconduct of the former President of Kenya into consideration.[2880] The tribunal indicated that it had some sympathy for the

[2872] In 1994, under pressure of the International Monetary Fund, Mr Pattni and some of his accomplices were arrested.
[2873] The High Court of Kenya declared by order of 24 February 1998 Mr Pattni on his request the beneficial owner of the company from 1992 onwards and placed the company under receivership. Mr Ali was able to prove forgery and the Kenyan police indicted Mr Pattni, however, the Attorney General under the influence of the Kenyan Government refused to bring the case to trial. In addition, when Mr Ali sought to lift the receivership in 1999, he was informed that in order to restore the contractual position he would have to decline to give prosecution evidence in the Goldenberg fraud. After a statement to the press on 19 July 1999 by Mr Ali linking President Moi and others to the Goldenberg scandal, Mr Ali was arrested and deported to United Arab Emirates. In addition, a formal judgment and a decree by the High Court of Kenya on 24 and 27 September 2001 were rendered in favour of Mr Pattni.
[2874] Mr Ali alleged that the Government of Kenya "*used its power to block any appeal*". See *World Duty Free v Kenya*, Award, para 70.
[2875] The basis of the tribunal's finding was an analysis of domestic anti-bribery laws, international conventions against corruption and decisions of courts and commercial arbitral tribunals. For a detailed analysis on transnational public policy see Chapter Three.
[2876] *World Duty Free v Kenya*, Award, para 157.
[2877] *World Duty Free v Kenya*, Award, para 182.
[2878] *World Duty Free v Kenya*, Award, para 184.
[2879] *World Duty Free v Kenya*, Award, para 185.
[2880] *World Duty Free v Kenya*, Award, paras 176-181.

criticisms raised against the strict English public policy rule, however, it found that this would not change its decision.[2881]

First, the strict rule remained established English law and granted no basis for any discretionary balancing.[2882] Secondly, in the opinion of the tribunal, the particular facts of the case did not support a deviation from the strict rule.[2883] In this context, the tribunal emphasised that the bribe was not procured by "*coercion or oppression or force by the Kenyan President*" and the investor had been free to pay the bribe and to enter into the agreement.[2884] At the same time, the tribunal found the illegal acts of the President of Kenya not attributable to Kenya, for which reason there could be no balancing between the parties' misconduct.[2885]

Nonetheless, the tribunal recognised the disturbing effect caused by its one-sided decision and emphasised that in this special case it had been the highest public official of Kenya, the President, who had solicited the bribe and initiated the corrupt act in the first place.[2886] Moreover, Kenya had made no attempts to prosecute the former President and to recover the illicit payment in proceedings against him.[2887] The tribunal's answer to this 'disturbing feature' is that

> "the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world."[2888]

It then referred to Lord Mansfield who had addressed this issue over two centuries ago to note that where both parties are equal at fault, the defendant will have the advantage, although such result might be contrary to the 'real justice'.[2889] In order to mitigate such outcome, the tribunal pointed at the fact that if the parties were to change sides, then Kenya as claimant would "*likewise fall at the same procedural hurdle*".[2890] In this context it found it worth citing Lord Mansfield in full

> "[…] the objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the

---

[2881] *World Duty Free v Kenya*, Award, para 177. ("*The Tribunal has some sympathy with these criticisms; but none can be applied in this case for two reasons*.").
[2882] *World Duty Free v Kenya*, Award, para 177.
[2883] *World Duty Free v Kenya*, Award, para 178.
[2884] *World Duty Free v Kenya*, Award, para 178.
[2885] *World Duty Free v Kenya*, Award, para 178.
[2886] *World Duty Free v Kenya*, Award, para 180.
[2887] *World Duty Free v Kenya*, Award, para 180. ("*It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings*."), emphasis added.
[2888] *World Duty Free v Kenya*, Award, para 181.
[2889] *World Duty Free v Kenya*, Award, para 181.
[2890] *World Duty Free v Kenya*, Award, para 181.

> defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, but accidentally, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est condition defendentis*".[2891]

(4) Comment

Once more it must be noted that *World Duty Free v Kenya* was a contract-based arbitration. The legal issues that arose in this case are therefore to some extent distinguishable to the ones encountered in investment treaty arbitration. Nonetheless, the mere label as contract-based investment arbitration shall not diminish the significance this case has for the analysis of the approach taken towards corruption. In particular, it is important to bear in mind that the decision is based on two separate grounds: transnational public policy and English law as the applicable law of the contract. In fact, commentators often fail to analyse both grounds separately.

Applying English and Kenyan Law to the circumstances of the case, the tribunal found no legal basis for conducting a discretionary balancing exercise by taking the wrongdoings of the most senior representative of the host State, the President, into consideration. Focusing on the strict English rule of public policy in cases where the contract had been obtained by corrupt means, the tribunal found the contract to be voidable. Moreover, the analysis of the issue whether the President's knowledge of the corrupt act is attributable to Kenya was merely focused on English agency law, which does not attribute knowledge from the agent, the President, to the innocent principal, the host State.[2892] While the application of English law seems straight forward, the tribunal did not engage on any discussion

[2891] *World Duty Free v Kenya*, Award, para 181, citing Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp. 341, 343, as cited in *Chitty on Contracts*, Volume 1, 28th edition, para 17-007.

[2892] Note that commentators often criticise that the tribunal in *World Duty Free v Kenya* should have attributed the knowledge about the corrupt act of the former President Daniel arap Moi to Kenya on basis of Article 7 ILC Articles. Such statements are mostly provided without any detailed analysis of the rules of attribution of international law and fail to understand that knowledge as such is also not attributable under the ILC Articles, but only internationally wrongful acts. For a detailed analysis of attribution of corrupt acts see Chapter Five.

whether the rules of agency law were suitable to the situation where the most senior officer of a host State and the responsibility of the same host State are in question.

The strict application of the rules of the applicable law of the underlying contract, i.e. in this case English law, may most certainly lead to this zero tolerance outcome. However, the tribunal itself disclosed an entry gate for considerations stemming from the international nature of the investor-State situation. First, the tribunal found that corruption violated transnational public policy, which it distinguished from international public policy relevant in international commercial arbitration and analysed such principle separately from English law.[2893] Secondly, the tribunal emphasised in context with the (domestic) public policy in English law that the law protects the public rather than the litigating parties.[2894]

However, while the tribunal at least in the context of its analysis of English law dealt with the question of balancing the circumstances of the case, it refrained from even mentioning such possibility with regard to transnational public policy. Concluding that corruption violated transnational public policy it failed to discuss the question of attribution of such international wrongful act to the conduct of the host State under international law. Moreover, considering that the tribunal itself introduced the interests of the public as an important factor, it failed to consider whether the approach taken towards corruption was in fact in the best interest of the public. In particular since Kenya had failed to prosecute its former President and to make any attempts to recover the illicit payments made to him.[2895]

b) Arbitral case law touching on corruption approach

Due to the evidentiary difficulties discussed in the previous chapters, while many arbitral tribunals have dealt with allegations of corruption, until very recently there had only been one positive finding of corruption in investment arbitration under the auspices of ICSID. Despite the negative findings of corruption, many tribunals made *obiter* statements regarding corruption, which reflect the approach the tribunal would have taken in case corruption had been established. In *Wena v Egypt*, for instance, the host State alleged that the investor had obtained the relevant leases for two hotels by corrupt means. While the tribunal found that Egypt had failed to prove corruption, it nonetheless stated in passing that

> "[i]f true, these allegations are disturbing and ground for dismissal of this claim."[2896]

Similarly, the tribunal in *TSA Spectrum v Argentina* rejected the allegations that the investment had been obtained by corrupt means, but nonetheless revealed that

[2893] See *World Duty Free v Kenya*, Award, paras 139, 157.
[2894] See *World Duty Free v Kenya*, Award, para 181.
[2895] See *World Duty Free v Kenya*, Award, para 180.
[2896] *Wena v Egypt*, Award, para 111.

in case of a positive finding of corruption, in its view, the investment would have not been protected under the BIT.[2897] In the words of the tribunal

> "[t]he Arbitral Tribunal cannot find it established, on the basis of available materials, that the Concession was illegally obtained and that, for this reason, it is not protected under the BIT."[2898]

Other tribunals made statements on corruption on a more general level while dealing with fraud or bad faith. In *Phoenix v Czech Republic*, for instance, the tribunal dealt with the investor's attempt to abuse the ICSID mechanism and found that only *bona fide* investments fall within the scope of investment protection. In this context, the tribunal mentioned corruption as one of the cases where investment protection should fail.[2899] In the words of the tribunal

> "[t]he purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments."[2900]

The tribunal in *Hamester v Ghana* – dealing with fraud – confirmed the approach taken in *Phoenix v Czech Republic* and also referred to an investment created by way of corruption as one example where an investment would not be protected.[2901] In the words of the tribunal

> "[a]n 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)."[2902]

All these statements show that the mentioned tribunals would probably have taken a strict approach in case of a positive finding of corruption and would have declined investment protection and dismissed the claim without further ado. However, the tribunals refrained from providing the legal reasoning behind their views – most certainly due to the *obiter* nature of these statements.

[2897] *TSA v Argentina*, Award, para 175.
[2898] *TSA v Argentina*, Award, para 175.
[2899] *Phoenix v Czech Republic*, Award, para 100.
[2900] *Phoenix v Czech Republic*, Award, para 100.
[2901] *Hamester v Ghana*, Award, para 123.
[2902] *Hamester v Ghana*, Award, para 123.

c) *Metal-Tech v Uzbekistan*

The decision in *Metal-Tech v Uzbekistan* has continuously been subject of this study and scrutinised from different angles and with different focus.[2903] This concluding analysis is therefore limited to the approach taken by the tribunal towards the particularities of corruption. Since the facts of the case have been presented in detail above,[2904] this section is limited to a brief overview.

(1) Facts of the case

In *Metal-Tech v Uzbekistan*, an Israeli investor brought a claim under the Israel-Uzbekistan BIT against Uzbekistan with regard to its investment in Uzmetal, a joint venture with two state-owned companies, initiated in 2000 to process molybdenum products from raw material deposits of the Tashkent region. In 2006, criminal proceedings were brought against Uzmetal's management for alleged abuse of authority and a series of actions were taken by Uzbek authorities. These actions culminated in bankruptcy proceedings against Uzmetal by one of the two state-owned entities.[2905] In 2008, Uzmetal was liquidated and its assets transferred to the two state-owned entities. The investor was left empty-handed.[2906]

(2) Tribunal's decision

During the hearing on jurisdiction and liability in January 2012, information emerged that caught the attention of the tribunal, which requested further documents and submissions of both parties on the issue of payments made of approx. USD 4 million to three Uzbek nationals for so-called lobbyist activity.[2907] After various rounds of document production and a one-day hearing with witnesses on this point, the tribunal concluded[2908] that the investor breached Uzbek anti-corruption law by making payments to (i) the brother of Uzbekistan's prime minster from 1995 to 2003 and deputy prime minister until 2000,[2909] and (ii) a member of the Uzbek president's staff.[2910]

On basis of the violation of Uzbek anti-bribery law in connection with the establishment of the investment, the tribunal concluded that the investor had not made an investment according to Article 1(1) of the BIT which requires that the investment is "*implemented in accordance with the laws and regulations*" of the

[2903] See Chapter Three (Public Policy), Chapter Five (Evidence) and Chapter Seven (Corruption-Defence).
[2904] See Chapter Seven A.
[2905] *Metal-Tech v Uzbekistan*, Award, paras 37-54.
[2906] *Metal-Tech v Uzbekistan*, Award, paras 50-54.
[2907] *Metal-Tech v Uzbekistan*, Award, paras 87 et seq.
[2908] For a discussion on the evidentiary issues and red flags found by the tribunal see Chapter Eight D.III.
[2909] *Metal-Tech v Uzbekistan*, Award, 337-352
[2910] *Metal-Tech v Uzbekistan*, Award, paras 311-327. Note that with regard to the payments made to the third Uzbek national, the tribunal saw neither facts on record that would have called for *ex officio* scrutiny nor has the respondent extended its allegation of bribery to these payments, *Metal-Tech v Uzbekistan*, Award, paras 365-366.

host State.[2911] Against the background that the consent of Uzbekistan to ICSID arbitration expressed in the arbitration clause, Article 8(1) of the BIT, is limited to disputes "*concerning an investment*", the tribunal found such consent missing for investments made in violation of local law, for which reason the consent requirement of Article 25(1) of the ICSID Convention was not met.[2912] The tribunal concluded that it lacked jurisdiction over the dispute due to corruption.

(3) Tribunal's approach towards corruption

The tribunal seemed aware of the one-sided outcome of its decision, disregarding the potential involvement of the host State in the corrupt acts and leaving any accountability of the host State out of the equation. While the tribunal acknowledged that the host State as respondent benefited from such outcome, it emphasised that the notion behind its decision was not to punish one party at the expense of the other. In its view, a tribunal cannot assist a party that participated in corruption. In the words of the tribunal

> "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."[2913]

Most notably, is that while the tribunal refrained from taking the involvement of the host State in the corrupt act into consideration for its analysis at the jurisdictional stage, it did so at its decision on costs.[2914] In this context the tribunal emphasised that it is "*implicit in the very nature of corruption*" that the host State has participated in the corrupt act.[2915] The tribunal failed to provide any legal or factual analysis and any explanation or ground for its conclusion, which may well be interpreted as indication that such notion is apparent with regard to corruption. However, if such involvement of the host State is apparent and even intrinsic for corruption, it is incomprehensible why the tribunal refrained from considering and discussing such participation before – for the question of jurisdiction.

(4) Comment

The tribunal mentions the ongoing debate calling for a more flexible approach without making specific reference to any relevant contribution and without dealing

[2911] *Metal-Tech v Uzbekistan*, Award, para 372.
[2912] *Metal-Tech v Uzbekistan*, Award, para 373.
[2913] *Metal-Tech v Uzbekistan*, Award, para 389.
[2914] *Metal-Tech v Uzbekistan*, Award, para 422.
[2915] *Metal-Tech v Uzbekistan*, Award, para 422.

with any of its arguments. Rather, the tribunal clarified that it scrutinised the issue of corruption from the limited perspective that as an adjudicator it required certainty on whether the claimant as party seeking assistance from the tribunal engaged in corruption. Without any reference or any discussion on this issue, the tribunal based its view on "*the promotion of the rule of law*".[2916] The tribunal made such statement as if it were untouchable and not amenable for challenge or discussion. While the starting point that the tribunal cannot grant assistance to a corrupt party is not to challenge, the tribunal provides no answer to the issue that such approach in fact 'assists' the respondent.

The tribunal fails to explain why the promotion of the rule of law is ensured by merely focusing on the acts of the investor disregarding any accountability of the host State, while the corrupt act involved a senior staff member of the President's Office and the Prime Minster of Uzbekistan, later the deputy-prime Minister. Uzbekistan ranked 170 out of 176 in the Transparency International Corruption Perceptions Index and has a negative score on the Control of Corruption Index as well as the Rule of Law Index.[2917] The analysis of the tribunal, however, did not address the actions taken by Uzbekistan in order to prevent or to fight such acts of corruption.

2. The zero tolerance approach in scholarship

The different legal and doctrinal issues that arise in investment treaty arbitration when a host State raises the corruption defence have been extensively discussed and analysed in Chapter Seven 'Corruption as Defence' and shall not be repeated in detail.[2918] However, at this stage a brief overview of the different views shall be summarised from the perspective of the zero tolerance approach. In this context commentators have argued that corruption should be dealt with at the jurisdictional phase of the investment treaty arbitration. Focusing on different doctrinal and legal arguments, this strand of scholars contends that corruption is a bar to jurisdiction of the arbitral tribunal (see below at **a)**). Another strand understands corruption to be a question of admissibility rendering any claim where the investment is tainted by corruption inadmissible (see below at **b)**).

a) Corruption as bar to jurisdiction of the tribunal

Strong voices among the investment arbitration commentators favour the view that an investment treaty arbitral tribunal has no jurisdiction over a claim based on a corruption-tainted investment. Commentators base such approach mainly on three grounds.

[2916] *Metal-Tech v Uzbekistan*, Award, para 389.
[2917] See Uzbekistan - Transparency.org.
[2918] For a detailed analysis of the legal issues encountered in investment treaty arbitration with regard to jurisdiction, admissibility and the merits see Chapter Seven.

First, many IIA contain legality requirements qualifying the protected investment as 'investments made in accordance with the host State law'.[2919] Some commentators interpret such provision as a limitation of the host State's consent to arbitrate to only legal investments.[2920] Against the background that corruption is most likely criminalised in every country, the fact that an investment was obtained by corrupt means would render it illegal. According to this view, an investment tainted by corruption would fall outside of the scope of consent of the host State amounting to a bar to jurisdiction of the tribunal pursuant to Article 25 ICSID Convention.[2921]

Secondly, even where the IIA does not contain any legality requirement, commentators contend that due to the violation of the general principle of good faith, an investment tainted by corruption deserves no protection.[2922]

Finally, some commentators base their lack of jurisdiction approach in corruption cases on the unclean hands doctrine. According to this view, an investor with unclean hands, which undisputedly results from the corrupt acts committed by the investor to obtain the investment, loses its rights to seek assistance from an international tribunal.[2923]

b) Corruption as bar to admissibility of claim

Commentators have challenged the jurisdictional approach towards corruption taken in investment arbitration scholarship and advocate for dealing with corruption issues at the admissibility stage. In their view, corruption is an issue that renders a claim inadmissible rather than barring the tribunal from jurisdiction.[2924]

II. The balanced approach

The balanced approach is based on the premise that no one-fits-all solution exists to a problem with that many layers and with that different faces, which makes a more nuanced differentiation of the individual circumstances of the case necessary. While there might be strong arguments to apply a strict approach towards

[2919] Note that the wording of such legality requirement varies significantly among the different IIA.
[2920] See above at Chapter Seven B.II, see in particular Knahr, "Investments 'in Accordance with Host State Law,'" 2008.; Carlevaris, "The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals"; Baltag, "Admission of Investments and the ICSID Convention."
[2921] See e.g. Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 721 et seq.; Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 313 et seq.; Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?," 739 et seq.; Schill, "Illegal Investments in International Treaty Arbitration," 288 et seq.; Moloo and Khachaturian, "The Compliance with the Law Requirement in International Investment Law," 1499.
[2922] See e.g. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," 313 et seq.; Kreindler, "Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers," 384 et seq.
[2923] Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine."
[2924] Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims."

corruption in law enforcement proceedings where the action is brought to each involved party individually, such approach does not fit in the context of investment treaty arbitration, where the relationship between the investor and the host State is reciprocal.

The balanced approach questions the zero tolerance approach for it only sanctions the investor and disregards without any limitation the responsibility that the host State might have for the corrupt actions of its public officials.[2925] Such a unilateral sanction leads to the contrary long-run effect it originally pursued. Since under the zero tolerance approach neither the host State nor the corrupt public officials need to fear any repercussions or any accountability for the illicit actions, no improvement of the corrupt environment can be expected.[2926] The zero tolerance approach may therefore actually have encouraging effect on corrupt officials and kleptomaniac regimes. It can therefore not be said to protect the public – as it claims. Moreover, it also opens the gate for abuse of the corruption defence.

Especially by taking into consideration the ultimate objectives of the international fight against corruption and the investment treaty regime, both of which pursue *inter alia* economic development; the balanced approach seeks to reconcile the conflicting interests by finding a tailor-made balance. The means to obtain such balance is the principle of proportionality. Before the theoretical basis and the practical application of the balanced approach are analysed *infra*, both approaches are compared by contrasting juxtaposition, in order to conclude which approach should be taken in investment treaty arbitration.

III. Balanced approach *versus* zero tolerance approach

In order to make the case for the balanced approach – instead of presenting the pros and cons of both approaches individually – the following analysis identifies crucial issues relevant in investment treaty arbitration and scrutinises how each approach copes with the respective challenges.

1. Specific nature of corruption

When dealing with corruption, one fundamental point has to be taken into account: contrary to fraud and other types of irregularities relevant in investment treaty arbitration, investor corruption requires the collaboration of both parties. While the basis of fraud and similar illicit acts is unilateral wrongdoing by one party against the other party, the core element of corruption is the mutual wrongdoing of two parties. There are two sides to the corruption equation,[2927] i.e. the supply and the demand side. It simply takes two to tango.[2928]

[2925] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 76.
[2926] Ibid., 68.
[2927] The use of the term "corruption equation" has become fairly common among commentators, see e.g. Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States -

While corrupt investors do not deserve sympathy for their illicit actions, the receiving, soliciting or even extortion of bribes by the demand side forms part of the two-sided act of corruption and cannot be ignored.[2929] Both sides are involved in the violation of domestic anti-corruption law and of international public policy. Thus, no side can be seen as innocent – no side is 'blameless'.[2930] The zero tolerance approach deals with corruption in the same way it deals with unilateral illicit acts. The balanced approach, however, focuses on both sides of the corruption equation.

Moreover, as discussed in Chapter One corruption is a broad concept, which comprises a variety of illicit acts and may thus come in many different forms. Corruption is therefore a grey zone making it complicated to investigate and finally identify. It certainly requires a closer look into the specific circumstances of the particular transaction. The zero tolerance approach applies one solution to any finding of corruption disregarding the many nuances that corruption may have. On the contrary, the balanced approach seeks to take all the circumstances of the corruption transaction into account to find a reasonable solution on a case-by-case basis.

2. Clear statement against corruption

The starting point for any appropriate approach against corruption is that corruption is an evil for international business,[2931] which must be condemned and eradicated.[2932] Thus, the first and most obvious policy consideration that comes to mind is to make a clear and unequivocal statement to the investment world that corruption will not be accepted as conventional means of doing business and will not be tolerated by international investment law and arbitration.[2933]

Where Angels Should Not Fear to Tread"; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration"; Llamzon, *Corruption in International Investment Arbitration*.

[2928] See Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption.". See also above fn. 2162.

[2929] See also Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 4; Llamzon, *Corruption in International Investment Arbitration*, 240. ("*But is should not be forgotten that this 'demand' side of the corruption equation – That of public officials of the host State receiving, soliciting, or sometimes even extorting bribes from foreign investors for private gain instead of public good – is no less venal, especially to the citizen of that State who suffers through the governance afflictions corruption engenders*.").

[2930] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 55; Llamzon, *Corruption in International Investment Arbitration*, 261.

[2931] For an overview of the detrimental impact corruption has on society, economy and international business see Chapter One C.

[2932] See Chapter Two for the global consensus to fight corruption.

[2933] See Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 62. Bottini, for instance, argues that the complete denial of investment treaty protection to investors who engaged in corrupt practices provides "*a strong incentive for investors not to breach the laws of the host state" and consequently not engage in corruption*"; see Bottini, "Legality of Investments under ICSID Jurisprudence," 300.

The zero tolerance approach constitutes such clear statement to all investors that in case they engage in corrupt practices in connection with the investment they automatically forfeit all their rights to investment protection. Such approach will most certainly deter investors from engaging in corruption in order to smooth the way for their investments.[2934] However, such statement is only addressed to half of the parties involved in transnational corruption. It is merely directed to the supply side of corruption, but leaves the demand side out of the equation. In order to make the statement against corruption complete it must be addressed to both: the supply and the demand side.[2935] Addressing both sides of the equation, the balanced approach may therefore act as a more effective statement to the complete investment world.

3. Asymmetry of investment treaty arbitration

The zero tolerance approach as applied by the tribunal in *World Duty Free v Kenya* and as favoured by many commentators, leaves the parties where the tribunals found them. While such approach has found some criticism in the international commercial arbitration context as being paradoxical,[2936] such strict policy applied to investment treaty arbitration leads to the one-sided result that where an investor and corrupt State officials have been involved in the corrupt act in connection with the investment, the investor will lose any investment protection while the host State will profit from such circumstances. The tribunal in *World Duty Free v Kenya* acknowledged that it was disturbing that its decision would only punish the investor although the bribe was solicited by Kenya's President and therefore its 'most senior officer'.[2937] However, the tribunal justified such one-sided result with the private law principle that where both are equally at fault the position of the defendant is better, *potior est condition defendentis*. Citing Lord Mansfield the tribunal sought to minimise this one-sided result by noting that if the parties would change sides, the investor as defendant would have the advantage.[2938] While such argument might have some weight in international commercial arbitration or in merely contract based investment arbitration where both parties may find themselves in the party role of claimant or respondent, this is not true for

[2934] See e.g. Moran, *Combating Corrupt Payments in Foreign Investment Concessions Closing the Loopholes, Extending the Tools*, 7.
[2935] See e.g. Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration," 272 et seq. Meshel argues that by "*linking corruption to violations of investment protection obligations through investment arbitration can send a strong message that corrupt practices, whether undertaken by a host state or a foreign investor, will not be tolerated*".
[2936] Sayed, *Corruption in International Trade and Commercial Arbitration*, 367. Sayed argues against the absolute-nullity approach to contracts tainted by corruption in situations where both parties are equally involved in the corrupt act.
[2937] *World Duty Free v Kenya*, Award, para 181.
[2938] *World Duty Free v Kenya*, Award, para 181.

investment treaty arbitration where the investor will most certainly always find himself in the role of the claimant.[2939]

Various commentators conform themselves by merely pointing at the fact that such unequal results follow from the asymmetry of the investment treaty system.[2940] Such observation is undoubtedly correct, but merely states the obvious without providing any justification for such disproportional approach where the host State is – to whatever extent – involved in the corrupt act. The asymmetry of investment treaty arbitration is in fact the reason – and not merely a justification – why the zero tolerance approach fails to come to a fair result.[2941] Such particularities of investment treaty arbitration must, however, be taken into account when dealing with corruption.

4. Effective means against corruption

One basis of the zero tolerance approach is the notion that effectively curbing corruption requires ousting it on the earliest stage possible and thus tackling the supply side. Confronted with the zero tolerance approach, investors will most likely become hesitant to invest in host States where corruption is a prerequisite to make or operate the investment.[2942] Thus, the argument runs that by cutting off the supply side, the corrupt host State will consequently be forced to realise that investors will refrain from investing as long as they have to encounter corrupt practices in the host State. It is then believed that the host State will change its policies due to the decrease in foreign investment and convert into a corruption-free investment landscape.[2943] While this outcome is desirable, it is far from reality. In fact, commentators and also arbitral tribunals have so far focused on a superficial analysis of corruption, its causes and detrimental effects to base their

[2939] Note however that only in rare circumstances host States have chosen the means of international investment arbitration to pursue their contractual rights. This follows already from the possibility to use their sovereign capacity to pursue their interests by unilateral acts, see Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," n. 64.

[2940] Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?," 774.

[2941] See also "International Investment Law and the Fight Against Corruption," 10 et seq. as cited in Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 54 ("*Because of the asymmetric nature of the investor-state arbitration, however, one might predict that in most situations the state will suffer no harm from exposure even of its own collusion in or tolerance of the bribery transactions, while the investor will lose everything*.").

[2942] See e.g. Menaker, "The Determinative Impact of Fraud and Corruption on Investment Arbitrations," 75. Note however that some commentators argue that the zero tolerance approach is most likely ineffective to diminish corruption to a significant extent, since pursuant to this view an investor would rather take the risk of losing its investment than surely not being able to invest in the first place, see Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 60.

[2943] See e.g. Menaker, "The Determinative Impact of Fraud and Corruption on Investment Arbitrations," 75.

decisions and arguments without taking into consideration the extensive studies on corruption conducted in other fields of study.[2944]

It parts from the wrong premise that corruption within the administration of the host State came into existence merely due to the investor's willingness to pay bribes and is only dependent on the continuous flow of bribes from foreign investors. Reality, however, shows that corruption is omnipresent and widespread in many jurisdictions not differentiating whether the bribe originates from a foreign investor or from a domestic one. In such terms, corruption does not discriminate.[2945] The administration of a host State with poor institutions and widespread corruption will not convert into a corruption-free landscape merely due to the decrease in foreign investment. The corrupt practices are rather deeply rooted in society and the daily life of the public administration. Such deadlock will continue unless it is actively broken. This is evidenced by the unsatisfactory results of the FCPA and the OECD Anti-Bribery Convention as discussed in Chapter Two, which also merely focus on the supply side of corruption. However, cutting off the supply side alone and ignoring the demand side problem will not curb corruption.[2946]

5. In line with international fight against corruption

As discussed in Chapter Two, the FCPA and the OECD Anti-Bribery Convention are good examples for how the limited focus on the supply side has not led to the desired results in the fight against corruption.[2947] Therefore, the international fight against corruption has evolved from its mere focus on the supply side to a global fight against both the supply and the demand side of corruption. The international instruments on the global and regional level as well as the modern domestic anti-bribery legislations in many countries nowadays condemn and tackle the demand side to the same extent as the supply side.[2948] The zero tolerance approach and its result of amounting to a complete defence for a host State to any liability for its violations of investment protection standards while it was to some extent involved in the corrupt act, leads to the one-sided result that is not in conformity with the international fight against corruption and the new implemented anti-corruption

[2944] See also Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," 12. ("*Commentators and investor-state arbitration tribunals are just as insulated from international efforts to combat corruption as they are from the vast theoretical and empirical literature on the causes and consequences of corruption – a fact immediately apparent from the paucity of references to literature on corruption outside the field of arbitration*.").
[2945] See Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 81.
[2946] See also Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 58 et seq.
[2947] See also Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," 6.
[2948] See Chapter Two. See also Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption."

policies.[2949] However, the approach developed by the international community cannot be ignored and must be taken into consideration when arbitral tribunals deal with corruption.

6. State responsibility

As discussed in Chapter Five, there are good arguments that under the rules of State responsibility and attribution of conduct to the State, the illicit conduct of the corrupt State officials trigger the State responsibility of the host State.[2950] However, against the background that an international consensus has developed that not only corrupt practices on the side of the investor must be criminalised and fought against, but also – and to the same extent – the corrupt practices of the demand side, the international obligation of the host State goes even further than merely not engaging in corruption. In fact, the host State must comply with its international obligation to fight against corruption by adopting the necessary anti-corruption policies, implementing measures to prevent corruption within its administration through transparency and good governance and taking serious actions to enforce the anti-corruption laws as well as prosecuting corruption among its public officials.[2951]

Thus, in any case, even if one rejects the view taken in this study that the involvement of public officials in corrupt actions shall be attributed to the host State, it cannot be overlooked that there is a degree of accountability, responsibility or even culpability of the host State with regard to the corrupt act of the corrupt officials vested with its authority.[2952] The zero tolerance approach fails, however, to provide even a possibility to analyse the potential host State's shortcomings of allowing its public officials to misuse and abuse its public power for private gains or failing to implement the required policies and measures – factors that the balanced approach takes into consideration.

[2949] See Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration," 268. ("*However, the recent emergence of a state 'corruption defence' in investment arbitration, i.e., the reliance of host states on investor misconduct, including corruption, as a complete defence to liability for breach of investment protection obligations, may arguably frustrate this cross-fertilization between international investment arbitration and anti-corruption policies and may even prove counterproductive in certain circumstances*."). See also Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," 8. ("*The existence of a transnational public policy that condemns bilateral corruption (supply-side and demand-side)* [as expressed in the international treaties and conventions] *has been largely ignored by investor-state arbitration tribunals.* […] *This effectively creates a divide between investor-state arbitration and the international communities' effort to constrain bilateral corruption*.").

[2950] See Chapter Five.

[2951] See e.g. Chapter Five C.

[2952] See also Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption."

7. Right incentive for both parties to fight corruption

The zero tolerance approach provides no incentives either to governmental officials to refrain from soliciting and taking bribes or to the host State itself to implement the necessary measures to prevent corrupt behaviour among its officials.[2953] This follows not only from the fact that the host State may feel safe from any repercussion on investment protection level, but also from the complete defence that corruption offers to the host State. The involvement of its public officials in any corrupt action would have the mere consequence that the investment will be declared outlawed and be open for any violation of the investment protection standards guaranteed in international investment treaties.[2954] Such consequence will be welcomed by corrupt and kleptomaniac host States and amount to a sort of "*carte blanche*"[2955], "*free pass*"[2956] or "*get-out-of-jail-card*".[2957] Such "*corruption card*"[2958] would create an "*easy instrument*"[2959] to escape liability and is therefore "*open to abuse*"[2960]. While the bribes remain with the corrupt public officials, the host State is invited to expropriate or take other measures towards the investment without facing any consequences. Such approach does not only fail to create any incentive for the host State to fight corruption and to improve its domestic institutions, but could even be said to encourage non-

[2953] See Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 81. See also Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration," 273 et seq., 280.

[2954] In this context Losco speaks about a "perverse incentive that encourages states to expropriate investors' assets" that follows from the corruption defense, Losco, "Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction," 1204. Note, however, that Losco takes the supply side approach of the FCPA as granted and argues for a strong corruption defense. He seeks to mitigate the effects of the divergent goals of the investment arbitration regime and the anticorruption regime by promoting the coordination between the two overlapping regimes, Ibid., 1231 et seq.

[2955] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 81. See also Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," 220.

[2956] Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," 1037.

[2957] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 237.

[2958] "International Investment Law and the Fight Against Corruption," 10. as cited in Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 54.

[2959] Raeschke-Kessler and Gottwald, "Corruption," 597; Raeschke-Kessler and Gottwald, "Corruption in Foreign Investment - Contracts and Dispute Settlement between Investors, States, and Agents," 16.

[2960] Summerfield, "The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions," 13. ("*The defense is open to abuse where corruption is used as a post hoc justification by a regime for expropriating an investment property, the more typical motive being mere distaste for a prior regime or the terms of the agreement*."). See also Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 59 ("*This 'corruption card' plays directly into the hands of kleptocratic regimes – it allows them to enrich their corrupt elites with impunity, and rewards them for doing so by granting them absolution for any wrongful mistreatment of the investor and its investment*.").

transparent and corrupt behaviour when dealing with foreign investment.[2961] Such one-sided zero tolerance approach might therefore even have the opposite effect on corruption than its advocates claim and believe it to have.[2962]

However, the approach taken against corruption in investment treaty law and arbitration must provide incentives for both the supply side and the demand side to participate in the fight against corruption. Thus, taking the potential shortcomings of the host State into consideration would push the host State to implement and enforce the relevant and necessary measures to prevent such illicit actions from happening in the first place. This would deter public officials from engaging in soliciting or accepting bribes, since the host State would be forced to prevent and prosecute such behaviour. At the same time the increased actions to prevent, detect and punish corruption would deter investors to engage in corruption since they would face legal actions under domestic law as well as a cutback to their rights to compensation under the IIA.[2963]

The balanced approach is therefore aimed at creating an incentive to both, the investors and the host State, and amounts to an effective method for fighting corruption.[2964]

8. Protection of public interests

As concluded in Chapter Four, in particular with regard to corruption in investment treaty arbitration, arbitrators should accept their responsibility to also serve the

[2961] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 81. See also Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," 220; Wilske and Obel, "The 'Corruption Objection' to Jurisdiction in Investment Arbitration - Does It Really Protect the Poor?," 184. Wilske and Obel argue that the zero tolerance approach might motivate a State to "*use corruption as a way to escape liability or responsibility for investment contracts intended to improve infrastructure and alleviate poverty, rather than be motivated by the exact state of poverty that requires an initial investment*". See also Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," 1000 ("*As long as the current form of corruption defense continues to be applied within the ICSID context, states have a perverse incentive to actually promote bribery as a means of limiting potential liability*."); "International Investment Law and the Fight Against Corruption," 10 et seq. as cited in Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 54. ("*The value of the 'corruption card' for states may even serve as a perverse disincentive for the state to put in place measures to prevent corruption, proof of which can benefit but likely not harm the state's interests in the arbitrations*."); Kulkarni, "Enforcing Anti-Corruption Measures Through International Investment Arbitration," 43 et seq.

[2962] Note that Kreindler, who rejects the balanced approach, explicitly emphasises that "*one does not want to propagate apologies for corrupt states, or perverse encouragement for acceptance of bribes – perverse encouragement via arbitral awards setting a questionable but to a certain degree measureable precedent* […]"; Kreindler, "Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers," 390. See also Kreindler, "Die Internationale Investitionsschiedsgerichtsbarkeit Und Die Korruption: Eine Alte Herausforderung Mit Neuen Antworten," 13.

[2963] See also Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 61.

[2964] See e.g. Ibid., para 57 et seq.

public interest.[2965] Regardless whether the commentators favour a zero tolerance approach or a balanced approach towards corruption, commentators stress more and more that in particular in the context of corruption, arbitral tribunals should take the interests of the public into consideration.[2966] While the vast majority agrees on such premise, its concrete application and the result of such application differ substantially.

In fact, the tribunal in *World Duty Free v Kenya* was openly driven by the consideration of protecting the public, i.e. the taxpayers of Kenya, "*one of the poorest countries in the world*".[2967] The tribunal rejected to consider any liability of Kenya for the corrupt practices of its 'most senior official'[2968] in order to alleviate the public from paying any compensation to a corrupt investor on the basis of the illicit acts of its President. In this context the Kenyan Attorney General Amos Wako who was supervising the Kenya's legal team in *World Duty Free v Kenya* emphasised that the outcome of the case was of the greatest public interest.[2969] In his view, fear existed that if Kenya lost the case its "*economic and social development would be halted and the country would become a failed state*".[2970] While the thought to protect the public is notable and desirable, the actual result of not holding the host State accountable for the corrupt acts of its public officials is, however, the opposite of the pursued one. In fact, the notion that the public needs to be protected does not automatically lead to the conclusion that the investor should lose all its rights and investment protection. There is at least one intermediate step missing: What is the best approach for the public in the long run?

As discussed in Chapter One, it is true that the population of the host State is the most vulnerable group suffering from the corrupt practices of a kleptocratic regime as the one of the former President of Kenya, Daniel arap Moi. However, the zero tolerance approach once more fails to take into consideration the extensive studies on corruption conducted in other fields of studies, which show that a mere focus on the supply side is not effective against corruption.[2971] The desired alleviation of the public is merely a short-term effect of the zero tolerance approach, which in fact harms the public in the long run.[2972]

[2965] Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2009, 135.
[2966] See e.g. Summerfield, "The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions"; Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 57 et seq.
[2967] *World Duty Free v Kenya*, Award, para 181.
[2968] *World Duty Free v Kenya*, Award, para 181.
[2969] Alison Ross, "The Man Behind Kenyan Arbitration," *Global Arbitration Review*, January 20, 2012.
[2970] Ibid.
[2971] See Chapter One. See also Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 58 et seq.
[2972] See also Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," 12. ("*The tribunal in WDF* [*World Duty Free v Kenya*] *and some commentators will justify inaction against demand-side corruption by underlining the immediate*

As discussed, such approach fails to curb corruption within the host State due to its lack of providing any incentive to fight corruption or any deterrence for corrupt officials to refrain from extorting, soliciting or accepting bribes. As shown by the example of *World Duty Free v Kenya*, Kenya refrained not only from prosecuting Daniel Arap Moi for its involvement in the corrupt transaction, but also from making any attempts of tracing the illegal proceeds of such transaction and recovering them in the public interest.[2973] After having succeeded with its corruption defence despite such failure to fight corruption, Kenya or any other host State is most certainly not encouraged to implement the required anti-corruption measures. Such result cannot be in the best interest of the public.[2974] The public is better off with an approach that holds its government accountable for any shortcomings of its international obligations to fight corruption. Only if held internationally responsible for the participation in the corrupt act and/or its failure to fight corruption, the host State will be – internationally and internally – forced to improve its efforts to fight corruption, which will also force the host State to promote the rule of law.[2975]

In this context it must be kept in mind that the amount of compensation paid would be based on the violation of both the protection standards and the international obligations to fight corruption.

9. Unclean hands doctrine – applicable to both parties

The zero tolerance approach is also based on the unclean hands doctrine. Pursuant to this doctrine as highlighted above and as explained in further detail in Chapter Seven, the investor engaged in illicit conduct vis-à-vis the investment shall forfeit

---

burden a finding against the state would have on the public purse. This line of reasoning is surprising as it discounts the destructive effect of corruption on economic and social development.").

[2973] The public is in fact deprived from the money the corrupt officials put into their own pockets, which the investors, however, were willing to pay in connection with the investments. Such illegal proceeds must therefore be traced and recaptured in the public interest. A host State failing to take such measures is to some extent condoning the corrupt official to keep the illegal proceeds.

[2974] Some commentators have emphasised that the zero tolerance approach may arguably also frustrate the domestic actors suffering from the corrupt host state, which may well continue with its corrupt practices after not having to fear any repercussion, see e.g. Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration," 274.

[2975] Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 61. ("[…] *upholding corrupt investors' claims in appropriate circumstances, such as where the state has condoned or demanded bribes from investors, is a more effective method of combating corruption and enhancing the rule of law. It should be noted that what countries which suffer from endemic government corruption lack is not national legislation prohibiting and criminalising corruption, but rather, a culture of above-board business practices, and the political will to encourage such practices by enforcing anti-corruption legislation aimed at detecting, punishing, and ultimately deterring, corruption. These practices cannot be fostered by allowing states to plead corruption (that they had participated in or turned a blind eye to) as a complete defence when claims are brought against them. If host states are instead made to honour their investment treaty commitments despite investor corruption, corrupt officials can no longer solicit and receive bribes from investors with impunity, knowing that their involvement in the investor's corrupt acts may permit the investor to successfully mount a claim against the host state for breach of investment protection standards*.").

its rights to pursue any claims under the IIA before an arbitral tribunal.[2976] Commentators have argued that the unclean hands doctrine should frustrate the investor's claim with regard to a corruption-tainted investment although public officials of the host State were part of the illicit act.[2977] Some commentators base such notion on their assertion that the corrupt act of public officials is not attributable to the host State,[2978] while others contend that even if it has been proven that the host State is equally at fault the claim should be dismissed.[2979] However, such approach is also criticised for it leads to the result that the host State would profit from its own violation of international law.[2980]

As discussed in Chapter Eight, the party alleging corruption has the burden of proof irrespective of whether it is alleged as cause of action or as defence.[2981] The zero tolerance approach, however, disregards that in order for the unclean hands doctrine to be applied to the investor and its claim, the host State must first allege corruption as a defence. On basis of the findings of this study there are sufficient grounds to assert that where public officials are involved in corruption, the host State has to some extent failed to comply with its international obligations, be it through attribution of the corrupt act under the principles of state responsibility or through failure to take the necessary actions to prevent the corrupt action or even by subsequently condoning it.[2982] In such case the host State itself has unclean hands as regards the corrupt circumstances it seeks to rely on. The host State should not benefit from corruption committed by its own public officials.[2983] The zero tolerance approach leads, therefore, to the situation where the tribunal is asked to disregard the unclean hands doctrine vis-à-vis the host State, but to apply it to

[2976] See Chapter Seven.

[2977] Kreindler, "Die Internationale Investitionsschiedsgerichtsbarkeit Und Die Korruption: Eine Alte Herausforderung Mit Neuen Antworten," 8; Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 726.

[2978] Lamm, Pham, and Moloo, "Fraud and Corruption in International Arbitration," 726. See Chapter Five.

[2979] Kreindler, "Die Internationale Investitionsschiedsgerichtsbarkeit Und Die Korruption: Eine Alte Herausforderung Mit Neuen Antworten," 8.

[2980] See e.g. Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 214 et seq. See also Raeschke-Kessler and Gottwald, "Corruption," 597; Raeschke-Kessler and Gottwald, "Corruption in Foreign Investment - Contracts and Dispute Settlement between Investors, States, and Agents," 16. Note that Raeschke-Keller and Gottwald limit their analysis to the validity of a corruption-tainted contract between an investor and a host State, which relates to the corruption scenario encountered in international commercial arbitration, but differs from the one present in investment treaty arbitration. They argue for a flexible approach where the corruption-tainted contract is not rendered void and invalid, but is rather modified or adapted in order to take into account that the host State was involved in the corrupt act and should not benefit from its own wrongdoing.

[2981] See Chapter Eight (Evidence).

[2982] Sacerdoti emphasises that even if one argues that the host State may invoke corruption as invalidating its consent, this would nonetheless render the unclean hands doctrine inapplicable. In this context, he contends that the "*State should show that it has not endorsed the corruptive conduct, has prosecuted the official and has attempted to recover the illicit profits*"; see Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," 586.

[2983] Wilske, "Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?," 224.

the investor to dismiss its claim.[2984] In fact, in case the unclean hands doctrine would be applied strictly – as called for by the advocates of the zero tolerance approach – then the host State would be denied the opportunity to raise the investor's unclean hands as a defence due to its own unclean hands. Any strict application of the unclean hands doctrine in such situation, however, undermines the spirit and purpose of the unclean hands doctrine in the first place: nobody shall profit from her own illicit behaviour. This must be true for both the investor and the host State. Thus, the unclean hands principle applies to both the investor and the host State.[2985]

In conclusion, the unclean hands doctrine in the form of civil law concept or as developed in international law for unilateral illicit behaviour cannot be applied to the corruption scenario in international investment arbitration without any modification to the specific circumstances of both corruption and the asymmetry of investment arbitration. In case both parties are involved in corruption, none of the parties may benefit from its own wrongdoing. This can only be achieved if the unclean hands doctrine is applied in a balanced or flexible manner and the actions of both sides are scrutinised and taken into account by the arbitral tribunal leading to a less beneficial result for both sides.[2986]

10. Unjust enrichment

The zero tolerance approach leads to an unjust enrichment of the host State in case it violated any investment protection standard, while exempting it from any liability due to the corruption defence.

Commentators have rejected such notion arguing that only the corrupt officials are unjustly enriched, but not the host State.[2987] Such argument is based on the fact that the bribe is not recoverable by the investor and will most certainly not find its way into the national treasury of the host State. In fact, when limiting the analysis to the proceeds of the corrupt transaction, it is right that only the corrupt official will be unjustly enriched. However, the scope of review is not limited to the bribe and its fate, but rather to the relationship between the investor and the host State in connection with the investment.

The zero tolerance approach leaves the investment under the control of the host State without any compensation in return. The host State would not only benefit

[2984] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 80.
[2985] Ibid. See also Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2009, 135; Wilske and Obel, "The 'Corruption Objection' to Jurisdiction in Investment Arbitration - Does It Really Protect the Poor?," 188.
[2986] Kulick and Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption," 80. See also Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 233.
[2987] Tidarat Sinlapapiromsuk, "The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?," *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 1–32.

from the corruption committed by its own public officials, but would also benefit from not paying compensation or damages for its treaty breaches, thus being unjustly enriched. The balanced approach seeks to prevent any unjust enrichment of the host State in cases where it is involved in the corrupt act.

11. Reconciling anti-corruption and investment protection objectives

One of the most important goals of investment treaties is to promote investment through investment protection in order to foster economic development. The underlying premise is that an increase in investment and trade will also lead to an increase in economic development and public wealth. Investment protection is, however, not achieved only by establishing international treaty standards regulating how an investment is to be treated, but requires an international mechanism to enforce these standards. By denying the investor its rights to bring its case before an international tribunal, the zero tolerance approach will most certainly weaken investment protection. Such approach will deter investors from investing in host States where corruption remains an issue and therefore lead to a decrease in foreign investment – a result that runs counter to the original purpose of investment treaties.[2988]

At the same time the international condemnation of corruption is based on the premise that it *inter alia* weakens economic development and reduces public wealth. As explained before, the one-sided approach of merely focusing on the supply side and penalising only the investor falls short of effectively curbing corruption and is in any case not in line with the international anti-corruption regime.[2989] Such approach leaves the corrupt environment in the host State

[2988] See e.g. Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?," 2009, 135. ("[…] *if arbitral tribunals punish those investors by removing their treaty protections, such reasoning may not support the original aim of the treaty which is generally to attract investments*."). See also Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration," 280; Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 6; Llamzon, *Corruption in International Investment Arbitration*, 241. Commentators have also emphasised the link between the deterrence of investors, the decrease in investment and effects on poverty, see e.g. Wilske and Obel, "The 'Corruption Objection' to Jurisdiction in Investment Arbitration - Does It Really Protect the Poor?," 185.

[2989] While this study focuses on the approach to be taken by investment treaty arbitration to combine and align the purpose of investment protection and the international fight against corruption, commentators have also focused on the counterproductive effects that the current anti-corruption regime has on investor-State dispute resolution. Torres-Fowler, for instance, argues that current anti-bribery law enforcement practices have a deterrent effect on investors to bring a claim before an investment treaty arbitral tribunal due to potential actions of enforcement agencies. Torres-Fowler thus suggests *inter alia* that enforcement agencies must take into consideration that host States may take advantage of domestic anti-corruption laws in order to deter investors from bringing a claim, see Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," 1034 et seq.
Note that Losco also identified the divergent goals of the one-sided approach taken by the FCPA and other national anti-corruption regimes on the one hand and the investment arbitration regime on the other. Losco, however, takes the one-sided approach for granted and argues for a strong corruption defense. In his view, the detrimental effects to the investment protection regime should

untouched with no incentive of improvement. Thus, corruption will most likely remain an endemic problem. Accordingly, it also runs counter the objective to fight corruption.

What is more, as discussed in Chapter One, corruption itself has a deterring effect on foreign investment due to the additional form of entry barrier for foreign investors and the additional risk of legal jeopardy.[2990] The decrease in foreign investment will, however, be detrimental to the economic development of the host State and worsen the economic situation of the population. The decline in the population's economic prosperity might even worsen the already weak public institutions and therefore increase the preconditions for corruption. This may lead to a vicious circle among poverty, corruption and deterrence of foreign investment.

This vicious circle must be actively broken. This will depend on both investment promotion through investment protection and the implementation of a stable legal investment environment where anti-corruption laws are enforced, also against corrupt public officials. The ultimate purpose of international investment protection and the goal of the international fight against corruption must therefore be reconciled.

While the zero tolerance approach pretends to be the guardian of the integrity of the investment arbitration system and the benefactor of the public, it in fact – unintentionally – leaves the population alone and navigates away from the original objectives of international investment protection. The balanced approach, however, forces the host State to take action and fight corruption as well as to honour the investment protection obligations it subscribed to. In addition, due to the possibility of taking all the relevant circumstances of the case into account rather than automatically rejecting any investment protection, it strikes a balance between both increasing investment and curbing corruption with the similar desire of fostering economic development.

12. Conclusion: investment treaty arbitration as part of the international fight against corruption

Investment treaty arbitral tribunals cannot disregard that they are part of the administration of international justice. As discussed in Chapter Four, investment treaty arbitration tribunals should accept their duty to participate in the global fight

---

be mitigated through a reconciliation of both regimes, for which he presents three options: First, in case anti-corruption authorities find proof for investor corruption after the ICSID award was rendered, the enforcement authorities should require the investor to waive or disgorge the award. Secondly, in case investor corruption has been established before commencing the arbitration proceedings, the investor should be able to cure the defect of the contract (or investment) by paying the damages caused by corruption. Thirdly, in case of parallel proceedings, the domestic enforcement authorities should instigate the tribunal to stay the arbitration proceedings until the investigation has been concluded. See Losco, "Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction," 1231 et seq.

[2990] See Chapter One C.III.

against corruption. This responsibility requires the arbitral tribunal to acknowledge the steps taken in the international fight against corruption as well as the studies conducted in different fields with regard to the socioeconomic impact of corruption.

As already mentioned, it is needless to say that all arbitrators, scholars and practitioners within the international investment arbitration community agree that corruption needs to be condemned and eradicated. However, it is an easy option to take a strict black and white approach based on the justification that corruption violates international public policy or leads to the illegality of the investment. At first sight it might appear to be the strong approach that corruption requires, but after taking a closer look it turns out to be too short-sighted. The zero tolerance approach falls short of complying with the responsibility a tribunal has to society since it disregards the negative impact it has on corruption and foreign investment in the long run.

Investment treaty arbitration tribunals must accept that, when corruption becomes an issue in the arbitration proceedings, the arbitral tribunal needs not only to scrutinise if States should be held accountable for breaches of investment protection standards established in investment treaties, but also to what extent the State complied with its international obligations to fight corruption.[2991]

We have to bear in mind that the international instruments against corruption fail to provide effective enforcement mechanisms, while investment treaty arbitration comprises a powerful tool to hold corrupt States accountable for their violations of treaty obligations, at least to some extent.[2992] Thus, while investment treaty arbitration is not the genuine enforcement mechanism of the international anti-corruption regime, it can make an important contribution to curb corruption. Applying the balanced approach and taking the responsibility of both parties – the investor and the host State – into consideration, is an effective measure to both motivate the host States to comply with their international obligations, in particular with regard to fighting corruption, and deter the investor from engaging in corruption.[2993] Investment arbitration therefore has prospects to play a significant

[2991] See also Litwin, "On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption," 12. Litwin argues that investor-State arbitration is an 'effective tool' to pressure governments to comply with their international obligations to implement "*appropriate demand-side mechanisms in order to prevent their public officials from accepting or soliciting bribes.* […] *However, this can only be achieved if the conduct of the state is exposed before the tribunal and this conduct must measure up to the commitments undertaken by these states as reflected in the international anti-corruption instruments they have subscribed to*."

[2992] See for such notion made with regard to other legal regimes in general Stephan W. Schill, "Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights," *ICSID Review - Foreign Investment Law Journal* 27, no. 1 (2012): 88. ("[…] *international investment treaties create a powerful remedy for foreign investors by providing access to investor-State arbitration in order to enforce treaty obligations, whereas many other international legal regimes lack comparably potent enforcement mechanisms*.").

[2993] Wilske and Obel, "The 'Corruption Objection' to Jurisdiction in Investment Arbitration - Does It Really Protect the Poor?," 187. ("*In other words, by refusing to simply accept corruption as*

role in the international fight against corruption.[2994] Arbitral tribunals will now need to assume such challenging task.

B. The balanced approach in theory: the principle of proportionality

Having concluded that from a policy perspective corruption in investment treaty arbitration needs to be dealt with in a flexible, balanced and nuanced manner rather than applying a strict all-or-nothing approach, this sub-chapter focuses on the conceptual foundation of the balanced approach and argues that there is a place in investment treaty arbitration to engage in a balancing of the relevant factors and interests when corruption is an issue. The need for balancing and weighing leads us to the principle of proportionality[2995] as a conceptual and doctrinal basis of the balanced approach. Thus, the principle of proportionality is first discussed in general terms (see below at **I.**), before it is analysed in the context of investment treaty arbitration (see below at **II.**). Finally, a conceptual bridge is built between the principle of proportionality and corruption in investment treaty arbitration (see below at **III.**).

I. The principle of proportionality in general

It is worth having a brief understanding of the origins of the principle of proportionality (see below at **1.**), before analysing its application and importance in international law (see below at **2.**). Finally, the three elements of the proportionality analysis will be summarised in order to serve as basis for the balancing in corruption cases (see below at **3.**).

---

solely an investor's responsibility, tribunals could motivate states to avoid fraudulent and exploitative deals initially, focusing instead on legally formed and operated investments that would run more effectively in the long term to reduce and prevent poverty.").

[2994] See also Llamzon, *Corruption in International Investment Arbitration*, 303 et seq. („*Investment arbitration can play a limited but significant role in righting this imbalance and forcing accountability from these public officials by putting pressure upon host States to prosecute public officials involved in corruption as a condition precedent to invoking bribery as a defence; but uncertainties relating to the law of State responsibility for corruption need to be addressed.*"). See also Kulkarni, "Enforcing Anti-Corruption Measures Through International Investment Arbitration," 41 et seq.

[2995] See e.g. Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier," *Law and Ethics of Human Rights* 4, no. 1 (2010): 62. ("*Balancing pushes arbitrators toward proportionality*."). Note that Stone Sweet acknowledges that such view is not uncontroversial among scholar. Moreover, at this stage it is important to clarify that the term 'balancing' is also used in American constitutional law as interpretative tool. Such 'balancing' is not identical with 'the principle of proportionality'. 'Balancing' has been subject to criticism and has never obtained the status of established doctrine in U.S. constitutional law. In contrast, the principle of proportionality has become an important part of European constitutional law. However, while both tests have different original, they are often discussed as being to some extent similar and 'resemble each other in important aspects'. The analytical differences between the two tests are rather minimal. For a comparison of both tests see Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German Proportionality: The Historical Origins," *International Journal of Constitutional Law* 8, no. 2 (2010): 263–86.

1. The origins of the principle of proportionality

The basis of the principle of proportionality parts from the premise that the collision of two competing interests or principles require a weighing rather than an 'all or nothing' solution. In the domestic law context, the proportionality analysis "*helps to define and to balance the public, represented by the interference and the underlying interest of the state or the community concerned, and the private, represented by the interests of the individuals affected*".[2996] The roots of the principle of proportionality can be found in domestic German administrative and constitutional law. Emerging in the late eighteenth century in the writings of German legal scholars, it then became established practice in late-nineteenth-century jurisprudence of Prussian administrative courts.[2997] In the 1950s, with the injustices committed in the Nazi era, the German Federal Constitutional Court adopted and continued to develop the principle of proportionality as threshold for any governmental action infringing fundamental rights.[2998] Gaining constitutional status in Germany, the principle of proportionality was adopted by various domestic orders around the world in both common law and civil law jurisdictions.[2999]

The modern view on the principle of proportionality and the proportionality analysis is strongly influenced by Robert Alexy's work on constitutional rights '*Theorie der Grundrechte*'[3000] ('Theory of Constitutional Rights'[3001]). According to his theory, norms can be distinguished in principles and rules. The latter are either complied with or not, which is determined by the legal methodological tool of subsumption. On the contrary, principles are based on the logic of optimisation, for which reason principles – even when in conflict with other norms – must be realised to the highest degree possible, which is achieved by the balancing exercise based on the proportionality analysis.[3002]

[2996] Benedict Kingsbury and Stephan W. Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford et al.: Oxford University Press, 2010), 80.

[2997] For an overview on the early development of the principle of proportionality in German legal theory in practice see Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47, no. 1 (2008): 93 et seq.

[2998] In its seminal decision called *Apothekenurteil* (Pharmacy Decision) the German Federal Constitutional Court sought to resolve the conflict between individual rights and public interests by applying the proportionality *stricto sensu* and referring to a "careful balancing" (*Abwägung*) of the meaning of the conflicting interests, see e.g. Kingsbury and Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, IILJ Working Paper 2009/6," 24 et seq.

[2999] See e.g. for Canada the Supreme Court of Canada case *Regina v Oakes* [1986] 1 SCR 103, 139; for South Africa the case of the Constitutional Court of South Africa *State v Makwanyane and anor* 1995 (3) SA 391, 436 (CC).

[3000] Robert Alexy, *Theorie Der Grundrechte*, 3rd edition (Suhrkamp, 1996).

[3001] Robert Alexy, *A Theory of Constitutional Rights* (Oxford et al.: Oxford University Press, 2002).

[3002] Alexy, *Theorie Der Grundrechte*, 75 et seq.

2. The principle of proportionality in international law

From its early domestic scope of application, the principle of proportionality has moved to the international sphere and has developed into an essential tool for international courts and tribunals. The European Court of Justice and the European Court of First Instance, for example, revert to the proportionality analysis *inter alia* in order to solve conflicts between fundamental European freedoms and other fundamental rights.[3003] In this regard it developed to a legal method to not only accommodate the rights of the Member States and the rights of the individuals, but also to coordinate between the legal orders of the Member States and the supranational legal order.[3004]

The principle of proportionality has also found its way into the jurisprudence of the ICJ. There it is mainly applied in connection with the law of military[3005] and non-military[3006] countermeasures to balance the means and the ends of the measures as well as the interests at stake.[3007]

[3003] See Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 81 et seq.

[3004] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 144.

[3005] For ICJ jurisprudence applying the proportionality analysis to military countermeasures see *Military and Paramilitary Activities (Nicaragua v United States)*, Merits, para 237 ("*even assuming* [acts of complicity by Nicaragua in El Salvador] *to have been established and imputable to that state,* [these activities] *could only have justified proportionate countermeasures* […]"); *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment of 6 November 2003, ICJ Reports 2003, 161 (hereinafter: "*Oil Platforms*, Judgment"), para 77 ("*As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither* [the operation of countermeasures] *as a whole, nor even that part of it that destroyed* [the platforms at issue], *can be regarded in these circumstances of the case, as a proportionate use of force in self-defense*."); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of December 19 December 2005, ICJ Reports 2005, 168 (hereinafter: "*Armed Activities in Congo*, Judgment"), para 147 ("[…] *the taking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end*.").

[3006] For ICJ jurisprudence applying the proportionality analysis to non-military countermeasures see e.g. *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, 7 (hereinafter: "*Gabcikovo-Nagymaros Project*, Judgment"), paras 85 et seq. ("*In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.* […] *Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube – with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz – failed to respect the proportionality which is required by international law.*").

[3007] See e.g. Thomas M. Franck, "On Proportionality of Countermeasures in International Law," *American Journal of International Law* 102, no. 4 (2008): 715–67; Thomas M. Franck, "Proportionality in International Law," *Law and Ethics of Human Rights* 4, no. 2 (2010): 230–42. ("*Across a broad range of subjects, there is now wide agreement that the principle of proportionality governs the extent to which a provocation may, lawfully, be countered by what might otherwise be an unlawful response*."), Ibid., 241.

The proportionality analysis can also be found in the WTO context,[3008] in particular in the jurisprudence of the WTO panels on Article XX of the General Agreement on Tariffs and Trade (GATT), which provides general exceptions to measures restraining trade, if these measures are aimed at protecting certain public interests as for instance public morals, human, animal or plant life or health. Pursuant to the necessity-test of Article XX GATT, measures undertaken in public interest might be justified if they are 'necessary' for the alleged purpose. While the necessity test mainly focuses on a least-restrictive-measures test, the WTO Appellate Body in *Korea – Beef* has nonetheless introduced "*a process of weighing and balancing a series of factors*" as part of the necessity test.[3009] Such approach was refined in *EC – Asbestos* where the Appellate Body clarified that the 'weighing and balancing process' was aimed at determining whether "*there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition*".[3010] The Appellate Body in *Brazil – Tyres* confirmed such approach and stated that

> "[t]he weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement".[3011]

However, the Appellate Body went a step further and seemed to have weighed the importance of the interests pursued with the measure against its trade restrictiveness, which to some extent mirrors the proportionality *stricto sensu*.[3012] In the words of the Appellate Body

> "[…] Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the

[3008] For proportionality in the WTO context see e.g. Peter Van den Bossche, "Looking for Proportionality in WTO Law," *Legal Issues of Economic Integration* 35, no. 3 (2008): 283–94; Mads Andenas and Stefan Zleptnig, "Proportionality: WTO Law: In Comparative Perspective," *Texas International Law Journal* 42, no. 3 (2007): 371–423; Axel Desmedt, "Proportionality in WTO Law," *Journal of International Economic Law* 4, no. 3 (2001): 441–80.

[3009] See e.g. WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, 11 December 2000, WT/DS161/AB/R (hereinafter: "*Korea Beef*, Appellate Body Report"), para 164. Note however that while this balancing of factors might hint at the assessment of proportionality *stricto sensu*, the Appellate Body stated that such balancing was part of the examination whether a less restrictive alterative measure was reasonably available, see *Korea Beef*, para 166. The precise scope of such balancing has been disputed in scholarship; see e.g. Van den Bossche, "Looking for Proportionality in WTO Law," n. 22.

[3010] WTO Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001 (hereinafter: "*EC-Asbestos*"), para 172.

[3011] *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007 (hereinafter: "*Brazil Tyres*"), para 182.

[3012] Van den Bossche, "Looking for Proportionality in WTO Law," 294.

> objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban."[3013]

Another important area of application of the proportionality analysis is the resolution of conflicts between individual rights granted under the European Convention on Human Rights and Fundamental Freedoms (***ECHR***) and public policies of the Member States. The European Court of Human Rights (***ECtHR***) regularly engages in a balancing of the competing interests with most rights established in the Convention and has "*produced an extensive jurisprudence pertaining to the principle of proportionality*".[3014] In *Handyside v United Kingdom* the ECtHR noted with regard to the censorship of a book based on violations of public morals and its conflict with the freedom of expression that "*every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued*".[3015] Referring to *Handyside* the ECtHR confirmed such approach in *Dudgeon v United Kingdom* and emphasised that

> "[…] a restriction on a Convention right cannot be regarded as 'necessary in a democratic society' – two hallmarks of which are tolerance and broadmindedness – unless, amongst other things, it is proportionate to the legitimate aim pursued".[3016]

Applying the proportionality test, the court found a Northern Ireland law that criminalised certain homosexual conduct "*by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved*".[3017]

3. Elements of the proportionality analysis

As discussed above, domestic courts and international courts and tribunals have engaged in a form of proportionality analysis when dealing with conflicts between competing rights. While the particular methodologies applied by the relevant adjudicators vary to some extent, a common notion of the proportionality analysis has developed and consists of a three-step approach.

a) Suitability for a legitimate purpose

The first step of the proportionality analysis is the test of whether the measure at issue is suitable to serve the alleged legitimate purpose. Such test is two-fold, since the adjudicator has to determine as a first step whether the measure at scrutiny

[3013] *Brazil Tyres*, para 210.
[3014] Franck, "Proportionality in International Law," 240.
[3015] ECHR, *Handyside v The United Kingdom*, Judgment, 7 December 1976 (hereinafter: "*Handyside v United Kingdom*"), para 49.
[3016] ECHR, *Dudgeon v The United Kingdom*, Judgment, 22 October 1981 (hereinafter: "*Dudgeon v United Kingdom*"), para 53.
[3017] *Dudgeon v United Kingdom*, para 61.

aims at a legitimate purpose and secondly whether it is generally suitable to achieve such purpose.

In this regard, States are free to choose the purpose they seek to pursue. Only measures adopted to pursue an illegitimate purpose – as for instance any purpose in violation of *ius cogens* – will *per se* amount to a disproportional measure.[3018] Moreover, any measure that fails to further the alleged purpose in any way will also be disproportionate.[3019] However, all that is required is a mere causal relationship between the measure and its purpose, which also only needs to exist from an *ex ante* perspective.[3020]

b) Necessity

The second step of the proportionality analysis comprises a necessity test, which is often referred to as a least-restrictive-measure-test. This test is based on the notion that a State should not be justified to infringe protected rights more than necessary in order to fulfil its public tasks. Pursuant to such test, a measure is only necessary if there is no less intrusive measure available which is equally effective to achieve the alleged purpose.[3021] Like the first step, this test is also two-fold.[3022] First, the adjudicator needs to analyse whether there is a less restrictive measure available to further the same purpose. Secondly, the less restrictive measure needs to be equally effective to achieve the stated goal in order to render the measure at issue unnecessary. Commentators have argued that in contrast to the suitability test, a measure might fail the necessity test if from an *ex post* perspective an equally effective but less restrictive measure was available.[3023]

c) Proportionality *stricto sensu*

The third and final step is the core element of the proportionality analysis and moves away from merely acknowledging the measure, its purpose and the availability of alternative measures, but engages in a balancing of the alleged purpose and the effects of the measures on the protected rights and interests. While in the first two steps the importance of the purpose of the measure is not questioned, but rather taken as the basis of the relevant test, the proportionality *stricto sensu* puts the pursued objective in perspective with the relative weight of the affected rights and principles. In the words of Kingsbury and Schill

[3018] See Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 86.
[3019] See e.g. Jan H. Jans, "Proportionality Revisited," *Legal Issues of Economic Integration* 27, no. 3 (2000): 240.
[3020] Kulick, *Global Public Interest in International Investment Law*, 187.
[3021] Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 86 et seq.
[3022] Ibid., 87.
[3023] Kulick, *Global Public Interest in International Investment Law*, 188. Referring to Eberhard Grabitz, "Der Grundsatz Der Verhältnismäßigkeit," *Archiv Des öffentlichen Rechts* 98, no. 4 (1973): 575.

> "[p]roportionality *stricto sensu* requires taking into account all relevant factors such as cost-benefit analysis, the importance of the right affected, the importance of the right or interest protected, the degree of interference (minor versus major interference), the length of interference (permanent versus temporary), the availability of alternative measures that might be less effective, but are proportionally less restrictive for the right affected, and so on".[3024]

Proportionality *stricto sensu* not only involves a balancing and weighing between the pursued objective and the affected rights and interests, but also accounts for a proportional solution of conflicts between competing rights and interests. Pursuant to the principle of '*Konkordanz*' originally developed in German doctrine to reconcile conflicts between fundamental rights, no fundamental right may be considered superior to any other fundamental right *in abstracto* for which reason the balancing needs to aim at a solution that provides the best possible protection for all rights involved.[3025]

II. The principle of proportionality in investment treaty arbitration

In the investment treaty context, there is a growing body of arbitral decisions drawing on the principle of proportionality when assessing State responsibility for potential breaches of investment protection standards established in IIAs (see below at **1.**). At the same time the principle of proportionality has been subject of intensive discussions in scholarship (see below at **2.**).

1. The principle of proportionality in investment treaty case law

At present, tribunals have included the principle of proportionality in their findings with regard to indirect expropriation (see below at **a)**), the fair and equitable treatment standard (see below at **b)**), and the necessity defence (see below at **c)**).

a) Indirect expropriation

The first important appearance of the principle of proportionality with regard to indirect expropriation was the tribunal's analysis in TECMED engaging in a comprehensive weighing and balancing of the competing interests. After massive protests by the local population against a waste landfill, the Mexican authorities refused to renew the operating licence of the Spanish investor TECMED. Referring to the jurisprudence of the European Court of Human Rights,[3026] the tribunal

[3024] Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 87.
[3025] On the principle of "*Konkordanz*" in German doctrine see Konrad Hesse, *Grundzüge Des Verfassungsrechts Der Bundesrepublik Deutschland*, 20th ed. (Heidelberg: Müller Verlag, 1995), para. 72.
[3026] Note that the proportionality test in the ECHR jurisprudence referred to by the tribunal is applied in the context of determining whether there is justification for a deprivation of a right under the European Convention of Human Rights.

concluded that the principle of proportionality also applied to administrative measures of the State in the investment protection context.[3027] The tribunal emphasised that in order for a measure to amount to an indirect expropriation, the tribunal would have to consider whether it was proportional to the pursued public purpose and to the objective of investment protection. In the words of the tribunal

> "[…] the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. […] There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure".[3028]

While the Mexican authorities justified the refusal to grant a renewal of the licence *inter alia* with shortcomings of the investor when operating the landfill,[3029] the tribunal found these breaches to be too marginal to justify the refusal to renew the licence and concluded after a balancing of all relevant aspects that the measure was disproportional and therefore amounted to an indirect expropriation.

Many investment treaty arbitral tribunals have confirmed the balancing approach taken by the tribunal in TECMED and the proportionality requirement in relation to expropriatory treatment.[3030]

b) Fair and equitable treatment

Arbitral tribunals also applied the proportionality analysis in order to determine whether a governmental measure complies with the fair and equitable treatment standard. The tribunal in *MTD Equity v Chile*, for instance, noted in the context of providing a definition of the fair and equitable treatment standard that one of its fundamental standards is the principle of proportionality.[3031] Moreover, emphasising the close ties between the fair and equitable treatment standard and the notion of legitimate expectations, the tribunal in *Saluka v Czech Republic*

[3027] *TECMED v Mexico*, Award, para 122.
[3028] *TECMED v Mexico*, Award, para 122 (emphasis added).
[3029] *TECMED v Mexico*, Award, paras 99 et seq. The Mexican agency argued that the investor lacked reliability due to violations of the operating licence in processing biological and toxic waste as well as exceeding the capacity of the landfill.
[3030] See e.g. *Azurix v Argentina*, Award, para 311; *LG&E v Argentina*, Decision on Liability, paras 189-195; *EDF v Romania*, Award, para 293; *Tza Yap Shum v Peru*, Award, para 174; *Deutsche Bank v Sri Lanka*, Award, para 522.
[3031] *MTD v Chile*, Award, para 109. Note that the tribunal referred to the definition of fair and equitable treatment provided by Judge Schwebel who appeared as an expert called by the claimants ("*As defined by Judge Schwebel, 'fair and equitable treatment' is 'a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality*.'").

engaged in a balancing of the investor's legitimate expectations and the host State's interests.[3032] In the words of the tribunal

> "[t]he determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."[3033]

Recent tribunals, *inter alia* in *Lemire v Ukraine*,[3034] *Suez v Argentina*,[3035] *Total v Argentina*,[3036] and *El Paso v Argentina*[3037] confirmed such approach and applied the principle of proportionality in order to assess whether the governmental measure at issue violated the fair and equitable treatment standard.

In the recent *Occidental Petroleum v Ecuador*[3038] award, the proportionality analysis also played a decisive role for the outcome of the case. The investor had failed to meet the conditions of an investment contract when transferring its rights under the contract without prior governmental authorisation. The contract provided for a right to issue *caducidad* (forfeiture) for such violation of the terms of the contract and finally the Minister of Energy and Mines terminated the contract by issuing a Decree of *caducidad*.[3039] The tribunals emphasised that the principle of proportionality is applied in a variety of international law settings, including the WTO and the ECtHR and referred to the growing body of arbitral law engaging in a proportionality analysis in connection with potential violations of investment protection standards.[3040] Against this background it concluded that the principle of proportionality is applicable in investment treaty arbitration as a matter of general international law.[3041] In the view of the tribunal, the fair and equitable treatment

---

[3032] *Saluka v Czech Republic*, Partial Award, para 306.
[3033] *Saluka v Czech Republic*, Partial Award, para 306.
[3034] *Lemire v Ukraine*, Award, para 285 ("*The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred* […]").
[3035] *Suez, Aguas de Barcelona, Vivendi and AWG v Argentina*, Decision on Liability, para 236 ("*in interpreting the meaning of fair and equitable treatment to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service.*").
[3036] *Total v Argentina*, Decision on Liability, paras 121 et seq. ("*The balance between* […] *competing requirements and hence the limits of the proper invocation of "legitimate expectations" in the face of legislative or regulatory changes* […] *has been based on a weighing of various elements pointing in opposite directions*.").
[3037] *El Paso v Argentina*, Award, para 373 ("[...] *fair and equitable treatment is a standard entailing reasonableness and proportionality. It ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances*.").
[3038] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012 (hereinafter: "*Occidental v Ecuador*, ICSID Award"). Note that the tribunal issued an award granting the largest amount of damages to date in investment treaty arbitration for approx. USD 1.76 billion plus interest.
[3039] *Occidental v Ecuador*, ICSID Award, paras 186-200.
[3040] *Occidental v Ecuador*, ICSID Award, para 403-409.
[3041] *Occidental v Ecuador*, ICSID Award, para 427.

standard had to be interpreted to import an obligation of proportionality.[3042] Thus, after finding that the investor had violated the terms of the contract the tribunal examined whether the measure of terminating the contract, was a proportional response to the investor's failure of obtaining prior authorisation, which in the view of the tribunal was not.[3043]

c) Necessity defence

Tribunals have also drawn on the principle of proportionality in the context of the necessity defence, which has so far mainly been raised by Argentina in light of its economic crisis.[3044] In *Continental Casualty Company v Argentina* – referring to the GATT and WTO case law in order to determine the content of the concept of necessity – the tribunal concluded that the issue whether a measure was 'necessary' required a proportionality analysis.[3045] In this regard the tribunal approvingly quoted the panel in *Brazil – Tyres*

> "[t]he necessity of a measure should be determined through 'a process of weighing and balancing of factors' which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce."[3046]

Applying the proportionality analysis, the tribunal found that "*a genuine relationship of end and means in this respect*"[3047] existed and that Argentina had

---

[3042] *Occidental v Ecuador*, ICSID Award, para 404, referring to prior ICSID cases *MTD v Chile*, *LG&E v Argentina*, *TECMED v Mexico* and *Azurix v Argentina*.

[3043] For a critical view on the application of proportionality analysis in a contractual situation see Borzu Sabahi and Kabir Duggal, "Occidental Petroleum v Ecuador (2012) Observations on Proportionality, Assessment of Damages and Contributory Fault," *ICSID Review - Foreign Investment Law Journal* 28, no. 2 (2013): 282. Note that Sabahi and Duggal conclude that the proportionality analysis has only been applied rarely and weakly.

[3044] Note that the requirements of the necessity defence have been interpreted differently by the arbitral tribunals, which have lead to distinct decisions on cases with similar facts. For a critical commentary on the case law on necessity see e.g. Michael Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E," *Leiden Journal of International Law* 20, no. 3 (2007): 637–48; Stephan W. Schill, "International Investment Law and the Host State's Power to Handle Economic Crises - Comment on the ICSID Decision in LG&E v. Argentina," *Journal of International Arbitration* 24, no. 3 (2007): 265–86.

[3045] *Continental Casualty v Argentina*, Award, para 192. The application of the proportionality analysis in connection with the necessity defence has found criticism among commentators, see e.g. Erlend M. Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration," *Journal of International Dispute Settlement* 3, no. 1 (2012): 126–132; Jürgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis," *International and Comparative Law Quarterly* 59, no. 02 (2010): 365 et seq.

[3046] *Continental Casualty v Argentina*, Award, para 194 quoting *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007, para 7.104, which in turn sums up the WTO Appellate Body case law.

[3047] *Continental Casualty v Argentina*, Award, para 197. The exercise of the principle of proportionality by the tribunal has found heavy criticism among commentators, see e.g.

no reasonable alternatives to the measures implemented during the economic crisis.[3048] However, with regard to the restructuring of certain government bonds, the tribunal found that the necessity test was not met, mainly since they were restructured at a time where the economy had regained strength and they were combined with the condition to waive any other rights, including any rights under the BIT.[3049]

2. The principle of proportionality in investment treaty scholarship

The proportionality concept has mainly been introduced to investment treaty arbitration in the context of balancing the investor's rights with the host State regulatory power. In addition to these two conflicting interests of private rights versus state autonomy and sovereignty, a third important interest has increasingly become a central point of attention: public interest.[3050] However, while investment treaty arbitration often affects rights and interests of parties not involved in the proceedings, in contrast to other treaties, IIAs generally do not provide any guidance as to under which circumstances investment protection might be restricted because of competing public interests. Thus, the crucial exercise of striking the balance between the private rights of the investor and the public interest is a difficult and challenging task for the investment treaty arbitrator. Against this background commentators have praised the proportionality analysis as the appropriate means and tool to address the conflicts between investor rights and public interests.[3051]

The principle of proportionality has also been discussed in the context of the legitimacy debate in investment treaty arbitration. Much has been written and

---

Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration," 126 – 132. Leonhardsen argues *inter alia* that the tribunal failed to connect the objectives of the measures with the permissible objectives in the wording of the necessity clause of the BIT. In the words of Leonhardsen, "*the necessity test should have analysed the measures as a causal factor to achieve the strict objectives found in Article XI* [the necessity clause of the BIT], *not only whether they were inevitable to counter the crisis*." For a critical view on the necessity approach taken by the tribunal see e.g. Jose E. Alvarez and Tegan Brink, "Revisiting the Necessity Defense," in *Yearbook on International Investment Law and Policy 2010-2011*, ed. Karl P. Sauvant (Oxford University Press, 2011), 319–75.

[3048] *Continental Casualty v Argentina*, Award, paras 201-219.

[3049] *Continental Casualty v Argentina*, Award, paras 220-222. Note however that the awarded amount of USD 2.8 million was only a small part of the USD 112 million claim.

[3050] For the discussion on public interest in investment treaty arbitration see e.g. Kulick, *Global Public Interest in International Investment Law*; Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality"; Caroline Henckels, "Balancing Investment Protection and the Public Interest: The Role of the Standard Review and the Importance of Deference in Investor-State Arbitration," *Journal of International Dispute Settlement* 4, no. 1 (2013): 197–215. For an overview of international instruments enhancing public interest related to foreign investment see Attila Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector," *The Law and Practice of International Courts and Tribunals* 11 (2012): 65 et seq.

[3051] See e.g. Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 80. See also Kulick, *Global Public Interest in International Investment Law*.

argued about the so-called 'legitimacy crisis in international treaty arbitration'.[3052] The legitimacy is understood as one of the conditions for the existence of the investment protection regime as a whole.[3053] However, concerns were raised as to the limited regulatory space left to host States by the restrictive interpretation of the IIA provision conducted by arbitral tribunals. At the same time, the different interpretation of the broad language of the treaty provisions caused concerns as to their unpredictability and risk of inconsistent decisions. Against this background commentators see the principle of proportionality as an effective means to minimise the legitimacy criticism faced by investment treaty tribunals.[3054]

Commentators have also argued that the proportionality analysis can be used as a 'tool of harmonization' in order to integrate international investment law into a global framework of international law that enables a balanced relationship between the different interests protected under international investment law and other international legal regimes.[3055] The conflict between the anti-corruption regime and the international investment regime is a vivid example of such fragmentation of international law and in particular international investment law, which has been subject of discussions for some years now.[3056]

[3052] This expression has been coined by the often cited article of Susan D. Franck, "The Legitimacy Crisis in International Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (2005): 1521–1625. For the legitimacy discussion in investment treaty arbitration see e.g. Louis T. Wells, "Backslash to Investment Arbitration: Three Causes," in *The Backlash against Investment Arbitration*, ed. Michael Waibel et al. (Alphen aan den Rijn et al.: Kluwer Law International, 2010), 341–52; William W. Burke-White, "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System," in *The Backlash against Investment Arbitration*, ed. Michael Waibel et al. (Alphen aan den Rijn et al.: Kluwer Law International, 2010), 407–32; Charles N Brower and Stephen W Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law," *Chicago Journal of International Law* 9, no. 2 (2009): 471–99; Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration." For an overview of a variety of issues of legitimacy in international law see Rüdiger Wolfrum and Volker Röben, eds., *Legitimacy in International Law* (Springer, 2008).

[3053] Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration," 102. ("*This legitimacy, in some degree, is one of the conditions for initial commitment and continued consent to as well as compliance with – and hence the existence – the regime as a whole.*").

[3054] Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration."

[3055] Schill, "Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights," 89, 108. Schill analyses the relationship between international investment law and the law of State immunity on basis of a case study and argues that the proportionality analysis is a powerful tool for cross-regime harmonisation in international law in general ("*Proportionality analysis* […] *becomes a tool that can harmonise the relationship between international investment law and other bodies of general or special international law*.").

[3056] On fragmentation in international law see Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission (International Law Commission, April 13, 2006).

Moreover, it has been stressed that the applicability of the proportionality analysis would also force the tribunal to engage in a detailed justification of its decision,[3057] which would therefore prevent tribunals from avoiding to deal with difficult or unpleasant issues as corruption in a comprehensive manner. In this context, it can be said that the proportionality analysis has been identified as the only available tool to deal with politically controversial disputes.[3058]

However, while the use of the principle of proportionality has found many supporters in literature, commentators have to some extent criticised its practical implementation.[3059] At the same time, concerns have been raised about the standard of review that the arbitral tribunal should apply to scrutinise the governmental measure.[3060] Commentators have argued for the general adoption of a deferential approach to review the legality of the exercise of public power by the host State, in particular in cases where the host State, due to its greater institutional competence and expertise, is better placed to judge which action needs to be adopted.[3061] Pursuant to this opinion, there is a risk that an international tribunal

[3057] See Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 104.

[3058] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism." See also Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier," 76.

[3059] Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration," 99. ("[…] *the legal basis for employing the proportionality principle in investment treaty arbitration so far has been rather weak and when conducting it arbitrators have seldom sought to argue what, exactly, they were doing from the view point of established international law discourse*.").

[3060] Henckels, "Balancing Investment Protection and the Public Interest: The Role of the Standard Review and the Importance of Deference in Investor-State Arbitration"; Rahim Moloo and Justin Jacinto, "Standards of Review an Reviewing Standards: Public Interest Regulation in International Investment Law," in *Yearbook on International Investment Law and Policy 2011-2012*, ed. Karl P. Sauvant (Oxford et al.: Oxford University Press, 2013); Caroline Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration," *Journal of International Economic Law* 15, no. 1 (2012): 223–55; Stephan W. Schill, "Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review," *Journal of International Dispute Settlement* 3, no. 3 (2012): 577–607; Anthea Roberts, "The Next Battleground: Standards of Review in Investment Treaty Arbitration," in *Arbitration - The Next Fifty Years*, ed. Albert Jan Van den Berg, vol. 16, ICCA Congress Series (Kluwer Law International, 2012), 170–80; William W. Burke-White and Andreas von Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations," *Yale Journal of International Law* 35, no. 2 (2010): 283–346; William W. Burke-White and Andreas von Staden, "The Need for Public Law Standards of Review in Investor-State Arbitrations," in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford et al.: Oxford University Press, 2010), 689–720.

[3061] Henckels, "Balancing Investment Protection and the Public Interest: The Role of the Standard Review and the Importance of Deference in Investor-State Arbitration," 215. ("*It is appropriate that investment tribunals continue to adopt standards of review reflecting their role as international adjudicators of public-law type disputes and, cognizant of the desirability of deference in certain circumstances, exercise restraint in their assessment of matters that are more appropriately the province of national authorities. Such an approach to the standard of review would go some way toward achieving a more balanced relationship between the protection of foreign investment and host states' right to regulate and take other actions in the public interest*."). See also Schill, "Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review." Some commentators argue that a deferential approach may only be adopted where the relevant treaty contains a provision indicating that the State intended to maintain regulatory autonomy, Burke-White and von Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in

may not fully comprehend the context and dimension of the domestic matter, which may potentially lead to an intrusion of national sovereignty and autonomy.[3062] Following a similar line of reasoning commentators have raised concerns that the proportionality analysis – despite being a neutral concept – might lead to an overprotection of investment and a creeping impairment of regulatory discretion.[3063] In contrast, commentators emphasised that deference should be applied with a degree of caution since *inter alia* due to the dual role of the host States as sovereigns and respondents it cannot be ruled out that States may pursue their own interests affecting their impartiality.[3064]

Despite the criticism, commentators have stressed that the proportionality analysis "*allows arbitrators to 'see' the entire contextual field and to narrow or expand their intervention as required*".[3065] For Stone Sweet and Matthews it is

> "the preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest".[3066]

While acknowledging some sceptical views on the proportionality analysis – with the appeal to apply it with caution[3067] – this subsection concludes, "*proportionality offers to arbitrators the best available doctrinal framework with which to meet the present challenges to the BIT-ICSID system*".[3068]

3. Applicability of the principle of proportionality to investment treaty arbitration

There are two provisions relevant to the applicability of the principle of proportionality in international investment law. First, pursuant to Article 42(1) of

---

Investor-State Arbitrations," 293–296. ("[…] *the particular provision of the BIT being invoked either by the claimant or respondent must include trigger language indicating that states sought to maintain some freedom of action to regulate in these circumstances and that, as a matter of formal treaty interpretation, public law standards of review are appropriate*.").

[3062] See e.g. Emily Crawford, "Proportionality," in *The Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford University Press, 2011), para. 25.

[3063] Xiuli Han, "The Application of the Principle of Proportionality in Tecmed v. Mexico," *Chinese Journal of International Law* 6, no. 3 (2007): 635. ("*Even though the principle of proportionality is a neutral concept, in the context of State sovereignty weakened and right of private property strengthened, its application in investment arbitration has led to protecting the right of private property excessively and encroaching upon regulatory discretion of the host country stealthily*.").

[3064] Roberts, "The Next Battleground: Standards of Review in Investment Treaty Arbitration," 179 et seq. ("*If investment arbitral tribunals afford too much deference to States, they are likely to undermine the utility of investment protections from the perspective of investors, which may compromise some of the system's essential aims. If they afford States too little deference, investment tribunals are likely to undermine their own legitimacy in the eyes of States, which may pose a threat to the continuation of the investment treaty system*.").

[3065] Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier," 62.

[3066] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 73.

[3067] Benedikt Pirker, "Seeing the Forest Without the Trees - The Doubtful Case for Proportionality Analysis in International Investment Arbitration," in *Proportionality and Post-National Constitutionalism*, ed. Alexia Herwig, Christian Joerges, and George Pavlakos, Forthcoming. ("[…] *proportionality analysis should be used with caution if at all*.").

[3068] Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier," 76.

the ICSID Convention, the tribunal shall decide the dispute *inter alia* by applying rules of international law (see below at **a)**). Secondly, pursuant to the interpretation mechanism established in Article 31 of the Vienna Convention on the Law of Treaties, rules of international law shall also be taken into account for treaty interpretation (see below at **b)**).

a) Principle of proportionality as rule of international law

The first gateway for the principle of proportionality – at least for investment treaty arbitration under the auspices of ICSID – is Article 42(1) second sentence of the ICSID Convention, which states that the tribunal shall decide the dispute *inter alia* by applying "such rules of international law as may be applicable".[3069] The direct applicability of the principle of proportionality depends therefore on whether (i) it constitutes a rule of international law and (ii) whether such rule of international law is applicable between the two parties.

The reference to rules of international law has been understood as comprising the full range of sources of international law as enumerated in Article 38(1) of the ICJ Statute, i.e. treaties, customary international law, general principles of law, judicial decisions, and academic writings.[3070] So far, IIAs do not contain any explicit reference to the principle of proportionality. However, commentators have argued that the principle of proportionality has reached the status of customary international law – at least with respect to the public international law fields of self-defence, retaliation, countermeasures, humanitarian law and human rights law.[3071] Moreover, having acknowledged that the principle of proportionality is well established in domestic courts in different jurisdictions around the world and across legal systems (regardless of whether common law or civil law based jurisdictions) it seems fair to conclude that the principle of proportionality amounts to a general principle of law. Hence, based on the widespread application in the different fields of international law and its nature as general principle of law, the principle of proportionality comprises a rule of international law in the sense of Article 42(1) of the ICSID Convention.[3072]

While the second condition of Article 42(1) of the ICSID Convention seems circular ("*it is applicable if it is applicable*") it has been interpreted as not limiting the applicability of international rules, but merely meaning, "*that the relevant rules of international law are to be applied*".[3073] In this context the particularity comes

[3069] Article 42 (1) reads:
"*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*." (Emphasis added).
[3070] Schreuer et al., *The ICSID Convention*, 604 et seq.
[3071] Han, "The Application of the Principle of Proportionality in Tecmed v Mexico," 637.
[3072] See also Kulick, *Global Public Interest in International Investment Law*, 169 et seq.; Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration," 135.
[3073] Schreuer et al., *The ICSID Convention*, 617.

to mind that some rules of international law by their nature may be meant to apply to inter-State relations, for which reason case-by-case consideration seems appropriate to determine whether the rules of international law in question are also applicable to the investor-State relationship.[3074] However, tribunals have constantly applied rules of international law originated from the inter-State relationship to the investor-State relationship, such as for instance the principles of attribution of conduct to the State[3075] or the plea of necessity for precluding State responsibility.[3076] While the application of the principle of proportionality in the public international law fields of self-defence, retaliation and countermeasures concerns the relationship between States; its application in human rights law and as general principle of law applied in administrative and constitutional disputes between States and individuals, shows its suitability to the investor-State relationship and therefore its applicability thereto.

b) Principle of proportionality as an interpretation tool

The other gateway is through the interpretation of the treaty provisions. According to Article 31(1) of the Vienna Convention on the Law of Treaties, treaties – and therefore also IIAs – must be interpreted in good faith in the light of its object and purpose.[3077] The purpose is not limited to mere protection of foreign investment but rather to "*pursue the broader goals of heightened economic cooperation between the two States concerned with a view towards achieving increased economic prosperity or development*".[3078] The ICSID Convention, for instance, emphasises in its preamble the "need for international cooperation for economic development". As Tanzi puts it

> "[…] an international arbitral tribunal competent on investment disputes should nonetheless interpret and apply the relevant BIT rules taking into account all pertinent rules applicable between the host State and that of nationality of the claimant including the general principles of good faith, equity, reciprocity and due diligence, as a yardstick for assessing the legality of conduct of the host State towards the foreign investor".[3079]

[3074] See e.g. Ibid., 613 et seq.
[3075] See Chapter Five.
[3076] See Argentine economic crisis cases where the tribunals found the necessity defense (Article 25 of the ILC Articles) applicable to the investor-State relationship, see e.g. *Sempra v Argentina* Award, paras 344 et seq. with references to previous cases.
[3077] Article 31 (1) of the Vienna Convention on the Law of Treaties reads:
"*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*
[3078] *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 218.
[3079] Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector," 55.

Taking the object and purpose as well as the principle of good faith into account calls for a balancing of the different interests at stake[3080] and therefore for the principle of proportionality.

Moreover, pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties "*any relevant rules of international law applicable in the relations between the parties*" shall be taken into account for the good faith interpretation of a treaty. Constituting a rule of international law, as discussed above, the proportionality principle would in any case have to be taken into account for the interpretation of the relevant IIA.[3081]

III. The principle of proportionality applied to corruption

Against the background that we have unmasked corruption as an evil to international trade and investment, the first question regarding the relationship between corruption and the principle of proportionality is not whether there is a doctrinal or legal basis or how it looks like in practice, but whether such 'evil' may even be open to any balancing or proportionality analysis in the first place (see below at **a)**). Having answered this question in the affirmative, the principle of proportionality serves as tool to reconcile the competing interests in corruption cases in investment treaty arbitration (see below at **b)**). Finally, the special characteristics of the proportionality analysis applied to corruption cases in investment treaty arbitration are discussed (see below at **c)**).

a) Amenability of corruption to the proportionality analysis

Bearing in mind the detrimental effects of corruption on society, economic development and the well-being of the people,[3082] having identified the global consensus to condemn corruption[3083] and having concluded that corruption violates universal public policy,[3084] the question is legitimate whether there is even room for a balanced approach calling for a proportional outcome. This study leaves no doubt that corruption is unconditionally wrong, but does such notion lead to the categorical imperative, whatever it takes? The extreme but vivid example used by Salbu shall serve to visualise this conflict: During a civil war the population of a developing country is suffering from a politically motivated famine, where the delivery of food donations is withheld in order to exercise pressure on dissents.[3085]

[3080] See Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 88. Note that Kingsbury and Schill made such observation with regard to the balance between investor protection and State regulatory powers.

[3081] See also Kulick, *Global Public Interest in International Investment Law*, 169 et seq.; Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration," 135.

[3082] See Chapter One C.

[3083] See Chapter Two and Chapter Three

[3084] See Chapter Three.

[3085] Steven R Salbu, "Transnational Bribery: The Big Questions," *Northwestern Journal of International Law & Business* 21 (2001 2000): 439.

Individual officials show willingness to allow the food distribution in exchange for bribes.[3086] Corruption in such extreme case would save the starving population.

At this stage and for the purpose of this study, it shall be sufficient to approach this question with a glance through the lens of business ethics, which sheds some light on this conflict. On the one hand, in line with the so-called deontological approach, it could be argued that corruption is simply wrong and there is a categorical imperative against it, which leaves no space for any plausible justification,[3087] and therefore no room for a proportional approach. However, pursuant to the teleological approach, right and wrong should be determined by looking at the consequences of the available options.[3088] Applying this concept to the approach to corruption allows us to consider the choice, which provides the most benefit for the parties involved. Going one step further and having acknowledged that the outcome of investment treaty arbitration has not only consequences for the two parties of the arbitration, i.e. the investor and the host State, but also for the public, leads us to evaluate the available choices also in the best interest of the public. Thus, although corruption is unquestionably wrong, the particular approach is open to an analysis of the available choices rather than just deciding for the choice, which at first glance – but without considering the big picture – seems to be the obvious one, i.e. treating corruption as a categorical imperative leading to a zero tolerance approach.

b) Proportionality analysis as a tool to reconcile anti-corruption policies and investment protection

On the basis that corruption, despite its contemptibility, is open to a balanced approach; we now turn to the conceptual link between corruption and the principle of proportionality applied to investment treaty arbitration.

The starting point can be illustrated by two questions, the answers to which appear to be in direct conflict with each other. First, should the investor be able to bring a claim under an IIA where the investment is to some extent tainted by corruption? Secondly, should the host State, which is involved in corruption, be discharged from any liability for its violations of the IIA in case the investment was obtained by corruption involving a State official? Neither question can satisfactorily be answered individually and detached from the other. At first glance everybody would agree to answer both questions in the negative, leading to a direct conflict.

Bearing such conflict of competing interests in mind, the next apparent question is which interest trumps the other. However, where two international obligations compete with each other, both need to be respected equally. Arbitral case law has confirmed such notion for instance for a conflict between human rights and

[3086] Ibid.
[3087] For a short introduction to the two different approaches developed by business ethicists see Ibid., 439 et seq.
[3088] Ibid., 441.

investment treaty obligations.[3089] The same must be true for corruption and international investment protection. In other words, while a host State has to observe the standards set by the international anti-corruption instruments, it must also comply with its obligations under the investment protection regime, i.e. under the IIA. Investment treaty law and the anti-corruption regime are both part of international law, which leads to more than mere coexistence, but interdependence. While a zero tolerance approach leads to a direct conflict between both regimes, international law provides a tool to overcome the fragmentation of international law in general and of investment treaty law in particular: the principle of proportionality.

Hence, the different international law regimes should not be seen as inevitably conflicting ones.[3090] As shown above, their objectives are not mutually exclusive. In fact, both regimes have the ultimate goal of improving the lives of the citizens by fostering economic development. The proportionality analysis as the "*gateway for non-investment law principles to enter into the argumentative framework of investment treaty arbitration*"[3091] is the appropriate tool to reconcile the public interest in anti-corruption policies with the underlying purpose of IIA, i.e. investment promotion through investment protection. Through the application of the proportionality analysis corruption can be condemned with legal repercussions, while the host State's accountability for breaches of investment protection standards can be upheld.

In conclusion, while the principle of proportionality and the balancing of interests are most certainly no panacea[3092] for the difficult challenges of corruption issues in investment treaty arbitration, the balanced approach based on the principle of proportionality offers the tool to reconcile the fight against corruption and investment protection.

[3089] See e.g. *Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability, para 262 ("*Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally.*").

[3090] One way to reconcile the two regimes is by construing the relationship as one of interpretation as opposed to a relationship of conflict. This approach is based on Tanzi who refers to the ILC report on fragmentation in order to argue for a relationship of interpretation between rules of different fields of law, with special regard to human rights; Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector."

[3091] Kingsbury and Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality," 104. ("[…] *the principle of proportionality has the potential to help structure both the relationship between states and foreign investors and between states and investment tribunals, and the relationship between international investment law and other sub-areas of international law*"). (Emphasis added).

[3092] The term is borrowed from Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration," 136.

c) Proportionality analysis in corruption cases

One crucial point still requires attention. The application of the proportionality analysis in corruption cases differs to some extent from the genuine three-step proportionality analysis described above[3093] and suitable to public interest cases. Generally, the principle of proportionality is a tool to scrutinise governmental measures and evaluate if public interests may serve as justification for such investment unfriendly measures. This, however, applies only for corruption cases where the host State implemented measures with detrimental effect on the investment, based on grounds of its anti-corruption policies.

In such cases, guided by the three-step proportionality approach, the tribunal would have to determine first whether the measures at issue are (i) aimed at a legitimate purpose and (ii) suitable to achieve that purpose. With regard to anti-corruption measures, such threshold will most certainly be met. At the second step, the tribunal would have to evaluate whether the specific anti-corruption measures adopted by the host State are the less restrictive measure available to further the anti-corruption purpose. At the third step, the tribunal would have to engage in a balancing of the alleged anti-corruption purpose and the effects of the measures on the investment protection rights under the IIA. The question whether the tribunal should apply a deferential scope of review with regard to the measures taken by the host State will also arise here.[3094]

However, in cases where the host State raises the corruption defence, the corruption issue will not be relevant for all stages of the proportionality analysis. The corruption scenario tainting the investment will mostly be unrelated to the governmental measures taken against the investment. The corrupt act and the governmental measures at scrutiny will most likely be based on different factual circumstances. Thus, the alleged legitimate purpose of the governmental measures at scrutiny will most likely not relate to the corrupt scenario the corruption defence is based on. As a result, the questions whether (i) the measures taken by the government are suitable to achieve the alleged legitimate goal, and (ii) there exist less restrictive measures to achieve the alleged goal, will most likely not have any link to the corruption issue. The entry gate for considerations of corruption issues is rather the third step, which serves as basis for balancing all circumstances with regard to the two separate circumstances and interests – fight against corruption and investment protection. Therefore, in corruption cases, the focus is on the balancing test, doctrinally based on the final step of the proportionality analysis, i.e. proportionality *stricto sensu*.

[3093] See above at B.I.3
[3094] For commentators favouring a deferential approach see above at B.II.2.

C. Balanced Approach in practice

After having explained the policy arguments in favour of the balanced approach, this sub-chapter presents the balanced approach in practice by identifying how the balancing test should be structured (see below at **I.**) and at which stage of the arbitral proceedings it may come into effect (see below at **II.**).

I. The balancing test

Corruption as a complex and multi-faceted phenomenon comes in many different forms and shall be dealt with – as argued before – on a case-by-case basis. The balanced approach can therefore not amount to a rigid test with fixed criteria, which could be evaluated and weighted in a predefined manner. Rather, the balanced approach as a holistic method starts from the premise that all relevant aspects and circumstances of the case shall be taken into account and shall be subject to a balancing on the basis of the proportionality principles. First, the current approaches developed by commentators with regard to a balancing test will be analysed (see below at **1.**), before identifying the issues that should form the basis of the balancing test (see below at **2.**).

1. Current trends in scholarship

Before identifying the factors and issues, which shall form the basis of the balanced approach, it is important to have a closer look at the current suggestions made by commentators.

a) Only 'undue' corrupt acts relevant

Some commentators have suggested that instead of automatically applying an all-or-nothing approach where the investment is tainted by corruption, the arbitral tribunal shall weigh whether the influence and benefits exchanged through the corrupt act were in fact 'undue'.[3095] In order to find that a certain corrupt act is 'undue' it is argued that the arbitral tribunal should analyse the negative effects on the citizens, the host State or the arbitration itself.[3096] Only if the tribunal comes to the conclusion that the corrupt transaction was 'undue', the host State would be successful with its corruption defence.

By applying the 'undue'-test, the arbitral tribunal is in fact asked to analyse the actual harm caused by the corrupt act. The actual harm caused to society by the particular act is most certainly an important factor, which the arbitral tribunal should consider, but this approach focuses merely on the effect of the transaction without considering any other factors or circumstances. While such approach may

[3095] Summerfield, "The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions."
[3096] Ibid., 16 et seq. ("*The corruption defense as it relates to international investments should be re-characterised as one that remedies actual wrongs and demands an inquiry into whether the alleged 'corruption' offends human sensibilities*.").

lead to reasonable results on many occasions, it fails to embrace all the different situations encountered when dealing with corruption.

b) Contributory fault of host State

Some commentators have argued for a 'contributory fault standard', which holds the host State accountable for the complicity act of corruption.[3097] However, while this contributory fault model is a form of balanced approach,[3098] it starts from the premise that the amount awarded by the tribunal depends merely on the relative level of culpability of the host State.[3099] The suggested factors to be taken into account under the contributory fault standard focus on the actions of the host State alone, as for example the number or the level of the government officials involved in the corrupt behaviour or the degree to which the host State used extortive measures to solicit the bribes.[3100]

c) Host State's commitment to prosecute corruption

Another approach recently developed in the scholarship suggests to only accept the corruption defence if the host State proves that it actively prosecuted the public officials involved in the corrupt scheme.[3101] While this approach provides an incentive for the host State to enforce its anti-corruption laws in case it seeks to rely on the corruption defence, it does not encourage the host State to implement the required anti-corruption measures in order to prevent corruption within its ranks. Since pursuant to this approach the host State is only required to demonstrate its efforts to prosecute and punish the public officials involved in the corrupt acts, the State may nonetheless benefit from its own shortcomings in fighting corruption and may use the State officials merely as pawn sacrifice without improving its administration.

d) Host State's commitment to prevent corruption

A similar approach focuses merely on the host State's compliance with its international obligations to prevent corruption in order to assess its responsibility for the corrupt transaction.[3102] Pursuant to such approach the host State should not be considered as a contributor to investor corruption if it had implemented all

---

[3097] Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration," 1030 et seq.
[3098] Torres-Fowler describes it as "sliding scale" to allocate fault, see Ibid., 1034.
[3099] Ibid., 1031.
[3100] Ibid.
[3101] Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration," 80; Llamzon, *Corruption in International Investment Arbitration*, 280. ("*To help bring about a rebalancing of international responsibility for corruption between investor and host State, it is modestly suggested that host States be required, in every case in which corruption is raised as a defense, to demonstrate that they have actively prosecuted the public officials involved for corruption* […]").
[3102] Sinlapapiromsuk, "The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?"

measures required under the several international instruments.[3103] While this approach will most certainly encourage host States to implement measures to achieve good governance and transparency, it falls short of dealing with situations as seen in *World Duty Free v Kenya* or *Wena v Egypt*. In both cases the host State failed to prosecute the corrupt officials, which may to some extent amount to condoning corruption while trying to benefit from it in the arbitration proceedings.

e) Investor's commitment against corruption

Some commentators have rejected to take the contributory fault aspect into consideration, since it might dilute the investors' incentives to combat bribery due to the decrease in the amount of liability that the investor has to bear.[3104] Instead, this view focuses merely on the measures taken by the investor to combat corruption, which may include its reasonable measures to prevent, monitor and punish any corrupt acts of its employees and to cooperate with the relevant enforcement authorities.[3105] The arbitral tribunal is therefore asked to evaluate the investor's commitment against corruption when deciding on the legal consequences of a corruption-tainted transaction.

This approach moves away from mere deterrence and creates instead incentives for the investor to implement the necessary anti-corruption measures within its corporate structure. It also rightly points at the conundrum that the incentives to combat corruption of one side of the involved parties may be diminished when also holding the other party to some extent accountable. This is an important consideration that the arbitral tribunal will most certainly have to bear in mind. However, as discussed before, the mere focus on the supply side fails to effectively comply with the international consensus to fight corruption.

f) Comment

While all these suggestions have in common that they seek to find a more nuanced approach than the zero tolerance one, they are limited to approaching corruption from a single angle. While some focus on the behaviour of the supply side, others take the behaviour of the demand side into account, be it pre-corruption, post-corruption or both. Other commentators disregard the behaviour of the parties and rather focus on the actual harm caused by the corrupt act. Each approach may come to right and just results in specific circumstances, but may fall short of reconciling the purpose and goals of investment treaty arbitration and the fight against corruption. Moreover, they fail to establish a wider method that generally fits corruption issues in investment treaty arbitration.

[3103] Ibid., 26 et seq.
[3104] Davis, "Civil Remedies for Corruption in Government Contracting: Zero Tolerance versus Proportional Liability," 42 et seq. Note that Davis made these arguments in connection with investment contracts rather than with investment treaty arbitration in general.
[3105] Ibid., 36 et seq.

The balanced approach suggested in this study starts from the premise that a variety of factors have to be taken into account which do not only focus on culpability of one party or weighing the relative culpability of both parties involved. Rather, there are certain important public interest considerations, which also have to be taken into account.

2. The relevant factors for the balancing test

The following factors and issues that should be taken into consideration by the arbitral tribunal do not amount to an exhaustive list, but should rather be understood as guidelines. They are the result of the analysis of the most frequent issues involved in corruption cases in international business transactions.

a) The different interests at stake

Corruption is a vivid example of a situation in which public interests are at stake. Whenever corruption becomes an issue in an investment arbitration proceeding, not only the interests of the investor as claimant and of the host State as respondent are affected, but most certainly also the interests of the population of the host State as well as the interests of the international society in light of the global fight against corruption.

The arbitral tribunal must therefore acknowledge the socioeconomic implications its decision will most certainly have on the different interests. It will not be sufficient to justify its decision by simple reference to the interest of the public without engaging in a detailed analysis of the concrete short and long-term consequences of such decision.

b) The degrees of involvement of both parties

Considering that the illicit act of investor corruption requires the complicity of two parties to be accomplished, the involvement of both parties needs to be taken into consideration. In the investment context the bribe paid in connection to the investment will have the assigned purpose of obtaining favourable or preventing harmful official decisions based on the public authority of the host State. The arbitral tribunal should therefore analyse to what extent the host State is involved in the corrupt act. Pursuant to the approach taken in this study, the illicit act committed by the public official vested with the public authority to render the investment related decision may be attributed to the conduct of the host State.[3106]

It must be clarified upfront that commentators have rightly emphasised that "*two wrongs do not make a right*".[3107] The mere fact that both parties are to some extent involved in the corrupt act may therefore not lead to a justification and defence for the respective other party. However, contrary to the suggestions of many

[3106] See Chapter Five.
[3107] See e.g. Kreindler, "Die Internationale Investitionsschiedsgerichtsbarkeit Und Die Korruption: Eine Alte Herausforderung Mit Neuen Antworten," 6.

commentators, the involvement of both parties does not need to be valued as being equal.[3108]

While both parties' contribution is required, such contribution may often have a different weight or degree of severity. For instance, it might be relevant which party initiated the illicit act. Was the investor seeking an illegal advantage by offering bribes and undermining the decision-making process of the host State or was the corrupt host State the party soliciting the bribe in the first place. In the latter situation it may also be important to differentiate whether the corrupt public officials merely alluded to a more favourable decision or whether they extorted the bribe. Moreover, in this context it may also be relevant whether the act was a single act by a public official or whether it is a current method by the administration of the host State to exploit the public authority vis-à-vis investors.[3109] Likewise the arbitral tribunal should consider whether the relevant contribution was rather a 'rogue act' by an employee or an agent of the investor or whether it was supported by or even in line with some sort of company policy.[3110]

c) The specific circumstances of the corrupt transaction

The circumstances of each corrupt transaction are rather specific and may vary to such extent that they do not justify the same outcome in every case. The comparison between the situation in *World Duty Free v Kenya* and *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*[3111], shows how different corrupt acts may be in the international business environment. In *Tanzania*, the state-owned electricity company alleged that the underlying power purchase agreement had been obtained by corruption. While in *Tanzania* the alleged bribery was in an amount of approx. USD 200 contained in a holiday gift package, in *World Duty Free v Kenya*, the bribe exchanged between the investor and the President of Kenya, Daniel arap Moi, was in an amount of USD 2,000,000 with the purpose of granting the relevant concession for the duty-free stores to the investor. While corrupt acts should be condemned, it cannot be denied that both corrupt acts cause different harm and require a different criminal energy.

The decision of the arbitral tribunal should therefore take the specific circumstances of the corrupt transaction into consideration. The amount as well as

---

[3108] Many commentators start from the premise that both parties involved in the corrupt act are 'equal at fault', see e.g. Kreindler, "Die Internationale Investitionsschiedsgerichtsbarkeit Und Die Korruption: Eine Alte Herausforderung Mit Neuen Antworten"; Kreindler, "Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers."

[3109] Note that the mere fact that corruption is endemic in a host State's administration has not evidentiary weight that a corrupt act was in fact committed by a public official of the host State. Likewise, it does not amount to a sort of defence for the investor that corruption is endemic and widespread in a host State. It is rather a factor that may be considered by the arbitral tribunal in order to assess the degree of involvement by the host State in the corrupt act.

[3110] Bishop, "Toward a More Flexible Approach to the International Legal Consequences of Corruption," 66.

[3111] *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on Tariff and Other Remaining Issues, 9 February 2001.

the nature of the bribe may in some cases shed some light on the gravity of the misconduct. Moreover, there is also a difference between investments based on corruption and cases in which the corrupt acts were merely incidental to the investment and committed by the investor in a different context. Needless to say, the investor should refrain from any illegal conduct in the host State, however, in order to curtail its rights to investment protection, the bribe must be directly related to the investment.

d) The benefit of the investment to the host State

While the discussion remains vivid whether the contribution to the host State's development is a requirement under the notion of investment under Article 25 ICSID Convention and therefore a jurisdictional condition,[3112] it cannot be overlooked that it falls within one of the most important objectives of investment protection: fostering the economy and the lives of the population of a host State through investment promotion. Against this background it must be borne in mind that investments as for example a power plant, a sewage plant, waste disposal sites, airports or highways may have an important contribution to the host State's development and benefit of the population. While such consideration will depend on the specific circumstances of the case, there is at least the possibility that minor acts of bribery aimed at keeping the investment operating – despite the undisputed illegality of such acts – may in comparison to the vast benefit of the investment as a whole, be less detrimental than the destruction of the investment.

e) The commitment of both parties to fight corruption

Finally, against the background that the approach taken by the arbitral tribunal should encourage both the supply side and the demand side to take the necessary

[3112] For ICSID case law finding the host State development a requirement for the notion of investment under Article 25 see e.g. *Salini v Morocco*, Decision on Jurisdiction, para 52; *Jan de Nul v Egypt*, Decision on Jurisdiction, para 91; *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006 (hereinafter: "*Mitchell v Congo*, Annulment"), paras 27 et seq.; *Malaysian Historical Salvors Sdn, Bhd v Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007 (hereinafter: "*Malaysian Historical Salvors v Malaysia*, Award on Jurisdiction"), paras 125 et seq.
For ICSID case law rejecting such view see e.g. *LESI v Algeria*, Decision on Jurisdiction, para 72; *Pey Casado v Chile*, Award, para 232; *Phoenix v Czech Republic*, Award, para 85; *Saba Fakes v Turkey*, Award, para 111; *Quiborax v Bolivia*, Decision on Jurisdiction, para 220 et seq.; *Deutsche Bank v Sri Lanka*, Award, para 295; *KT Asia Investment Group B.V. v Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (hereinafter: "*KT Asia v Kazakhstan*"), paras 170-173.
For a further discussion on this topic see e.g. Govert Coppens, "Treaty Definitions of 'Investment' and the Role of Economic Development: A Critical Analysis of the Malaysian Historical Salvors Case," in *Foreign Investment and Dispute Resolution Law and Practice in Asia*, ed. Vivienne Bath and Luke Nottage (Routledge, 2011), 174–91.

actions to curb corruption, such commitment should also be considered. Soft law in the field of anti-corruption measures can serve as guidelines for the tribunal.[3113]

The required cooperation of both sides can be divided in the different stages when action needs to be taken.

(1) Anti-corruption measures in place before corrupt act

An important indication of the commitment of the parties against corruption is to what extent anti-corruption measures were in place before the corrupt act was committed. The arbitral tribunal should therefore analyse the host State's and the investor's official anti-corruption policies and their normal practice of enforcement.[3114] While the mere fact that the corrupt act was committed shows that the already implemented measures were not totally effective, they may show the general culture of the respective party towards corruption. The measures and actions taken should deal with the prevention of corruption, the monitoring and supervision of public decision-making and the enforcement of anti-corruption laws in general. In this regard, investors may create positions within their corporate structure dedicated to protect corporate integrity and to ensure legitimate conduct when doing business. At the same time, host States may have taken serious efforts to foster good governance within their administration. A host State discouraging and refusing to investigate and prosecute its own public officials must also be evaluated differently than a host State that takes a consequent approach of dealing with corruption among its ranks.[3115]

(2) Anti-corruption measures implemented after the corrupt act

The commitment of the parties against corruption may also be evidenced by the general actions taken after the concrete corrupt act was revealed. Have the parties used the discovery of the corrupt practice as an opportunity to review their anti-corruption policies and practices? The corrupt act may be an indication that the selection and training programmes of employees and public officials as well as of the codes and standard of conduct within the company or the public administration require review.[3116] At the same time, the reporting and monitoring system may

---

[3113] For general consideration of soft law as guidelines for the balancing exercise with public interests see Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector," 72. ("*To that end, they seem to provide concrete substance to the principle of proportionality, not only between the benefits for the public interest and the constraints on the foreign investor, but also between the degree of compliance with clearer due diligence standards by both host States and the foreign investors, also in terms of reciprocity*.").

[3114] See Bishop, "Toward a More Flexible Approach to the International Legal Consequences of Corruption," 66.

[3115] Ibid.

[3116] Cremades, "Corruption and Investment Arbitration," 217. Cremades enumerates various actions, which the host State could or even should take in case the corrupt behaviour of its officials comes to light. Note that Cremades does not make any reference to any balancing of these actions on the merits level, but Cremades asks the right question: "[…] *if a host State takes no steps (or merely token steps) to investigate, prosecute or rectify the corrupt acts of its own officials, does this*

have proven inefficient and needs improvement. In addition, the host State may have to amend its procurement system and its handling of foreign investment. The efforts taken by the host State to transform its corruption prone administration to a more transparent system with good governance serve as an indication that the host State is not merely abusing the corruption defence.

Once more Siemens serves as example for the efforts of an investor to come clean and support the enforcement agencies around the world to shed light on the corrupt schemes. Subsequent to the revelation of the widespread corrupt practices within Siemens, the company engaged in a massive internal investigation to break up the corrupt framework, implemented new ethical codex and monitoring measures and even brought actions against its corrupt employees.

(3) Parties' cooperation on investigating the corrupt act

Due to the obscure character of corruption, special efforts and investigations will be required to reveal the facts. The contributions of each party to uncover the corrupt act will therefore be relevant to shed light on the truth. At the same time such conduct will also indicate the parties' commitment against corruption. Should an investor, which uncovers and voluntarily discloses a corrupt scheme within its company to the relevant enforcement agencies, be treated equally to an investor, which sought to conceal the corrupt action and refuses to cooperate with the investigations?

Pursuant to the balanced approach, the tribunal should take notice and factor the specific conduct of the parties towards uncovering the corrupt act. It must be an incentive for an investor to detect illicit actions within its company and disclose them without automatically losing all its investment protection rights. In this context it may be relevant at which stage the investor came clean and to what extent such disclosure was made in connection with arbitration proceedings or, unrelated to the arbitration proceedings, in order to comply with its general obligation of legitimate conduct.

(4) Parties' concrete reactions to the corrupt acts (condonation or condemnation)

An important factor that needs to be taken into consideration by the arbitral tribunal is the behaviour of the parties with regard to the concrete corrupt act once it came to light.[3117] In order to exclude any abuse of the corruption defence, the arbitral tribunal should scrutinise whether the host State condemned the corrupt act by enforcing its anti-corruption laws and by prosecuting the public officials involved or whether the host State condoned it by unassertive action or even

---

have any consequences upon its rights to rely on corruption as a defence in an investment arbitration?".

[3117] Note that already in 2005 Cremades asked the crucial question what consequences would the host State's indifference to take the necessary steps against its corrupt officials have on the host State's corruption defence. See Ibid., 216 et seq.

complete inaction. As occurred in *Wena Hotels v Egypt*, for instance, the tribunal pointed at the fact that while Egypt had made allegations of corruption, it had fallen short of providing any evidence and had even failed to show that any investigation was conducted in this regard.[3118] The tribunal continued with a clear statement that due to Egypt's reluctance to prosecute the allegedly corrupt public official it was not willing to "*immunize Egypt from liability*".[3119] In the words of the tribunal

> "[…] given the fact that the Egyptian government was made aware of this agreement by Minister Sultan but decided (for whatever reasons) not to prosecute Mr. Kandil, the Tribunal is reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with Mr. Kandil was illegal under Egyptian law".[3120]

In *World Duty Free v Kenya* the host State asserted that it had only learned about the corrupt act by the declarations made by the investor in the proceedings. This might be a valid explanation for not having entered into any investigations before the proceedings; however, it is no justification for not taking the necessary actions once the corrupt act was revealed. While the tribunal rejected that Kenya's subsequent conduct would have an impact on the decision, it also acknowledged that it was disturbing that Kenya had not prosecuted the corrupt public official, the former President Daniel arap Moi.[3121] Such behaviour is not only disturbing, but also shows that the host State may take advantage of the corruption defence without showing willingness and commitment to comply with its corresponding international obligations. Such failure and blockade should have a bearing on the decision sought by the arbitral tribunal.

In this context it will most certainly also matter at what time the host State became aware of the corrupt act and whether it reacted in due time to such suspicion, allegation or even proof. An indication of an abuse of the corruption defence would be if the host State was aware of the illicit act, but refrained from taking appropriate actions until the day it could take advantage of such situation by raising the corruption defence. Thus, it must have a consequence whether the host State commenced the appropriate investigations, disciplinary and criminal proceedings in due time and whether the host State removed and prosecuted the corrupt officials or left them in power.

At the same time the concrete reaction of the investor towards the specific corrupt act at issue deserves a closer look and may also influence the decision of the

[3118] See *Wena v Egypt*, Award, para 116.
[3119] See *Wena v Egypt*, Award, para 116. Note that in Cremades' view the statement made by the *Wena* tribunal was not clear. It may be interpreted as (i) referring to the legal conclusion that due to the indifference of the host State the corruption defence is legally barred or (ii) as referring to the inference of fact that due to the inaction of Egypt corruption could not be established. See Cremades, "Corruption and Investment Arbitration," 218.
[3120] See *Wena v Egypt*, Award, para 116.
[3121] *World Duty Free v Kenya*, Award, para 180.

arbitral tribunal. The investor, for instance, may have brought legal actions against the employees involved in the corrupt transaction.

II. Relevant stages for the balancing test

The balanced approach and the corresponding balancing test may be relevant at different stages of the arbitration proceedings. As discussed in Chapter Seven there exist reasonable and – according to the view represented in this study – convincing arguments that the mere fact that the investment might be tainted by corruption shall not be a question of jurisdiction.[3122] The question whether an arbitral tribunal has jurisdiction over the claim or not depends on requirements established in the underlying treaty and Article 25 of the ICSID Convention, which are fulfilled or not. There is no room for a balancing of any kind at the jurisdictional stage. This is, however, different for the admissibility (see below at **1.**) and the merits stage (see below at **2.**) as well as for cost allocation (see below at **3.**).

1. Balancing at the admissibility stage

According to the view represented in this study, corruption should be dealt with at the merits of the case. However, as discussed in Chapter Seven there are reasonable arguments that investor corruption might affect the admissibility of the claim. Commentators favouring this approach have contended that in case of corruption the tribunal should assert jurisdiction, but automatically hold the claim inadmissible.[3123] According to these commentators the arbitral tribunal should refrain from engaging in any balancing at the admissibility stage and directly dismiss the case.[3124] The main argument is based on the unclean hands doctrine according to which the investor engaged in corruption forfeits all its rights to pursue its claim before an international tribunal.

It must be conceded that the outcome of the tribunal's decision with regard to the admissibility of the claim will be an 'all or nothing' or a 'black or white' decision. The claim is either admissible or not – there is no 'in between' when it comes to admissibility. However, the mere fact that the question of admissibility leads to a binary decision is no reason to exclude a balancing test as basis for the decision-making process of the arbitral tribunal. Thus, in case the arbitral tribunal considers corruption to be a matter of admissibility of the claim, the arbitral tribunal should, based on the arguments in favour of a balanced approach, engage in the suggested balancing test in order to find whether the claim is finally admissible or inadmissible. Based on the principle of proportionality and the balanced approach, the unclean hands doctrine should be applied in a flexible rather than strict manner.[3125]

[3122] See Chapter Seven E.
[3123] See Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims."
[3124] Ibid.
[3125] See also Lim, "Upholding Corrupt Investor's Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread," para 233.

2. Balancing at the merits and quantum stage

According to the view represented in this study, the most suitable stage to deal with corruption is the merits stage since it provides both the means to take all the relevant circumstances of the case into consideration and the opportunity to adjust the outcome of the case accordingly, leading to a reasonable and proportional decision. Weighing and balancing the relevant factors, circumstances and interests will then result in a proportional adjustment of the quantum.[3126]

3. Balancing at the costs stage

In addition, the balanced approach may also have an impact on allocating the costs of the proceedings.[3127] In *World Duty Free v Kenya*, the tribunal did not actually engage in a balancing exercise, but nonetheless adopted the cost allocation to the specific circumstances of the case involving a dismissal of the claim based on corruption. Starting from the general practice in international commercial arbitration that the successful party should recover its legal costs, the tribunal found that due to the dismissal of the claim on international public policy grounds there was "*no successful party on the merits in the traditional sense*".[3128] Hence, the tribunal held that both parties had to bear half of the costs of the arbitration and their own costs in full.[3129]

In *Metal-Tech v Uzbekistan*, for instance, the tribunal – after having taken a zero tolerance approach at the jurisdictional stage – dismissed the claim due to corruption, but emphasised at its decision on costs that in particular in cases of corruption it should be considered that the host State is to some extent involved in the illicit acts.[3130] Accordingly, the tribunal explicitly based its decision – that each party had to bear its own costs – on such participation of the host State in the corrupt act.[3131] In the words of the tribunal

> "[…] the Tribunal's determination is linked to the ground for denial of jurisdiction. 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

[3126] See e.g. Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice," 586. ("*In dealing with any claims for restitution, damages or payment due, an arbitral tribunal is empowered, and it has a duty, to take into account the conduct of the parties as an element which might affect, at a minimum, the quantum*.").
[3127] See e.g. Joost Pauwelyn, "Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy," in *Anti-Corruption Policy: Can International Actors Play a Constructive Role?*, ed. Susan Rose-Ackerman and Paul D Carrington (Durham, U.S.A.: Carolina Academic Press, 2013), 247–66; Kulkarni, "Enforcing Anti-Corruption Measures Through International Investment Arbitration," 46.
[3128] *World Duty Free v Kenya*, Award, para 190.
[3129] *World Duty Free v Kenya*, Award, paras 190 et seq.
[3130] *Metal-Tech v Uzbekistan*, para 422.
[3131] *Metal-Tech v Uzbekistan*, para 422.

> 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".[3132]

The tribunal refrained from explaining on which grounds such participation of the host State was established. It seems as if for the tribunal such participation, which would have to be established on the basis of attribution, is apparent and requires no legal reasoning or further explanation. Considering that in the view of the tribunal such participation is "implicit in the very nature of corruption"[3133] it remains unexplained and even incomprehensible why the tribunal failed to take such participation into account at the jurisdictional stage.

Against this background it seems as if the cost stage may function as a correction tool for tribunals applying a zero tolerance approach and discharging the host State of any responsibility. It may be used as the last resort to balance the particularities of corruption cases and to minimise the one-sidedness of the outcome. By doing so, the tribunals may not only have each party bear its own costs but also even allocate the costs accordingly to the outcome of its balancing exercise.

D. Conclusion

Needless to say, corruption cannot be tolerated in investment treaty arbitration. The investor's illegal conduct must have legal consequences, but so does the illegal conduct of the host State, which may even be twofold. On the one hand, when dealing with corruption one fundamental point has to be taken into account: contrary to fraud, corruption requires the collaboration of both parties. Thus, the host State is to some extent also responsible for the corruption at issue – be it for attribution of the illicit acts of the corrupt public officials or the lack of good governance rules and efforts to combat corruption. On the other hand the host State might have breached treaty obligations under the IIA, for which reason the proceedings have been brought in the first place. In other words, neither party should profit from its wrong.

For every violation of law there exists a proper remedy. However, in investment treaty arbitration where multiple interests are at stake, the remedy must constitute a holistic approach. It cannot be the object and purpose of investment treaties to set the host State free from any liability of both wrongdoings – involvement in corruption and treaty breach – based on a ground created, to some extent, with the participation of the host State. By leaving the investor without any remedy for the host State's treaty breach, such approach leads to a one-sided accountability – disregarding any responsibility of the host State. The often-contended justification that where two litigation parties are equally at fault, the claimant has the weaker

[3132] *Metal-Tech v Uzbekistan*, para 422.
[3133] *Metal-Tech v Uzbekistan*, para 422.

position, is less than satisfactory. It disregards the specific characteristics of investment treaty arbitration, where the investor will always find itself in the position as claimant and thus amounts to a *carte blanche* for the host State for both wrongdoings. Such approach will neither deter the host State from engaging in corruption nor encourage it to implement measures in violation of its obligations under IIAs. On the contrary, the host State may well be encouraged to facilitate corruption among its officials or at least not fight it with all required emphasis in order to be able to raise the corruption defence, without having to fear any repercussions.

While the zero tolerance approach seeks to condemn corruption, it fails to acknowledge that it does not curb corruption on a long-term perspective. In the long run, tackling corruption requires incentives for and international pressure on the host State leading to far-reaching changes in the political structure by implementing good governance. The first step on such long road is that the host State takes responsibility for corruption among its public officials. Thus, not taking the corrupt practices of a host State into account in investment treaty arbitration is counterproductive. Experience with the FCPA and the OECD Anti-Bribery Convention has shown that only punishing the supply side does not lead to satisfactory results. Rather both the supply side and the demand side need to be tackled in order to gain grounds against corruption. At the same time the drastic result would cause insecurity in the investment world due to the impotence to even have the tribunal review the particular circumstances and all relevant facts. Hence, such strict and narrow approach of merely focusing on the illicit behaviour of one side of the equation, the investor, is in conflict with the purposes and objectives of the international instruments fighting corruption and of the IIAs promoting investment by providing just protection.

Against this background, this study contends that both the interests of the international fight against corruption as well as the interests of the investment protection regime must be upheld by finding an approach, which reconciles both regimes. Investment treaty arbitration does not exist in a vacuum, it rather is part of the universe of international law, which the anti-corruption regime is also part of. Neither regime trumps the other. On the contrary, the approach towards corruption in investment treaty arbitration must seek the optimisation of both, which can be best accomplished through the balanced approach.

This approach draws from the proportionality analysis as a tool for the optimisation of competing interests. The principle of proportionality plays an important role in international law and is also gaining ground in investment treaty arbitration. As rule of international law it finds its entry gate into investment treaty arbitration through Article 42(1) ICSID Convention and through Article 31(1) Vienna Convention as interpretative tool of the treaty provisions. In particular where public interests come into play, the principle of proportionality has been applied by tribunals and has found supporters among commentators.

As regards corruption issues in investment treaty arbitration, the main focus is on the proportionality *strictu senso* as basis for the balancing of all relevant circumstances of the case and interests affected. On basis of the balancing test, the tribunal may take into account the degrees of involvement of both parties, the specific circumstances of the corrupt transaction and the commitment of both parties to fight corruption. In particular, the tribunal should scrutinise the anti-corruption measures in place before the corrupt act occurred as well as the parties' concrete reactions when the corrupt act came to light. In this context it will be interesting to see whether the parties condoned or rather condemned the corrupt act. Indications for such behaviour will generally be whether the parties have distanced themselves from the involved personnel and taken legal actions against them. The commitment of the parties against corruption may also be shown by their cooperation in investigating the corrupt act or by the measures implemented after the event in order to prevent it from happening again. At the same time, at the balancing stage the tribunal may consider the socioeconomic implications of its decision and take into consideration the different interests at stake.

The outcome of the balancing test then determines the quantum. In cases where the host State shows good governance and implemented anti-corruption measures as well as a functioning enforcement system while the investor's conduct is outrageous such balancing test may well leave the investor without compensation. In other cases where the corrupt transaction was initiated and promoted by the public officials and the host State condoned such behaviour by failing to prosecute them and seeking recovery of the bribes paid, the circumstances of the case may lead to awarding compensation to the investor for the treaty breach, but with a significant reduction of the compensation due to its participation in corruption. This approach holds the host State internationally accountable for its treaty breach as well as its failure to combat corruption, while punishing the investor by reducing its right to compensation.

CONCLUDING REMARKS

The question *how* to deal with corruption in investment treaty arbitration starts with the question *why* corruption needs to be dealt with in investment treaty arbitration. The reason is that the negative effects of corruption are contrary to the object and purpose of investment protection and IIAs, which is to promote economic development and increase the host State's prosperity through foreign investment. Corruption slows down economic growth and spreads poverty through misallocation of funds. While in specific circumstances it may 'grease the wheel' and assist individual investors to make the investment possible in the first place, it is detrimental to the investment protection system as a whole. Consequently, this study concludes that corruption has to be taken seriously in investment treaty arbitration and tackled by the arbitral tribunals through an appropriate approach.

Against the background of the detrimental effects of corruption, an international fight against corruption has developed within the last 20 years. The international community in form of States, International Organisations and Non-Governmental Organisations has concluded international instruments against corruption, implemented anti-corruption programmes, and conducted research and education on this topic. While such international fight against corruption started with only tackling the supply side of corruption, it has now adopted a holistic approach and also dedicates its efforts against the demand side of corruption. In fact, the vicious circle of corruption can only be broken if both the supply and demand sides of corruption are tackled.

The efforts adopted by the international community form the basis for the international consensus to fight corruption. From this international consensus it also follows that corruption violates universal principles and notions, which are fundamental to the wellbeing of the international society. Since private international law defines the term international public policy as the core of the fundamental principles and values of a *specific* legal system applied to disputes with international implications, the preferable term for the relevant scope of public policy in investment treaty arbitration is transnational public policy or universal public policy.

The detrimental effects of corruption and the fact that it violates transnational public policy have a bearing on the duty of the arbitrator dealing with suspicious circumstances. In particular, the investment treaty arbitrator has a special responsibility that goes beyond adjudicating the dispute between the two parties to the arbitration. In investment treaty arbitration, the decision will most certainly have an impact on the public. Consequently, any corrupt action that may be connected to the investment dispute may also affect the population of the host State and members of the international investment community. Thus, the role of the investment treaty arbitrator can be described as that of a guardian of the

international community and especially of the international investment community. In this function, the investment treaty arbitrator has the duty to shed light on any suspicious circumstances and thoroughly deal with corruption issues while always safeguarding the principle of due process and equality of the parties.

The above developed notions that (i) corruption is detrimental to all that the investment treaty system seeks to protect and promote, (ii) the international community has taken a holistic approach to fight both the supply and demand sides of corruption, (iii) corruption breaches transnational public policy by violating the core principles of the international community, and (iv) the investment treaty arbitrator has a duty to deal with corruption thoroughly, form the basis for the detailed analysis of how to deal with corruption in investment treaty arbitration.

On this basis, the next core question is to what extent the corrupt acts of public officials are attributable to the host State. In this context, the difference between investment treaty arbitration and international commercial arbitration becomes apparent once more, since due to (i) the hybrid concept of investment treaty arbitration, (ii) the fact that one party is a State and (iii) the essential role of international law, the law of State responsibility plays a major role. Pursuant to one view, the corrupt action of soliciting or accepting a bribe can be detached from the official act of making a decision with governmental power. From this it would follow that the corrupt act of a public official only constitutes private conduct, which is not attributable to the host State. This study has, however, shown that based on the principles of attribution of the law on State responsibility mirrored in the ILC Articles, corrupt acts of public official may well be attributable to the host State despite their *ultra vires* character. Due to the essential link between the possibility to solicit or accept bribes and the governmental authority, it is the official capacity of the public official that in fact creates the necessary position to become a bribe solicitor or a bribe receiver.

Such possible attribution of corruption to the State needs to be taken into account when corruption is used as a shield of the host State against the investor's claim. The starting point is that the illegal behaviour of the investor must have negative consequences on the investor's rights and the outcome of the case. In case the relevant IIA contains an 'in accordance with host State law' clause, the host State may argue that the investment tainted by corruption falls outside of the scope of consent of the host State to arbitrate or fails to amount to a protected investment under the IIA. Moreover, it can also be argued that the investor's treaty claim is inadmissible due to the violation of international public policy and the investor's unclean hands. Finally, the argument runs that the violation of the general principle of good faith resulting from the investor's involvement in corrupt acts turns the investor's expectations illegitimate.

As the potential arguments of a host State show, investor corruption may raise issues related to the jurisdiction of the tribunal, the admissibility of the claim or the merits. The possible attribution of corruption to the State in specific circumstances

contrasts investor corruption from other forms of irregularities. In such case the jurisdictional stage falls short from providing the adequate platform to make a full assessment of the corrupt conduct of both parties. A decision on jurisdiction is rather an 'all or nothing' decision with no room for taking all aspects of corruption into consideration.

Hence, depriving the investor already at the jurisdictional stage from bringing a treaty claim against the host State without having the host State's conduct also scrutinised by the arbitral tribunal would lead to a disproportional result by providing the corrupt host State with an escape possibility. Moreover, the participation of the host State in the corrupt act or other failure to take the required action against such corrupt act may trigger the responsibility of the host State and bar it from pleading the corruption defence. Thus, a general 'in accordance with the host State law' clause should not be interpreted as a jurisdictional hurdle in corruption cases. The tribunal should rather accept jurisdiction and enter into a thorough examination of all relevant circumstances of the corrupt act. On the basis of all facts of the case, the tribunal should apply a flexible approach to admissibility and scrutinise the conduct of both parties at the merits stage.

Corruption may also be the sword of the investor's claim against the corrupt host State. Against the background of the widespread condemnation of corruption, the international business community and the international society nowadays perceive corrupt practices within public authorities as an egregious evil that is unacceptable and causes outrage. The wilful disregard of any public interest for personal gain along with the deliberate abuse of power by implementing measures not based on a legitimate purpose violates the minimum standard of treatment under customary international law and the fair and equitable treatment standard. Since corrupt behaviour violates the principle of good faith, which is applicable to both parties, an investor may only base its fair and equitable treatment claim on the corrupt conduct of the host State in which it has not been involved.

Moreover, the host State is under the obligation to provide full protection and security to the investor against corrupt practices of its public officials. In this context, the host State must take all reasonable efforts and steps to impede the abuse of power of its public officials and is required to provide the investor with the adequate mechanism to remedy the harm. With regard to expropriation, corruption will not be decisive to determine whether a direct taking or an indirect expropriation took place. Rather the existence of corruption tainting the expropriation decision of the host State will make any expropriation unlawful.

Regardless of whether corruption is used as a sword or a shield, it will be challenging for the alleging party to prove it. Due to its criminal nature, it is inherent to corruption that it will be difficult to provide evidence for the solicitation or the payment of a bribe. Even more demanding for the alleging party will be to prove the causal link between the bribe and the abuse of the official

authority. Thus, the question arises how to deal with corruption in terms of burden of proof, standard of proof and admissibility of evidence.

Generally, the party alleging corruption will bear the burden of proving such allegation. At the jurisdictional stage, an investor alleging corruption as a breach of treaty will only have to present a *prima facie* case of corrupt practices, since the potential breach of treaty is a matter for the merits. The host State alleging corruption as an objection to jurisdiction bears, however, the full burden of proof for each objection. While the normal burden of proof applies at the merits stage, tribunals should make use of their wide discretion and evaluate all available evidence rather than decide a corruption issue on strict burden of proof rules. Thus, it might be appropriate for the tribunal to use its authority to request additional evidence or shift the burden of proof. In doing so the tribunal must observe that due process and equality of arms are safeguarded at all times.

The standard of proof should neither be lowered nor heightened. Allegations of corruption should be treated as what they are, an alleged breach of treaty or an objection to the claim. Thus, the same standard of proof should apply. In order to secure a full opportunity to present one's case, the tribunal should rather take all relevant circumstances into account when weighing the evidence on a balance of probabilities.

Moreover, tribunals dealing with corruption should take advantage of their wide discretion on evidentiary matters and admit all sorts of evidence in order to assure obtaining the full picture of the corrupt scheme. The fact that evidence was obtained unlawfully may be taken into account when evaluating the probable value. Depending on the specific circumstances of the case, a tribunal may also rely on a wide variety of evidentiary tools to shed light on the obscure corrupt practice, by e.g. drawing inferences and making presumptions based on circumstantial evidence.

From all the above it follows that the approach that should be taken towards corruption should be proportional and balanced. Indeed, the one-sided zero tolerance approach is contrary to the object and purpose of both the international fight against corruption and of the international investment protection regime. On the one hand, it provides the host State with a *carte blanche* for its treaty breaches and its failure to fight corruption within its ranks, which creates no incentives for the host State to seriously tackle corruption. On the other hand, such draconic approach would most certainly cause insecurity in the investment world due to the impotence of even having the tribunal review the particular circumstances and all relevant facts of the corrupt act.

Thus, creating incentives for adopting appropriate anti-corruption measures and enforcing them starts with scrutinising the host State's efforts to fight corruption, instead of setting it free from both - the treaty violation and its potential involvement in the corrupt act. Moreover, based on the notion that in investment treaty arbitration multiple interests are at stake, the arbitral tribunal needs to adopt

a holistic approach, taking into account the wrongdoings of both parties. The fight against corruption can only succeed if both the supply and demand sides of corruption are tackled.

The appropriate tool for the balanced approach is the principle of proportionality, which is also applicable to investment treaty arbitration. Such balancing test provides the tribunal with an appropriate mechanism to take into consideration *inter alia* the degrees of involvement of both parties, the specific circumstances of the corrupt transaction and the commitment of both parties to fight corruption. In this context, the tribunal may evaluate all measures and efforts taken by the parties against corruption before and after the corrupt act occurred and became known. The outcome of the balancing test may then be considered at the quantum phase. The tribunal may hold the host State internationally accountable for its treaty breach as well as its failure to combat corruption, while punishing the investor for its illicit conduct by reducing compensation.

Corruption is a broad term, which encompasses a variety of types and forms of illicit actions. This study has shown that there are manifold legal questions that arise in investment treaty arbitration in connection with corruption issues. Taking into account the complex circumstances of corruption, the various different interests at stake in investment treaty decisions, and the global consensus to fight corruption, the conclusion can be made that there is no 'one fits all' solution. Against this background, this study developed the *balanced approach*, which is based on the principle of proportionality and the wide discretion the arbitral tribunal has to solve the disputes before it, in order to take into account all relevant interests at stake when dealing with corruption. Only through such balanced approach can the conflict between the international fight against corruption and the international investment regime be overcome and their objective and purpose streamlined.

* * *

A. BIBLIOGRAPHY

Abbott, KW. "Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption." *J Int Economic Law* 4, no. 2 (2001): 275–96.

Abdala, Manuel A., and Spiller Pablo T. "Chorzów's Standard Rejuvenated - Assessing Damages in Investment Treaty Arbitrations." *Journal of International Arbitration* 25, no. 1 (2008): 103–20.

———. "Damage Valuation of Indirect Expropriation in International Arbitration Cases." *The American Review of International Arbitration* 14, no. 4 (2003): 447–60.

Abdel Raouf, Mohamed. "How Should International Arbitrators Tackle Corruption Issues?" *ICSID Review - Foreign Investment Law Journal* 24, no. 1 (2009): 116–36.

———. "How Should International Arbitrators Tackle Corruption Issues?" In *Liber Amicorum Bernardo Cremades*, edited by Miguel Angel Fernández-Ballesteros and David Arias, 1–16. Madrid: La Ley, 2010.

Accioly, Hildebrando. "Principes Généraux de La Responsabilité Internationale D'après La Doctrine et La Jurisprudence." *Hague Academy of International Law: Recueil Des Cours* 96, no. I (1959): 349–441.

Adede, A. O. "A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law." *Canadian Yearbook of International Law* 14 (1976): 73.

Ahlin, Christian, and Pinaki Bose. "Bribery, Inefficiency, and Bureaucratic Delay." *Journal of Development Economics* 84, no. 1 (September 2007): 465–86.

Aidt, Toke S. "Corruption, Institutions, and Economic Development." *Oxford Review of Economic Policy* 25, no. 2 (June 1, 2009): 271–91.

Akcay, Selcuk. "Corruption and Human Development." *Cato Journal* 26, no. 1 (2006): 29–48.

———. "Is Corruption an Obstacle for Foreign Direct Investors in Developing Countries?" *Economic Review* 12, no. 2 (2001): 27–34.

Alexy, Robert. *A Theory of Constitutional Rights*. Oxford et al.: Oxford University Press, 2002.

———. *Theorie Der Grundrechte*. 3rd edition. Suhrkamp, 1996.

Al-Sadig, Ali. "The Effect of Corruption on FDI Inflows." *Cato Journal* 29, no. 2 (2009): 267–94.

Altamirano, Giorleny D. "Impact of the Inter-American Convention against Corruption, The." *University of Miami Inter-American Law Review* 38 (2007 2006): 487.

Alvarez, Jose E., and Tegan Brink. "Revisiting the Necessity Defense." In *Yearbook on International Investment Law and Policy 2010-2011*, edited by Karl P. Sauvant, 319–75. Oxford University Press, 2011.

Amerasinghe, Chittharanjan F. *Evidence in International Litigation*. Leiden et al.: Martinus Nijhoff Publishers, 2005.

Andenas, Mads, and Stefan Zleptnig. "Proportionality: WTO Law: In Comparative Perspective." *Texas International Law Journal* 42, no. 3 (2007): 371–423.

Androulakis, Ioannis. *Die Globalisierung Der Korruptionsbekämpfung: Eine Untersuchung Zur Entstehung, Zum Inhalt Und Zu Den Auswirkungen Des Internationalen Korruptionsstrafrechts*. 1st ed. Baden-Baden: Nomos, 2007.

Annacker, Claudia. "Protection and Admission of Sovereign Investment under Investment Treaties." *Chinese Journal of International Law* 10, no. 3 (2011): 531–64.

"Anticorruption in Transition - A Contribution to the Policy Debate." The World Bank, 2000.

Argandoña, Antonio. "The United Nations Convention Against Corruption and Its Impact on International Companies." *Journal of Business Ethics* 74, no. 4 (2007): 481–96.

Babu, R. Rajesh. "The United Nations Convention Against Corruption: A Critical Overview." *Available at SSRN: http://ssrn.com/abstract=891898*, 2006.

Baltag, Crina. "Admission of Investments and the ICSID Convention." *Transnational Dispute Management* 6, no. 1 (2009): 1–24.

Bardhan, Pranab. "Corruption and Development: A Review of Issues." *Journal of Economic Literature* 35, no. 3 (1997): 1320.

Béla Vitányi. "International Responsibility of States for Their Administration of Justice." *Netherlands International Law Review* 22, no. 02 (1975): 131–63.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. Oxford ;New York: Clarendon Press; Oxford University Press, 1996.

Berger, Klaus Peter. *The Creeping Codification of the New Lex Mercatoria*. 2nd ed. Alphen aan den Rijn et al.: Kluwer Law International, 2010.

———. *The Practice of Transnational Law*. Kluwer Law International, 2001.

Bernardini, Piero. "The Role of the International Arbitrator." *Arbitration International* 20, no. 2 (2004): 113–22.

Bishop, Doak. "Toward a More Flexible Approach to the International Legal Consequences of Corruption." *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 63–66.

Bishop, R. Doak, James Crawford, and W. Michael Reisman. *Foreign Investment Disputes: Cases, Materials, and Commentary*. 2nd ed. The Hague: Kluwer Law International, 2014.

Blackaby, Nigel. "Public Interest and Investment Treaty Arbitration." In *International Commercial Arbitration: Important Contemporary Questions*, edited by Albert Jan Van den Berg, 11:355–65. ICCA Congress Series. Kluwer Law International, 2003.

Blackaby, Nigel, Constantine Partasides, Alan Redfern, and J. Martin H. Hunter. *Redfern and Hunter on International Arbitration*. Oxford; New York: Oxford University Press, 2009.

Blackburn, Keith, Niloy Bose, and M. Emranul Haque. "The Incidence and Persistence of Corruption in Economic Development." Discussion Paper. Centre for Growth & Business Cycle Research - University of Manchester, 2003.

Böckstiegel, Karl-Heinz. "Applicable Law to State Responsibility under Energy Charter Treaty and Other Investment Protection Treaties." In *Ribeiro (ed.) Investment Arbitration and the Energy Charter Treaty*, 257–61. New York: JurisNet, 2006.

———. "Presenting, Taking and Evaluating Evidence in International Arbitration." In *Handbook on International Arbitration and ADR*, 2nd ed., 79–88. Juris, 2010.

———. "Public Policy and Arbitrability." In *Comparative Arbitration Practice and Public Policy in Arbitration*, edited by Pieter Sanders, 3:177–204. ICCA Congress Series. Kluwer Law International, 1987.

———. "Public Policy as a Limit to Arbitration and Its Enforcement," Special Issue 2008 The New York Convention: - 50 Years:123 et seq. New York: IBA Journal of Dispute Resolution, 2008.

———. "The Role of the Arbitrator in Investment Treaty Arbitration." In *International Commercial Arbitration: Important Contemporary Questions*, edited by Albert Jan Van den Berg, 11:366–75. ICCA Congress Series. Kluwer Law International, 2003.

Bonell, Michael Joachim and Olaf Meyer. "The Impact of Corruption on International Commercial Contracts – General Report." In T*he Impact of Corruption on International Commercial Contracts*, edited by Michael Joachim Bonell and Olaf Meyer. Heidelberg: Springer, 2015.

Borchard, Edwin Montefiore. *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*. First. New York: The Banks Law Publishing Co., 1915.

Born, Gary B. *International Commercial Arbitration*. 2nd ed. The Hague: Kluwer Law International, 2014.

Borris, Christian, and Rudolf Hennecke. "Das Kriterium Der Einhaltung von Vorschriften Nationalen Rechts in ICSID-Schiedsverfahren - Anmerkungen Zum Schiedsspruch in Der Sache Fraport v. Philippines." *Zeitschrift Für Schiedsverfahren - German Arbitration Journal* 6, no. 2 (2008): 49–58.

———. "Fraport AG Frankfurt Airport Services Worldwide v. Republic of The Philippines - Compliance with National Laws: A Jurisdictional Requirement under BITS?" *Transnational Dispute Management* 4, no. 5 (2007).

Bottini, Gabriel. "Legality of Investments under ICSID Jurisprudence." In *The Backlash against Investment Arbitration*, edited by Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Liz Chung, and Claire Balchin, 297–314. The Hague: Kluwer Law International, 2010.

Brennan, Bartley A. “Foreign Corrupt Practices Act Amendments of 1998: Death of a Law, The.” *North Carolina Journal of International Law and Commercial Regulation* 15 (1990): 229.

Brower, Charles H. “Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes.” In *Yearbook on International Investment Law and Policy 2008-2009*, edited by Karl P. Sauvant. Oxford: Oxford University Press, 2009.

Brower, Charles N. “Evidence Before International Tribunals: The Need for Some Standard Rules.” *International Lawyer* 28 (1994): 47–58.

Brower, Charles N, and Stephen W Schill. “Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law.” *Chicago Journal of International Law* 9, no. 2 (2009): 471–99.

Brown, H. Lowell. *Bribery in International Commerce*. Thomson West, 2003.

Brownlie, Ian. “The Responsibility of States for the Acts of International Organizations.” In *International Responsibility Today*, 355–62. Leiden [et al.]: Nijhoff, 2005.

Bungenberg, Marc, and Catharine Titi. “Precedents in International Investment Law.” In *International Investment Law*, edited by Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch, 1st ed., 1505–16. Baden-Baden: Nomos, 2015.

Burke-White, William W. “The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System.” In *The Backlash against Investment Arbitration*, edited by Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Liz Chung, and Claire Balchin, 407–32. Alphen aan den Rijn et al.: Kluwer Law International, 2010.

Burke-White, William W., and Andreas von Staden. “Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations.” *Yale Journal of International Law* 35, no. 2 (2010): 283–346.

———. “The Need for Public Law Standards of Review in Investor-State Arbitrations.” In *International Investment Law and Comparative Public Law*, edited by Stephan W. Schill, 689–720. Oxford et al.: Oxford University Press, 2010.

Burns, John F. “House of Graft: Tracing the Bhutto Millions - A Special Report; Bhutto Clan Leaves Trail of Corruption.” *New York Times*. January 9, 1998.

Cairns, David J. A. “Transnational Public Policy and the Internal Law of State Parties.” *Transnational Dispute Management* 6, no. 1 (March 2009).

Canadian Council on International Law, ed. *Responsibility of Individuals, States and Organizations: Proceedings of the 35th Annual Conference of the Canadian Council on International Law, Ottawa, 26 - 28 October 2006*. Ottawa, Ontario: CCIL, 2007.

Carlevaris, Andrea. “The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals.” *The Journal of World Investment and Trade* 9, no. 1 (2008): 35–49.

Carrington, Paul D. “Enforcing International Corrupt Practices Law.” *Michigan Journal of International Law* 32 (2010): 129–64.

Carver, Jeremy P. “Combating Corruption: The Emergence of New International Law.” *International Law FORUM Du Droit International* 5 (2003): 119.

Cassese, Antonio. *International Law*. 2nd ed. Oxford; New York: Oxford University Press, 2005.

Chand, Sheetal K., and Karl O. Moene. “Controlling Fiscal Corruption.” *World Development* 27, no. 7 (1999): 1129–40.

Changaroth, Anil. “International Arbitration - A Consensus on Public Policy Defences?” *Asian International Arbitration Journal* 4, no. 2 (2008): 143–74.

Cheng, Bin. *General Principles of Law as Applied by International Courts and Tribunals*. London: Stevens & Sons Limited, 1953.

Clermont, Kevin M., and Emily Sherwin. “A Comparative View of Standards of Proof.” *The American Journal of Comparative Law* 50, no. 2 (2002): 243–75.

Cohen-Eliya, Moshe, and Iddo Porat. “American Balancing and German Proportionality: The Historical Origins.” *International Journal of Constitutional Law* 8, no. 2 (2010): 263–86.

Cohen Smutny, Abby, and Petr Polásek. “Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration.” In *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought*, edited by Jacques Werner and Arif Hyder Ali, 277–96. London: Cameron May, 2009.

Commission, Jeffery P. “Precedent in Investment Treaty Arbitration - A Citation Analysis of a Developing Jurisprudence.” *Journal of International Arbitration* 24, no. 2 (2007): 129–58.

Condorelli, Luigi, and Claus Kress. “The Rules of Attribution: General Considerations.” In *The Law of International Responsibility*, First., 221–36. New York: Oxford University Press, 2010.

Coppens, Govert. “Treaty Definitions of ‘Investment’ and the Role of Economic Development: A Critical Analysis of the Malaysian Historical Salvors Case.” In *Foreign Investment and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, 174–91. Routledge, 2011.

Cordero Moss, Giuditta. “Tribunal’s Powers Versus Party Autonomy.” In *The Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph Schreuer, 1207–43. Oxford: Oxford University Press, 2008.

Craig, W. Laurence, William W. Park, and Jan Paulsson. *International Chamber of Commerce Arbitration*. 3rd ed. New York: Oceana Publications, 2000.

Crawford, Emily. “Proportionality.” In *The Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford University Press, 2011.

Crawford, James. *Brownlie’s Principles of Public International Law*. Eight. Oxford; New York: Oxford University Press, 2012.

———. “Investment Arbitration and the ILC Articles on State Responsibility.” *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 127–99.

———. “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect.” *The American Journal of International Law* 96, no. 4 (2002): 874–90.

———. *The International Law Commission’s Articles on State Responsibility - Introduction, Text and Commentaries*. First. Cambridge et al.: Cambridge University Press, 2002.

———. *The International Law Commission’s Articles on State Responsibility: Introduction, Text, Commentaries*. Cambridge: Cambridge University Press, 2002.

———. “Treaty and Contract in Investment Arbitration.” *Arbitration International* 24, no. 3 (2008): 351–74.

Crawford, James, and Simon Olleson. “The Application of the Rules of State Responsibility.” In *International Investment Law*, edited by Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch, 1st ed., 411–41. Baden-Baden: Nomos, 2015.

———. “The Nature and Forms of International Responsibility.” In *Evans (ed.) International Law*, 441–71. Oxford; New York: Oxford University Press, 2010.

Cremades, Bernardo M. “Corruption and Investment Arbitration.” In *Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in Honour of Robert Briner*, edited by Gerald Aksen, Karl-Heinz Böckstiegel, Michael John Mustill, Paola Michele Patocchi, and Anne Marie Whitesell, 203–19. Paris: ICC Publishing, 2005.

———. “Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration.” *Arbitration International* 14, no. 2 (1998): 157–72.

Cremades, Bernardo M., and David J. A. Cairns. “Corruption, International Public Policy and the Duties of Arbitrators.” In *Handbook on International Arbitration and ADR*, 2nd ed., 35–48. Huntington, New York: JurisNet, 2010.

———. “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud.” In *Arbitration, Money Laundering, Corruption and Fraud*, edited by Kristine Karsten and Andrew Berkeley, 65–91. Paris: ICC Publishing, 2003.

Crivellaro, Antonio. “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence.” In *Arbitration, Money Laundering, Corruption and Fraud*, 109–46. Paris: ICC Publishing, 2003.

———. “The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption.” *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 1–22.

Cujo, Eglantine. “Invocation of Responsibility by International Organizations.” In *The Law of International Responsibility*, 969–83. Oxford: Oxford University Press, 2010.

Cummings, Amy, and Ellen Hayes. “Taming the Risk of Project Finance, Part One: Corruption and Legislative Reform.” *International Financial Law Review* 20 (2001): 27.

Czaplinski, Wladyslaw. “International Responsibility of International Organisations.” *The Polish Yearbook of International Law* 27 (2005): 49–58.

Damania, Richard, Per G. Fredriksson, and John A. List. “Trade Liberalization, Corruption, and Environmental Policy Formation: Theory and Evidence.” *Journal of Environmental Economics and Management* 46, no. 3 (November 2003): 490–512.

Davis, Kevin. “Civil Remedies for Corruption in Government Contracting: Zero Tolerance versus Proportional Liability.” Institute for International Law and Justice (IILJ) Working Paper 2009/4, 2009.

Delbrück, Jost, and Rüdiger Wolfrum. *Völkerrecht*. Second. Berlin: De Gruyter, 2002.

Denolf, Bert. “The Impact of Corruption on Foreign Direct Investment.” *The Journal of World Investment and Trade* 9, no. 3 (2008): 249–74.

Dereje, Jonas. “Staatsnahe Unternehmen - Die Zurechnungsproblematik im Internationalen Investitionsrecht und weiteren Bereichen des Völkerrechts.” Baden-Baden: Nomos, 2016.

Desmedt, Axel. “Proportionality in WTO Law.” *Journal of International Economic Law* 4, no. 3 (2001): 441–80.

Diel-Gligor, Katharina, and Rudolf Hennecke. “Investment in Accordance with the Law.” In *International Investment Law*, edited by Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch, 1st ed., 566–76. Baden-Baden: Nomos, 2015.

Dolinger, Jacob. “World Public Policy: Real International Public Policy in the Conflict of Laws.” *Texas International Law Journal* 17 (1982): 167–93.

Dolzer, Rudolf. “Fair and Equitable Treatment: A Key Standard in Investment Treaties.” *The International Lawyer* 39, no. 1 (2005): 87–106.

———. “Indirect Expropriations: New Developments?” *New York University Environmental Law Journal* 11, no. 1 (2002): 64–93.

Dolzer, Rudolf, and Christoph Schreuer. *Principles of International Investment Law*. 2nd edition. Oxford et al.: Oxford University Press, 2012.

Dolzer, Rudolf, and Margrete Stevens. *Bilateral Investment Treaties*. The Hague; Boston: M. Nijhoff, 1995.

Dolzer, Rudolf, and André von Walter. “Fair and Equitable Treatment - Lines of Jurisprudence on Customary Law.” In *Investment Treaty Law Current Issues II*, 99–114. London: British Institute of International and Comparative Law, 2007.

Don Wallace, Jr. “Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico.” In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Todd Weiler (ed.)*, 669–700. London: Cameron May, 2005.

Douglas, Zachary. “Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?” *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 104–10.

———. “The Hybrid Foundation of Investment Treaty Arbitration.” *British Yearbook of International Law* 74 (2003): 151–290.

———. *The International Law of Investment Claims*. First. Cambridge et. al.: Cambridge University Press, 2009.

———. “The Plea of Illegality in Investment Treaty Arbitration.” *ICSID Review - Foreign Investment Law Journal* 29, no. 1 (2014): 155–86.

Dudas, Stefan H., and Nikolaos Tsolakidis. “Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?” *Transnational Dispute Management* 10, no. 3 (2013): 1–24.

Dumas-Aubin, Gabrielle, and Patrick Dumberry. “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law.” *Transnational Dispute Management*, no. 1 (2013): 1–10.

Eagleton, Clyde. “Denial of Justice in International Law.” *The American Journal of International Law* 22, no. 3 (1928): 538–59.

———. *The Responsibility of States in International Law*. New York: New York University Press, 1928.

Egger, Peter, and Hannes Winner. “Evidence on Corruption as an Incentive for Foreign Direct Investment.” *European Journal of Political Economy* 21, no. 4 (2005): 932–52.

Eicher, Theo, Cecilia García-Peñalosa, and Tanguy van Ypersele. “Education, Corruption, and the Distribution of Income.” *Journal of Economic Growth* 14, no. 3 (September 2009): 205.

Elliott, Kimberly Ann. “Problem of Corruption: A Tale of Two Countries, The.” *Northwestern Journal of International Law & Business* 18 (1998 1997): 524.

Eser, Albin, and Michael Kubiciel. *Institutions against Corruption a Comparative Study of the National Anti-Corruption Strategies Reflected by GRECOś First Evaluation Round*. 1st ed. Baden-Baden: Nomos, 2005.

Eveleigh, Edward. “General Standards of Proof in Litigation and Arbitration Generally.” *Arbitration International* 10, no. 3 (1994): 354–56.

Fadel, Mohammad. “Public Corruption and the Egyptian Revolution of January 25: Can Emerging International Anti-Corruption Norms Assist Egypt Recover Misappropriated Public Funds?” *Harvard International Law Journal* 52 (Online) (2011): 292–300.

Fadlallah, Ibrahim. “L’ordre Public Dans Les Sentences Arbitrales.” In *Collected Courses of the Hague Academy of International Law*, 1994:– V:377–430. The Hague: Martinus Nijhoff Publishers, 1996.

Fan, Joseph P.H., Randall Morck, Lixin Colin Xu, and Bernard Yeung. “Does ‘Good Government’ Draw Foreign Capital? Explaining China’s Exceptional Foreign Direct Investment Inflow.” World Bank Policy Research Working Paper. World Bank, April 2007.

Feit, Michael. “Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity.” *Berkeley Journal of International Law* 28 (2010): 142–77.

Fietta, Stephen. “Expropriation and the ‘Fair and Equitable’ Standard - The Developing Role of Investors’ ‘Expectations’ in International Investment Arbitration.” *Journal of International Arbitration* 23, no. 5 (2006): 375–99.

Fischer, Christophe. *La Responsibilité Internationale de L’etat Pour Les Comportements Ultra Vires de Ses Organes*. Tolochenaz: Imprimerie Chabloz, 1993.

Fitzmaurice, Gerald Gray. “The General Principles of International Law Considered from the Standpoint of the Rule of Law.” *Hague Academy of International Law: Recueil Des Cours* 92, no. 2 (1957): 1–228.

———. *The Law and Procedure of the International Court of Justice*. Cambridge: Grotius, 1986.

———. “The Meaning of the Term Denial of Justice.” *British Year Book of International Law* 13 (1932): 93.

Fjeldstad, Odd-Helge, and Bertil Tungodden. “Fiscal Corruption: A Vice or a Virtue?” *World Development* 31, no. 8 (2003): 1459–67.

Flatters, Frank, and W Bentley Macleod. “Administrative Corruption and Taxation.” *International Tax and Public Finance* 2, no. 3 (1995): 397–417.

Fouchard, Philippe. *L’arbitrage Commercial International*. Paris: Dalloz, 1965.

Francioni, Francesco. “Access to Justice, Denial of Justice and International Investment Law.” *European Journal of International Law* 20, no. 3 (2009): 729–47.

Franck, Susan D. “The Legitimacy Crisis in International Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions.” *Fordham Law Review* 73, no. 4 (2005): 1521–1625.

———. “The Role of International Arbitrators.” *ILSA Journal of International & Comparative Law* 12, no. 2 (2006): 499–521.

Franck, Thomas M. “On Proportionality of Countermeasures in International Law.” *American Journal of International Law* 102, no. 4 (2008): 715–67.

———. “Proportionality in International Law.” *Law and Ethics of Human Rights* 4, no. 2 (2010): 230–42.

Freeman, Alwyn V. “Responsibility of States for Unlawful Acts of Their Armed Forces.” In *Collected Courses of the Hague Academy of International Law*, 88:263–416. Martinus Nijhoff Publishers, 1955.

———. *The International Responsibility of States for Denial of Justice*. London et al.: Longmans, Green and Co., 1938.

Frowein, Jochen Abr. "Probleme Des Allgemeinen Völkerrechts Vor Der Europäischen Kommission Für Menschenrechte." In *Von Münch (ed.) Staatsrecht - Völkerrecht - Europarecht: Festschrift Für Hans-Jürgen Schlochauer Zum 75. Geburtstag Am 28. März 1981*, 298–300. Berlin, New York: De Gruyter, 1981.

Fry, James D. "Désordre Public International under the New York Convention: Wither Truly International Public Policy." *Chinese Journal of International Law* 8, no. 1 (2009): 81–134.

Gaillard, Emmanuel. "Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules." In *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, edited by Albert Jan van den Berg, 7:570–90. ICCA Congress Series. Kluwer Law International, 1996.

———. "Transitional Law: A Legal System or a Method of Decision Making?" *Arbitration International* 17, no. 1 (2001): 59–71.

Gaillard, Emmanuel, and Yas Banifatemi. "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process." *ICSID Review - Foreign Investment Law Journal* 18 (2003): 375–411.

Gaillard, Emmanuel, and John Savage, eds. *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999.

Gantz, David A. "Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus." *Northwestern Journal of International Law & Business* 18 (1998 1997): 457.

Gardiner, Richard. *Treaty Interpretation*. Oxford; New York: Oxford University Press, 2008.

Garner, J. W. "International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice." *British Year Book of International Law* 10 (1929): 181.

Gathii, James Thuo. "Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya." *Connecticut Journal of International Law* 14 (1999): 407.

Giegerich, Thomas. "Verantwortlichkeit Und Haftung Für Akte Internationaler Und Supranationaler Organisationen." *Zeitschrift Für Vergleichende Rechtswissenschaftchaft* 104, no. 2 (2005): 163–91.

Gill, Judith. "Is There a Special Role for Precedent in Investment Arbitration?" *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 87–94.

Goldman, Berthold. "La Lex Mercatoria Dans Les Contrats et L'arbitrage International: Réalite et Perspectives." *Journal Du Droit International* 106 (1979): 475.

———. “Les Conflits de Lois Dans L’arbitrage International de Droit Privé.” In *Collected Courses of the Hague Academy of International Law*, 109:347–485. Martinus Nijhoff Publishers, 1963.

———. “The Applicable Law: General Principles of Law - Lex Mercatoria.” In *Contemporary Problems in International Arbitration*, edited by Julian D.M. Lew, 113–25. Dordrecht et al.: Martinus Nijhoff Publishers, 1987.

Goldstone, Jack A. “Understanding the Revolutions of 2011 - Weakness and Resilience in Middle Eastern Autocracies.” *Foreign Affairs* 90, no. 3 (2011): 8–16.

Grabitz, Eberhard. “Der Grundsatz Der Verhältnismäßigkeit.” *Archiv Des öffentlichen Rechts* 98, no. 4 (1973): 568–616.

Green, Duncan. “What Caused the Revolution in Egypt?” *The Guardian*, February 17, 2011. http://www.theguardian.com/global-development/poverty-matters/2011/feb/17/what-caused-egyptian-revolution.

Griebel, Jörn. *Internationales Investitionsrecht - Lehrbuch Für Studium Und Praxis*. 1st ed. München: C. H. Beck, 2008.

Griebel, Jörn, and Sophie Spetzler. “2. Tagung Junger Investitionsrechtler Auf Schloss Krickenbeck Am Niederrhein.” *German Arbitration Journal* 8, no. 5 (2010): 265–68.

Grierson-Weiler, Todd J., and Ian Laird. “Standards of Treatment.” In *The Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph H. Schreuer, 259–304. Oxford: Oxford University Press, 2008.

Guedj, Thomas G. “The Theory of the Lois de Police, A Functional Trend In Continental Private International Law - A Comparative Analysis With Modern American Theories.” *The American Journal of Comparative Law* 39 (1991): 661–97.

Gupta, Sanjeev, Hamid R. Davoodi, and Rosa Alonso-Terme. “Does Corruption Affect Income Inequality and Poverty?” Working Paper. International Monetary Fund, 1998.

Gupta, Sanjeev, Hamid Davoodi, and Erwin Tiongson. “Corruption and the Provision of Health Care and Education Services.” IMF Working Paper. International Monetary Fund, June 2000.

Habib, Mohsin, and Leon Zurawicki. “Corruption and Foreign Direct Investment.” *Journal of International Business Studies* 33, no. 2 (2002): 291–307.

Haeri, Hussein. “A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law.” *Arbitration International* 27, no. 1 (2011): 27–45.

Hakkala, Katariina Nilsson, Pehr-Johan Norbäck, and Helena Svaleryd. “Asymmetric Effects of Corruption on FDI: Evidence from Swedish Multinational Firms.” *Review of Economics and Statistics* 90, no. 4 (November 1, 2008): 627–42.

Hamida, Walid Ben. “The Mihaly v. Sri Lanka Case: Some Thoughts Relating to the Status of Pre-Investment Expenditures.” In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, 47–76. Cameron May, 2005.

Hanotiau, Bernard. “Satisfying the Burden of Proof: The Viewpoint of a ‘Civil Law’ Lawyer.” *Arbitration International* 10, no. 3 (1994): 341–53.

Hanotiau, Bernard, and Olivier Caprasse. “Public Policy in International Commercial Arbitration.” In *Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention in Practice*, edited by Emmanuel Gaillard and Domenico Di Pietro, 787–828. Cameron May, 2008.

Han, Xiuli. “The Application of the Principle of Proportionality in Tecmed v. Mexico.” *Chinese Journal of International Law* 6, no. 3 (2007): 635–52.

Harris, Troy L. “The ‘Public Policy’ Exception to Enforcement of International Arbitration Awards Under the New York Convention.” *Journal of International Arbitration* 24, no. 1 (2007): 9–24.

Haugeneder, Florian. “Corruption in Investor-State Arbitration.” *The Journal of World Investment and Trade* 10, no. 3 (June 2009): 323.

Haugeneder, Florian, and Christoph Liebscher. “Corruption and Investment Arbitration: Substantive Standards and Proof.” In *Austrian Arbitration Yearbook 2009*, edited by Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser, and Gerold Zeiler, 539–64. C.H. Beck, 2009.

Heinman, Fritz F. “Combating International Corruption: The Role of the Business Community.” In *Corruption and the Global Economy*, 147–62, 1997.

Heintschel von Heinegg, Wolff. *Casebook Völkerrecht*. 1st ed. München: Verlag C. H. Beck, 2005.

Henckels, Caroline. “Balancing Investment Protection and the Public Interest: The Role of the Standard Review and the Importance of Deference in Investor-State Arbitration.” *Journal of International Dispute Settlement* 4, no. 1 (2013): 197–215.

———. “Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration.” *Journal of International Economic Law* 15, no. 1 (2012): 223–55.

Hepburn, Jarrod. “In Accordance with Which Host State Laws? Restoring the ‘Defence’ of Investor Illegality in Investment Arbitration.” *Journal of International Dispute Settlement* 5, no. 3 (2014): 531–59.

Hesse, Konrad. *Grundzüge Des Verfassungsrechts Der Bundesrepublik Deutschland*. 20th ed. Heidelberg: Müller Verlag, 1995.

Highet, Keith. “Evidence, the Court, and the Nicaragua Case.” *The American Journal of International Law* 81, no. 1 (1987): 1–56.

Hobér, Kaj. “State Responsibility and Attribution.” In *Muchlinski Et. Al. (eds.) Oxford Handbook of International Investment Law*, 549–83. Oxford; New York: Oxford University Press, 2008.

———. “State Responsibility and Investment Arbitration.” *Transnational Dispute Management* 2, no. 5 (2005).

———. “State Responsibility and Investment Arbitration.” In *Ribeiro (ed.) Investment Arbitration and the Energy Charter Treaty*, 261–89. New York: JurisNet, 2006.

———. “State Responsibility and Investment Arbitration.” *Journal of International Arbitration* 25, no. 5 (2008): 545–68.

Hobe, Stephan. *Einführung in Das Völkerrecht*. 10th ed. Tübingen: A. Francke Verlag, 2014.

Horn, Norbert. “Arbitration and the Protection of Foreign Investment: Concepts and Means.” In *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects*, edited by Norbert Horn and Stefan Kröll, 3–31. Kluwer Law International, 2004.

Horvath, Günther J. “The Duty of the Tribunal to Render an Enforceable Award.” *Journal of International Arbitration* 18, no. 2 (2001): 135–58.

Hostetler, Courtney. “Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects.” *Yale Human Rights & Development Law Journal* 14 (2011): 231–72.

Houston, Douglas A. “Can Corruption Ever Improve an Economy?” *Cato Journal* 27, no. 3 (2007): 325.

Hunter, Martin, and Gui Conde E Silva. “Transnational Public Policy and Its Application in Investment Arbitration.” *Journal of World Investment* 4, no. 3 (2003): 367–78.

Hunter, Sharifa G. “A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business.” *ILSA Journal of International and Comparative Law* 18, no. 1 (2011): 89–113.

Huntington, Samuel P. *Political Order in Changing Societies*. 2. print. New Haven: Yale University Press, 1969.

Hwang, Michael, and Kevin Lim. “Corruption in Arbitration - Law and Reality.” *Asian International Arbitration Journal* 8, no. 1 (2012): 1–119.

“International Investment Law and the Fight Against Corruption.” Vale Columbia Center on Sustainable International Investment Open Society Justice Initiative, 2009.

Ipsen, Knut. *Völkerrecht*. 6th ed. München: Verlag C. H. Beck, 2014.

Jans, Jan H. “Proportionality Revisited.” *Legal Issues of Economic Integration* 27, no. 3 (2000): 239–65.

Jarvin, Sigvard. “The Sources and Limits of the Arbitrator’s Powers.” In *Contemporary Problems in International Arbitration*, edited by Julian D.M. Lew, 50–72. Dordrecht et al.: Martinus Nijhoff Publishers, 1986.

Jennings, Robert, and Arthur Watts, eds. *Oppenheim's International Law*. Ninth. London: Longman, 1992.

Jessup, Philip C. *Transnational Law*. New Haven: Yale University Press, 1956.

Johnston, Michael. "Corruption and Democratic Consolidation." Princeton University, 1999.

———. "Keeping the Answers, Changing the Questions: Corruption Definitions Revisited." In *Dimensionen Politischer Korruption - Beiträge Zum Stand Der Internationalen Forschung*, 1st ed., 61–76. Wiesbaden: VS, Verlag für Sozialwissenschaften, 2005.

Jordan, Jon. "Adequate Procedures Defense under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act, The." *Stanford Journal of Law, Business & Finance* 17, no. 1 (2011): 25–66.

———. "Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend towards Greater Accountability in the Prevention of Foreign Bribery." *NYU Journal of Law & Business* 7 (2011 2010): 845–71.

Joubin-Bret, Anna. "Admission and Establishment in the Context of Investment Protection." In *Standards of Investment Protection*, edited by August Reinisch, 9–28. Oxford: Oxford University Press, 2008.

Karanja, Elizabeth. "Report on the Session Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse." In *Legitimacy: Myths, Realities, Challenges*, edited by Albert Jan Van den Berg, 18:439–50. ICCA Congress Series. Kluwer Law International, 2015.

Karsten, Kristine, and Andrew Berkeley, eds. *Arbitration, Money Laundering, Corruption and Fraud*. Paris: ICC Publishing, 2003.

Kaufman, Daniel, and Shang-Jin Wei. "Does 'Grease Money' Speed Up the Wheels of Commerce?" NBER Working Paper 7093. Cambridge: National Bureau of Economic Research, April 1999.

Kaufmann, Daniel. "Corruption: The Facts." *Foreign Policy*, no. 107 (Summer 1997): 114–31.

Kaufmann, Daniel, Aart Kraay, and Pablo Zoido-Lobatón. "Governance Matters." Policy Research Working Paper. World Bank, October 1999.

Kaufmann-Kohler, Gabrielle. "Arbitral Precedent: Dream, Necessity or Excuse?" *Arbitration International* 23, no. 3 (2007): 357–78.

Kazazi, Mojtaba. *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*. The Hague; London; Boston: Kluwer Law International, 1996.

Kazazi, Mojtaba, and Bette E. Shifman. "Evidence before International Tribunals - Introduction." *International Law FORUM Du Droit International* 1, no. 4 (1999): 193–96.

Kendra, Thomas, and Anna Bonini. "Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?" *Journal of International Arbitration* 31, no. 4 (2014): 439–53.

Kessedjian, Catherine. “Transnational Public Policy.” In *International Arbitration 2006: Back to Basics?*, edited by Albert Jan Van den Berg, 13:857–70. ICCA Congress Series. Kluwer Law International, 2007.

Kingsbury, Benedict, and Stephan W. Schill. “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, IILJ Working Paper 2009/6.” Global Administrative Law Series. New York: Institute for International Law and Justice, 2009.

———. “Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality.” In *International Investment Law and Comparative Public Law*, edited by Stephan W. Schill, 75–104. Oxford et al.: Oxford University Press, 2010.

Kläger, Roland. *“Fair and Equitable Treatment” in International Investment Law*. Cambridge et al.: Cambridge University Press, 2011.

Klaw, Bruce W. “A New Strategy for Preventing Bribery and Extortion in International Business Transactions.” *Harvard Journal on Legislation* 49 (2012): 303–71.

———. “State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles and Opportunities.” *SSRN eLibrary No. 2298886*, 2013, 1–44.

Knahr, Christina. “Indirect Expropriation in Recent Investment Arbitration.” *Transnational Dispute Management* 6, no. 1 (2009): 1–18.

———. “Investments ‘in Accordance with Host State Law.’” *Transnational Dispute Management* 4, no. 5 (September 2007): 1–28.

———. “Investments ‘in Accordance with Host State Law.’” In *International Investment Law in Context*, 27–42. Eleven International Publishing, 2008.

———. “Transparency, Third Party Participation and Access to Documents in International Investment Arbitration.” *Arbitration International* 23, no. 2 (2007): 327–55.

Kokott, Juliane. *The Burden of Proof in Comparative and International Human Rights Law*. The Hague: Kluwer Law International, 1998.

Kolb, Robert. *La Bonne Foi En Droit International Public - Contribution à L’etude Des Principes Généraux de Droit*. 1st ed. Paris: Presses Universitaires de France, 2000.

———. “Principles as Sources of International Law (with Special Reference to Good Faith).” *Netherlands International Law Review* 53, no. 1 (2006): 1–36.

Korker, Samer, and Margaret Ryznar. “Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing.” *Missouri Law Review* 76, no. 2 (2011): 415–53.

Kosheri, Ahmed S. El, and Philippe Leboulanger. “L’arbitrage Face a La Corruption et Aux Trafics D’influence.” *Revue de l’Arbitrage* 3 (1984): 3–18.

Koskenniemi, Martti. “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.” Report of the Study Group of the International Law Commission. International Law Commission, April 13, 2006.

Kreindler, Richard. “Approaches to the Application of Transnational Public Policy by Arbitrators.” *The Journal of World Investment* 4, no. 2 (2003): 239–50.

———. “Aspects of Illegality in the Formation and Performance of Contracts.” In *International Commercial Arbitration: Important Contemporary Questions*, edited by Albert Jan Van den Berg, 11:209–84. ICCA Congress Series. Kluwer Law International, 2003.

———. “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine.” In *Between East and West: Essays in Honour of Ulf Franke*, edited by Kaj Hobér, Annette Magnusson, and Marie Öhrström, 309–27. New York: Juris Publications, 2010.

———. “Die Internationale Investitionsschiedsgerichtsbarkeit Und Die Korruption: Eine Alte Herausforderung Mit Neuen Antworten.” *Zeitschrift Für Schiedsverfahren - German Arbitration Journal*, no. 1 (2010): 2–13.

———. “Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers.” In *Liber Amicorum En L’honneur de Serge Lazareff*, edited by Laurent Lévy and Yves Derains, 383–90. Pedonne, 2011.

Kriebaum, Ursula. “Investment Arbitration - Illegal Investments.” In *Austrian Arbitration Yearbook 2010*, edited by Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser, and Gerold Zeiler, 307–35. C.H. Beck, 2010.

———. “Local Remedies and the Standards for the Protection of Foreign Investment.” In *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, edited by Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich, 418–63. Oxford et al.: Oxford University Press, 2009.

Kropholler, Jan. *Internationales Privatrecht*. 6th ed. Tübingen: Mohr Siebeck, 2006.

Kulick, Andreas. *Global Public Interest in International Investment Law*. Cambridge et al.: Cambridge University Press, 2012.

Kulick, Andreas, and Carsten Wendler. “A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption.” *Legal Issues of Economic Integration* 37, no. 1 (2010): 61–85.

Kulkarni, Sagar A. “Enforcing Anti-Corruption Measures Through International Investment Arbitration.” *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 1–50.

Kunicová, Jana. “Democratic Institutions and Corruption: Incentives and Constraints in Politics.” In *International Handbook on the Economics of Corruption*, 140–60. Cheltenham, UK: Edward Elgar Publishing Limited, 2006.

Kunicová, Jana, and Susanne Rose-Ackerman. “Electoral Rules and Constitutional Structures as Constraints on Corruption.” *British Journal of Political Science* 35, no. 04 (2005): 573–606.

Kunoy, Bjørn. “The Notion of Time in ICSID’s Case Law Indirect Expropriation.” *Journal of International Arbitration* 23, no. 4 (2006): 337–49.

Kurtz, Jürgen. “Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis.” *International and Comparative Law Quarterly* 59, no. 02 (2010): 325–71.

Lalive, Pierre. “Ordre Public Transnational (or Réellement International) et Arbitrage International.” *Revue de l’Arbitrage*, 1986, 329 et seq.

———. “Transnational (or Truly International) Public Policy and International Arbitration.” In *Comparative Arbitration Practice and Public Policy in Arbitration*, edited by Pieter Sanders, 3:257–318. ICCA Congress Series. Kluwer Law International, 1987.

Lalive, Pierre, and Emmanuel Gaillard. “Le Nouveau Droit de L’arbitrage International En Suisse.” *Journal Du Droit International* 116, no. 4 (1989): 905–63.

Lambsdorff, Johann Graf. “Corruption and Rent-Seeking.” *Public Choice* 113, no. 1 (October 1, 2002): 97–125.

Lamm, Carolyn B., Brody K. Greenwald, and Kristen M. Young. “From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption.” *ICSID Review* 29, no. 2 (2014): 328–49.

Lamm, Carolyn B., Hansel T. Pham, and Rahim Moloo. “Fraud and Corruption in International Arbitration.” In *Liber Amicorum Bernardo Cremades*, 699–731. Madrid: La Ley, 2010.

Lau, Martin. “Note on Société Générale de Surveillance SA v. Pakistan, through Secretary, Ministry of Finance.” *Arbitration International* 19, no. 2 (2003): 179–212.

Leff, Nathaniel H. “Economic Development Through Bureaucratic Corruption.” *American Behavioral Scientist* 8, no. 3 (1964): 8–14.

———. “Economic Development Through Bureaucratic Corruption.” In *Political Corruption: A Handbook*, edited by Arnold J Heidenheimer, Michael Johnston, and Victor T LeVine, 389–404. New Brunswick: Transaction Publishers, 1989.

Leon, Barry, and John Terry. “Why Arbitrating against a State Is Different: Twelve Key Reasons.” In *Handbook on International Arbitration and ADR*, 2nd ed., 105–20. Juris Publications, 2010.

Leonhardsen, Erlend M. “Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration.” *Journal of International Dispute Settlement* 3, no. 1 (2012): 95–136.

Lestelle, Evan P. “Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction, The.” *Tulane Law Review* 83 (2009 2008): 527.

Levine, Eugenia. “Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation.” *Berkeley Journal of International Law* 29, no. 1 (2011): 200–224.

Levy, Daniel. “Price Adjustment under the Table: Evidence on Efficiency-Enhancing Corruption.” *European Journal of Political Economy* 23, no. 2 (June 2007): 423–47.

Lewis, Eleanor Roberts. “LPIB Roundtable on Global Corruption - Remarks.” *Law and Policy in International Business* 31 (2000 1999): 210.

Lew, Julian D.M. *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*. Dobbs Ferry, New York: Oceana Publications, 1978.

Lew, Julian D.M., Loukas A. Mistelis, and Stefan Michael Kröll. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003.

Leys, Colin. “What Is the Problem About Corruption.” *The Journal of Modern African Studies* 3, no. 2 (1965): 215–30.

Lim, Kevin. “Upholding Corrupt Investor’s Claims Against Complicit or Compliant Host States - Where Angels Should Not Fear to Tread.” *Yearbook on International Investment Law & Policy* 2011/2012 (2012).

Litwin, Daniel. “On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption.” *Transnational Dispute Management*, no. 3 (2013): 1–12.

Llamzon, Aloysius P. *Corruption in International Investment Arbitration*. Oxford: Oxford University Press, 2014.

———. “State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration.” *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 1–81.

López and, Ramón, and Siddhartha Mitra. “Corruption, Pollution, and the Kuznets Environment Curve.” *Journal of Environmental Economics and Management* 40, no. 2 (September 2000): 137–50.

Lorz, Ralph Alexander, and Manuel Busch. “Investment in Accordance with Law - Specifically Corruption.” In *International Investment Law*, edited by Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch, 1st ed., 577–89. Baden-Baden: Nomos, 2015.

Losco, Michael A. “Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction.” *Duke Law Journal* 63, no. 5 (2014): 1201–42.

Lui, Francis T. “An Equilibrium Queuing Model of Bribery.” *Journal of Political Economy*, Journal of Political Economy, 93, no. 4 (1985): 760–81.

Macrae, J. “Underdevelopment and the Economics of Corruption: A Game Theory Approach.” *World Development* 10, no. 8 (1982): 677.

Mann, F. A. “British Treaties for the Promotion and Protection of Investments.” *British Yearbook of International Law* 52, no. 1 (1981): 241–54.

———. “Foreign Investment in the International Court of Justice: The ELSI Case.” *The American Journal of International Law* 86, no. 1 (1992): 92.

Mantilla-Serrano, Fernando. “Towards a Transnational Procedural Public Policy.” *Arbitration International* 20, no. 4 (2004): 333–53.

Marossi, Ali Z. “Shifting the Burden of Proof in the Practice of the Iran-United States Claims Tribunal.” *Journal of International Arbitration* 28, no. 5 (2011): 427–43.

Marriott, Arthur L. “Evidence in International Arbitration.” *Arbitration International* 5, no. 3 (1989): 280–90.

Martinez, Alexis. “Invoking State Defenses in Investment Treaty Arbitration.” In *The Backlash against Investment Arbitration*, 315–37. Alphen aan den Rijn et al.: Kluwer Law International, 2010.

Martin, Timothy. “International Arbitration and Corruption: An Evolving Standard.” *Transnational Dispute Management* 1, no. 2 (2004).

Mauro, Paolo. “Corruption and Growth.” *Quarterly Journal of Economics* 110, no. 3 (1995): 681–712.

———. “Corruption and the Composition of Government Expenditure.” *Journal of Public Economics* 69, no. 2 (June 1998): 263–79.

———. “The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis.” In *Corruption and the Global Economy*, edited by Kimberly Ann Elliott, 83–107. Washington D.C.: Institute for International Economics, 1997.

Mayer, Pierre. “Effect of International Public Policy in International Arbitration.” In *Pervasive Problems in International Arbitration*, edited by Loukas A. Mistelis and Julian D.M. Lew, 61–70. Alphen aan den Rijn et al.: Kluwer Law International, 2006.

———. “La Règle Morale Dans L’arbitrage International.” In *Etudes Offertes à Pierre Bellet*, 379–93. Paris: Litec, 1991.

———. “Mandatory Rules of Law in International Arbitration.” *Arbitration International* 2, no. 4 (1986): 274–93.

McLachlan, Campbell, Lauren Shore, and Matthew Weininger. *International Investment Arbitration - Substantive Principles*. Oxford: Oxford University Press, 2008.

Menaker, Andrea J. “The Determinative Impact of Fraud and Corruption on Investment Arbitrations.” *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 67–75.

Méon, Pierre-Guillaume, and Khalid Sekkat. “Does Corruption Grease or Sand the Wheels of Growth?” *Public Choice* 122, no. 1/2 (January 2005): 69–97.

Meron, Theodor. “International Responsibility of States for Unauthorized Acts of Their Officials.” *British Yearbook of International Law* 33 (1957): 85–114.

Merton, Robert K. *Social Theory and Social Structure*. 1968 enlarged ed. Free Press, 1968.

Meshel, Tamar. “The Use and Misuse of the Corruption Defence in International Investment Arbitration.” *Journal of International Arbitration* 30, no. 3 (2013): 267–81.

Miles, Cameron A. “Corruption, Jurisdiction and Admissibility in International Investment Claims.” *Journal of International Dispute Settlement*, 2012, 1–41.

Miller, Lisa. “No More This for That: The Effect of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.” *Cardozo Journal of International and Comparative Law* 8 (2000): 139.

Mills, Karen. “Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto.” *International Arbitration Law Review* 5, no. 4 (2002): 126–32.

———. “Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto.” In *International Commercial Arbitration: Important Contemporary Questions*, edited by Albert Jan Van den Berg, 11:288–99. ICCA Congress Series. Kluwer Law International, 2003.

Mistelis, Loukas A. “‘Keeping the Unruly Horse in Control’ or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards.” *International Law FORUM Du Droit International* 2, no. 4 (2000): 248–53.

———. “Legal Issues Arising Out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues.” In *Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention in Practice*, edited by Emmanuel Gaillard and Domenico Di Pietro, 573–94. London: Cameron May, 2008.

Moloo, Rahim. “A Comment on the Clean Hands Doctrine in International Law.” *Transnational Dispute Management* 8, no. 1 (2011): 1–10.

Moloo, Rahim, and Justin Jacinto. “Standards of Review an Reviewing Standards: Public Interest Regulation in International Investment Law.” In *Yearbook on International Investment Law and Policy 2011-2012*, edited by Karl P. Sauvant. Oxford et al.: Oxford University Press, 2013.

Moloo, Rahim, and Alex Khachaturian. “The Compliance with the Law Requirement in International Investment Law.” *Fordham International Law Journal* 34, no. 6 (2011): 1472–1501.

Montt, Santiago. *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*. Oxford, Portland: Hart Publishing, 2009.

Moran, Theodore. *Combating Corrupt Payments in Foreign Investment Concessions Closing the Loopholes, Extending the Tools*. Washington, D.C.: Center for Global Development, 2008.

Morse, Stephen. “Is Corruption Bad for Environmental Sustainability? A Cross-National Analysis.” *Ecology and Society* 11, no. 1 (2006): 22.

Mosconi, Franco. “Exception to the Operation of Choice of Law Rules.” In *Collected Courses of the Hague Academy of International Law*, 1989:–V:19–214. Dordrecht et al.: Martinus Nijhoff Publishers, 1990.

Mosler, Hermann. *The International Society as a Legal Community*. Alphen aan den Rijn: Sijthoff & Noordhoff, 1980.

Mourre, Alexis. “Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator.” *Arbitration International* 22, no. 1 (2006): 95–118.

Mourre, Alexis, and Alexandre Vagenheim. “Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem.” In *Liber Amicorum Bernardo Cremades*, edited by M. Á. Fernández-Ballesteros and David Arias, 843–66. Madrid: La Ley, 2010.

Müller, Jörg P. *Vertrauensschutz Im Völkerrecht*. Köln: Carl Heymanns Verlag KG, 1971.

Murphy, Kevin M., Andrei Shleifer, and Robert W. Vishny. “The Allocation of Talent: Implications for Growth.” *The Quarterly Journal of Economics* 106, no. 2 (May 1991): 503–30.

Mustill, Michael John. “The New Lex Mercatoria: The First Twenty-Five Years.” *Arbitration International* 4, no. 2 (1988): 86–119.

Nadakavukaren Schefer, Krista. “Corruption and the WTO Legal System.” *Journal of World Trade* 43, no. 4 (2009): 737–70.

———. “Will the WTO Finally Tackle Corruption in Public Purchasing? The Revised Agreement on Government Procurement.” *Insights - American Society of International Law* 17, no. 11 (2013).

Nesbit, Julie B. “Transnational Bribery of Foreign Officials: A New Treat to the Future of Democracy.” *Vanderbilt Journal of Transnational Law* 31 (1998): 1273.

Newcombe, Andrew. “Investor Misconduct: Jurisdiction, Admissibility or Merits?” In *Evolution in Investment Treaty Law and Arbitration*, edited by Chester Brown and Kate Miles, 187–200. Cambridge et al.: Cambridge University Press, 2011.

Newcombe, Andrew, and Lluís Paradell. *Law and Practice of Investment Treaties: Standards of Treatment*. The Hague: Kluwer Law International, 2009.

Nichols, Philip M. “Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization’s Authority.” *New York University Journal of International Law and Politics* 28 (1996 1995): 711.

———. “Outlawing Transnational Bribery through the World Trade Organization.” *Law and Policy in International Business* 28 (1997 1996): 305–81.

Noonan, John. *Bribes*. New York: Macmillan, 1984.

Nye, J. S. “Corruption and Political Development: A Cost-Benefit Analysis.” *The American Political Science Review* 61, no. 2 (June 1967): 417–27.

Obadia, Eloïse M. “How Proactive Arbitrators Really Are in Conducting Arbitral Proceedings: An ICSID Perspective.” *News from ICSID* 16, no. 2 (1999): 8–10.

Obersteiner, Thomas. “‘In Accordance with Domestic Law’ Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors.” *Journal of International Arbitration* 31, no. 2 (2014): 265–88.

O’Connor, J. F. *Good Faith in International Law*. Aldershot, UK: Dartmouth, 1991.

Olaniyan, Kolawole. “African Union Convention on Preventing and Combating Corruption: A Critical Appraisal.” *African Human Rights Law Journal* 4 (2004): 74.

Oquendo, Angel Ricardo. “Corruption and Legitimation Crisis in Latin America.” *Connecticut Journal of International Law* 14 (1999): 475–94.

Otto, Dirk, and Omaia Elwan. “Article V(2).” In *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, edited by Herbert Kronke, Patricia Nacimiento, Dirk Otto, and Nicola Christine Port. The Hague: Kluwer Law International, 2010.

Palazzolo, Joe. “Siemens Compliance Program Made The Catch, Company Says.” *The Wall Street Journal*, June 10, 2011.

Partasides, Constantine. “Proving Corruption in International Arbitration: A Balanced Standard for the Real World.” *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 47–62.

———. “World Duty Free v The Republic of Kenya: A Unique Precedent?” Chatman House, March 28, 2007.

Patocchi, Paola Michele, and Ian L. Meakin. “Procedure and the Taking of Evidence in International Commercial Arbitration.” *International Business Law Journal*, no. 7 (1996): 884–95.

Paulsson, Jan. *Denial of Justice in International Law*. First. Cambridge et al.: Cambridge University Press, 2005.

———. , ed. “Jurisdiction and Admissibility.” In *Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in Honour of Robert Briner*. Paris: ICC Publishing, 2005.

———. “The Role of Precedent in Investment Arbitration.” In *Arbitration under International Investment Agreements - A Guide to the Key Issues*, edited by Katia Yannaca-Small, 699–718. Oxford: Oxford University Press, 2010.

Paulsson, Jan, and Zachary Douglas. “Indirect Expropriation in Investment Treaty Arbitrations.” In *Arbitrating Foreign Investment Disputes - Procedural and Substantive Legal Aspects*, edited by Norbert Horn and Stefan Michael Kröll, 145–58. The Hague: Kluwer Law International, 2004.

Paulsson, Jan, and Georgios Petrochilos. “Neer-Ly Misled?” *ICSID Review - Foreign Investment Law Journal* 22, no. 2 (2007): 242–57.

Pauwelyn, Joost. “Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy.” In *Anti-Corruption Policy: Can International Actors Play a Constructive Role?*, edited by Susan Rose-Ackerman and Paul D Carrington, 247–66. Durham, U.S.A.: Carolina Academic Press, 2013.

Pellet, Alain. “The Definition of Responsibility in International Law.” In *The Law of International Responsibility*, edited by James Crawford, Alain Pellet, and Simon Olleson, 3–16. Oxford University Press, 2010.

Peterson, Luke Eric. “Lithuania Update: Italian Investor Was Denied FET in Tender Process, but Tribunal Not Persuaded That $250 Million in Losses Can Be Hung on State.” *Investment Arbitration Reporter*, March 28, 2013.

Petrochilos, Georgios. “Attribution.” In *Yannaca-Small (ed.) Arbitration under International Investment Agreements - A Guide to the Key Issues*, 287–322. New York: Oxford University Press, 2010.

Philip, Allan. “Arbitration - Money Laundering, Corruption and Fraud: The Role of the Tribunals.” In *Arbitration, Money Laundering, Corruption and Fraud*, edited by Kristine Karsten and Andrew Berkeley, 147–55. Paris: ICC Publishing, 2003.

Pieth, Mark. “Transnational Commercial Bribery: Challenge to Arbitration.” In *Arbitration, Money Laundering, Corruption and Fraud*, edited by Kristine Karsten and Andrew Berkeley, 41–46. ICC Publishing, 2003.

Pietrowski, Robert. “Evidence in International Arbitration.” *Arbitration International* 22, no. 3 (2006).

Pirker, Benedikt. “Seeing the Forest Without the Trees - The Doubtful Case for Proportionality Analysis in International Investment Arbitration.” In *Proportionality and Post-National Constitutionalism*, edited by Alexia Herwig, Christian Joerges, and George Pavlakos, Forthcoming.

Platte, Martin. “An Arbitrator’s Duty to Render Enforceable Awards.” *Journal of International Arbitration* 20, no. 3 (2003): 307–13.

Porta, Donatella della, and Alberto Vannucci. “The ‘Perverse Effects’ of Political Corruption.” *Political Studies* 45, no. 3 (1997): 516–38.

Posadas, Alejandro. “Combating Corruption under International Law.” *Duke Journal of Comparative and International Law* 10 (2000): 345.

Pryles, Michael. “Reflections on Transnational Public Policy.” *Journal of International Arbitration* 24, no. 1 (2007): 1–8.

Przetacznik, Franciszek. “The International Responsibility of the State for Ultra Vires Acts of Their Organs.” *Revue de Droit International de Sciences Diplomatiques et Politiques* 61 (1983): 129–60.

Racine, Jean-Baptiste. *L’arbitrage Commercial International et L’ordre Public*. Paris: L.G.D.J., 1999.

Raeschke-Kessler, Hilmar. “Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects.” In *Arbitrating Foreign Investment Disputes*, edited by Norbert Horn and Stefan Kröll. The Hague et al.: Kluwer Law International, 2004.

Raeschke-Kessler, Hilmar, and Dorothee Gottwald. “Corruption.” In *The Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph Schreuer, 584–616. Oxford et al.: Oxford University Press, 2008.

———. “Corruption in Foreign Investment - Contracts and Dispute Settlement between Investors, States, and Agents.” *The Journal of World Investment and Trade* 9, no. 1 (2008): 5.

———. “Korruption Und Internationales Vertragsrecht - Rechtliche Aspekte Der Korruption Im Bau- Und Infrastruktursektor Mit Auslandsbezug.” In *Festschrift Für Hans-Jochem Lüer Zum 70. Geburtstag*, edited by Wilhelm Moll, 39–56. C.H. Beck, 2008.

Rahman, Aminur, Gregory Kisunko, and Kapil Kapoor. “Estimating the Effects of Corruption - Implications for Bangladesh.” Policy Research Working Paper. Washington D.C.: World Bank, November 2000.

Randall, Lisa Harriman. “Multilateralization of the Foreign Corrupt Practices Act.” *Minnesota Journal of Global Trade* 6 (1997): 657.

Ranjan, Prabhash. “Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion.” *Journal of International Arbitration* 26, no. 2 (2009): 217–35.

Rau, Wolfgang. “The Council of Europe’s Civil Law Convention on Corruption.” In *The Civil Law Consequences of Corruption*, edited by Olaf Meyer, 21–30. Nomos, 2009.

Redfern, Alan. “Comments on Commercial Arbitration and Transnational Public Policy.” In *International Arbitration 2006 Back to Basics?*, edited by Albert Jan Van den Berg, 13:871–75. ICCA Congress Series. Kluwer Law International, 2006.

———. “The Practical Distinction Between the Burden of Proof and the Taking of Evidence - An English Perspective.” *Arbitration International* 10, no. 3 (1994): 317–22.

Reed, Lucy. “The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management.” *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 95–103.

Reiner, Andreas. “Burden and General Standards of Proof.” *Arbitration International* 10, no. 3 (1994): 328–40.

Reinisch, August. “Expropriation.” In *The Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph H. Schreuer, 408–58. Oxford: Oxford University Press, 2008.

Reisman, W. Michael. “Law, International Public Policy (So-Called) and Arbitral Choice in International Commercial Arbitration.” In *International Arbitration 2006 Back to Basics?*, edited by Albert Jan Van den Berg, 13:849–56. ICCA Congress Series. Kluwer Law International, 2007.

Reisman, W. Michael, and Eric E. Freedman. “The Plaintiff’s Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication.” *The American Journal of International Law* 76, no. 4 (1982): 737–53.

Reisman, W. Michael, and Robert D. Sloane. “Indirect Expropriation and Its Valuation in the BIT Generation.” *British Year Book of International Law* 74 (2003): 115–50.

Reymond, Claude. “The Practical Distinction Between the Burden of Proof and Taking of Evidence - A Further Perspective.” *Arbitration International* 10, no. 3 (1994): 323–27.

Ricci, Edoardo F. “Evidence in International Arbitration: A Syntetic Glimpse.” In *Liber Amicorum Bernardo Cremades*, 1025–31. Madrid: La Ley, 2010.

Riddell, Anna, and Brendan Plant. *Evidence before the International Court of Justice*. London: British Institute of International and Comparative Law, 2009.

Rigo Sureda, Andrés. “Precedent in Investment Treaty Arbitration.” In *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, edited by Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich, 830–42. Oxford: Oxford University Press, 2009.

Ripinsky, Sergey, and Kevin Williams. *Damages in International Investment Law*. London: British Institute of International and Comparative Law, 2008.

Roberts, Anthea. “The Next Battleground: Standards of Review in Investment Treaty Arbitration.” In *Arbitration - The Next Fifty Years*, edited by Albert Jan Van den Berg, 16:170–80. ICCA Congress Series. Kluwer Law International, 2012.

Rogers, Catherine A. “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration.” *Michigan Journal of International Law* 23, no. 2 (2002): 341–424.

———. “The Vocation of the International Arbitrator.” *American University International Law Review* 20, no. 5 (2005): 957–1020.

Rose-Ackerman, Susan. “Corruption and Democracy.” *Proceedings of the Annual Meeting of the American Society of International Law* 90 (1996): 83–90.

———. *Corruption and Government*. Cambridge et al.: Cambridge University Press, 1999.

———. “The Political Economy of Corruption.” In *Corruption and the Global Economy*, edited by Kimberly Ann Elliott, 31–60. Washington, D.C.: Institute for International Economics, 1997.

———. “The Role of the World Bank in Controlling Corruption.” *Law and Policy in International Business* 29 (1997): 93–114.

———. “When Is Corruption Harmful.” In *Political Corruption: Concepts & Contexts*, edited by Arnold J Heidenheimer and Michael Johnston, Third., 353–71. New Brunswick: Transaction Publishers, 2002.

Rose, Cecile. “Questioning the Role of International Arbitration in the Fight against Corruption.” *Journal of International Arbitration* 31, no. 2 (2014): 183–264.

———. *International Anti-Corruption Norms - Their Creation and Influence on Domestic Legal Systems.* Oxford: Oxford University Press, 2015.

Rosell, José, and Harvey Prager. “Illicit Commissions and International Arbitration: The Question of Proof.” *Arbitration International* 15, no. 4 (1999): 329–48.

Ross, Alison. “The Man Behind Kenyan Arbitration.” *Global Arbitration Review*, January 20, 2012.

Rossbacher, Henry H, and Tracy W Young. “Foreign Corrupt Practices Act within the American Response to Domestic Corruption, The.” *Dickinson Journal of International Law* 15 (1997 1996): 509.

Sabahi, Borzu, and Kabir Duggal. “Occidental Petroleum v Ecuador (2012) Observations on Proportionality, Assessment of Damages and Contributory Fault.” *ICSID Review - Foreign Investment Law Journal* 28, no. 2 (2013): 279–90.

Sacerdoti, Giorgio. “Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice.” *ICSID Review - Foreign Investment Law Journal* 24, no. 2 (2009): 565–86.

Salacuse, Jeswald W. *The Law of Investment Treaties*. Oxford: Oxford University Press, 2010.

Salbu, Steven R. “Transnational Bribery: The Big Questions.” *Northwestern Journal of International Law & Business* 21 (2001 2000): 435.

Sandholtz, Wayne, and William Koetzle. “Accounting for Corruption: Economic Structure, Democracy, and Trade.” *International Studies Quarterly* 44, no. 1 (2000): 31–50.

Sandifer, Durward V. *Evidence before International Tribunals*. Rev. ed. Charlottesville: University Press of Virginia, 1975.

Sasson, Monique. *Substantive Law in Investment Treaty Arbitration*. Alphen aan den Rijn et al.: Kluwer Law International, 2010.

Sayed, Abdulhay. *Corruption in International Trade and Commercial Arbitration*. The Hague et al.: Kluwer Law International, 2004.

Schäfer, Daniel. “Siemens Uncovers Bribery Case at Kuwait Unit.” *Financial Times*. June 10, 2011.

Scherer, Matthias. “Circumstantial Evidence in Corruption Cases Before International Arbitration Tribunals.” *International Arbitration Law Review* 5, no. 2 (2002): 29.

Schill, Stephan W. “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator.” *Leiden Journal of International Law* 23, no. 2 (2010): 401–30.

———. “Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights.” *ICSID Review - Foreign Investment Law Journal* 27, no. 1 (2012): 87–119.

———. “Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review.” *Journal of International Dispute Settlement* 3, no. 3 (2012): 577–607.

———. “Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties.” *Minnesota Journal of International Law* 18, no. 1 (2009): 1–97.

———. “Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law.” In *International Investment Law and Comparative Public Law*, edited by Stephan W. Schill, 151–82. Oxford: Oxford University Press, 2010.

———. “Illegal Investments in International Treaty Arbitration.” *The Law and Practice of International Courts and Tribunals* 11, no. 2 (2012): 281–323.

———. “International Investment Law and Comparative Public Law - An Introduction.” In *International Investment Law and Comparative Public Law*, edited by Stephan W. Schill, 3–37. Oxford: Oxford University Press, 2011.

———. “International Investment Law and the Host State’s Power to Handle Economic Crises - Comment on the ICSID Decision in LG&E v. Argentina.” *Journal of International Arbitration* 24, no. 3 (2007): 265–86.

———. “Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed.” *Transnational Dispute Management* 3, no. 2 (2006): 1–15.

Schreuer, Christoph. “Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration.” *Law and Practice of International Courts and Tribunals* 4, no. 1 (2005): 1–17.

———. “Fair and Equitable Treatment (FET): Interactions with Other Standards.” *Transnational Dispute Management* 4, no. 5 (September 2007): 1–26.

———. “Fair and Equitable Treatment in Arbitral Practice.” *The Journal of World Investment and Trade* Vol. 6, no. No. 3 (June 2005): 357–86.

———. “The Concept of Expropriation under the ECT and Other Investment Protection Treaties.” In *Investment Arbitration and the Energy Charter Treaty*, edited by Clarisse Ribeiro, 108–59. New York: JurisNet, 2006.

Schreuer, Christoph, Loretta Malintoppi, August Reinisch, and Anthony Sinclair. *The ICSID Convention: A Commentary*. 2nd ed. Cambridge et al.: Cambridge University Press, 2009.

Schröder, Meinhard. “Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung Und Sanktionen.” In *Graf Vitzthum (ed.) Völkerrecht*. Berlin, New York: De Gruyter, 2010.

Schroth, Peter W. “The African Union Convention on Preventing and Combating Corruption.” *Journal of African Law* 49, no. 01 (2005): 24–38.

———. “The United States and the International Bribery Conventions.” *The American Journal of Comparative Law* 50 (Autumn 2002): 593–622.

Schwebel, Stephen M. “Is Neer Far from Fair and Equitable?” *Arbitration International* 27, no. 4 (2011): 555–61.

Seelig, Marie Louise. “The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility.” *Annals FLB - Belgrade Law Review* LVII, no. 3 (2009): 116–34.

Selby, Jamison M. “Fact-Finding Before the Iran-United States Claims Tribunal: The View from the Trenches.” In *Fact-Finding Before International Tribunals*, edited by Richard B Lillich, 135–45. New York: Transnational Publishers, 1992.

Sen, Amartya Kumar. *Development as Freedom*. Oxford: Oxford Univ. Press, 2001.

Seraglini, Christophe. *Lois de Police et Justice Arbitrale Internationale*. Paris: Dalloz, 2001.

Shaw, Malcolm N. *International Law*. 6th ed. Cambridge et. al.: Cambridge University Press, 2008.

Sheppard, Audley. “Public Policy and the Enforcement of Arbitral Awards: Should There Be a Global Standard?” *Transnational Dispute Management* I, no. 1 (February 2004).

———. “The Jurisdictional Threshold of a Prima-Facie Case.” In *The Oxford Handbook of International Investment Law, Muchlinski, Ortino and Schreuer (ed.)*, 932–61. Oxford; New York: Oxford University Press, 2008.

Sheppard, Audley, and Joachim Delaney. “Corruption and International Arbitration.” Prague, 2001.

Shirazi, Moiz A. “The Impact of Corruption on International Trade.” *Denver Journal of International Law and Policy* 40 (2012): 435–46.

Shleifer, Andrei, and Robert W. Vishny. “Corruption.” *The Quarterly Journal of Economics* 108, no. 3 (August 1993): 599–617.

———. “Politicians and Firms.” *Quarterly Journal of Economics* 109, no. 4 (1994): 995–1025.

Sinlapapiromsuk, Tidarat. “The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?” *Transnational Dispute Management (TDM)* 10, no. 3 (2013): 1–32.

Slade, David R. “Foreign Corrupt Payments: Enforcing a Multilateral Agreement.” *Harvard International Law Journal* 22 (1981): 117.

Sornarajah, M. *The International Law on Foreign Investment*. 2nd ed. Cambridge: Cambridge University Press, 2004.

———. *The International Law on Foreign Investment*. 3rd ed. Cambridge et al.: Cambridge University Press, 2010.

Spiegel, Hans W. “Origin and Development of Denial of Justice.” *The American Journal of International Law* 32, no. 1 (1938): 63–81.

Stapenhurst, Rick, and Shahrzad Sedigh. “Introduction: An Overview of the Costs of Corruption and Strategies to Deal with It.” In *Curbing Corruption: Toward a Model for Building National Integrity*, 1–12. EDI Development Studies. Washington D.C.: The World Bank, 1999.

Stone Sweet, Alec. “Investor-State Arbitration: Proportionality’s New Frontier.” *Law and Ethics of Human Rights* 4, no. 1 (2010): 47–76.

Stone Sweet, Alec, and Jud Mathews. “Proportionality Balancing and Global Constitutionalism.” *Columbia Journal of Transnational Law* 47, no. 1 (2008): 72–164.

Summerfield, Jason Noah. “The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions.” *Transnational Dispute Management (TDM)* 6, no. 1 (2009): 1–18.

Svensson, Jakob. “Eight Questions about Corruption.” *Journal of Economic Perspectives* 19, no. 3 (2005): 19–42.

———. “Who Must Pay Bribes and How Much?” *Quarterly Journal of Economics* 118, no. 1 (2003): 207–30.

Swaleheen, Mushfiq us, and Dean Stansel. “Economic Freedom, Corruption, and Growth.” *Cato Journal* 27, no. 3 (2007): 343–58.

Tams, Christian J. “Waiver, Acquiescence, and Extinctive Prescription.” In *The Law of International Responsibility*, edited by James Crawford, Alain Pellet, and Simon Olleson, 1035–50. Oxford: Oxford University Press, 2010.

Tanzi, Attila. “On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector.” *The Law and Practice of International Courts and Tribunals* 11 (2012): 47–76.

Tanzi, Vito. “Corruption Around the World: Causes, Consequences, Scope, and Cures.” *Staff Papers - International Monetary Fund* 45, no. 4 (December 1998): 559–94.

Tanzi, Vito, and Hamid R. Davoodi. “Corruption, Public Investment, and Growth.” IMF Working Paper. International Monetary Fund, October 1997.

Thirlway, Hugh. “Dilemma or Chimera? - Admissibility of Illegally Obtained Evidence in International Adjudication.” *The American Journal of International Law* 78, no. 3 (1984): 622–41.

Timmeny, Wallace. “Overview of the FCPA, An.” *Syracuse Journal of International Law and Commerce* 9 (1982): 235.

Tirado, Joe, Matthew Page, and Daniel Meagher. “Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship.” *ICSID Review - Foreign Investment Law Journal* 29, no. 2 (2014): 493–513.

Torres-Fowler, R. Zachary. “Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration.” *Virginia Journal of International Law* 52, no. 4 (2012): 995–1039.

Transparency International. *Global Corruption Report 2009: Corruption in the Private Sector*. Cambridge: Cambridge University Press, 2009.

———. “Poverty and Corruption.” Working Paper, March 2008.

Treisman, Daniel. “The Causes of Corruption: A Cross-National Study.” *Journal of Public Economics* 76, no. 3 (June 2000): 399–457.

Triantafilou, Epaminontas E. “Amicus Submissions in Investor-State Arbitration After Suez v. Argentina.” *Arbitration International* 24, no. 4 (2008): 571–86.

Tudor, Ioana. *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*. Oxford; New York: Oxford University Press, 2008.

Udombana, Nsongurua J. “Fighting Corruption Seriously - Africa’s Anti-Corruption Convention.” *Singapore Journal of International & Comparative Law* 7 (2003): 447.

United Nations Office on Drugs and Crimes. *UN Anti-Corruption Toolkit*. 3rd ed. Vienna, 2004.

Vaitkute Pavan, Vilija, and Rapolas Kasparavicius. “Can an Investor Claim Lost Profits for Breach of Pre-Contractual Relations?” *Kluwer Arbitration Blog*, September 20, 2013.

Van den Berg, Albert Jan. “Grounds for Refusal of Enforcement - Public Policy - Distinction Domestic/International.” Edited by Albert Jan Van den Berg. *Yearbook Commercial Arbitration 1996* XXI (1997): 502–4.

Van den Bossche, Peter. “Looking for Proportionality in WTO Law.” *Legal Issues of Economic Integration* 35, no. 3 (2008): 283–94.

Vandevelde, Kenneth. “A Unified Theory of Fair and Equitable Treatment.” *International Law and Politics* 43, no. 1 (2010): 43–106.

Van Harten, Gus, and Martin Loughlin. “Investment Treaty Arbitration as a Species of Global Administrative Law.” *European Journal of International Law* 17, no. 1 (2006): 121–50.

Vasani, Baiju S., and Timothy L. Foden. “Burden of Proof Regarding Jurisdiction.” In *Arbitration under International Investment Agreements - A Guide to the Key Issues, Katia Yannaca-Small (ed.)*, 271–86. Oxford; New York: Oxford University Press, 2010.

Vascannie, Stephen. “The Fair and Equitable Treatment Standard in International Investment Law and Practice.” *British Year Book of International Law* 70, no. 1 (1999): 99–164.

Vattel, Emer. *The Law of Nations of Nations; Or, Principles of the Law of Nature (Le Droit Des Gens, Ou Principes de La Loi Naturelle*. Vol. II. III vols. Philadelphia: T. & J. W. Johnson, 1852.

Verdross, Alfred, and Bruno Simma. *Universelles Völkerrecht - Theorie Und Praxis*. Third. Berlin: Duncker & Humblot, 1984.

Vincke, Francois. “How Effective Is the Business Community in Combating Corruption.” *American Society of International Law Proceedings* 91 (1997): 99.

Visscher, Charles. “La Déni de Justice En Droit International.” In *Collected Courses of the Hague Academy of International Law*, 52:365–442. The Hague: Martinus Nijhoff Publishers, 1935.

von Mehren, George M., and Claudia T. Salomon. “Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide.” *Journal of International Arbitration* 20, no. 3 (2003): 285–94.

von Mehren, Robert B. “Burden of Proof in International Arbitration.” In *International Council For Commercial Arbitration*, 7:123–30. The Hague: Kluwer Law International, 1996.

Waibel, Michael. “Investment Arbitration: Jurisdiction and Admissibility.” In *International Investment Law*, edited by Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch, 1st ed., 1212–87. Baden-Baden: Nomos, 2015.

———. “Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E.” *Leiden Journal of International Law* 20, no. 3 (2007): 637–48.

Waincymer, Jeff. *Procedure and Evidence in International Arbitration*. Kluwer Law International, 2012.

Wälde, Thomas W., and Borzu Sabahi. “Compensation, Damages, and Valuation.” In *The Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph Schreuer, ???? Oxford: Oxford University Press, 2008.

Wang, Hongying, and James N Rosenau. “Transparency International and Corruption as an Issue of Global Governance.” *Global Governance* 7 (2001): 25.

Webb, Philippa. “The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?” *J Int Economic Law* 8, no. 1 (2005): 191–229.

Weeramantry, J. Romesh. “The Future Role of Past Awards in Investment Arbitration.” *ICSID Review - Foreign Investment Law Journal* 25, no. 1 (2010): 111–24.

———. *Treaty Interpretation in Investment Arbitration*. Oxford; New York: Oxford University Press, 2012.

Weiler, Todd. “Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico.” In *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Todd Weiler (ed.)*, 701–45. London: Cameron May, 2005.

Wei, Shang-Jin. “Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?” World Bank Policy Research Working Paper, 1999.

———. “Corruption in Economic Transition and Development: Grease or Sand?” Draft for the UNECE Spring Seminar in Geneva on May 7 2001, 2001.

———. “How Taxing Is Corruption on International Investors?” *Review of Economics and Statistics* 82, no. 1 (2000): 1–10.

Weiss, Edith Brown. “Invoking State Responsibility in the Twenty-First Century.” *The American Journal of International Law* 96, no. 4 (2002): 798–816.

Wells, Louis T. “Backslash to Investment Arbitration: Three Causes.” In *The Backlash against Investment Arbitration*, edited by Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Liz Chung, and Claire Balchin, 341–52. Alphen aan den Rijn et al.: Kluwer Law International, 2010.

Welsch, Heinz. “Corruption, Growth, and the Environment: A Cross-Country Analysis.” *Environment and Development Economics* 9, no. 5 (2004): 663–93.

Werner, Simcha B. “The Development of Political Corruption in Israel.” In *Political Corruption: A Handbook*, edited by Arnold Heidenheimer, Michael Johnston, and Victor T LeVine, 251–74. New Brunswick: Transaction Publishers, 1989.

Wetter, J. Gillis. “Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in Case No. 1110.” *Arbitration International* 110, no. 3 (1994): 277–94.

Williams, Sope. “The Debarment of Corrupt Contractors from World Bank-Financed Contracts.” *Public Contract Law Journal* 36, no. 3 (2007): 277–306.

Wilske, Stephan. *Die Völkerrechtswidrige Entführung Und Ihre Rechtsfolgen*. Berlin: Duncker & Humblot, 2000.

———. “Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword?” *Contemporary Asia Arbitration Journal* 3, no. 2 (2010): 211–35.

Wilske, Stephan, and Todd J. Fox. “Corruption in International Arbitration and Problems with Standard of Proof.” In *Liber Amicorum Eric Bergsten - International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, 489–506. Kluwer Law International, 2011.

Wilske, Stephan, and Willa Obel. “The ‘Corruption Objection’ to Jurisdiction in Investment Arbitration - Does It Really Protect the Poor?” In *Poverty and the International Economic Legal System - Duties to the World’s Poor*, edited by Krista Nadakavukaren Schefer, 177–88. Cambridge et al.: Cambridge University Press, 2013.

Wilske, Stephan, and Martin Raible. “The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues.” In *The Future of Investment Arbitration*, edited by Catherine A. Rogers and Roger P. Alford, 249–72. Oxford et al.: Oxford University Press, 2009.

Wilske, Stephan, Martin Raible, and Lars Markert. “International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a ‘Status Thing’?” *Contemporary Asia Arbitration Journal* 1, no. 2 (2008): 213–34.

Wittich, Stephan. “State Responsibility.” In *International Investment Law*, 1st ed., 23–45. Baden-Baden: Nomos, 2015.

Wolfrum, Rüdiger, and Volker Röben, eds. *Legitimacy in International Law*. Springer, 2008.

World Bank - Poverty Reduction and Economic Management. “Helping Countries Combat Corruption, The Role of the World Bank.” The World Bank, September 1997.

Wouters, Jan, Cedric Ryngaert, and Ann Sofie Cloots. “International Legal Framework against Corruption: Achievements and Challenges, The.” *Melbourne Journal of International Law* 14 (2013): 205–80.

Yackee, Jason Webb. “Investment Treaties and Investor Corruption: An Emerging Defense for Host States?” *Virginia Journal of International Law* 52, no. 3 (2012): 723–45.

Yala, Farouk. “The Notion of ‘Investment’ in ICSID Case Law: A Drifting Jurisdictional Requirement? Some ‘Un-Conventional’ Thoughts on Salini, SGS and Mihaly.” *Journal of International Arbitration* 22, no. 2 (2005): 105–26.

Yannaca-Small, Katia. “Definition of ‘Investment’: An Open-Ended Search for a Balanced Approach.” In *Arbitration under International Investment Agreements - A Guide to the Key Issues*, edited by Katia Yannaca-Small, 243, 2010.

———. “Fair and Equitable Treatment Standard.” In *Arbitration under International Investment Agreements - A Guide to the Key Issues*, First Edition., 385–410. Oxford; New York: Oxford University Press, 2010.

———. “Fair and Equitable Treatment Standard: Recent Developments.” In *Standards of Investment Protection*, edited by August Reinisch, 111–30. Oxford; New York: Oxford University Press, 2008.

Young, Margaret Helen. “Comparison of the Foreign Corrupt Practices Act and the Draft International Agreement on Illicit Payments, A.” *Vanderbilt Journal of Transnational Law* 13 (1980): 795.

Zervos, Alexandros. “Amending the Foreign Corrupt Practices Act: Repealing the Exemption for Routine Government Action Payments.” *Penn State International Law Review* 25 (2007 2006): 251.

Ziegler, Katja S. *Fluchtverursachung Als Völkerrechtliches Delikt - Die Völkerrechtliche Verantwortlichkeit Des Herkunfsstaates Für Die Verursachung von Fluchtbewegungen*. Berlin: Duncker & Humblot, 2002.

Zoller, Elisabeth. *La Bonne Foi En Droit International Public*. Paris: Éditions a Pedone, 1977.

B. List of Cases

I. Investment Arbitration Cases (alphabetical order)

A

Abaclat et al. v The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011	*Abaclat v Argentina*, Decision on Jurisdiction and Admissibility
Abaclat et al. v The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion Georges Abi-Saab, 28 October 2011	*Abaclat v Argentina*, Dissenting Opinion Georges Abi-Saab
ADC & ADMC Management Limited v The Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006	*ADC v Hungary*, Award
ADF Group Inc. v United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003	*ADF v United States*, Award
AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 25 April 2005	*AES v Argentina*, Decision on Jurisdiction
AES Summit Generation Limited and AES-Tisza Erömü Kft. v Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010	*AES v Hungary*, Award
African Holding Company of America, Inc and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of Congo, ICSID Case No. ARB/05/21, Award, 29 July 2008	*African Holding v Congo*, Award

Aguas del Tunari S.A. v Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, 21 October 2005	*Aguas del Tunari v Bolivia*, Decision on Jurisdiction
AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award, 7 October 2003	*AIG v Kazakhstan*, Award
Hesham Talaat M. Al-Warraq v The Republic of Indonesia, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012	*Al-Warraq v Indonesia*, Decision on Jurisdiction
Hesham Talaat M. Al-Warraq v The Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014	*Al-Warraq v Indonesia*, Final Award
Mohammad Ammar Al-Bahloul v Republic of Tajikistan, SCC Case No V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009	*Al-Bahloul v Tajikistan*, Decision on Jurisdiction
Alpha Projektholding GmbH v Ukraine, ICSID Case No. ARB/07/16, Award, 8 November 2010	*Alpha v Ukraine*, Award
Amco Asia Corporation et al. v The Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983	*Amco v Indonesia I*, Decision on Jurisdiction
Amco Asia Corporation et al. v The Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment 16 May 1986	*Amco v Indonesia*, Annulment

Amco Asia Corporation et al. v The Republic of Indonesia, ICSID Case No. ARB/81/8, Award, 5 June 1990	*Amco v Indonesia II*, Award
American Manufacturing & Trading, Inc. v Republic of Zaire, ICSID Case No. ARB/93/1, Award, 21 February 1997	*AMT v Zaire*, Award
Limited Liability Company AMTO v Ukraine, SCC Arbitration No. 080/2005, Final Award, 26 March 2008	*Amto v Ukraine*, Final Award
Alasdair Ross Anderson et al. v Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010	*Anderson v Costa Rica*, Award
Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States, NAFTA, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007	*ADM v Mexico*, Award
Mr Franck Charles Arif v Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013	*Arif v Moldova*, Award
Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 27 June 1990	*AAPL v Sri Lanka*, Final Award
ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, 18 May 2010	*ATA v Jordan*, Award

Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999	*Azinian v Mexico*, Award
Azpetrol International Holding B.V.; Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v Republic of Azerbaijan, ICSID Case No. ARB/06/15, Award, 8 September 2009	*Azpetrol v Azerbaijan*, Award
Azurix Corp. v The Argentine Republic, Decision on Jurisdiction, 8 December 2003	*Azurix v Argentina*, Decision on Jurisdiction
Azurix Corp. v The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006	*Azurix v Argentina*, Award
Azurix Corp. v the Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment 1 September 2009	*Azurix v Argentina*, Annulment

B

Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005	*Bayindir v Pakistan*, Decision on Jurisdiction
Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009	*Bayindir v Pakistan*, Award
BG Group Plc. v The Republic of Argentina, UNCITRAL, Final Award, 24 December 2007	*BG v Argentina*, Final Award

Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989	*Biloune v Ghana*, Award
Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008	*Biwater v Tanzania*, Award
Bosh International, Inc. and B & P Ltd Foreign Investments Enterprise v Ukraine, ICSID Case No. ARB/08/11, Award, 25 October 2012	*Bosh v Ukraine*, Award
Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V v The Republic of Paraguay, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009	*Bureau Veritas v Paraguay*, Decision on Jurisdiction
Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010	*Burlington v Ecuador*, Decision on Jurisdiction

C

Camuzzi International S.A. v The Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005	*Camuzzi v Argentina*, Decision on Jurisdiction
Canfor Corporation et al. v United States of America, NAFTA/UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005	*Canfor v United States*, Order of the Consolidation Tribunal

Canfor Corporations et al. v United States of America NAFTA/UNCITRAL, Decision on Preliminary Question, 6 June 2006	*Canfor v Argentina*, Decision on Preliminary Question
Cargill, Incorporated v United Mexican States, NAFTA, ICSID Case No. ARB(AF)/05/2, 18 September 2009	*Cargill v Mexico*, Award
Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Award, 29 December 2004	*CSOB v Slovakia*, Award
Champion Trading Company, Ameritrade International, Inc. v Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award, 27 October 2006	*Champion Trading v Egypt*, Award
Chemtura Corporation (formerly Crompton Corporation) v Government of Canada, NAFTA/UNCITRAL, Award, 2 August 2010	*Chemtura v Canada*, Award
CME Czech Republic B.V. v The Czech Republic, UNCITRAL, Partial Award, 13 September 2001	*CME v Czech Republic*, Partial Award
CMS Gas Transmission Company v Republic of Argentina, ICSID Case No. ARB/01/08, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003	*CMS v Argentina*, Decision on Jurisdiction
CMS Gas Transmission Company v The Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005	*CMS v Argentina*, Award

Compañia de Aguas del Aconquija, S.A. & Vivendi Universal (formally Compagnie Générale des Eaux) v Argentine Republic, ICSID Case No. ARB/97/3, Award, 21 November 2000	*Vivendi v Argentina I*, Award
Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007	*Vivendi v Argentina II*, Award
Corn Products International, Inc. v The United Mexican States, NAFTA, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008	*Corn Products v Mexico*, Award
Consortium RFCC v Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, 22 December 2003	*Consortium RFCC v Morocco*, Award
Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006	*Continental Casualty v Argentina*, Decision on Jurisdiction
Continental Casualty Company v The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008	*Continental Casualty v Argentina*, Award
D	
Desert Line Projects LLC v The Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008	*Desert Line v Yemen*, Award
Duke Energy International Peru Investments No. 1, Ltd. v Republic of Peru, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006	*Duke v Peru*, Decision on Jurisdiction

Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008	*Duke v Ecuador*, Award

E

Eastern Sugar B.V. v The Czech Republic, SCC No. 088/2004, Partial Award, 27 March 2007	*Eastern Sugar v Czech Republic*, Partial Award
ECE Projectmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH&Co v The Czech Republic, PCA Case No. 2010-5, Award, 19 September 2013	*ECE v Czech Republic*, Award
EDF (Services) Limited v Romania, ICSID Case No. ARB/05/13, Procedural Order No. 3, 29 August 2008	*EDF v Romania*, Procedural Order No. 3
EDF (Services) Limited v Romania, ICSID Case No. ARB/05/13, Award and Dissenting Opinion, 8 October 2009	*EDF v Romania*, Award
Electrabel S.A. v Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012	*Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability
El Paso Energy International Company v Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006	*El Paso v Argentina*, Decision on Jurisdiction
Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru, ICSID Case No. ARB/03/4, Award, 7 February 2005	*Lucchetti v Peru*, Award

EnCana Corporation v Republic of Ecuador, UNCITRAL, LCIA Case UN3481, Award, 3 February 2006	*EnCana v Ecuador*, Award
Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction 14 January 2004	*Enron v Argentina*, Decision on Jurisdiction
Enron Corporation, and Ponderosa Assets, L.P. v Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007	*Enron v Argentina*, Award
Eureko B.V. v Republic of Poland, *Ad hoc* Arbitration, Partial Award, 19 August 2005	*Eureko v Poland*, Partial Award
Eureko B.V. v Republic of Poland, *Ad hoc* Arbitration, Partial Award, Dissenting Opinion Jerzy Rajski, 19 August 2005	*Eureko v Poland*, Dissenting Opinion Jerzy Rajski
Eureko B.V. v Slovak Republic PCA Case No. 2008-13 Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010	*Eureko v Slovak Republic*, Award on Jurisdiction
Europe Cement Investment & Trade S.A. v Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009	*Europe Cement v Turkey*, Award
European American Investment Bank AG v The Slovak Republic, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012	*Euram v Slovak Republic*, Award on Jurisdiction
F	
Marvin Feldman v Mexico, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002	*Feldman v Mexico*, Award

Fireman's Fund Insurance Company v United Mexican States, ICSID Case No. ARB(AF)/02/01, Award, 14 July 2006	*Fireman's Fund v Mexico*, Award
Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award (Spanish), 18 November 2014	*Flughafen Zürich v Venezuela*, Award
Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007	*Fraport v Philippines*, Award
Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Dissenting Opinion of Bernardo M. Cremades, 19 July 2007	*Fraport v Philippines*, Dissenting Opinion Bernardo Cremades
Fraport AG Airport Services Worldwide v Republic of the Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Airport Services Worldwide, 23 December 2010	*Fraport v Philippines*, Annulment
Fraport AG Airport Services Worldwide v Republic of Philippines, ICSID Case No. ARB/11/12, Award, 10 December 2014	*Fraport v Philippines II*, Award
Bernardus Henricus Funnekotter and others v Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award, 22 April 2009	*Funnekotter v Zimbabwe*, Award
F-W Oil Interests, Inc. v The Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14, Award, 3 March 2006	*F-W Oil v Trinidad and Tobago*, Award

G

Gami Investments, Inc. v The Government of the United Mexican States, NAFTA/UNCITRAL, Final Award, 15 November 2004	*Gami v Mexico*, Final Award
GEA Group AG v Ukraine, ICSID Case No. ARB/08/16, Award, 31 March 2011	*GEA v Ukraine*, Award
Joint Award of *Gemplus S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. v The United Mexican States*, ICSID Case No. ARB(AF)/04/3, and *Talsud S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010	*Gemplus and Talsud v Mexico*, Award
Generation Ukraine, Inc. v Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003	*Generation v Ukraine*, Award
Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001	*Genin v Estonia*, Award
Glamis Gold, Ltd. v United States of America, NAFTA/UNCITRAL, Award, 8 June 2009	*Glamis v United States*, Award
Grand River Enterprises Six Nations, Ltd, et al. v United States of America, NAFTA, Decision on Objections to Jurisdiction, 20 July 2006	*Grand River v United States*, Decision on Jurisdiction
Grand River Enterprises Six Nations, Ltd., et al. v United States of America, NAFTA, Award, 12 January 2011	*Grand River v United States*, Award

H

Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010	*Hamester v Ghana*, Award
Helnan International Hotels A/S v Egypt, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006	*Helnan v Egypt*, Decision on Jurisdiction
Hochtief AG v The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011	*Hochtief v Argentina*, Decision on Jurisdiction
Hochtief AG v Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014	*Hochtief v Argentina*, Decision on Liability

I

Impregilo S.p.A v Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005	*Impregilo v Pakistan*, Decision on Jurisdiction
Impregilo S.p.A v The Argentine Republic, ICSID Case No. ARB/07/17, Award, 21 June 2011	*Impregilo v Argentina*, Award
Impregilo S.p.A v The Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Judge Charles N. Brower, 21 June 2011	*Impregilo v Argentina*, Opinion Judge Brower
Inceysa Vallisoletana, S.L. v Republic of El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006	*Inceysa v El Salvador*, Award

Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010	*Inmaris v Ukraine*, Decision on Jurisdiction
International Thunderbird Gaming Corporation v The United Mexican States, NAFTA/UNCITRAL, Separate Opinion of Prof. Thomas Wälde, 1 December 2005	*International Thunderbird Gaming v Mexico*, Separate Opinion Thomas W. Wälde
International Thunderbird Gaming Corporation v The United Mexican States, NAFTA/UNCITRAL, Award, 26 January 2006	*International Thunderbird Gaming v Mexico*, Award

J

Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006	*Jan de Nul v Egypt*, Decision on Jurisdiction
Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008	*Jan de Nul v Egypt*, Award
Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004	*Joy Mining v Egypt*, Award on Jurisdiction

K

Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v The Government of Mongolia, PCA Case No. 2011-09 Decision on Jurisdiction, 25 July 2012	*Khan Resources v Mongolia*, Decision on Jurisdiction

Ioannis Kardassopoulos v Republic of Georgia, ICSID Case Nos. ARB/05/18, Decision on Jurisdiction, 6 July 2007	*Kardassopoulos v Georgia*, Decision on Jurisdiction
Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010	*Kardassopoulos v Georgia*, Award

L

Roland S. Lauder v The Czech Republic, UNCITRAL, Final Award, 3 September 2001	*Lauder v Czech Republic*, Final Award
Joseph Charles Lemire v Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 28 March 2011	*Lemire v Ukraine*, Award
L.E.S.I. S.p.A. and ASTALDI S.p.A. v The Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006	*LESI v Algeria*, Decision on Jurisdiction
Libananco Holdings Co. Limited v Republic of Turkey, ICSID Case No. ARB/06/8, Award, 2 September 2011	*Libananco v Turkey*, Award
Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010	*Liman Caspian Oil v Kazakhstan*, Award
LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v The Argentine Republic, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004	*LG&E v Argentina*, Decision on Jurisdiction

LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006	*LG&E v Argentina*, Liability
The Loewen Group, Inc. and Raymond L. Loewen v United States of America, ICSID Case No. ARB(AF)/98/3), Decision on hearing of Respondent's objection to competence and jurisdiction, 9 January 2001	*Loewen v United States*, Decision on Jurisdiction
The Loewen Group, Inc. and Raymond L. Loewen v United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003	*Loewen v United States*, Award
M	
Emilio Agustín Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000	*Maffezini v Spain*, Decision on Jurisdiction
Emilio Agustín Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7, Award, 13 November 2000	*Maffezini v Spain*, Award
Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015	*Mamidoil Jetoil v Albania* Award
Malicorp Limited v Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award, 7 February 2011	*Malicorp v Egypt*, Award
M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador, ICSID Case No. ARB/03/6, Award, 31 July 2007	*MCI v Ecuador*, Award
Metalclad Corp v United Mexican States, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000	*Metalclad v. Mexico*, Award

Metalpar S.A. and Buen Aire S.A. v The Argentine Republic, ICSID Case No. ARB/03/5, Decision on Jurisdiction, 27 April 2006	*Metalpar v Argentina*, Decision on Jurisdiction
Metalpar S.A. and Buen Aire S.A. v The Argentine Republic, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008	*Metalpar v Argentina*, Award
Metal-Tech Ltd. v Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013	*Metal-Tech v Uzbekistan*, Award
Methanex Corporation v. United States of America, NAFTA/UNCITRAL, Partial Award, 7 August 2002	*Methanex v United States*, Partial Award
Methanex Corporation v United States of America, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005	*Methanex v United States*, Award
Merrill & Ring Forestry L.P. v The Government of Canada, NAFTA/UNCITRAL, Award, 31 March 2010	*Merrill v Canada*, Award
Micula et al. v Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008	*Micula v Romania*, Decision on Jurisdiction and Admissibility
Micula et al. v Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013	*Micula v Romania*, Award
Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, 12 April 2002	*Middle East Cement v Egypt*, Award

Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, 15 March 2002	*Mihaly v Sri Lanka*, Award
MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004	*MTD v Chile*, Award
MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7, Decision on the Application for Annulment, 21 March 2007	*MTD v Chile*, Annulment
Mobil Corporation and others v Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010	*Mobil v Venezuela*, Decision on Jurisdiction
Mondev International Ltd. v United States of America, NAFTA, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002	*Mondev v United States*, Award
Mytilineos Holdings SA v The State Union of Serbia & Montenegro, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006	*Mytilineos v Serbia*, Decision on Jurisdiction
N	
National Grid P.L.C. v The Argentine Republic, UNCITRAL, Award, 3 November 2008	*National Grid v Argentina*, Award
Niko Resources (Bangladesh) Ltd. v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013	*Niko v Bangladesh*, Decision on Jurisdiction

Noble Energy, Inc. and Machalapower Cia. Ltda. v Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Award, 5 March 2008	*Noble Energy v Ecuador*, Award
Noble Ventures, Inc. v Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005	*Noble Ventures v Romania*, Award
Nordzucker AG v The Republic of Poland, UNCITRAL, Partial Award on Jurisdiction, 10 December 2008	*Nordzucker v Poland*, Partial Award on Jurisdiction
O	
Occidental Exploration and Production Company v The Republic of Ecuador, LCIA Administered Case No. UN 3467, Award, 1 July 2004	*Occidental v Ecuador*, LCIA Award
Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012	*Occidental v Ecuador*, ICSID Award
Jan Oostergetel and Theodora Laurentius v Slovak Republic, UNCITRAL, Decision on Jurisdiction, 30 April 2010	*Oostergetel v Slovak Republic*, Decision on Jurisdiction
Jan Oostergetel and Theodora Laurentius v Slovak Republic, UNCITRAL, Final Award, 23 April 2012	*Oostergetel v Slovak Republic*, Award
P	
Pantechniki S.A. Contractors & Engineers v The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009	*Pantechniki v Albania*, Award

Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007	*Parkerings v Lithuania*, Award
Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011	*Paushok v Mongolia*, Award
Petrobart Limited v The Kyrgyz Republic, SCC Arbitration No. 126/2003, Award 29 March 2005	*Petrobart v Kyrgyz Republic*, Award
Victor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No. ARB/98/2, Decision on Jurisdiction, 8 May 2002	*Pey Casado v Chile*, Decision on Jurisdiction
Victor Pey Casado y President Allende Foundation v Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008	*Pey Casado v Chile*, Award
Pan American Energy LLC and BP Argentina Exploration Company v Argentina, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006	*Pan American Energy v Argentina*, Decision on Preliminary Objections
Phoenix Action, Ltd. v Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009,	*Phoenix v Czech Republic*, Award
Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008	*Plama v Bulgaria*, Award

Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005	*Plama v Bulgaria*, Decision on Jurisdiction
Pope & Talbot Inc. v Government of Canada, UNCITRAL, Interim Award, 26 June 2000	*Pope & Talbot v Canada*, Interim Award
Pope & Talbot Inc. v The Government of Canada, NAFTA/UNCITRAL, Award on the Merits Phase 2, 10 April 2001	*Pope & Talbot v Canada*, Award Phase 2
Pope & Talbot Inc. v Government of Canada, NAFTA/UNCITRAL, Award in respect of damages, 31 May 2002	*Pope & Talbot v Canada*, Damages
PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction 4 June 2004	*PSEG v Turkey*, Decision on Jurisdiction
PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007	*PSEG v Turkey*, Award

Q

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012	*Quiborax v Bolivia*, Decision on Jurisdiction

R

Rompetrol Group N.V v Romania, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility 18 April 2008	*Rompetrol v Romania*, Decision on Jurisdiction and Admissibility
Rompetrol Group N.V v Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013	*Rompetrol v Romania*, *Award*
RosInvestCo UK Ltd. v The Russian Federation, SCC Arbitration V (079/2005), Final Award, 12 September 2010	*RosInvest v Russia*, Final Award
RSM Production Corporation v Grenada, ICSID Case No. ARB/05/16, Decision on RSM Production Corporation's Application for a Preliminary Ruling, 29 October 2009	*RSM v Grenada*, Preliminary Ruling
RSM Production Corporation v Grenada, ICSID Case No. ARB/05/14, Award, 13 March 2009	*RSM v Grenada*, Award
Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S, ICSID Case No. ARB/05/16, Award, 29 July 2008	*Rumeli v Kazakhstan*, Award
Republic of Kazakhstan v Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S., ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee, 25 March 2010	*Rumeli v Kazakhstan*, Annulment

S

Saba Fakes v Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010	*Saba Fakes v Turkey*, Award

Saipem S.p.A. v The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007	*Saipem v Bangladesh*, Decision on Jurisdiction
Saipem S.p.A. v The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, 30 June 2009	*Saipem v Bangladesh*, Award
Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001	*Salini v Morocco*, Decision on Jurisdiction
Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004	*Salini v Jordan*, Decision on Jurisdiction
Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Award, 31 January 2006	*Salini v Jordan*, Award
Saluka Investments B.V. v The Czech Republic, UNCITRAL, Partial Award, 17 March 2006	*Saluka v Czech Republic*, Partial Award
Compañía del Desarrollo de Santa Elena SA v Costa Rica, ICSID Case No. ARB/96/1, Final Award, 17 February 2000	*Santa Elena v Costa Rica*, Final Award
SAUR International S.A. v Argentine Republic, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (Spanish), 6 June 2012	*SAUR v Argentina*, Decision on Jurisdiction and Liability
S.D. Myers, Inc. v Government of Canada, NAFTA/UNCITRAL, Partial Award, 13 November 2000	*SD Myers v Canada*, Partial Award

Sempra Energy International v The Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005	*Sempra v Argentina*, Decision on Jurisdiction
Sempra Energy International v Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007	*Sempra v Argentina*, Award
SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on objections to jurisdiction, 6 August 2003	*SGS v Pakistan*, Decision on Jurisdiction
SGS Société Générale de Surveillance S.A. v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004	*SGS v Philippines*, Decision on Jurisdiction
Waguih Elie George *Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009	*Siag & Vecchi v Egypt*, Award
Waguih Elie George *Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion Orrego Vicuña, 11 May 2009	*Siag & Vecchi v Egypt*, Dissenting Opinion Orrego Vicuña
Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004	*Siemens v Argentina*, Decision on Jurisdiction
Siemens A.G. v The Argentine Republic, ICSID Case No. ARB/02/8, Award, 6 February 2007	*Siemens v Argentina*, Award

Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award, 7 July 2004	*Soufraki v UAE*, Award
Southern Pacific Properties (Middle East) Limited v The Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985	*SPP v Egypt*, Decision on Jurisdiction
Southern Pacific Properties (Middle East) Limited v The Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, 20 May 1992	*SPP v Egypt*, Award
Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* 19 Mai 2005	
Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic, ICSID Case No. ARB/03/19, and *AWG Group v The Argentine Republic*, UNCITRAL, Decision Liability, 30 July 2010	*Suez, Aguas de Barcelona, Vivendi and AWG* v *Argentina*, Decision on Liability

T

TECO Guatemala Holdings LLC v The Republic of Guatemala, ICSID Case No. ARB/1017, Award, 19 December 2013	*TECO v Guatemala*, Award
Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012	*Teinver v Argentina*, Decision on Jurisdiction

Telefónica S.A. v The Argentine Republic, ICSID Case No. ARB/03/20, Decision on Jurisdiction, 25 May 2006	*Telefónica v Argentina*, Decision on Jurisdiction
Telenor Mobile Communications A.S. v The Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006	*Telenor v Hungary*, Award
Tokios Tokelės v Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004	*Tokios Tokelės v Ukraine*, Decision on Jurisdiction
Tokios Tokelės v Ukraine, ICSID Case No. ARB/02/18, Award, 26 July 2007	*Tokios Tokelės v Ukraine*, Award
Tokios Tokelės v Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion Daniel M. Price, 29 June 2007	*Tokios Tokelės v Ukraine*, Dissenting Opinion Daniel M. Price
Total S.A. v Argentine Republic, ICSID Case No. ARB/04/01, Decision on Jurisdiction, 25 August 2006	*Total v Argentina*, Decision on Jurisdiction
Total S.A. v Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010	*Total v Argentina*, Decision on Liability
Toto Costruzioni Generali S.P.A. v Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009	*Toto v Lebanon*, Decision on Jurisdiction
Tradex Hellas S.A. v Republic of Albania, ICSID Case No. ARB/94/2, Award, 29 April 1999	*Tradex v Albania*, Award

TSA Spectrum de Argentina S.A. v The Argentine Republic, ICSID Case No. ARB/05/5, Award, 19 December 2008	*TSA v Argentina*, Award
Tza Yap Shum v Republic of Peru, ICSID Case No. ARB/07/6, Award, 7 July 2011	*Tza Yap Shum v Peru*, Award

U

Ulysseas, Inc. v Republic of Ecuador, UNCITRAL, Final Award, 12 June 2012	*Ulysseas v Ecuador*, Final Award
United Parcel Service of America Inc. v Canada, NAFTA/UNCITRAL, Decision Of The Tribunal On Petitions For Intervention And Participation As *Amici Curiae*, 17 October 2001	*UPS v Canada*, Decision on *Amici Curiae*
United Parcel Service of America Inc. v. Government of Canada, NAFTA/UNCITRAL, Award on Jurisdiction, 22 November 2002	*UPS v Canada*, Award on Jurisdiction
United Parcel Service of America Inc v Government of Canada, NAFTA/UNCITRAL, Award on the merits, 24 May 2007	*UPS v Canada*, Award

V

*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. (*formerly *Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000	*Vivendi I v Argentina*, Award
Vannessa Ventures Ltd. v Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013	*Vannessa Ventures v Venezuela*, Award

W

Waste Management, Inc. v. United Mexican States, *NAFTA* *ICSID Case No. ARB(AF)/98/2*, Dissenting Opinion of Keith Highet, 8 May 2000	*Waste Management I,* Dissenting Opinion Keith Highet
Waste Management v Mexico, Inc. v United Mexican States, NAFTA, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004	*Waste Management II v Mexico,* Award
Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 28 June 1999	*Wena Hotels v Egypt*, Decision on Jurisdiction
Wena Hotels Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, 8 December 2000	*Wena v. Egypt*, Award
Wena Hotels Limited v The Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002	*Wena v Egypt*, Annulment
White Industries Australia Limited v Republic of India, UNCITRAL, Final Award, 30 November 2011	*White Industries v India*, Final Award
World Duty Free Company Limited v The Republic of Kenya, ICSID Case No. ARB/00/7, Award, 6 October 2006	*World Duty Free v Kenya*, Award

Y

Yukos Universal Limited v Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009	*Yukos v Russia*, Interim Award on Jurisdiction and Admissibility
Yukos Universal Limited v Russian Federation, PCA Case No. AA 227, Final Award, 18 July 2014	*Yukos v Russia*, Final Award

Z

Zhinvali Development Ltd. v Republic of Georgia, ICSID Case No. ARB/00/1, Award, 24 January 2003	*Zhinvali v Georgia*, Award

II. IRAN US CLAIMS TRIBUNAL (Chronological Order)

Oil Field of Texas, Inc. v Government of the Islamic Republic of Iran, National Iranian Oil Company, Award No. 258-43-1, 8 October 1986, Iran-U.S.C.T.R. 1988, Vol. 12, 308	*Oil Field of Texas v Iran*, Award
Rockwell International Systems, Inc. v Government of the Islamic Republic of Iran, Award No. 438-430-1, 5 September 1989, Iran-U.S.C.T.R. Vol. 23, 150.	*Rockwell v Iran*
Petrolane, Inc. v Islamic Republic of Iran, Award No. 518-131-2 14 August 1991 Iran-U.S.C.T.R. 1991, Vol 27, 64.	*Petrolane v Iran*

III. INTERNATIONAL COMMERCIAL ARBITRATION CASES (numerical order)

Claimant Mr X (Argentina) v Company A (Argentina), ICC Case No. 1110 of 1963, Arbitration International, 1994, Vol. 10, No. 3, 282	ICC Case No. 1110
UK Company v French Company/African Country, ICC Case No. 3913, Journal du droit international, 1985, 989 and Collection of ICC Arbitral Awards 1974-1985, 497	ICC Case No. 3913
Claimant (Iran) v Defendant (Greek company/Iran), ICC Case No. 3916 of 1982, Journal du droit international, 1984, 934 and Collection of ICC Arbitral Awards 1974-1985, 507	ICC Case No. 3916
Hilmarton Ltd. v Omnium de Traitment et de Valorisation S.A., ICC Case No. 5622, 1988, Yearbook of Commercial Arbitration Vol. XIX, 1994, 105-123, and ASA Bulletin 1993, 247	*Hilmarton*
Consultant v Contractor, ICC Case No. 6248, Yearbook of Commercial Arbitration Vol. XIX, 1994, 124	ICC Case No. 6248
Westinghouse International Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v National Power Corp. and The Republic of the Philippines, ICC Case No. 6401, Preliminary Award, 19 December 1991	*Westinghouse*, Preliminary Award
Consultant (Liechtenstein) v Contractor (Germany), ICC Case No. 6497, Yearbook of Commercial Arbitration Vol. XXIV, 1999, 71	ICC Case No. 6497

Westacre (UK) v Jugoimport (Yugoslavia), ICC Case No. 7047, Yearbook Commercial Arbitration XXI, 1996, 79 and ASA Bulletin, 1995, 301	*Westacre*
Frontier AG & Brunner Sociedade v Thomson CSF, ICC Case No. 7664, 31 July 1996	ICC Case No. 7664
ICC Case No. 8891, Journal du droit international, 2000, 1076	ICC Case No. 8891
Agent (North Africa) v Contractor (France), ICC Case No. 9333, ASA Bulletin, 2001, 757	ICC Case No. 9333
Himpurna California Energy Ltd. (Bermuda) v PT. (Persero) Perrusahaan Listruik Negara (Indonesia), UNCITRAL, Award, 4 May 1999, Yearbook of Commercial Arbitration Vol. XXV, 2000, 13	*Himpurna v PLN*, Award

IV. INTERNATIONAL COURT OF JUSTICE (chronological order)

Fisheries Case (United Kingdom v Norway), Judgment, 18 December 1951, ICJ Reports 1951, 116	*Fisheries Case (United Kingdom v Norway*), Judgment
Case Concerning the *Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June 1962, ICJ Report 1962, 6	*Temple of Preah Vihear*, Merits
Nuclear Tests Case (New Zealand v France), Judgment, 20 December 1974, I.C.J. Reports 1974, 457	*Nuclear Tests Case (New Zealand v France)*, Judgment

Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America), Judgment of 12 October 1984, ICJ Reports 1984, 246	*Gulf of Maine*
Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Reports 1984, 392	*Military and Paramilitary Activities (Nicaragua v United States)*, Jurisdiction and Admissibility
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, 14	*Military and Paramilitary Activities (Nicaragua v United States)*, Merits
Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Merits, Judgment of 27 June 1986, Separate Opinion Ago, ICJ Reports 1986, 181	*Case Concerning Military and Paramilitary Activities*, Merits, Separate Opinion Ago
Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, I.C.J. Reports 1986, 259	*Military and Paramilitary Activities (Nicaragua v United States*), Merits, Dissenting Opinion Judge Schwebel
Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy), Judgment of 20 July 1989, I.C.J. Reports 1989, 15	*ELSI* Case, Judgment
Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objection, Judgment of 12 December 1996, ICJ Reports 1996, 803	*Oil Platforms*, Judgement

Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objection, Judgment of 12 December 1996, Separate Opinion Judge Higgins, ICJ Reports 1996, 847	*Oil Platforms*, Separate Opinion Higgins
Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objection, Judgment of 12 December 1996, Separate Opinion Judge Shahabuddeen, ICJ Reports 1996, 822	*Oil Platforms*, Separate Opinion Judge Shahabuddeen
Fisheries Jurisdiction Case (Spain v Canada), Jurisdiction of the Court, Judgment of 4 December 1998, ICJ Reports 1998, 432	*Fisheries Jurisdiction*, Judgment
LaGrand (Germany v United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, 9	*LaGrand*, Provisional Measures
Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, ICJ Reports 1999, 62	*ICJ Advisory Opinion on Immunity*
Case *Concerning Legality of Use of Force (Yugoslavia v Italia)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, 481	*Use of Force (Yugoslavia v Italia*), Order
LaGrand (Germany v United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001, 466	*LaGrand Case*, Judgment

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002, Dissenting Opinion Judge van den Wyngaert, I.C.J. Reports 2002, 137	*Arrest Warrant*, Dissenting Opinion Judge van den Wyngaert
Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 26 February 2007	*Genocide* case *(Bosnia v Serbia)*

IV. PERMANENT COURT OF INTERNATIONAL JUSTICE (chronological order)

Question relating to Settlers of German Origin in Poland, Advisory Opinion of 10 September 1923, PCIJ, Series B, No. 6, 1925	*Settlers of German Origin*, Advisory Opinion
Case Concerning the Factory at Chorzów (Claim for indemnity) (Germany v Poland), Judgment of 13 September 1928, PCIJ Seri. A., No. 17	*Chorzów Factory*, Judgment
PCIJ Case *Oscar Chinn (Britain v Belgium)*, Judgment of 12 December 1934, PCIJ Series A/B No. 63	*Oscar Chinn Case*, Judgment
PCIJ *Case Concerning the Diversion of Water from the River Meuse (Netherlands v Belgium)*, Judgment of 28 June 1937, PCIJ Series A/B, No. 70, Separate Opinion of Judge Hudson, 73	*River Meuse (Netherlands v Belgium)*, Separate Opinion M. Hudson

V. MIXED CLAIMS COMMISSIONS (chronological order)

Faber Case, German/Venezuelan Commission, 1903, RIAA Vol X, 438-467	*Faber v Venezuela*

Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v Great Britain, 18 December 1920, RIAA Vol VI, 42-44	*Home Frontier v Great Britain*
William A. Parker (U.S.A.) v United Mexican States, Mexico/United States General Claims Commission, 31 March 1926, RIAA Vol IV, 35-41	*Parker v Mexico*
Nick Cibich (U.S.A.) v United Mexican States, Mexico/United States General Claims Commission, 31 March 1926, RIAA Vol IV, 57-58	*Cibich v Mexico*
L. F. H. Neer and Pauline Neer (U.S.A.) v United Mexican States, Mexico/United States General Claims Commission 15 October 1926, RIAA Vol IV, 60-66	*Neer v Mexico*
Harry Roberts (U.S.A.) v United Mexican States, Mexico/United States General Claims Commission 2 November 1926, RIAA Vol IV, 77-81	*Roberts v Mexico*
Thomas H. Youmans (U.S.A.) v United Mexican States, Mexico/United States General Claims Commission 23 November 1926, RIAA Vol IV, 110-117	*Youmans v Mexico*

Gertrude Parker Massey (U.S.A.) v United Mexican States, Mexico/United States General Claims Commission, 15 April 1927, RIAA Vol IV, 155-164	*Parker Massey v Mexico*
Francisco Mallén (United Mexican States) v United States, Mexico/United States General Claims Commission 27 April 1927, RIAA Vol IV, 173-190	*Mallén v United States*
Salome Lerma Vda. De Galvan (United Mexican States) v United States, Mexico/United States General Claims Commission 21 July 1927, RIAA Vol IV, 273-275	*Lerma v United States*
B.E. Chattin (United States) v United Mexican States, Mexico/United States General Claims Commission, 23 July 1927, RIAA Vol IV, 282-312	*Chattin v Mexico*
William T. Way (U.S.A.) v United Mexican States, Mexico/United States General Claims Commission, 18 October 1928, RIAA Vol IV, 391-401	*Way v Mexico*
Estate of Jean-Baptiste Caire (France) v United Mexican States, Mexico/France Claims Commission, 7 June 1929, RIAA Vol V, 516-534	*Caire v Mexico*

Estate of Hyacinthe Pellat (France) v United Mexican States,
Mexico/France Claims Commission
7 June 1929,
RIAA Vol V, 534-538

Pellat v Mexico

Différend Héritiers de S.A.R. Mgr le Duc de Guise,
France/Italy Claims Commission,
15 September 1951,
RIAA Vol XIII, 154-161

Duc de Guise v Italy

Différend Dame Mossé,
France/Italy Claims Commission
17 January 1953,
RIAA Vol XIII, 486-497

Mossé v Italy

VI. INTERNATIONAL COURTS AND TRIBUNALS (chronological order)

ECtHR
Republic of Ireland v Great Britain, Judgment,
18 January 1978,
Series A, Vol. 25 (1978)

IACHR,
Case of Velásquez Rodríguez v Honduras,
Merits,
Judgment of 29 July 1988,
Inter-Am.Ct.H.R. Series C, No. 4 (1988)

Velásquez Rodríguez

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair,
30 April 1990,
RIAA, Vol. XX, 215

Rainbow Warrior case

WTO Appellate Body Report,
United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,
WT/DS33/AB/R
23 May 1997

United States - Wool Shirts

WTO Appellate Body Report,
Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,
WT/DS161/AB/R,
11 December 2000 — *Korea Beef*, Appellate Body Report

WTO Appellate Body Report,
EC – Measures Affecting Asbestos and Asbestos-Containing Products,
WT/DS135/AB/R,
5 April 2001 — *EC-Asbestos*

WTO Panel Report,
Brazil – Measures Affecting Imports of Retreaded Tyres,
WT/DS332/R,
12 June 2007 — *Brazil Tyres*

Guyana v Suriname,
PCA (UNCLOS),
Award of 17 September 2007 — *Guyana v Suriname*, Award

VII. DECISIONS BY NATIONAL COURTS (chronological order)

Richardson v Mellish,
2 Bing. 229 (1824) at 303,
reprinted in [1824-1834] ALL ER Rep. 258

Parsons & Wittemore Overseas Co. v Société Générale de l'Industrie du Papier (RAKTA),
508 F.2d 969 (2d Cir. 1974),
Y.B. Commercial Arbitration 1976, Vol I, 205

Westacre Case
[1998] 2 Lloyd's Rep. 111.

The United Mexican States v Metalclad Corporation,
2 May 2001,
2001 BCSC 664

The Attorney General of Canada and S.D. Myers, Inc. and United Mexican States,
Federal Court of Canada,
Reasons for Order (2004 FC 38),
13 January 2004

VIII. INTERNATIONAL TREATIES AND CONVENTIONS (chronological order)

ICSID Convention,
International Centre for Settlement of Investment Disputes,
entry into force 14 October 1966

Vienna Convention on the Law of Treaties,
signed on 23 May 1969, entry into force on 27 January 1980

Inter-American Convention Against Corruption,
Organisation of American States,
entry into force on 6 March 1997

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
Organization for Economic Cooperation and Development (OECD),
entry into force 15 February 1999

Civil Law Convention on Corruption,
Council of Europe,
entry into force on 1 November 1999

Criminal Law Convention on Corruption,
Council of Europe,
entry into force on 1 July 2002

United Nations Convention Against Corruption,
United Nations,
entry into force on 14 December 2005

Convention on Preventing and Combating Corruption,
African Union,
entry into force on 5 August 2006

IX. NATIONAL LEGISLATION

Foreign Corrupt Practices Act of 1977
(with amendments in 1988 and 1998),
United States,
entry into force 1978

UK Bribery Act 2010,
United Kingdom,
entry into force 1 July 2011