

SYMPOSIUM ON NEW DIRECTIONS IN ANTICORRUPTION LAW

DEALING WITH ALLEGATIONS OF CORRUPTION IN INTERNATIONAL ARBITRATION

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With the rise of corruption as a subject of international instruments and the convergence of obligations around its prevention, detection, and remediation in both the public and private sectors,¹ corruption has increasingly figured as an issue in international arbitration. Indeed, its acceptance as a public policy issue at both the international and transnational levels has resulted in the need for tribunals, in both commercial and investor-state disputes, to grapple with questions of jurisdiction, admissibility, and consequences, as well as standards of proof. As this essay demonstrates, the challenges presented by the issue of corruption pose special difficulties for arbitration. Time will tell if tribunals will move from their current largely binary, all-or-nothing approach to a more nuanced one based on proportionality.

Allegations of Corruption in International Arbitration: Factors and Typologies

Typically, allegations of corruption are presented as a defense against arbitral claims. In investor-state disputes, the respondent state may claim corruption as a basis for asserting that the arbitral tribunal lacks jurisdiction or the claim is inadmissible. In commercial disputes, the respondent may allege corruption to void a contract under which the claimant seeks damages.² Occasionally, corruption surfaces in an affirmative claim—for example, as part of a claim of denial of fair and equitable treatment under an investment treaty.³

The problem of corruption is now universally viewed as part of international (and transnational) public policy.⁴ This is perhaps the most settled aspect of the issue in international arbitration. However, the scope and definition of corruption, methods, standards, and burden of proof, the duties of members of an arbitral tribunal, the consequences of proving corruption, rules of attribution, and the effect of host country investigation and/or prosecution are hotly contested issues in the cases.

The stakes are high. The consequences of a successful claim of corruption can be dire. Contracts *for* corruption—i.e., contracts whose object and purpose are found to be illicit in nature—are considered to be

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¹ See, e.g., [UN Convention Against Corruption](#), opened for signature Dec. 9, 2003, 2349 UNTS 41 [hereinafter UNCAC]; [Organisation for Economic Co-Operation and Development Convention on Combatting the Bribery of Foreign Public Officials in International Business Transactions](#), Dec. 17, 1997, 37 I.L.M. 1, 4 (1998).

² See, e.g., Lucinda A. Low & Jonathan Drimmer, *We'll Take That Mine: The Corruption Defense by Governments in International Arbitrations*, 64 ROCKY MTN. MIN. L. INST. 20–21 (2018).

³ [Methanex Corp. v. U.S.](#), Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005).

⁴ See, e.g., [Union Fenosa Gas, S.A. v. Egypt](#), ICSID Case No. ARB/14/4, Award, para. 7.48 (Aug. 31, 2018).

void ab initio and, consequently, unenforceable.⁵ Contracts *resulting from* corruption—i.e., contracts procured via corrupt practices—are voidable at the option of the injured party.⁶ The UN Convention Against Corruption permits state parties to void contracts or concessions that are tainted by corruption.⁷ Some tribunals have interpreted bilateral investment treaties (BITs) requiring that foreign investments be procured “in accordance with law” as barring claims where corruption in the establishment of an investment has been proven, notwithstanding any contributory conduct of state officials.⁸ A new generation of BITs may extend this result to investments found to have corruption in their performance.⁹ And even if a claim survives this gauntlet to become an award, its recognition and enforcement may be at risk.¹⁰

Dismissal of a claim for lack of jurisdiction, or a finding of inadmissibility, while perhaps defensible, risks leaving the party invoking the defense with a windfall if the contract has been performed or the benefits of an investment received. It may leave a claimant that has provided valuable performance without any remedy whatsoever. These consequences have led many to question the merits of a binary approach, especially taking into account the bilateral nature of the corruption offense.¹¹ Unlike fraud or other violations of host country law, which may be unilateral in character, corruption has two sides: an “active” (supply) side, and a “passive” (demand) side. In claims against states or state-owned enterprises, the passive (demand) side implicates public officials. In extreme cases, the public official may have solicited or even extorted the bribe, or the bribe may be the result of endemic corruption in the state or sector concerned. The state, although obliged by international law to prevent, detect, and prosecute corruption, may be woefully delinquent in complying with those obligations.

There is widespread agreement that anticorruption developments of the last twenty years have been more successful in addressing supply side rather than demand side issues.¹² Yet, as Llamzon and others have observed, permitting a state in investor-state dispute settlement to secure dismissal of a claim on jurisdictional grounds creates a perverse incentive for the state to cynically reap the benefits of an investment or contract over time, ignoring the corrupt conduct of its own officials, and then terminate the contract and defend the claim based on the investor’s corruption.¹³

That is not to say that arbitral tribunals should adopt a “head in the sand” approach to corruption. International law demands more of today’s tribunals. But the challenges must be recognized if arbitration is to be effective in dealing with allegations of corruption and more systemic approaches may need to be developed.

⁵ [Council of Europe Civil Law Convention Against Corruption](#) art. 8(1), *adopted* Nov. 4, 1999, E.T.S. No. 174 [hereinafter CLCAC].

⁶ *Id.* art. 8(2).

⁷ [UNCAC](#), *supra* note 2, art. 34.

⁸ [Spentex Netherlands, B.V. v. Uzb.](#), ICSID Case No. ARB/13/26, Award (Dec. 27, 2016) (Award not yet published), *in* KATHRIN BETZ, *PROVING BRIBERY, FRAUD AND MONEY LAUNDERING IN INTERNATIONAL ARBITRATION* 83 (2017) [hereinafter BETZ]; [Metal-Tech Ltd. v. Uzb.](#), ICSID Case No. ARB/10/3, Award (Oct. 4, 2013); [World Duty Free Co. v. Kenya](#), ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

⁹ *See, e.g.*, [Southern African Development Community Model Bilateral Investment Treaty and Commentary](#) art. 10.1 (2012) (“Investors and their Investments shall not, prior to the establishment of an investment or afterwards, offer, promise or give any undue . . . advantage, . . . to a public official of the Host State.”) (emphasis added).

¹⁰ *See, e.g.*, [Valeri Belokon v. Kyrg.](#), Cour d’appel [CA] [regional court of appeal] Paris, Feb. 21, 2017 (annulment of an UNCITRAL award on grounds of international public policy based on money laundering).

¹¹ *See, e.g.*, ALOYSIUS P. LLAMZON, [CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION](#) (Loukas Mistelis et al. eds., 2014); Constantine Partasides, [Proving Corruption in International Arbitration: A Balanced Standard for the Real World](#), 25 ICSID REV. 47 (2010).

¹² The Organisation for Economic Co-operation and Development Anti-Bribery Convention, widely regarded as the most successful of the anticorruption instruments, is solely focused on the supply side.

¹³ *See supra* note 12.

The Main Challenges of Corruption in International Arbitration

There are at least five significant challenges to addressing corruption in international arbitration.

The definitional challenge. Corruption is not a precise term with a universally accepted definition. International treaties dealing with corruption typically identify a range of conduct as acts of corruption. Some enjoy wide international consensus—for example, bribery—while others enjoy far less—for example, trading in influence (lobbying). The first challenge of a tribunal facing a corruption allegation is to define precisely the alleged misconduct, based on the applicable law. This often involves importing elements of offenses defined by treaties and national law. Tribunals have limited powers based on the parties' consent and the legal instrument(s) under which their authority arises; they are not free to go beyond them. Tribunals must therefore ground the allegation of corruption properly in the applicable law of the dispute, but also consider the issues that may arise in the recognition and enforcement of any award.

For contracts (or investments) resulting from corruption, the proof requirements should include not just the type of corruption alleged but also the linkage between that corruption and the issuance of the contract or concession, or the establishment of the investment. This linkage requirement is not present in contracts for corruption, where proof of the contract's illicit purpose alone is sufficient.¹⁴

Standard, burden, and methods of proof. The second major challenge is how to establish proof of alleged corruption. This implicates the standard, burden, and methods of proof. Rarely is the issue presented directly, as occurred in the now infamous *World Duty Free* dispute. There, an affidavit submitted by the Claimant's controlling shareholder attested to his having paid a seven-figure bribe to the Kenyan President. (He later claimed that this was only *har-ambee*, a customary payment.) More often, however, the evidence is hidden, requiring the arbitrators to infer corruption from circumstantial evidence. While use of indirect evidence is well accepted, disagreement arises over the role of so-called "red flags" or "indicators" of corruption.

"Red flags" in corruption analysis originated with the U.S. Foreign Corrupt Practices Act as warning signs of possible illicit activity by an intermediary.¹⁵ They are recognized by numerous international soft law instruments.¹⁶ As a preventive tool, they warn a principal of potential risks that, if ignored, could result in liability in statutes that criminalize corruption based on willful ignorance as well as knowledge.¹⁷

Parties alleging corruption have seized on red flags, sometimes arguing that the mere presence of numerous red flags establishes corruption. But red flags are only indicators that must be pursued to determine what evidence they yield. General red flags—relating to the country or sector—have little probative value, and prove nothing in an individual case, while those that are more specific to a counterparty or transaction—for example, a lack of services provided by a third party in return for significant compensation—have more probative value. While parties have sometimes sought to gloss over these distinctions, tribunals typically have not. In *Metal-Tech v. Uzbekistan*, for instance, the tribunal investigated ex officio the legality of several intermediary relationships that the claimant

¹⁴ See *CLCAC*, *supra* note 5, arts. 2, 4; *Niko Resources Bangladesh, Ltd. v. Bangl.*, ICSID Case Nos. ARB/10/11 & ARB/10/18, Decision on Jurisdiction (Aug. 19, 2013) (attempt insufficient to invalidate contract); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010).

¹⁵ See U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the Foreign Corrupt Practices Act* 22–23 (2012).

¹⁶ See, e.g., Int'l Chamber of Commerce, *Guidelines on Agents, Intermediaries and Other Third Parties* (2010).

¹⁷ However, there have been virtually no criminal cases in the forty-plus year history of the U.S. Foreign Corrupt Practices Act prosecuted solely on this basis. Cf. *United States v. Kozeny*, 582 F.Supp.2d 535, 537–40 (S.D.N.Y. 2008), *aff'd*, 667 F.3d 122 (2d Cir. 2011) (conviction of Frederic Bourke on the alternative basis of actual knowledge along with willful ignorance of bribery scheme in Azerbaijan).

entered into. After probing the red flags for further evidence, the tribunal found that two of the three arrangements in question were illicit.¹⁸

Tribunals need to guard against facile claims about the contribution of red flags to the ultimate analysis. The party advancing the corruption defense often argues for a lowered standard of proof of corruption or for a shifting of the burden of proof, while the party resisting the defense argues for clear and convincing evidence. But a close review of the cases suggests that even where tribunals pay lip service to red flag analysis, they are searching for probative evidence.¹⁹ There are cases, however, especially in the commercial arena, that accept the methodology of “*indices graves, précis et concordants*,” similar to the “connect the dots” methodology identified by the tribunal in the *Methanex* case.²⁰ To the extent that this approach reflects nothing more than close analysis of a chain of circumstantial evidence, the methodology is sound. To the extent that it relies on potential risk indicators as evidence and aggregates those risk indicators, however, it is unsound and could lead to a finding of an excess of power on the part of the tribunal in enforcement or annulment proceedings.

Role of the tribunal. Some have argued that arbitrators face risks as accessories to criminal activity if they fail to investigate issues of corruption. This may be particularly true where arbitrators have duties under applicable laws to report suspicions of criminal activity to the authorities. Others argue that given the general duty of tribunals to do justice, they must investigate issues of corruption even if the parties have not raised them. These views are in tension with the concept of arbitration as being based on party consent and the limited powers typically given to arbitrators. Tribunals confronting these issues need to consider their authorities under the rules under which the arbitration operates, including any limitations on those authorities. The position is relatively clear under the current International Centre for Settlement of Investment Disputes rules,²¹ but may not be so clear under other regimes.

Compared to national investigating authorities, arbitral tribunals possess limited powers to compel the production of evidence and to conduct searches. If national authorities are investigating the matter, the tribunal may consider staying the proceedings until the investigation is complete, on the theory that the investigation may yield relevant evidence that will facilitate the tribunal’s task.²² If not, the tribunal may use its authority to issue orders to a party that it fairly presumes to have relevant evidence (e.g., on the provision of services) in its custody or control, and may take adverse inferences from a failure to produce, in the process of establishing key facts probative of the issue of corruption.²³

Consequences. *World Duty Free* held (applying English and Kenyan law) that the claimant’s corruption required dismissal of its claim. Subsequent English case law has abandoned that “all or nothing” approach in favor of a more nuanced approach based on proportionality.²⁴ For many, a jurisdictional approach that fails to give effect to the bilateral nature of the conduct, and that fails to consider the possibility of finding waiver by or estoppel of the host state, is problematic. Of course, this requires grappling with consent limitations of states when treaties are in

¹⁸ *Metal-Tech*, supra note 9, at paras. 359–64, 389.

¹⁹ In the recent *Union Fenosa* case, the majority wrote regarding one intermediary: “Several were classic ‘red flags’; but even the reddest of red flags does not suffice without proof of corruption before the tribunal.” *Union Fenosa*, supra note 4, at para. 7.113.

²⁰ See, e.g., ICC Case No.12990 (Final Award, 2005) (excerpts reprinted in *COLLECTION OF ICC ARBITRAL AWARDS 2008–2011*, 831 (2013)). For “connect the dots” methodology, see *Methanex*, supra note 3, at 1410–12 pt. III, ch. B, 1–2.

²¹ Int’l Ctr. for Settlement of Inv. Disputes, *ICSID Convention, Rules and Regulations*, Rule 34(2), Doc. ICSID/15 (Apr. 2006) (giving the Tribunal the power “if it deems it necessary, at any stage of the proceeding,” to call upon the parties to produce documents, witnesses, and experts and to visit any place connected with the dispute or conduct inquiries there).

²² This has happened only rarely. See, e.g., *Société Générale de Surveillances v. Phil.*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, para. 175 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

²³ See, e.g., *Metal-Tech*, supra note 8, at paras. 216, 267–73; *Spentex*, supra note 8, at 83.

²⁴ *Patel v. Mirza* [2016] UKSC 42 (appeal taken from Eng.).

play, and attributing the conduct of state officials to the state, just as conduct of corporate officials is attributed to the corporate entity.²⁵

Treating the issue of corruption at the merits rather than the jurisdictional stage would permit arbitrators to consider a broader range of remedies on the basis of proportionality, including restitution. This is perhaps the least developed of the issues surrounding corruption allegations. In the *Spentex* case,²⁶ the tribunal dismissed the claim on jurisdictional grounds based on its finding of corruption, but ordered the state to contribute to an anticorruption NGO or face an adverse costs order. This unusual approach, which was not challenged by the parties, appears to reflect discomfort on the part of the tribunal with the consequences of its finding.

Emerging issues. Anticorruption best practices are evolving rapidly. States have assumed obligations under international treaties to adopt and maintain control measures over their own officials and to prosecute violations. Companies are increasingly confronting national law obligations to establish and maintain compliance programs as a condition of avoiding or mitigating liability.²⁷

As compliance programs become more mainstream, arbitral tribunals may inquire into a company's preventive measures relevant to the specific case before them and perhaps make inferences regarding the adequacy of a company's efforts to manage corruption risks. Similarly, arbitral tribunals, taking a proportionality approach, may examine the extent of a state's preventive measures in furtherance of its treaty obligations both in general and in the specific case before them and make state responsibility or attribution decisions based on those findings.

Conclusion

The acceptance of corruption as a public policy issue at both the international and transnational levels has consequences for arbitration. Arbitral tribunals must increasingly grapple with allegations of corruption. The challenges of the corruption issue, particularly issues of proof, pose special difficulties for arbitration. Reconciling the bilateral nature of corruption with perceived limitations of state consent to arbitration or a tribunal's reluctance to hear claims that implicate public policy issues presents a second set of challenges. Time will tell if the issue will move from its current largely binary, all-or-nothing approach to a more nuanced approach based on proportionality.

²⁵ As noted above, the tribunal in *WDF* refused to do this, but this approach has been widely criticized. See, e.g., [LLAMZON](#), *supra* note 12 (the "attribution asymmetry"). *But cf.* Int'l Law Comm'n, [Responsibility of States for Internationally Wrongful Acts](#) art. 45 (2005).

²⁶ See [BETZ](#), *supra* note 8, at 135 (citing *Spentex*, ICSID Case No. ARB/13/26, para. 981).

²⁷ The Foreign Corrupt Practices Act does not impose such an obligation, although such a program is a mitigating factor. But laws such as the UK Bribery Act provide an "adequate procedures" defense to strict corporate liability, and are being adopted by other countries.