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# How Should International Arbitrators Tackle Corruption Issues?\*

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## I. INTRODUCTION

“WE NEED TO DEAL WITH THE CANCER of corruption.” This was a declaration made by a former President of the World Bank, Mr. James D. Wolfensohn, in a 1996 speech addressing the keys to achieving growth and reducing poverty in developing countries.<sup>1</sup>

In international trade and investment, corruption is often associated with the bribing of a foreign public official who has some degree of influence over international business involving his or her country. The official is promised, offered or given, directly or indirectly, an illegal payment or advantage in exchange for his or her reciprocal promise to act or refrain from acting in his or her official capacity in a manner specified by the briber. The official's act or omission allows the briber to obtain or retain business or other improper advantage with respect to the conduct of international business.

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<sup>1</sup> V. Bhargava, “Curing the Cancer of Corruption,” *in* Global Issues for Global Citizens: An Introduction to Key Development Challenges, ch. 18, at 2 (V. Bhargava ed., World Bank 2006) (footnote omitted), *available at* <http://siteresources.worldbank.org/EXTABOUTUS/Resources/Ch18.pdf>.

More generally, corruption may encompass a variety of wrongful acts in addition to bribery, such as trading in influence, abuse of public office for private gain, obstruction of justice, diversion of property by a public official, illicit enrichment and money laundering. It may occur in different forms, in different types of organizations, and at different levels within organizations:

Corrupt practices range from small amounts paid for frequent transactions (*petty corruption*) to bribes to escape taxes, regulations, or win relatively minor procurement contracts (*administrative corruption*) to massive and wholesale corruption. Corruption occurs within private corporations (*corporate corruption*) or, more famously, in the public sector, including the political arena (*political corruption*). When corruption is prevalent throughout all levels of society it is seen as *systemic*, and when it involves senior officials, ministers, or heads of State serving the interests of a narrow group of businesspeople, politicians, or criminal elements, it is aptly called *grand corruption*.<sup>2</sup>

As such, to quote the words of Judge Lagergren, corruption is deemed an “international evil” that it is “contrary to good morals and to an international public policy common to the community of nations.”<sup>3</sup>

In order to face this “evil,” a legal framework has been established on both the national<sup>4</sup> and international levels. The understanding of the effects of corruption on economic development, political stability and the rule of law has resulted in a series of international instruments and policies. These instruments include:

- Inter-American Convention Against Corruption (1996), adopted by the Organization of American States;<sup>5</sup>
- OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996);<sup>6</sup>
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);<sup>7</sup>

<sup>2</sup> *Id.*

<sup>3</sup> Award, ICC Case No. 1110 (1963), 10 Arb. Int'l 282, 292 (1994).

<sup>4</sup> National laws fighting corruption are generally categorized either as preventive, like the UK Bribery Act of 2010 and others which govern the activities of intermediaries and agents in the field of public procurement, or punitive, like the U.S. Foreign Corrupt Practices Act of 1977 (FCPA).

<sup>5</sup> Available at <http://www.oas.org/juridico/english/Treaties/b-58.html>.

<sup>6</sup> Available at [http://www.oecd.org/olis/1996doc.nsf/LinkTo/c\(96\)27-final](http://www.oecd.org/olis/1996doc.nsf/LinkTo/c(96)27-final).

<sup>7</sup> Available at [http://www.oecd.org/document/210,2340,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html#text](http://www.oecd.org/document/210,2340,en_2649_34859_2017813_1_1_1_1,00.html#text).

- Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (1997), adopted by the Council of the European Union;<sup>8</sup>
- Criminal Law Convention on Corruption (1999), adopted by the Committee of Ministers of the Council of Europe;<sup>9</sup>
- Civil Law Convention on Corruption (1999), adopted by the Committee of Ministers of the Council of Europe;<sup>10</sup>
- African Union Convention on Preventing and Combating Corruption (2003), adopted by the Heads of State and Government of the African Union;<sup>11</sup> and
- United Nations Convention Against Corruption (2003).<sup>12</sup>

In the presence of this multilateral legal framework of instruments that establishes an international rule of law regime on corruption, those charged with administering justice, including international arbitrators, have an undeniable responsibility to ensure that such instruments are applied properly.

However, unlike national judges, arbitrators or private judges are only committed to the contract which creates their mission. Considering the absence of extensive investigative tools, and given the difficult evidentiary burden of proving corruption, should international arbitrators consider themselves servants of the parties or of justice?

Confronted with cases involving allegations of corruption, international arbitrators could adopt one of two positions:

- A “positive” position, by redressing corrupt practices. The international arbitrator would thus be acting as the true guardian of the laws and treaties; or
- A “passive” or “indifferent” position, by refusing to tackle corruption for reasons pertaining to their limited powers, being adjudicators rather than prosecutors. In such a case, international arbitrators could be used to validate the legality of a contract that a state prosecutor would normally

<sup>8</sup> Council Act of 26 May 1997, 1997 O.J. (C 195) 1.

<sup>9</sup> Europ. T. S. No. 173, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>.

<sup>10</sup> Europ. T. S. No. 174, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm>.

<sup>11</sup> 43 I.L.M. 1 (2004), available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>. This Convention entered into force on August 5, 2006, and the number of its signatories has reached 44 States, including 7 Arab States.

<sup>12</sup> 43 I.L.M. 37 (2004), available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. This Convention entered into force on December 14, 2005, and the number of its signatories has reached 140 States, including 18 Arab States.

view as illegal. They could actually become “accessories” to corrupt dealings.<sup>13</sup>

An authority in the field of corruption in international arbitration came to the following conclusion in 2004: arbitral practice is not uniform in matters of corruption. Among the reasons underpinning such inconsistency are the absence of a uniform definition of corruption and the diverse approaches resulting from the different arbitrators’ own conceptions, backgrounds and experiences.<sup>14</sup>

This paper reviews how international arbitrators are at present tackling corruption issues. Based on the available case law, a distinction can be made between commercial arbitration, involving mainly two private entities, and investment arbitration, where host States typically are the respondents.

## II. COMMERCIAL ARBITRATION

Agency contracts are the most common type of commercial agreements giving rise to allegations of corruption. The dispute usually arises when the principal refuses to pay the commission, objecting either that the services were not rendered or that the agreement was illegal and invalid.

Confronted with indicia of corruption in such disputes, commercial arbitrators are faced with a series of difficult jurisdictional and substantive issues. They are forced to assess their own jurisdiction over the matter and decide whether they have to refer it to the national courts. If jurisdiction is accepted, the next question concerns the applicable standard of evidence and whether public international law standards will prevail over any law of the parties’ choosing. If such preeminence is recognized, the precise legal consequences remain to be determined.

### *A. Jurisdictional Issues*

The jurisdiction of arbitral tribunals to decide upon a contract involving corruption has been challenged in a number of commercial arbitrations.

Probably the oldest and best-known case is ICC Case No. 1110, where the sole arbitrator, Judge Lagergren, declined jurisdiction on the basis that a dispute arising out of bribery inevitably results in its non-arbitrability. Referring to the

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<sup>13</sup> M. Pieth, “Trans-national Commercial Bribery: Challenge to Arbitration,” in *Dossier of the ICC Institute of World Business Law: Arbitration – Money Laundering, Corruption and Fraud* 41 (ICC Publishing 2003).

<sup>14</sup> A. Sayed, *Corruption in International Trade and Commercial Arbitration* 423 (Kluwer Law Int’l 2004).

“general principles of denying arbitrators to entertain disputes of this nature rather than ... any national rules on arbitrability,” he concluded that the “[p]arties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”<sup>15</sup>

The prevailing trend, however, is to proclaim jurisdiction over the dispute on the basis of the well-established doctrine of *Kompetenz-Kompetenz*, according to which arbitrators have jurisdiction to determine the scope of their own jurisdiction. This trend has consistently been confirmed by various decisions, which recognize that the arbitrators’ own competency is an inherent attribute of international tribunals.<sup>16</sup>

The autonomy of the arbitration agreement (the doctrine of separability) is also embedded in many awards. Under this doctrine, the arbitration clause is separate and independent from the contract in which it is contained and will therefore survive and continue to be valid, even if the arbitral tribunal decides that the main contract is null and void because it involves bribery. Many arbitral awards consistently adhere to this principle, which enables international commercial arbitrators to investigate the allegations of corruption and to ultimately decide upon the validity of a contract tainted by corruption.<sup>17</sup>

### B. Substantive Issues

Arbitral tribunals have constantly recognized that legal provisions to fight corruption and bribery are part of the “*ordre public international*,”<sup>18</sup> and that “bribery renders an agreement invalid.”<sup>19</sup> Commercial arbitrators also refer to a “legal principle generally recognized by civilized nations according to which agreements that are in serious violation of moral standards or international

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<sup>15</sup> ICC Case No. 1110, Award (1963), 3 Arb. Int’l 282 (1994), reprinted in XXI Y.B. Comm. Arb. 47, 52 (1996).

<sup>16</sup> See, e.g., *Westinghouse Int’l Projects Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v. Nat’l Power Corp. and The Republic of the Philippines*, ICC Case No. 6401, Preliminary Award (Dec. 19, 1991) (hereinafter *Westinghouse et al. v. Philippines et al.*), in 7 Mealey’s Int’l Arb. Rep., no. 1, sec. B, at 17–18 (1992).

<sup>17</sup> See, e.g., ICC Case No. 4145, First Interim Award (1983), 112 J. du Droit Int’l 985 (1985), reprinted in XII Y.B. Comm. Arb. 97 (1987). The Tribunal held that it had jurisdiction to decide the case, indicating that the validity of the arbitration clause had to be considered separately from the validity of the contract in which it was contained.

<sup>18</sup> *Westacre Investments Inc. v. Jugoinport—SDPR Holdings Co. Ltd. and Beogradska Banka*, ICC Case No. 7047, Award (1994) (hereinafter *Westacre v. Jugoinport*), 13 ASA Bull. 301 (1995), para. 36, IV Collection of ICC Arb. Awards 1996–2000, at 32 (2003).

<sup>19</sup> *Id.* para. 53.

public policy are null and void or at least cannot be performed.”<sup>20</sup> A contract can also be declared illegal and invalid if an award enforcing it would be contrary to the public policy of the country in which the award would be enforced. This issue was the concern of an Arbitral Tribunal which had to determine whether U.S. public policy would be violated by an award on the merits and thus whether such an award would ultimately be enforceable in U.S. courts.<sup>21</sup>

A related matter is the determination by the commercial arbitrator of the applicable law. This could be the law of the contract chosen by the parties, the law of the seat of arbitration, or the law of the place where the contract is to be performed, in addition to the relevant international treaties.

The arbitral tribunal would normally rely upon the substantive law of the contract chosen by the parties based on the principle of party autonomy, except to the extent that it violates generally accepted international norms. Alternatively, the tribunal may be entitled to conclude that even if the agreed substantive law is the law of that single country, it will disregard that governing law if applying it would contravene international public policy.

Such considerations were highlighted in the *Hilmarton* case where the arbitrator concluded that the agreement was in violation of Swiss public policy and hence invalid, since the agent was appointed in patent violation of Algerian law, forbidding intermediaries in administrative contracts.<sup>22</sup>

The potential contravention of moral standards under Swiss Law by violating a foreign law was also examined in another commercial arbitration. In this case, the sole arbitrator ruled that under exceptional circumstances, a violation of a foreign law may be considered as contrary to moral standards under Swiss law, if it is irreconcilable with Swiss moral standards.<sup>23</sup> The sole arbitrator found that a violation of the U.S. Foreign Corrupt Practices Act (FCPA) was not established, because “the ground of corruption was not

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<sup>20</sup> ICC Case No. 3916, Award (1982), I Collection of ICC Arb. Awards 1974–1985, at 511 (1994).

<sup>21</sup> This case is unpublished, though it is referred to in M. Eriksson, “Arbitration and Contracts Involving Corrupt Practices: The Arbitrator’s Dilemma,” 4 *Am. Rev. of Int’l Arb.* 409 (1993).

<sup>22</sup> *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A.*, ICC Case No. 5622 (hereinafter *Hilmarton v. OTV*), Award (1982) (annulled) and Award (1992). Excerpts of the 1982 Award are published in 2 *Rev. de L’arb.* 341 (1993). For references to the 1992 Award and its enforcement in England, see E. Brown, “Illegality and Public Policy – Enforcement of Arbitral Awards in England: *Hilmarton Limited v. Omnium de Traitement et de Valorisation S.A.*,” 3 *Int’l Arb. L. Rev.* 31 (2000).

<sup>23</sup> ICC Case No. 9333, Award (1998), para. 12.2, 19 *ASA Bull.* 757 (2001) (unofficial translation). The original text reads: “Dans des circonstances exceptionnelles, une violation d’un droit étranger peut néanmoins être considérée comme contraire aux mœurs selon l’article 20 CO si elle est irréconciliable avec les mœurs suisse,”; see also A. Crivellarro, “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence,” *Diritto del Commercio Internazionale*, fasc. saggio 1, at 52 (Giuffrè 2003), available at [http://www.giuffre.it/age\\_files/download/fascicoli\\_saggio/CommercioInternazionale\\_1\\_2003.pdf](http://www.giuffre.it/age_files/download/fascicoli_saggio/CommercioInternazionale_1_2003.pdf) (hereinafter Crivellarro, “Arbitration Case Law on Bribery”).



established by evidence ....<sup>24</sup> He considered that the FCPA does not apply to American subsidiaries located abroad,<sup>25</sup> nor may it prevail over the choice of another substantive law made by the parties merely because of the “powerful and legitimate interest of the United States in applying this law.”<sup>26</sup> In this respect, the sole arbitrator declared that it “would be slightly inappropriate to apply in this manner the FCPA to companies located outside the United States (...) the fight against corruption, to be sure a laudable objective, not necessarily justifying the exportation of the singular methods or code of conduct of the FCPA to achieve this objective (...).”<sup>27</sup>

The most delicate issue for commercial arbitrators addressing allegations of corruption is undoubtedly the weighing of the evidentiary proof.<sup>28</sup> Indeed, arbitrators cannot make decisions with respect to corruption based upon suspicions or allegations; they must apply proper rules of evidence.<sup>29</sup>

Most of the reviewed arbitral awards state that the burden of proof is on the party alleging the corruption. This is based upon the general evidentiary rule that the burden of proof is on the party making a claim. However, an Arbitral Tribunal suggested that 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.<sup>30</sup> If the other party failed to do so, the tribunal could then conclude that the alleged facts were true.<sup>31</sup>

Regarding the standard of proof, the dominant trend is to require a “high” standard. In one case, the arbitral tribunal ruled that “direct or even circumstantial evidence” was needed.<sup>32</sup> It declared that “a fact can be considered as proven even by the way of circumstantial evidence ... [h]owever such circumstantial evidence

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<sup>24</sup> ICC Case No. 9333, *supra* note 23, para. 12.2 (unofficial translation). The original text reads: “Le Tribunal ... est arrivé à la conclusion que le grief de corruption n’était pas établi par des preuves.”

<sup>25</sup> *Id.* para. 12.4 (unofficial translation). The original text reads: “la loi FCPA ne s’applique pas aux filiales de sociétés américaines à l’étranger.”

<sup>26</sup> *Id.* para. 12.5 (unofficial translation). The original text reads: “encore faudrait-il démontrer des intérêts puissants et légitimes des Etats-Unis à l’application de cette loi.”

<sup>27</sup> *Id.* (unofficial translation). The original text reads: “la lutte contre la corruption, but certes louable, ne justifie pas nécessairement l’exportation des méthodes ou du code de conduite singulier de la loi FCPA pour atteindre ce but.”

<sup>28</sup> A. Martin, “International Arbitration and Corruption: An Evolving Standard,” 1 *Transnat’l Disp. Mgmt.*, no. 2 (May 2004), available at [http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article45a.htm#\\_ftnref21](http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article45a.htm#_ftnref21).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (citing ICC Case No. 6497, Award (1994), paras. 3–4, IV Collection of ICC Arb. Awards 1996–2000, at 234 (2003), *reprinted in* XXIV Y.B. Comm. Arb. 71, 73 (1999)).

<sup>31</sup> *Id.*

<sup>32</sup> ICC Case No. 4145, Second Interim Award (1984), para. 27, 112 J. du Droit Int’l 985 (1985) (with case commentary by Y. Derains), *reprinted in* XII Y. B. Comm. Arb. 102 (1987).

must lead to a very high probability.”<sup>33</sup> It stated that neither the language of the contract nor the defendant’s own witness mentioned or supposed any bribery. The arbitral tribunal ruled that although the “consultancy price was very high,” this element was not sufficient, alone, to prove corruption.<sup>34</sup> Finally, the arbitrators “[did] not find sufficient reasons to arrive at the conclusion it was an agreement for bribery,” stressing that the nullity implies that both parties agree on the immoral purpose to be achieved or on the immoral means to be used in order to achieve a certain result, which was not, according to the arbitral tribunal, the case in the matter in question.<sup>35</sup>

The arbitrator in the *Hilmarton* case reached a similar conclusion, finding that the evidence (witness statements and the amount of the commission) was not sufficient to establish “with certainty” the existence of corruption.<sup>36</sup>

In another case, the Arbitral Tribunal ruled that the proof of bribery may be “adopted only if it is established that the amounts paid were intended to bribe officials to trade on their influence to obtain favors.”<sup>37</sup> Corruption was not proved, since it was not established that the beneficiary (the Panamanian intermediary) of the commission “had effectively played a part in respect of the concessions ... [o]n the contrary, the concessions have not been granted yet, as the Government continues the negotiation only as a result of a decision of arbitral nature.”<sup>38</sup> Moreover, the arbitral tribunal found that the amounts pertaining to the agreements with the intermediary were never paid. Hence, no corruption could have been committed.<sup>39</sup>

The *Westinghouse* case provided the greatest elaboration on the required standard of proof. The Arbitral Tribunal held that the standard to be applied in weighing the evidence was the “preponderance of evidence” standard as generally understood by the governing laws of the parties (U.S. and the Philippines), taking into account, however, that with respect to the allegation of corruption, a higher standard of “clear and convincing evidence” would apply.<sup>40</sup> According to the Arbitral Tribunal, since bribery is a form of fraud in civil cases in the U.S. and the Philippines, it “must be proved to exist by clear and convincing evidence amounting to more than a mere preponderance, and

<sup>33</sup> *Id.* para. 28.

<sup>34</sup> *Id.* para. 30.

<sup>35</sup> *Id.* para. 35–36.

<sup>36</sup> *Hilmarton v. OTV*, *supra* note 22, Award (1982) (annulled).

<sup>37</sup> ICC Case No. 6286, Partial Award (Aug. 28, 1991), para. 22, III Collection of ICC Arb. Awards 1991–1995, at 264 (1997).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Westinghouse et al. v. Philippines et al.*, *supra* note 16, at 33–35.

cannot be justified by mere speculation.”<sup>41</sup> Even though evidence existed that Westinghouse intended to bribe President Marcos by paying the local agent, the Arbitral Tribunal stated that the Respondents failed to carry their burden of proof, since they neither provided evidence of payments to Marcos nor proved the existence of an agreement between President Marcos and Westinghouse.<sup>42</sup> The Arbitral Tribunal concluded that the (main) contracts were valid and rejected any allegation of bribery.<sup>43</sup>

The lack of sufficient evidence was also the reason for denying allegations of corruption in another case, *Westman v. European Gas Turbines*, where the Arbitral Tribunal concluded that a valid contract existed between the parties and declared that it was not apparent from the terms of the contract that the Claimant had to exercise influence over the owner to obtain the pre-qualification of the Respondent.<sup>44</sup> Its role was solely to “promote” the Respondent, who was thus ordered to pay the agreed commission, that is, 4% of the amount of the supply contract.<sup>45</sup> The Paris Court of Appeal, before which a setting-aside motion against the Arbitral Decision was filed by the Respondent, confirmed that no proof of traffic in influence had been provided.<sup>46</sup>

The same conclusion was reached by a different Award, which ruled that “no direct or circumstantial evidence of bribery” was found.<sup>47</sup>

<sup>41</sup> *Id.* at 34.

<sup>42</sup> *Id.* at 77–78.

<sup>43</sup> *Id.* It should be noted that the matter was subsequently brought before the U.S. District Court for the District of New Jersey, which held that the ICC Arbitral Tribunal “applied a significantly heavier burden of proof than would be applied at trial.” *Republic of the Philippines and The Nat'l Power Comm. v. Westinghouse Elec. Corp. et al.*, 782 F. Supp. 972, 981 (D. N.J. Feb. 4, 1992). The Court added that “[b]y compartmentalizing and segregating the categories of evidence, the Tribunal deprived it as a whole of its natural collective force in a way in which the evidence might not be so deprived in this Court.” *Id.* at 982. As a result, the Court ruled that “there is ample evidence to permit a reasonable jury to find that the [local agent’s] commissions were intended to be paid in whole or in part to President Marcos and were in fact paid in whole or in part to him or upon his direction.” *Republic of the Philippines and The Nat'l Power Comm. v. Westinghouse Elec. Corp. et al.*, 774 F. Supp. 1438, 1446 (D. N.J. Sept. 20, 1991, as amended Oct. 1, 1991 and Nov. 1, 1991).

<sup>44</sup> *Westman Int'l Ltd. v. European Gas Turbines S.A.*, ICC Case No. 6662, Award (1992). The Arbitral Award in this case has not been published. Only the decision of the Paris Court of Appeal in *European Gas Turbines S.A. v. Westman Int'l Ltd.* (Sept. 30, 1993), which summarizes the Award, is published in *Rev. de l'arb.* 359 (1994) and 12 *ASA Bull.* 105 (1994) (with a summary by A. Nassar), reprinted in *XX Y.B. Comm. Arb.* 198, 200 (1995).

<sup>45</sup> *Id.*

<sup>46</sup> *European Gas Turbines S.A. v. Westman Int'l Ltd.* (Cour d'appel Paris, Sept. 30, 1993), para. 21, *XX Y.B. Comm. Arb.* 198, 205 (1995).

<sup>47</sup> This case is referred to in M. Scherer, “Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals,” 5 *Int'l Arb. L. Rev.* 29 (2002); 16 *ASA Bull.* 210, 442 (1998). According to Scherer, this was an ICC Award rendered in 1993 by Pierre Lalive in an arbitration taking place in Geneva applying French law.

In another case, several agency agreements were disputed, but the Tribunal did not find “conclusive evidence” of bribery in the case of the vast majority of the agreements, notwithstanding the disproportion between the price paid to, and the costs borne by, the agent.<sup>48</sup> However, in relation to one of the agreements in which the commission amounted to the “extremely unusual” fee of 33.33%, the Tribunal found a “high degree of probability that the real object of [the agreement] was to channel bribes to officials ....”<sup>49</sup> It is interesting to note that in this case, the Tribunal considered that “a civil court, and in particular an arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth.”<sup>50</sup> If the demonstration of the party making the allegations is not convincing, then the tribunal should reject its argument, even if the tribunal has some doubts about whether the agreements involved bribery.<sup>51</sup>

In the *Westacre* case, the majority of the Arbitral Tribunal found the agreement in question to be a valid brokerage contract. According to the majority, even though bribery renders an agreement invalid, it is a fact which, in arbitration proceedings, must be alleged and for which evidence must be submitted by the party making the allegation.<sup>52</sup> Furthermore, the tribunal must be convinced that there is indeed a case of bribery. A “mere ‘suspicion’ by any member of the tribunal ... is entirely insufficient” to prove the presence of corruption.<sup>53</sup> The clause “exonerating the agent from proving his actual services” was not considered a sufficient indication of an illicit intent.<sup>54</sup> The tribunal further held that the amount of fees agreed upon also failed to show joint illicit intentions.<sup>55</sup> The disproportionately high fees, therefore, were not sufficient to invalidate the agreement.<sup>56</sup>

An agency contract was also found valid in the famous “*frigates-to-Taiwan*” case, where the arbitrators ruled that even though an agent was paid to influence Chinese authorities so that they would not object to the sale of warships to Taiwan, no evidence of bribery was found.<sup>57</sup> The Tribunal relied mainly on

<sup>48</sup> ICC Case No. 6497, Award (1994), paras. 6–15, IV Collection of ICC Arb. Awards 1996–2000 (2003), reprinted in XXIV Y.B. Comm. Arb. 71 (1999).

<sup>49</sup> *Id.* paras. 17, 30.

<sup>50</sup> *Id.* para. 3.

<sup>51</sup> *Id.*

<sup>52</sup> *Westacre v. Jugoinport*, *supra* note 18, para. 53.

<sup>53</sup> *Id.* para. 54.

<sup>54</sup> *Id.* para. 42.

<sup>55</sup> *Id.* para. 45.

<sup>56</sup> *Id.* para. 46.

<sup>57</sup> *Frontier AG & Brunner Sociedade v. Thomson CSF*, ICC Case No. 7664, Award (July 31, 1996). The Award in this case is unpublished, though it is referred to in Scherer, *supra* note 51, at 29. The Award was confirmed by the Swiss Federal Tribunal on January 28, 1997. See 16 ASA Bull. 118 (1998). It is worth noting that in an Award rendered on April 29, 2010 in a related ICC case, a Tribunal held that a French

witness statements in concluding that there was no evidence of corrupt influence peddling involving the governments of France, Taiwan or China.<sup>58</sup>

This final international Award was revised more than ten years later by a decision of the Swiss Federal Tribunal, which was seized by a request for revision in 2008. In a remarkable decision dated October 6, 2009, the Swiss Supreme Court granted revision of the Award, ruling that it was tainted by fraud.<sup>59</sup> The five judges vacated the Award in the ICC arbitration, which had been connected to a larger scandal over the sale of arms by a French company, after reviewing evidence from a recent French court decision.<sup>60</sup> The decision revealed that one of the witnesses, who died in 2005, had lied to the Arbitral Tribunal at the hearings. The Swiss judges held that the Award was fraudulent because of the false testimony.<sup>61</sup> They required that either the same ICC Tribunal, or a newly constituted one, rehear the case.<sup>62</sup> Switzerland ordinarily has an absolute time limit of 10 years to request a review, except in cases where the new evidence relates to criminal behavior.<sup>63</sup> It should be noted that this is the first time since the entry into force of the Swiss Federal Statute on the Federal Tribunal in 2007, and only the second time since the entry into force of the Swiss Private International Law Act in 1989, that the Swiss Federal Tribunal has revised an international arbitral award.<sup>64</sup>

Prior to the Decision of the Swiss Federal Tribunal, several arbitral awards had rejected allegations of corruption for want of clear and convincing evidence, which was required in order to declare the agreement invalid.<sup>65</sup> In an *ad hoc* arbitration conducted under the UNCITRAL Rules, the Arbitral Tribunal stated that “a finding of illegality or other invalidity must not be made lightly,

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defense company (Thales) breached a “no agents or commissions” clause in its contract with Taiwan for the supply of six Lafayette frigates. The Tribunal ordered Thales to pay 630 million (US\$830 million) including interest for using agents to secure a defense contract. The Award in this case is unpublished. For a report on the case, see K. Karadelis, “Taiwan Wins Damages in Frigates Case,” *Global Arb. Rev.* (May 5, 2010), <http://www.globalarbitrationreview.com/news/article/28389/taiwan-wins-damages-frigates-case>.

<sup>58</sup> *Id.*

<sup>59</sup> U. Sulaiman, “Swiss Court Cancels Decade-Old ICC Award After New Evidence Surfaces,” *Global Arb. Rev.* (Oct. 23, 2009), <http://www.globalarbitrationreview.com/news/article/19188/swiss-court-cancels-decade-old-icc-award-new-evidence-surfaces> (discussing the Decision of the Swiss Federal Tribunal of October 6, 2009, Case No. 4A\_596/2008).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> G. von Segesser, “Federal Tribunal Revises Award Influenced by Fraud,” *Kluwer Arb. Blog* (Oct. 23, 2009), <http://kluwerarbitrationblog.com/blog/2009/10/23/piercing-the-corporate-veil-effect-on-the-arbitration-clause-and-jurisdiction> (discussing the Decision of the Swiss Federal Tribunal of October 6, 2009, Case No. 4A\_596/2008).

<sup>65</sup> See, e.g., ICC Case No. 8133 (1996) and ICC Case No. 9333 (1998).

but must be supported by clear and convincing proof ....<sup>66</sup> The Tribunal held that the Respondent failed to meet that burden.<sup>67</sup> In addition, the Tribunal declared that the arbitrators “would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption ... [b]ut such grave accusations must be proven.”<sup>68</sup>

Once the allegations of corruption are established by clear and convincing evidence, the contracts involving bribery are declared null and void, or at least unenforceable. Indeed, in international commercial arbitrations, the substantive rights of the claimant derive from the contract, and the usual effect of corruption in the execution or performance of the contract is to render it invalid or null and void.

This was the case in the recent arbitration between Alfa Group Consortium and IPOC International Growth Fund Limited over a dispute concerning a large stake in the Russian telecom company, MegaFon. In this case, a Zurich-based Arbitral Tribunal went a step further when it ruled that IPOC could not benefit from the disputed agreement “because it is a criminal organization and its money was tainted.”<sup>69</sup> This is probably the first arbitral award to uphold a defense based on an allegation of money laundering.<sup>70</sup> According to commentators, however, it will be more broadly remembered as “the first case where arbitrators broadly evaluated a party’s criminality.”<sup>71</sup> Essentially, the Zurich Panel “conducted a private judicial investigation into the crime of money laundering,” which to some lawyers is “admirable,” and to others it is “outrageous.”<sup>72</sup> It should be noted that the Swiss national courts affirmed the Zurich Award in August 2006.

In the light of the above case law, Antonio Crivellaro noted that commercial arbitrators tend to accept their jurisdiction while considering that their primary duty is owed to the parties to settle their dispute in accordance with the parties’ agreement, and is not a duty to be an “organ” of the international community entrusted with enforcing morality in trade operations.<sup>73</sup> They also require clear

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<sup>66</sup> *Himpurna California Energy Ltd. v. Patuha Power Ltd.* (UNCITRAL), Award (May 4, 1999), para. 116, 14 Mealey’s Int’l Arb. Rep., A-1 (Dec. 1999), reprinted in XXV Y.B. Comm. Arb. 13, 43 (2000).

<sup>67</sup> *Id.* para. 117–118.

<sup>68</sup> *Id.* para. 118.

<sup>69</sup> The Award in this case is unpublished. For a report on the case originally posted on Law.com, see M. Goldhaber, “Arbitrators Tackle Russian Corruption in Fight Over Cell Phone Operator,” *The American Lawyer* (June 20, 2007), available at <http://ruminationsonrussia.wordpress.com/2007/06/25/alfa-vs-reiman-an-overview>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> A. Crivellaro, “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence,” in *Dossier of the ICC Institute of World Business Law: Arbitration – Money Laundering, Corruption and Fraud 118* (ICC Publishing 2003).

proof of bribery before invalidating an agency agreement, notwithstanding any suspicions they may have.<sup>74</sup> Only in very rare cases is search for indicia of bribery made on commercial arbitrators' own initiative—the MegaFon case is the exception that proves this rule.

### III. INVESTMENT ARBITRATION

In investment arbitration, where States hosting the foreign investment are inexorably the respondents, allegations of corruption are likely to be made by the States against the foreign investors involved in the establishment or development of the investment. Such allegations include bribery of a senior member of government,<sup>75</sup> the concealed participation of officials or their families in the investment either through a commission or agency agreement<sup>76</sup> or through shares in or other benefits from an entity involved in the investment,<sup>77</sup> and corruption of the judiciary to overcome regulatory obstacles.<sup>78</sup>

In extremely rare cases, allegations of corruption are made by the foreign investor, in which case the investor argues that the unlawful expropriation or unfair treatment of its investment is caused by its refusal to comply with demands for bribes from the government officials of the host state.<sup>79</sup>

As rightly noted by Bernardo Cremades, the unique features of investment arbitration are of particular relevance when it comes to the treatment and consequences of corruption.<sup>80</sup> Indeed, unlike commercial arbitration, in investment arbitration the substantive rights of the investor mainly arise out of a BIT rather than a contract. In addition, the arbitration agreement takes a unique form in investment arbitrations, especially those conducted under the auspices of ICSID, which are subject to no review by the courts of the place

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7 (hereinafter *World Duty Free v. Kenya*); *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, para. 78 (Aug. 6, 2003), 18 ICSID Rev.—FILJ 301 (2003), 42 I.L.M. 1290 (2003).

<sup>76</sup> See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), 41 I.L.M. 896 (2002), 6 ICSID Rep. 89 (2004).

<sup>77</sup> See *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000), 16 ICSID Rev.—FILJ 168 (2001), 40 I.L.M. 36 (2001).

<sup>78</sup> See *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Perú*, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005), paras. 37, 43, 51 and 57.

<sup>79</sup> See *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009) (hereinafter *EDF Award*).

<sup>80</sup> B. Cremades, "Corruption and Investment Arbitration," in *Global Reflections on International Law, Commerce and Dispute Resolution—Liber Amicorum in Honour of Robert Briner* 203, 210 (ICC Publishing 2005).

of arbitration. Such an agreement usually results from the investor submitting in the request for arbitration a written acceptance of a permanent offer made by the State in the relevant BIT. Furthermore, public international law plays a very important role in investment arbitrations, especially with respect to the interpretation of the relevant provisions of the BIT and the determination of State responsibility. Moreover, the lack of provisions pertaining to bribery or corruption—and more generally relating to investor responsibility—in the more than 2,600 existing BITs, in addition to the absence of any means of reviewing arbitral awards on grounds of public policy (as opposed to international commercial arbitration), makes the investigation of corruption accusations an intricate task for any arbitral tribunal.

To address such accusations, investment arbitrators are left to their own discretion, which does not necessarily lead to straightforward approaches to the treatment of corruption allegations. So far, investment arbitrators have provided inconsistent responses to cases in which corruption has been suspected or expressly assumed. In a number of these cases they have avoided facing the corruption issue, while in some other cases, they have properly tackled it.

#### *A. The “Eyes Shut” Approach*

In one group of cases, investment arbitrators appeared to be passive or reticent to address allegations of corruption. In these cases, it is sometimes astonishing to observe how arbitrators have relied on weak procedural grounds when rationalizing their decisions to avoid inquiry into matters that indicate a strong indicia of corruption.

In the famous “*Plateau des Pyramides*” case, the Egyptian Government (Respondent) requested the Tribunal to declare that the Claimants’ claims were unfounded by reason of corruption. The Tribunal found that allusions not supported by evidence and based on suppositions are not sufficient to prove corruption.<sup>81</sup> It should be noted that the Respondent effectively admitted to the lack of concrete evidence in this respect when it stated in its Counter-Reply that “nothing we have said in our [memorials] should be construed as an accusation, or allegation of misconduct regarding any particular Egyptian Official referred [to] ....”<sup>82</sup>

In *Azurix v. Argentina*, Argentina alleged that, while it was preparing its rejoinder on jurisdiction, it realized that a section of the concession agreement

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<sup>81</sup> *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992), paras. 127, 132, 8 ICSID Rev.—FILJ 328 (1993), reprinted in XIX Y.B. Comm. Arb. 51 (1994) (excerpts), available at <http://www.worldbank.org/icsid>.

<sup>82</sup> *Id.* para. 128 (citation omitted).



under consideration and a provision comprising an exemption of fines were added after the award of the concession. The Tribunal was informed by Argentina that an investigation of this matter had been initiated by the office of the *Procurador del Tesoro*.

During the hearing on the merits, and as a reaction to insinuations of corruption during the examination by Argentina of one of its witnesses, counsel for Azurix asked the witness whether, to his knowledge, there had been any corruption in connection with the award of the concession. The witness replied that he was not aware of any improper conduct, and the *Procurador General*, present at the hearing, confirmed that the investigation was continuing but that no evidence of improper conduct had surfaced. The Tribunal decided not to dig further, and concluded that since no further information had been transmitted to it, it was not satisfied that the concession agreement had been obtained by corruption.<sup>83</sup>

The *Siemens v. Argentina* case concerned a claim that was filed in 2002 by the German company Siemens after the termination of its US\$2 billion contract to develop national identity cards in Argentina. In 2007, the Tribunal ruled against Argentina and ordered it to pay US\$218 million in damages to return a US\$20 million bond.<sup>84</sup> Six years later, in 2008, in the midst of the accusations of corruption that surrounded the procurement of the contract by Siemens, a former Siemens employee admitted paying bribes to secure the Argentine contract. Siemens was thus forced to waive its US\$218 million ICSID award against Argentina.<sup>85</sup>

In *African Holdings v. Congo*, the host State alleged that the contracts were not valid, arguing that they had been obtained through the corrupt former Mobutu regime, with whom the foreign investor was heavily associated. The investor denied the allegation, relying on the testimony of a witness who claimed that the contracts were awarded directly to it as a result of its unique position as the only company capable of executing the required work. The Arbitral Tribunal recognized that the allegation of corruption was “very grave,” necessitating “irrefutable evidence” and a “particularly high standard of proof,” such as the evidence required for the investigation or criminal prosecution of corruption in countries where it is considered a criminal offense.<sup>86</sup> In the absence

<sup>83</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), para. 56, available at <http://www.worldbank.org/icsid>.

<sup>84</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007).

<sup>85</sup> It should be noted that similar allegations were made regarding Siemens' operations in other countries. In December 2008, Siemens paid US\$800 million as a settlement with the U.S. Department of Justice and U.S. Securities and Exchange Commission in relation to similar payouts to authorities in Munich.

<sup>86</sup> *African Holding Co. of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. The Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award (July 29, 2008), para. 52 (unofficial translation). The original French text reads: “Le Tribunal est disposé à considérer toute pratique

of such evidence, the Tribunal dismissed the allegations of corruption made by the Congo, ruling that they were merely based on general considerations concerning the Mobutu period and the related political events.<sup>87</sup>

In the *EDF v. Romania* case, the dispute revolved around allegations of corruption made by the foreign investor. EDF asserted that, in 2001, when it refused to comply with demands for bribes from senior Romanian government officials, Romania started to unlawfully expropriate EDF's investment and subject it to unfair and unreasonable treatment. The Tribunal first noted that the burden of proof lay with the Claimant as the party alleging solicitation of a bribe. The Tribunal then stipulated that clear and convincing evidence was required showing not only that a bribe had been requested from a government official, but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf of the Government authorities in Romania, so as to make the State liable in that respect.

In the absence of such evidence, the tribunal was compelled to draw the conclusion that the investor did not sustain its burden of proof.<sup>88</sup> The Tribunal actually rejected EDF's allegations of corruption after finding that EDF had failed to produce "clear and convincing evidence" that a bribe had been requested on behalf of the Romanian government.<sup>89</sup> The Tribunal noted that there was no evidence to EDF's claim that a kind of "concerted attack" was organized and designed to bring about the taking and destruction of its investment in Romania.<sup>90</sup> According to the Tribunal, "the produced evidence reveal[ed] weaknesses as to the bribery allegation and inconsistencies among the various witnesses."<sup>91</sup> Based on the above considerations, the majority of the Tribunal dismissed the investor's claims and awarded Romania US\$6 million in costs.<sup>92</sup>

### B. The "Zero Tolerance" Approach

A second group of cases illustrates a more proactive role played by investment arbitrators with respect to corruption issues. In these cases arbitral tribunals firmly deny foreign investors' claims on jurisdictional or substantive grounds

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de corruption comme une affaire très grave, mais exigerait une preuve irréfutable de cette pratique, telle que celles qui résulteraient de poursuites criminelles dans les pays où la corruption constitue une infraction pénale".

<sup>87</sup> *Id.* para. 53.

<sup>88</sup> *EDF Award, supra* note 79, paras. 221–237.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* para. 285.

<sup>91</sup> *Id.* para. 231.

<sup>92</sup> *Id.* para. 330.

based on the host States' defense of bribery or fraud in the inducement of the investment opportunity. The dynamics and reasoning behind each of these cases are worth studying as they raise the important question of whether "clean hands" should be a factor in investment arbitration.

In *World Duty Free v. Kenya*, Kenya alleged that the investor had obtained the contract by paying a bribe of US\$2 Million to the former Kenyan President. In this respect, the Tribunal first noted that "bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries."<sup>93</sup> Referring to the several multilateral conventions covering corruption, the Tribunal then declared that the "States have shown their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation ... [i]n doing so, States not only reached a new stage in the fight against corruption, but also solidly confirmed their prior condemnation of it."<sup>94</sup>

Regarding the role of international arbitrators, the Tribunal noted the following:

Arbitral tribunals have more often based their decisions on universal values in using various formulations such as "good morals", "bonas mores", "ethics of international trade" or "transnational public policy" ... But it has been rightly stressed that [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.<sup>95</sup>

According to the Tribunal, the term "international public policy" is sometimes interpreted as signifying "an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora."<sup>96</sup> The Tribunal found that "claims based on contracts of corruption or contracts obtained by corruption cannot be upheld."<sup>97</sup> It further concluded that "as regards public policy both under English and Kenyan law ..., the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio*."<sup>98</sup> As explained in the award, *ex turpi causa* defence "rests on a principle of public policy that the courts will

<sup>93</sup> *World Duty Free v. Kenya*, *supra* note 75, Award (Oct. 4, 2006), para. 142.

<sup>94</sup> *Id.* para. 146.

<sup>95</sup> *Id.* para. 141 (citations omitted).

<sup>96</sup> *Id.* para. 139.

<sup>97</sup> *Id.* para. 157.

<sup>98</sup> *Id.* para. 179.

not assist a plaintiff who has been guilty of illegal (or immoral) conduct ....<sup>99</sup>

In view of domestic laws and international conventions relating to corruption, along with the decisions concerning corruption rendered by courts and arbitral tribunals, the Tribunal was convinced that “bribery is contrary to the international public policy of most, if not all, States and to transnational public policy.”<sup>100</sup> Hence, the tribunal dismissed the claims advanced by the foreign investor.<sup>101</sup>

In the *Plama v. Bulgaria* case, the Tribunal had to determine whether the alleged misrepresentation did in fact occur as asserted by the Respondent host State, and if so, what were the consequences for the Claimant’s application for the protections provided under the Energy Charter Treaty (ECT). The Tribunal first noted that the alleged misrepresentation by the Claimant did not pertain to its jurisdiction, but rather concerned the question of whether the Claimant (the foreign investor) was entitled to the substantive protections offered by the ECT.<sup>102</sup>

The Tribunal ruled that the investment was the result of a “deliberate concealment amounting to fraud ....”<sup>103</sup> This behavior was, in the Tribunal’s view, contrary to the relevant provisions of the Bulgarian law and to international law and therefore precluded the Claimant from securing the protections of the ECT.<sup>104</sup> Granting the ECT’s protection to Claimant’s investment would also contravene the principle of *nemo auditur propriam turpitudinem allegans* (that no one should benefit from his own wrong).<sup>105</sup> It would 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.”<sup>106</sup> The Tribunal further held that “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 ... [t] his obligation is particularly important when the information is necessary for obtaining the State’s approval of the investment.”<sup>107</sup>

In the above case, the fraudulent misrepresentation, like the acts of corruption, deprived the foreign investor of the treaty protection. The Tribunal

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<sup>99</sup> *Id.* para. 161 (citations omitted).

<sup>100</sup> *Id.* para. 157.

<sup>101</sup> *Id.* paras. 157, 188 and 192.

<sup>102</sup> *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), paras. 126–130, available at <http://ita.law.uvic.ca>.

<sup>103</sup> *Id.* para. 135.

<sup>104</sup> *Id.* para. 135–144.

<sup>105</sup> *Id.* para. 141–143.

<sup>106</sup> *Id.* para. 143.

<sup>107</sup> *Id.* para. 144.

was very sensitive to the fact that the foreign investor's failure to reveal certain important information meant that the state was misled as to its assets and its financial and managerial capacity to run the investment.

The requirement of "clean hands" for treaty protection was also invoked in the *Azpetrol v. Azerbaijan* case,<sup>108</sup> where a witness for Azpetrol admitted paying bribes to the government under cross-examination in an attempt to defend an assertion in his witness statement that Azerbaijan is corrupt.<sup>109</sup> The case ended by agreement of the parties, but not before Azerbaijan filed an objection stating that the case could not proceed because of the evidence of bribery, which meant that the Claimant had "unclean hands."

It is interesting to note that, unlike in the *World Duty Free v. Kenya* case, where the investor paid a bribe in advance to secure the investment, in the *Azpetrol v. Azerbaijan* case the bribes were paid to prevent government investigation of the investor's operations.

#### IV. CONCLUSION

Allegations of corruption raise serious and complex problems for international arbitrators, whose role in rendering justice is becoming increasingly challenging. These problems are at the origin of the inconsistent approaches and conclusions adopted and reached in the cases reviewed in this paper.

Within the context of the current multilateral legal framework of instruments, that establishes an international rule of law regime on corruption, international arbitrators have an undeniable responsibility to ensure that such instruments are applied properly. As demonstrated in the reviewed arbitral decisions, some international arbitrators, cognizant of their role in fighting corruption, adopt a positive position, by redressing corrupt practices, while others seem to be indifferent, by refusing to tackle corruption for reasons pertaining to their limited powers.

As rightly noted by one commentator,<sup>110</sup> the limited means at the disposal of international arbitrators, especially with respect to the gathering of evidence, is the most difficult and challenging area for tribunals to address. Indeed, while clear evidentiary rules need to be established and applied to ensure that the facts are properly determined, the systematic requirement of high standard of proof to establish corruption, makes it extremely difficult for international arbitrators to fight corruption without exceeding the limits of their jurisdiction.

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<sup>108</sup> *Azpetrol Int'l Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award (Sept. 8, 2009), para. 7.

<sup>109</sup> *Id.* para. 6.

<sup>110</sup> See Martin, *supra* note 28.

One solution would be to provide for a certain flexibility in terms of the burden of proof, like the one suggested in 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.”<sup>111</sup>

Even with limited means, international arbitrators can redress corruption. They are often more talented and better financed than prosecutors or the judges that, in many jurisdictions, investigate cases themselves. Most crucially, arbitrators are independent; in many nations, prosecutors and investigating judges are not.

Surely arbitrators serve the public interest when they properly tackle corruption issues. However, some crucial questions need to be addressed in the future, namely who really deserves to be punished, the briber or the bribee? It can in fact be revolting to see that the same governments that may have condoned or directly participated in corruption seek to raise it as a defense in an investment treaty claim, as if they were the victims.

A state that has accepted and benefited from a bribe should be precluded from complaining. The requirement of “clean hands” should be mandated from both parties in order to be a sustainable principle. If a host State takes no action to investigate or prosecute the corrupt acts of its own officials, it should forfeit its right to rely on corruption as a defense. In cases where the allegations of corruption are invoked by the host State denouncing the acts of its former officials, the question arises whether there should be preconditions for declaring the contract null and void, e.g., that the procedure required to report the corrupt practice has been followed, or if the government is the claimant, that the bribed governmental official has been pursued.

In addition, should the investor be deprived of the treaty protection even when the payment of bribes is the normal means of entering the market of the host State? Indeed, one cannot deny that in some countries it is common practice for foreign investors to pay money to local governments or authorities to maintain their business operations. The liberty to bribe abroad with impunity is tolerated in these countries with the acceptance, in some business circles, that corruption is part of doing business. In some jurisdictions, foreign bribes are even tax deductible. In these countries, if arbitral tribunals punish those investors by removing their treaty protections, the result may conflict with the original aim of the treaty, which is generally to attract investments.

Another delicate question is to know whether the international arbitrator is under any obligation to denounce corruption and to report the corrupt practices

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<sup>111</sup> *Id.*

to the competent authorities, and if so, whether this could be deemed a violation of the obligation to maintain the confidentiality of the arbitral proceedings. Furthermore, taking into account the current legislative trend to broadly define bribery to cover not just monetary transactions but also the conferral of business advantages, would “stooge” arbitrators who give a favorable award to a party in return for further appointments by that party be implicated? These questions are also valid for lawyers, especially those representing the briber. In this regard, are there any limits under the applicable ethical codes?<sup>112</sup>

Finally, one cannot imagine international arbitrators efficiently fighting corruption without the support of national courts, which are called upon either to set aside arbitral awards tackling corruption issues, or to review those that have failed to redress corrupt practices. A quick review of recent court decisions demonstrates that the national court judge still serves as the core safety net.

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<sup>112</sup> It should be noted that in a recent ICC event on “Arbitration and Public Policy” held on April 24, 2010, it was suggested that an international professional association, like the International Bar Association, adopt a code of conduct for lawyers representing parties in international arbitration in order, *inter alia*, to avoid corruption. For a report on this conference, see K. Karadelis, “How Should We Deal with Dishonest Behaviour in Arbitration?”, *Global Arb. Rev.* (May 7, 2010), <http://www.globalarbitrationreview.com/news/article/28397/how-deal-dishonest-behaviour-arbitration>.