

International Arbitration in Latin America

Energy and Natural
Resources Disputes

EDITED BY
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With

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Para Sophie, Leonidas y Gaia Sofia

Editors

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José Ignacio García Cueto focuses his practice on commercial and investor-state international arbitration matters. He advises on international disputes in a wide range of matters. José Ignacio has experience in the construction, energy and infrastructure sectors, including disputes related to PC, RPC and EPC contracts, gas pipelines, power plants and concession contracts. He has experience advising on ICC commercial disputes, UNCITRAL, ICSID and ad hoc arbitrations.

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Foreword*

Energy consumption is essential in daily life and its role is vital for the growth of the global economy.

Latin America is home to the second largest reserve of oil after Middle East, with a high oil concentration in Venezuela, while most of its coal reserves are located in Colombia and Brazil. Further, large hydroelectric projects have a significant presence, particularly in Argentina, Brazil, Chile, Colombia, Ecuador and Peru. Moreover, gas production and reserves are also relevant in the region, with Venezuela ranking as the eighth largest natural gas reserve in the world. Latin America's economic development also owes its success to opening up to international markets which have in turn improved legislative reforms thus encouraging international trade and investments, even though Latin-American states differ in the degree to which private investors are involved in the hydrocarbon sector.

This book aptly elucidates and comments on the type of energy and natural resources projects key for the Latin-American economies. As these projects typically span over several decades, these are inherently extremely volatile involving complex and large transactions. Several players and back-to-back contracts are some of the issues encompassing immeasurable risks against uncertain political backgrounds. For these reasons, disputes are likely to arise during the lifetime of such projects.

In this context, the book offers a sector-specific, legal and practical analysis on international arbitration in Latin America. The book makes an eloquent and clear justification on and how dispute resolution has gained momentum, strength and consolidation in becoming the preferred mode for settling high stake and complex commercial disputes, involving domestic and international parties.

For example, the International Court of Arbitration ("Court") of the International Chamber of Commerce ("ICC") is the most preferred arbitral institution worldwide and its presence is also indisputably reflected in Latin America with one of its 11 case management teams located in São Paulo, Brazil, and a representation office located in

* The views expressed in this foreword are my personal views and not those of ICC International Court of Arbitration.

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Panama City, Panama. As a matter of fact, out of 176 Court members, 24 are members from the Latin-American region.¹ In 2019, (i) 15% of the parties involved in cases administered by ICC Court were from Latin America,² (ii) 172 arbitrators from Latin America were confirmed or appointed by the Court, comprising 12%³ and placing Latin America in the top six nationalities of appointed arbitrators, and (iii) Spanish accounted for the third most used language.⁴ Moreover, between 2015 and 2019, the Court registered 685 energy-related cases, approximately 150 of which involved Latin-American parties. In 2019 alone a total of 140 energy-related cases were generated. This is testament to the growing use of arbitration in the Latin-American region and its preference for choosing arbitration to resolve energy-related disputes.

This new book envisioned by Gloria M. Alvarez, Mélanie Riofrio Piché and Felipe V Sperandio offers a serious and well-crafted analysis of how energy-related projects and transactions give rise to highly complex arbitrations (i.e., multiple parties, multiple arbitration agreements, joinder of additional parties, issues pertaining to the existence, validity and scope of the arbitration agreement, admissibility issues in light of multitier dispute resolution, etc.). The book focuses on how sovereign states or state-owned entities act as coinvestors in projects of joint ventures or public-private partnerships with a private sector, or as one of the contracting parties, executing either concession or similar agreements or even as a customer and therefore often they are directly involved in the arbitration as parties. In this regard, in 2019, 20% of the cases registered by ICC Court (i.e., 170 cases) involved a state or a state-owned entity.⁵

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1. See the full list of Court members: <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/court-members/#1478195489936-1a1acd15-7f6d>.
 2. See 2019 ICC Dispute Resolution Statistics: <https://iccwbo.org/publication/icc-dispute-resolution-statistics/#:~:text=The%20ICC%20Court%20registered%20a,its%20almost%2010%20year%20history>. The Latin-American region saw a 14% increase in the number of parties which rose from 339 to 386, in 2019. Further 10%-20% of state and state entity parties originate from Latin America. Brazil is the most represented nationality among parties from Latin America at 35% and maintains the third place in worldwide ranking and sixth overall preferred seat. Since its establishment in October 2017, ICC case management team in Brazil has administered 103 cases.
 3. In 2010 the Latin-American appointments were 118; 2011: 106; 2012: 129; 2013: 135; 2014: 131; 2015: 185; 2016: 164; 2017:201; and 2018: 198.
 4. 79% of awards were drafted in English, 42 awards were in French and 32 in Spanish.
 5. It is also worth mentioning that 73 cases involved 386 states or state-owned entities from Latin America. ICC Court has administered some landmark energy-related cases involving Latin-American parties: *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata BV v. Petroleo S.A.*, ICC Case 20549/ASM/JPA; *Corporacion Mexicana de Mantenimiento Integral v. Pemex Exploracion y Produccion*, No. 13-4022 (2nd circuit, August 2, 2016); *YPF S.A. v. AES Uruguaina Empreendimentos S.A.*, *Companhia de Gas to Estado do Rio Grande do Sul*, and *Transportadora de Gas del Mercosur S.A.* (see the curious case of an arbitration with two annulment courts: comments on YPF Saga by Diego Fernandez Arroyo, *Arbitration International*, 2017, 33, 317-344); and *Agência Nacional de Petróleo Gás Natural e Biocombustíveis - ANP, Petróleo Brasileiro S.A. - Petrobras y Otros*, Federal Justice of Rio de Janeiro, May 8, 2014 case number 0005966-81.2014.4.02.5101; *Agência Nacional de Petróleo Gás Natural e Biocombustíveis - ANP, Petróleo Brasileiro S.A. - Petrobras y Otros*, Federal Justice of Rio de Janeiro, Oct. 31, 2014, case number 0160246-10.2014.4.02.5101; *Estado do Espírito Santo e Petróleo Brasileiro S.A. - Petrobras*. Federal Regional Court of the 2nd Region, Feb. 24, 2015, case number 0001194-18.2015.4.02.000 (2015.00.00.001194-6).

The book links the current state of the law with some of the most important priorities of the international arbitration community: tackling corruption and climate change. The book incorporates into the arbitration scene these two pervasive issues, which ICC recognizes as important and in need to be addressed. For example, ICC Commission on Arbitration and ADR has recently constituted a task force “Addressing Issues of Corruption in International Arbitration.” As to climate change, ICC released a Report that examines the role and benefits of arbitration to auspice existing and anticipated climate change disputes. Moreover, the Report highlights that disputes arising out of sectors expected to be impacted by climate change-driven transitions accounted for around 70% of all new ICC arbitration cases in 2018, with the construction, engineering and energy sectors alone accounting for over 40%.

What will the future hold for energy-related disputes?

At the date this foreword and the book was written, we have experienced COVID-19 pandemic; its uncertainties and challenges caused globally have had some devastating impact on the energy sector.⁶ ICC has experienced an increase in the number of cases, but the fact is that such an increase followed by an increase in the financial difficulties faced by the parties in complying with the payment obligations established by ICC Rules has also been felt. At this stage, it is sufficient to say that it may well be early to conclude or predict that the current flow of cases will be a continuous one.⁷

For all these reasons, I am pleased to introduce this book as one of the unique pieces of scholarship dealing with energy and natural resources disputes in Latin America. It offers a well-rounded overview from hydrocarbons, transmissions systems, renewable energy, all the way to the discussions regarding the importance of hydrogen in achieving the energy transition. The book displays a forward-looking approach and very mature conversations on damages, and policy issues around energy projects in the region. It also elaborates further on indigenous, environmental and human rights.

6. In the context of the “Covid-19 containment measures,” OPEC announced that demand for its crude oil next year will be lower than anticipated, putting greater pressure on producer countries to reconsider their plans to unload more barrels on the market from January. *See*: Anjali Raval, the Financial Times, Nov. 11, 2020, < <http://www.ft.com/content/ff79bf26-bc3f-4a83-be74-638b3123fc74> > accessed Nov. 16, 2020.

7. ICC had registered 790 cases (against the forecasted 750 cases) accompanied by an increase of Emergency Arbitrator Applications (26 Applications have been filed so far in 2020 against a total of 23 in 2019). Some of the new cases filed in 2020 are energy-related disputes and the parties have alleged force majeure circumstances to justify a breach of contract as a consequence of the measures taken by certain governments to contain the pandemic.

Foreword

Most importantly, this book celebrates the arbitration know-how in the region; all Latin-American countries are very well represented in terms of topics, content and diversity of authors, not only in terms of gender but also in terms of expertise and backgrounds.

Ana Serra e Moura
Deputy Secretary General of ICC International Court of Arbitration
Paris, December 2020

CHAPTER 8

Corruption in Energy and Natural Resources Investment Disputes in Latin America

*Mélanie Riofrio Piché & Patricia Saiz**

Corruption in international arbitration is a recurring theme in articles that analyse new cases as they come to light. Hence a general overview, compiling and analysing the most relevant cases so far, has become necessary. With a special focus on the energy and natural resources sector, a sector particularly prone to corruption, this chapter will examine the consequences of corruption in investment arbitration. It will first analyse the context in which corruption allegations are typically raised. It will then enter into detail about the legality requirement, express or implied, and how arbitral tribunals have established material and temporary limitations. After considering how parallel criminal proceedings and limited evidentiary-gathering powers affect tribunals, the chapter will go into the substance of how proof of corruption is assessed. Finally, in their conclusions, the authors will point out how arbitration can be a tool to address and combat corruption, calling out arbitral tribunals to develop an anti-corruption approach that guarantees that parties are treated with fairness.

‘Sunlight is the best disinfectant.’

Louis Brandeis, associate justice of the Supreme Court of the United States

[A] INTRODUCTION

Corruption is an insidious business practice, perceived by many as a *necessary evil* for the successful conduct of business. Indeed, hundreds of corporations, including

* The authors are grateful to Mohamed Bouzagou Ouali for his contribution to this chapter.

numerous Fortune 500 companies, have admitted to making dubious or illegal payments.¹

The last decade has seen a worldwide trend of increased transparency and good governance requirements to tackle corruption. Several international legal instruments have been issued in an effort to address it, including the United Nations Convention against Corruption² and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,³ as well as numerous regional conventions.⁴

And yet, corruption remains a serious public policy problem, particularly in Latin America, where the majority of countries rank above the global corruption average according to the *2019 Corruption Perceptions Index* from Transparency International.⁵

Because of how pervasive this practice is, and because organizations typically use the payment of bribes in order to obtain or retain business overseas, it is inevitable for corruption issues to arise in the context of arbitration proceedings. Corruption may arise in both investment arbitration and commercial arbitration.⁶ In investment arbitrations, disputes generally revolve around the availability and extent of the protections afforded by investment treaties to investments tainted by corruption. As for commercial arbitration, legal consequences may differ depending on whether the contract at stake itself provides for corruption (i.e., the contract is a mere simulation used to offer an aura of legality to corrupt payments), or is tainted by corruption (i.e., the contract formalizes a proper business transaction that was procured through corruption).⁷ Last but not least, corruption may also affect the arbitrators' conduct during the proceeding. In the Petrobras – Lava Jato government fraud scandal that hit several Latin American countries, the Brazilian infrastructure company Odebrecht was

1. Foreign Corrupt Practices Act, House Report No. 95-640.

2. See United Nations Convention against Corruption (2003).

3. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

4. See, e.g., the Inter-American Convention Against Corruption (1996); the African Union Convention on Preventing and Combating Corruption (2003); the European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (Council Act of 26 May 1997); Council of Europe Criminal Law Convention on Corruption (1999); Council of Europe Civil Law Convention on Corruption (1999); and European Union Council Framework Decision on Combating Corruption in the Private Sector (2003). Arbitral institutions are also making an effort to tackle corruption; for instance, the International Chamber of Commerce (ICC) Commission on Arbitration and ADR has created a task force on *Addressing Issues of Corruption in International Arbitration*.

5. Transparency International, *Corruption Perceptions Index*, <https://www.transparency.org/en/cpi/2019> (accessed 11 Nov. 2020).

6. The Operation Jet-Wash has touched numerous commercial arbitrations in the energy and infrastructure sectors, relating to Brazil and Latin America.

7. The consequences of corruption differ significantly between contractual arbitration where the tribunal's jurisdiction derives from the arbitration agreement and investment arbitration where jurisdiction arises from an international treaty. For a deeper analysis on this subject, cf. Juan Fernández-Arnesto, *The Effect of a Positive Finding of Corruption*, in Domitille Baizeau, Richard H. Kreindler (eds.), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, ICC Dossiers Institute of World Business Law, 167-175 (2015).

alleged to have bribed not only high-level government authorities in order to win tenders but also arbitrators in order to influence the results of arbitration proceedings.⁸

This chapter will focus on the consequences of corruption in investment arbitration. Numerous investment arbitration awards have dealt with allegations of corruption and the wide-ranging legal issues left in its wake: for example, may an investment procured through bribery retain the protections afforded by the applicable treaty? May a state benefit from the misconduct of its own public officials to circumvent its international obligations? How is the proof of corruption assessed in investment arbitration? Who has the burden of proof and how can it be met? What are the consequences of a finding of corruption? This chapter will provide an overview of how investment tribunals have dealt with these and other corruption-related issues, with a particular focus on cases arising in the energy and natural resources sector in Latin America, although reference to other geographic regions or industries may be made where relevant or useful.

The authors will first analyse the corruption allegations that typically arise in investment arbitration cases ([B]), the hurdles tribunals generally face with corruption allegations ([C]), and how proof of corruption is assessed ([D]). Finally, they will draw some conclusions ([E]).

[B] CORRUPTION ALLEGATIONS

Corruption allegations in investment arbitration cases typically arise in two different contexts: ([1]) in the parties' claims regarding the arbitral tribunal's jurisdiction to hear the case, and ([2]) in the parties' claims regarding the host state's liability under the applicable investment treaty and customary international law. Thus, this section will follow the same structure and will explore the legal consequences of corrupt practices as charted in numerous investment arbitration awards issued to date, first in the context of the analysis of jurisdiction, and second in the context of the analysis of the state's liability.

[1] Corruption Allegations and the Arbitral Tribunal's Jurisdiction

States will typically raise corruption allegations as an objection to the tribunal's jurisdiction. In this case, the state uses the corruption allegations as a *shield*: a jurisdictional defence by which the state asserts that the investor has committed acts of

8. One of the biggest corruption cases in Latin America was *Odebrecht*; the company was involved in bribery scandals to public servants as well as arbitrators. See Lessons from Peru's legacy in public procurement: a successful approach to follow and mistakes to avoid, <http://arbitrationblog.kluwerarbitration.com/2018/12/14/lessons-perus-legacy/> (accessed 1 Oct. 2020); Arbitrators jailed in Peru amid Odebrecht corruption scandal, <https://globalarbitrationreview.com/article/1210721/arbitrators-jailed-in-peru-amid-odebrecht-corruption-scandal> (accessed 1 Oct. 2020); Mixing righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators, <http://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and-sinners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/> (accessed 1 Oct. 2020).

corruption and that such illicit conduct deprives the investment of the protections of the treaty.

For example, in *Glencore* the state filed a jurisdictional objection on the basis that the claimants had corrupted a senior Colombian civil servant in order to obtain an amendment to a mining contract.⁹ While the tribunal found that Colombia had failed to prove the alleged corrupt practices and dismissed its objection,¹⁰ it also concluded that an investment obtained through corruption is not protected by the treaty:¹¹ ‘[u]nder Colombian law, an investor who corrupts civil servants of the host State to procure the investment commits a crime. Therefore, an investment made by corrupting the senior Colombian civil servant in charge of supervising the mining sector would not be protected by the Treaty’.

[i] The Legality Requirement: Express Versus Implied

In analysing corruption defences, tribunals have typically focused on the provisions of the particular investment treaty giving rise to the claim. In particular, tribunals have paid attention to the so-called *legality requirement*, according to which an investment must be made ‘in accordance with the laws and regulations of the host state’ for it to be protected under the treaty. Numerous bilateral investment treaties contain an express provision to that effect, which is usually included in the definition of *investment* under the treaty.¹² Importantly, the definition of investment (and thus, the legality requirement) is relevant to determining both the treaty’s scope of application and the scope of the state’s consent to arbitration.

Some have questioned whether or not such a *legality requirement* exists, particularly where the treaty does not expressly provide for it. In analysing this issue, a number of tribunals have found that the legality requirement is implicit in the concept of treaty-protected investment.¹³ Among the arguments put forth by tribunals in

9. *Glencore International A.G and C.I. Prodeco S.A v. Republic of Colombia* (*Glencore*), Case No. ARB/16/6, para. 564 (ICSID Award, 27 Aug. 2019).

10. *Glencore*, *supra* n. 9, para. 1680.

11. *Glencore*, *supra* n. 9, para. 665.

12. See, e.g., Art. I(2) of the Bolivia-Chile BIT: ‘made in accordance with the laws and regulations’ (free translation – original wording: ‘se haya efectuado de conformidad con las leyes y reglamentos’); Art. 1(1) of the Italy-Argentina BIT: ‘in accordance with the laws and regulations’ (free translation – original wording: ‘in conformità alle leggi e regolamenti’); Art. 1(1) of the China-Peru BIT (1994): ‘in accordance with the laws and regulations’. To illustrate recent treaty-making practice, the Morocco’s Model BIT (2019) expressly provides in Art. 19.4 that a host state can raise as a jurisdictional objection a breach of Arts 19.1 and 19.2 on the prohibition of corrupt practices.

13. *Álvarez y Marín v. República de Panamá* (*Álvarez y Marín*), Case No. ARB/15/14, paras 134-135 (ICSID Award, 12 Sep. 2018): ‘The Tribunal considered that the requirement of legality arises implicitly from the investment treaties and is based on a general principle of law that restricts international legal protection to investments made without violating the legality of the host State. The requirement of legality, although not expressed explicitly in the treaties, is an implicit part of the concept of protected investment.’ See also *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (*Flughafen*), Case No. ARB/10/19, para. 132 (ICSID Award, 18 Nov. 2014): ‘And even if this express reference did not exist in the BITs, the requirement of no serious breach of the host State’s legal system would be a tacit

support of this proposition is the notion that no state can be understood to offer the benefit of protection through investment arbitration to investors who have committed an illegal act;¹⁴ indeed, for some, the implicit legality requirement is a manifestation of the clean hands doctrine, according to which ‘he [or she] who comes into equity must come with clean hands’.¹⁵ Similarly, others have argued that if investment protections were granted to investments obtained in contravention of domestic or international law, it would be contrary to the principle *nemo auditur propriam turpitudinem allegans* and the basic notion of international public policy;¹⁶ to the principle of good faith, recognized in both public international law and all national legal systems;¹⁷ and to the principle that ‘every rule of law includes an implied clause that it should not be abused’.¹⁸

On the other end of the spectrum, other tribunals have rejected the notion that the concept of treaty-protected investment implicitly includes a legality requirement. For example, in *Bear Creek v. Peru* the tribunal found that there was no jurisdictional requirement that claimant’s investment had to be legally constituted under the laws of Peru, since nowhere in the Canada-Peru Free Trade Agreement or otherwise in the record was this requirement present. The tribunal specified that, because the legality requirement is a special formality that the state may adopt if it so desires, the tribunal

condition, insisted upon in every BIT, since a State cannot in any case be understood to be offering the benefit of protection through investment arbitration when the investor, in order to achieve that protection, has incurred in a grave illegal act’ (free translation); *Gustav FW Hamster GmbH & Co KG v. Republic of Ghana* (*‘Hamster’*), Case No. ARB/07/24, paras 123-125 (ICSID Award, 18 Jun. 2010): ‘An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g., by the tribunal in *Phoenix*). These are general principles that exist independently of specific language to this effect in the Treaty’; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (*‘Fraport’*), Case No. ARB/11/12, paras 343 and 402 (ICSID Award, 16 Aug. 2007).

14. *Saur International SA v. Republic of Argentina* (*‘Saur’*), Case No. ARB/04/4 (ICSID Award, 22 May 2014), para. 308.
15. In the context of the Unclean Hands Doctrine, see Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, in *Collected Courses of the Hague Academy of International Law*, 119 (Sijthoff, 1958) as cited in Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, in *Between East and West Essays in Honor of Ulf Franke*, 312 (Juris, March 2020).
16. *Álvarez y Marín*, *supra* n. 13, paras 135 and 136; *Plama Consortium Limited v. Republic of Bulgaria* (*‘Plama’*), Case No. ARB/03/24, paras 138 and 143 (ICSID Award, 27 Aug. 2008).
17. *Saur*, *supra* n. 14, para. 308 ‘[e]l Tribunal entiende que la finalidad del sistema de arbitraje de inversión radica en proteger únicamente inversiones legales y bona fide. El hecho de que el APRI entre Francia y la Argentina mencione o deje de mencionar la exigencia de que el inversor haya actuado en conformidad con la legislación interna, no constituye un factor relevante’; *Hamster*, paras 123-124: ‘[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’.
18. In the context of states not offering access to the ICSID dispute settlement mechanism to investments not made in good faith, see *Phoenix v. Czech Republic* (*‘Phoenix’*), Case No. ARB/06/5 para. 106 (ICSID Award, 15 Apr. 2009).

may not import a requirement that limits its jurisdiction when such a limit was not specified by the parties in the treaty.¹⁹ The *Stati v. Kazakhstan* award, even though it does not deal with a Latin American respondent state, is also illustrative of this point. In *Stati*, the tribunal found that because the Energy Charter Treaty ('ECT') did not contain a legality requirement, '[a]t least with regard to jurisdiction, the Tribunal [did] not see where such a requirement could come from'.²⁰ It further elaborated that if ECT Member States had intended for there to be such a requirement, they could have written it into the text of the treaty.

As explained above, although tribunals have gone both ways in analysing this issue, a majority has embraced the view that no state can be deemed to offer the privilege of legal protection to investments made in violation of its laws.²¹ Consequently, a majority of tribunals has concluded that even if the applicable treaty does not include such specific language, the requirement that the investor abstains from grave violations of the host states' legal order is a tacit condition for the availability of the protections afforded by the treaty.²²

[ii] The Legality Requirement: Scope of Application

Whether express or implied, the legality requirement is not without limitations in its application. The issue at stake here is whether any illegality, no matter its timing or how minor or insignificant, may result in the investment losing the protections afforded by the applicable investment treaty. States will typically claim that the legality requirement covers any breach of the entirety of its legal order, without regard to the significance of the rule breached or the seriousness of the breach, and regardless of when the breach was committed. Investors, on the other hand, will usually claim that the legality requirement is limited in scope to the host state's fundamental principles or the investment regime, and is only applicable at the time when the investment is established.

In this respect, tribunals have clarified that not all *illegalities* result in loss of treaty protection. As further explained below, treaty practice has indicated that the legality requirement has material and temporal limitations.

Material Limitations

The better view is that the illegality must be deemed *serious* for it to result in the denial of treaty protections. Several tribunals have emphasized this point:

19. *Bear Creek Mining Corporation v. Republic of Peru*, Case No. ARB/14/21, paras. 319-321 (ICSID Award, 30 Nov. 2017).

20. *Stati and others v. Kazakhstan* ('*Stati*'), Case No. 116/2010, para. 812 (SCC Award, 19 Dec. 2013).

21. *Phoenix*, *supra* n. 18, para. 101; *Plama*, *supra* n. 16, para. 138; *Saur*, *supra* n. 14, para. 308.

22. Juan Fernández-Armesto, *supra* n. 7, para. 172.

- (1) in *Quiborax*, the tribunal concluded that not every violation of the law would entail the loss of protection under the treaty, and that so-called *trivial* violations of the legal order would be irrelevant;²³
- (2) in *Tokios Tokelés*, the tribunal stated that the denial of jurisdiction on the basis of minor errors (such as defects in the investment documentation) would be contrary to the object and purpose of the treaty;²⁴ and
- (3) in *Saur*, the tribunal stressed that the violation of the legal system must be serious.²⁵

The question then arises as to how to determine whether or not the illegality committed by the investor qualifies as *serious*. Some tribunals have taken different criteria into consideration: the gravity of the law that has been infringed, the investor's intent, the investor's subsequent behaviour, and whether damage to third parties was caused, among others.

For example, in *Álvarez y Marín* the tribunal found that the severity of the penalty to be imposed (i.e., the loss of treaty protections) was to be assessed on the basis of two main factors: (1) on the one hand, the seriousness of the infringement and (2) on the other hand, the intent of the offender:

- (1) The tribunal found that the infringement would be *serious* if the rule infringed were *relevant* within the domestic legal system. The analysis proceeded to lay out the factors to establish said relevance, such as 'the nature of the protected interest, the damage caused to third parties, the effect on fundamental principles or the severity of the penalty imposed by domestic law for non-compliance'²⁶ [free translation].
- (2) As to the offender's intent, the tribunal emphasized the need to assess 'the fraudulent intent to violate the law; the deliberate or negligent ignorance of the applicable legal framework; the awareness or unawareness of acting unlawfully; [and] the appropriateness or inappropriateness of other excuses or mitigating factors'²⁷ [free translation].

In similar terms, the tribunal in *Vladislav Kim* established that:

the gravity of the law itself is a central part of the examination but not the sole focal point. It is not only the law, but the act of non-compliance (or in some wordings, the violation) that is key. The seriousness of the act is a combination of both the

23. *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* ('*Quiborax*'), Case No. ARB/06/2, paras 263 and 281 (ICSID Award, 16 Sep. 2015).

24. *Tokios Tokelés v. Ukraine* ('*Tokios Tokelés*'), Case No. ARB/02/18, para. 86 (ICSID Award, 26 Jul. 2007).

25. *Saur*, *supra* n. 14, para. 308.

26. *Álvarez y Marín*, *supra* n. 13, para. 154.

27. *Álvarez y Marín*, *supra* n. 13, para. 154.

importance of the requirements in the law and the flagrancy of the investor's non-compliance.²⁸

The tribunal in *Vladislav Kim* reasoned that the loss of protection under a treaty is a severe punishment, and therefore acceptable only if it is a proportionate response to a violation of a norm that preserves a significant interest of the host state.²⁹ The tribunal devised a proportionality test, consisting of three steps:

- (1) first, to determine the importance of the obligation breached, taking into account the sanction provided for by the law in the case of non-compliance and its remediable or irreparable nature, as well as the state's behaviour once the non-compliance has been detected;³⁰
- (2) second, to determine the seriousness of the non-compliant behaviour, taking into account the clarity of the rule, the intention of the investor, the performance of due diligence, and the investor's subsequent behaviour;³¹ and
- (3) third, to determine whether there has been a significant detriment to a *protected interest* of the state, such that it merits a punishment as severe as the loss of treaty protection.³²

Interestingly, the tribunal in *Quiborax* took a different route when grappling with the issue of which violations are covered by the legality requirement. In its *line-drawing exercise*, the tribunal considered the legality requirement to have *subject matter limitations* which it summarized as follows:³³

- (1) non-trivial violations of the host state's legal order (*Tokios Tokelés*,³⁴ *LESI*³⁵ and *Desert Line*³⁶);
- (2) violations of the host state's foreign investment regime (*Saba Fakes*³⁷); and

28. *Vladislav Kim v. Republic of Uzbekistan* ('*Vladislav Kim*'), Case No. ARB/13/6, para. 398 (ICSID Decision on Jurisdiction, 8 Mar. 2017).

29. *Vladislav Kim*, *supra* n. 28, para. 396.

30. *Vladislav Kim*, *supra* n. 28, para. 406.

31. *Vladislav Kim*, *supra* n. 28, para. 407.

32. *Vladislav Kim*, *supra* n. 28, para. 408.

33. *Quiborax*, *supra* n. 23, para. 266.

34. Denial of jurisdiction on the basis of minor errors (defects in the investment documentation) would be contrary to the object and purpose of the treaty. *Tokios Tokelés*, *supra* n. 24, para. 86.

35. *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* ('*LESI*'), Case No. ARB/05/3, para. 83(iii) (ICSID Decision on Jurisdiction, 12 Jul. 2006).

36. Investments that violate fundamental principles of the host state, such as through fraudulent misrepresentation or simulation of the true owner, must be excluded. *Desert Line Projects LLC v. The Republic of Yemen*, Case No. ARB/05/17, para. 104 (ICSID Award, 6 Feb. 2008).

37. Not every violation of the law leads to the illegality of the investment. The relevant laws are those related to the establishment of investments in the host state. If the investor violates any requirement of national law not related to the establishment of his or her investment, the state may sanction him or her as it sees fit, but he or she will not lose the protection of the treaty. *Saba Fakes v. Republic of Turkey* ('*Saba Fakes*'), Case No. ARB/07/20, para. 119 (ICSID Award, 14 Jul. 2010).

- (3) fraud – for instance, to secure the investment (*Inceysa*,³⁸ *Plama*,³⁹ *Hamester*⁴⁰) or profits (*Fraport*⁴¹).

Overall, tribunals have articulated different solutions, but they all come to the same conclusion: it would be inconsistent with the objective of the investment treaties, which is to protect foreign investment, if states were allowed to strip investors of treaty protection as punishment for committing any breach, however minor, of the host state's legal order.

In the case of corruption, however, because of how damaging it is to society and because it is generally considered to be a criminal activity, it is highly likely that a tribunal will consider it to be a *serious* breach of the host state's legal order. Thus, a finding of corruption when making the investment will most likely result in the loss of any protection afforded by the treaty.⁴²

Temporary Limitation

The second issue related to the scope of application of the legality requirement is whether it applies only at the time when the investment has been established, or throughout the life of the investment. In the case of acts of corruption, one could draw a distinction between those committed to obtain or procure the investment, which would most certainly fall squarely within the scope of the legality requirement, versus those committed throughout the life of the investment (i.e., to retain or preserve the investment or prevent interference).

In order to resolve this issue, arbitral tribunals typically look to the treaty language for guidance. In particular, a number of tribunals have distinguished between: (i) legality at the time of establishment of the investment and (ii) legality during the performance of the investment.⁴³ This distinction has been primarily focused on the

38. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Case No. ARB/03/26, paras 236-238 (ICSID Award, 2 Aug. 2006).

39. Misrepresentations made for the purpose of obtaining consent to a contract, from which the investment arises, are a defect in consent and render the contract invalid. The investor had an obligation to inform the state and get it out of its error. *Plama*, *supra* n. 16, paras 133-135.

40. *Hamester*, *supra* n. 13, paras 129 and 135.

41. The good faith of the investor is presumed. Errors of good faith are induced by a lack of clarity in national law or when illegality is not a central factor affecting investment performance. An investor cannot benefit from these presumptions of good faith when he or she was warned of the existence of illegality or when his or her project depended precisely on that illegal element. *Fraport*, *supra* n. 13, para. 396.

42. 'Claimants would not have standing, because an investor who has obtained the contract in which his or her investment is materialized, corrupting the highest political authority of the state, by having it arbitrarily assigned, has his or her hands tainted and has lost all rights to invoke international law in defence of his or her investment' (free translation – original wording: 'Las Demandantes no dispondrían de legitimación activa, porque un inversor que ha obtenido el contrato en el que se materializa su inversión, corrompiendo a la más alta autoridad política del Estado, logrando que se lo adjudique arbitrariamente, tiene las manos manchadas y ha perdido todo derecho a invocar el Derecho internacional en defensa de su inversión') *Flughafen*, *supra* n. 13, para. 130.

43. *Quiborax*, *supra* n. 23, para. 249.

verbal tense that is employed in the legality provision, which is usually formulated as follows: i.e., investments *made* in accordance with the laws and regulations of the host state. Pursuant to this distinction, when the past tense is used, the legality requirement is only applicable at the admission or establishment of the investment and does not extend to the subsequent performance of the investment.⁴⁴ The *Hamester* tribunal clarifies this notion:⁴⁵

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 investor's conduct during the life of the investment is a merits issue* (added emphasis).

The *Fraport* case was also very clear when making this distinction based on the drafting of the Bilateral Investment Treaty ('BIT'), which contends that 'the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment'.⁴⁶ The tribunal concluded that if, at the time of the initiation of the investment, there was compliance with the law of the host state, allegations by a state of violation of its law in the course of the investment might be submitted as a defence to the alleged substantive violations of the BIT, but could not deprive a tribunal of its jurisdiction.⁴⁷

Some tribunals have concluded that the legality requirement is limited to the establishment of the investment without this conclusion being based on the language of the treaty (and more specifically on the word *made*). For example, the *Álvarez y Marín* tribunal stated:⁴⁸

The Tribunal considers that the illegality must have occurred precisely for the purpose of making the investment: there must be a close relationship between the investment process itself and the legal provision that was violated by the investor. Only in this case is would be justified for the sanction to be the loss of the privileged legal regime for the protection of foreign investments.

Once the investment has been made, any subsequent breach of national law by the investor must be sanctioned at a national level, by applying the internal legal order; an additional ius-international punishment would not be justified in this case (free translation).

44. *Quiborax*, supra n. 23, paras 249, 266; *Fraport*, supra n. 13, para. 345; *Hamester*, supra n. 13, para. 127; *Vladislav Kim*, supra n. 28, para. 374.

45. *Hamester*, supra n. 13, para. 127.

46. *Fraport*, supra n. 13, para. 345. This distinction was also endorsed by Mr Bernardo Cremades in his dissenting opinion in *Fraport*, where he stated: 'As a matter of principle, therefore, the legality of the investor's conduct is a merits issue. The inquiry at the jurisdictional phase required by the phrase "in accordance with the laws and regulations of the Host State" is limited to determining whether the type of asset is legal in domestic law', para. 38.

47. *Fraport*, supra n. 13, para. 345.

48. *Álvarez y Marín*, supra n. 13, paras 149-150.

A similar conclusion was reached by the *Saba Fakes* tribunal, which stated that in the event an investor breaches a requirement of domestic law, a host state can take appropriate action against such investor within the framework of its domestic legislation.⁴⁹

Summing up, the majority view with respect to this issue is that the temporal scope of the legality requirement is limited to the establishment of the investment and does not extend to the subsequent performance. A question arises however as to what the findings of the tribunal would be if faced with different language in the treaty. For example, Article 1(2) of the Islamic Republic of Iran and the Slovak Republic BIT (2016) requires that: 'the investment is made *and maintained* in accordance with the laws of the Host State and in good faith' (added emphasis), in which case presumably the legality requirement would apply throughout the life of the investment.

In the specific case of acts of corruption that occurred during the performance of the investment and not during its establishment, and given the seriousness of the breach of the host state's legal order, a tribunal may take different routes. One option would be to deny the protections of the treaty outright; alternatively, it might take a more proportionate approach, such as denying the protections of the treaty only with respect to the portion of the investment that is tainted by corruption; last, it could opt for treating such corruption allegations as a matter of the merits of the dispute, as the tribunal did in *Vladislav Kim*.⁵⁰

[iii] *Estoppel*

A question arises as to whether a state may raise a jurisdictional defence on the basis of alleged acts of corruption by the investor where: (i) its own public officials were involved in the corruption scheme, (ii) the state was aware, and (iii) failed to prosecute. While some consider that a decision by the state not to prosecute should not equate with acquiescence in corruption, others opine that a state may only raise a corruption defence if it has first demonstrated that it undertook genuine efforts to prosecute and punish the culprits. For example, the *Wena* tribunal⁵¹ prevented the state from relying on the corruption defence on the basis that Egypt was aware of the alleged instance of corruption, but had failed to prosecute the state official allegedly on the receiving end.⁵²

The *Fraport* award also sheds light into how tribunals may deal with this issue. While the *Fraport* tribunal focused on a violation of national law different from

49. 'In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation.' *Saba Fakes*, *supra* n. 37, para. 119.

50. *Vladislav Kim*, *supra* n. 28, para. 553, 'As a final point, the Tribunal notes that its focus, at this stage of these proceedings, is on jurisdictional matters and therefore on bribery or corruption only that pertains to Claimants' initial investment. Any matters as regards bribery or corruption that arose later are more appropriately addressed at the merits stage.'

51. *Wena Hotels Ltd. v. Arab Republic of Egypt* ('*Wena*'), Case No. ARB/98/4, para. 132 (ICSID Award, 8 Dec. 2000).

52. *Wena*, *supra* n. 51, para. 116.

corruption, it instructively stated that a government should be held ‘estopped from raising violations of its own law as a jurisdictional defence when it knowingly overlooked them and endorsed an investment which was not in compliance with its law’.⁵³

However, tribunals have on occasion ruled differently. For example, in *World Duty Free*, the tribunal observed the failure of the state to prosecute the alleged culprit but reached a different conclusion. In this case, the claimant submitted that in order to reach an agreement for the construction, maintenance and operation of duty-free complexes located at Nairobi and Mombasa International Airports, it was required to make a USD 2 million donation to the president of Kenya. The tribunal highlighted that it was highly disturbing that the corrupt recipient of the claimant’s bribe was the former Kenyan president and that it was Kenya that was raising the illegalities committed by its own former president as a defence. It appeared that no attempts had been made by Kenya to prosecute the former president for corruption or to recover the bribe in civil proceedings.⁵⁴ Despite this, the tribunal eventually dismissed the claimant’s claim, holding that ‘the answer, as regards public policy, is that the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world’.⁵⁵

[2] Corruption Allegations and the Host State’s Liability

Allegations of corruption may also surface in the merits phase of the proceedings. While both parties may raise them, it is more frequent for investors to put them forward at this stage of the proceedings. In particular, investors will typically use corruption allegations as a *sword*, claiming that the host state has breached its obligations under the investment treaty and customary international law on the basis of the alleged acts of corruption.⁵⁶

For example, tribunals have been called to determine whether acts of extortion committed by a state agency followed by retaliation constitute a breach of the fair and equitable treatment (FET) standard. In *EDF*, the claimant alleged that prime minister of Romania had requested a USD 2.5 million-dollar bribe and that upon claimant’s refusal to pay, Romania took retaliatory action resulting in a total loss of EDF’s business.⁵⁷ Among other standards, EDF claimed this was a breach of the FET principle. The tribunal found that ‘a request for a bribe by a state agency is a violation of the fair and

53. *Fraport*, *supra* n. 13, para. 346.

54. *World Duty Free Company v. Republic of Kenya* (*World Duty Free*), Case No. ARB/00/7, para. 180 (ICSID Award, 4 Oct. 2006).

55. *World Duty Free Company*, *supra* n. 54, para. 181.

56. To date, there are five instances where claimants invoked corruption in their argumentation as to the liability of the host state: *Methanex v. United States*, *F-W Oil Interests v. Trinidad and Tobago*, *Rumeli v. Kazakhstan*, *EDF v. Romania* and *RSM v. Grenada*. See S. Alekhin & L. Shmatenko, *Corruption in Investment Arbitration – It Takes Two to Tango*, in A.V. Asoskov, I. Muranov, R.M. Khodykin (eds.), *New Horizons of International Arbitration*, Association of Private International and Comparative Law Studies, 167 (March 2018).

57. *EDF (Services) Limited v Romania* (*EDF*), Case No. ARB/05/13, para. 106 (ICSID Award, 8 Oct. 2009).

equitable treatment obligation owed to the Claimant pursuant to the BIT'.⁵⁸ However, the tribunal concluded that the claimant had not successfully met its burden of proof as it had failed to tender *clear and convincing* evidence of the bribe solicitation by the respondent⁵⁹ and ultimately ruled that 'no FET violation [could] be held by the Tribunal to be present as to this aspect of the case'.⁶⁰

Other fact patterns may involve illegal payments made by third parties to state officials to the detriment of the investor. For example, in *RSM*, the claimant brought proceedings under the FET, full protection and security and expropriation provisions (among others) of the investment treaty, on the basis that Grenada had received payments from Russian parties for it to cancel the claimant's exploration licence for offshore hydrocarbon reserves and to reissue the licence for the benefit of a Russian company.⁶¹ In this case, the tribunal found that Grenada had rightfully terminated the agreement and the exploration licence by relying on its contractual rights, in particular, because RSM had failed to file the application licence in a timely fashion.⁶² The tribunal explained that 'even if Grenada was motivated, by bribes, to offer its off-shore exploration rights to Global Petroleum, its reliance on its contractual rights to terminate the Agreement cannot be said to infringe the fair and equitable standard when Grenada had done nothing to induce RSM's failure to file its application within the time limits the parties had agreed'.⁶³ The tribunal concluded that the state had not acted improperly in connection with RSM's loss of its contractual rights, 'the alleged corruption notwithstanding',⁶⁴ and ruled in its favour.

In summary, whether as claims regarding the arbitral tribunal's jurisdiction to hear the case or as claims regarding the host state's liability under the applicable investment treaty and customary international law, it is gradually becoming a regular occurrence for arbitral tribunals to deal with allegations of corruption. And yet, the evolution of arbitral case law shows that a standard of procedure for addressing the issues is yet to be defined. We now turn to the practical application of the principles discussed in this section, specifically to the hurdles faced by tribunals when addressing corruption allegations.

[C] HURDLES WHEN THE TRIBUNAL IS FACED WITH CORRUPTION ALLEGATIONS

Arbitrators dealing with allegations of corruption are confronted with a difficult task, and one for which there is little to no guidance. This section will briefly address two of the main complications that arbitrators face when corruption is alleged: the tribunal's limited evidentiary-gathering powers ([1]) and parallel criminal proceedings ([2]).

58. *EDF*, *supra* n. 57, para. 221.

59. *EDF*, *supra* n. 57, paras 221, 224, 227.

60. *EDF*, *supra* n. 57, para. 237.

61. *RSM v. Grenada* ('*RSM*'), Case No. ARB/10/6 (ICSID Award, 14 Oct. 2010).

62. *RSM*, *supra* n. 61, paras 7.2.6-7.2.7.

63. *RSM*, *supra* n. 61, para. 7.2.25.

64. *RSM*, *supra* n. 61, para. 7.2.5.

[1] The Tribunal's Limited Evidentiary-Gathering Powers

An arbitrator dealing with an allegation of corruption is faced with a very serious criminal accusation that has severe legal consequences, and yet, unlike domestic courts, the arbitrator lacks the powers, investigative tools, and jurisdictional faculties to lead a full investigation of the alleged corruption acts.⁶⁵ For example, the arbitrator lacks coercive powers to order the disclosure of bank secrets or personal data protected by third parties, execute search warrants, or conduct surveillance, among others. As a result, arbitral tribunals are typically limited to evidentiary records provided by the parties.

Therefore, the response from investment tribunals following findings of corruption has taken a more flexible evidentiary approach because the tribunal's role is not to mete out for corruption. Instead, the outcome of an investment dispute where corruption allegations have been brought up will typically be to either grant or deny the protection afforded by investment protection treaties.

Although it is not in the scope of this chapter, a final question arises as to whether the tribunal has a duty to report suspicions, admissions or findings, and if so, to whom? Presumably, arbitrators could be required by national laws applicable to them to denounce certain acts, just like other citizens might be obligated to report criminal activity. In that case, a further question arises as to whether said duty could be overridden by the arbitrators' duty of confidentiality.

[2] Parallel Criminal Proceedings

Another difficulty arises when criminal, civil or administrative investigation processes related to acts of corruption run in parallel to the investment arbitration where those acts of corruption are being alleged. Such parallel criminal proceedings may be either ongoing or completed. The following section will address the effects that parallel criminal investigations or proceedings in a state court may have on the arbitral procedure.

[i] Ongoing Investigations

With respect to ongoing investigations, one of the issues that the tribunal must decide is whether or not to stay the arbitral proceedings. Case law and arbitral practice indicate that arbitrators have discretion to stay arbitral proceedings; the stay is neither mandatory nor automatic.⁶⁶ Despite such discretion, arbitrators are typically reluctant to stay arbitral proceedings until the completion of criminal investigations. This may be partly due to the fear of having arbitral proceedings endlessly paralysed because of

65. Alexandre de Fontmichel, *Procédure pénale et arbitrage commercial international; quelques points d'impact*, Les Cahiers de l'Arbitrage, 2012-2, 309-319 (2012).

66. Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, Arbitration International 2006, Vol. 22 Issue 1, 114.

dilatory criminal litigation brought in domestic courts, resulting in a denial of justice,⁶⁷ in line with the principle of efficiency that arbitral tribunals must abide by.⁶⁸

On the other hand, tribunals may also consider ordering a stay of the criminal proceedings, particularly if such an order is necessary to preserve the integrity of the arbitration. This may be appropriate where, for example, the criminal proceedings are meritless, they impair the investor's right to access evidence or the integrity of the evidence, or if they are part of the respondent's strategy to delay or altogether avoid the arbitration. For example, the tribunal in *Quiborax* issued provisional measures ordering a stay of criminal investigations initiated by Bolivia.⁶⁹ Even though the parallel criminal proceedings in that case were not related to corruption (they revolved around accusations of forgery), this decision could chart a path for arbitral tribunals faced with similar situations.

[ii] Completed Investigations

As for completed investigations, certain issues may arise depending on whether the investigations are completed before or after the award is rendered.

If the investigations are completed before the award is rendered, one of the key questions at stake is whether the parties are allowed to use the criminal file in the arbitration.⁷⁰ Restrictions to the access of information related to the criminal investigations may create imbalances among the parties. For example, a particular file may only be accessible to one of the parties in the arbitration but not the other. This was the case in *Glencore*, where the file at stake was obtained by Colombia's antitrust agency during an unrelated antitrust investigation. The tribunal decided to exclude the document introduced by respondent on the basis that 'the obligation to arbitrate fairly and in good faith and the principle of equality of arms precluded Respondent from coercing evidence from Claimants through its administrative powers, and to marshal it thereafter in an investment arbitration'.⁷¹

If, on the other hand, investigations are completed after the award is rendered, a problem may arise where the outcome of the criminal investigation is in conflict with the tribunal's findings on corruption which have impacted the outcome of the arbitration. This would be the case, for example, where the tribunal considered an allegation of corruption to be proven which was subsequently dismissed in criminal court, or, in reverse, where the tribunal reached the conclusion that corruption

67. *B. Fund Ltd v. A. Group Ltd*, Case No. 4P_168/2006, para. 6.1 (Swiss Federal Tribunal, 19 Feb. 2007).

68. Matti Kurkela, *Criminal laws in International Arbitration – the May, the Must, the Should and the Should Not*, ASA Bulletin, Vol. 26 Issue 2, 279 ff, 290 (2008).

69. *Quiborax*, *supra* n. 23, para. 148 (Decision on Provisional Measures, 26 Feb. 2010).

70. Access to the criminal file should be the case as a matter of principle, but some national laws impose some restrictions to the access of information of criminal investigations. See Sébastien Besson, *Chapter 6: Corruption and Arbitration*, in Domitille Baizeau and Richard Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law, Vol. 13, 108 (Kluwer Law International, International Chamber of Commerce (ICC), 2015).

71. *Glencore*, *supra* n. 9 (ICSID Procedural Order no. 2).

allegations were not established while the criminal investigations led to a verdict of corruption.⁷² In the case of a court decision finding evidence of corruption, a question then arises as to whether this may constitute a ground for setting aside the award or for refusing the recognition and enforcement of such award. A party could potentially argue that the arbitrators decided the dispute incorrectly and that the award is in breach of public policy for not penalizing an act of corruption.⁷³

[D] ASSESSMENT OF PROOF OF CORRUPTION

Allegations of corruption are quite difficult to prove since typically there is little or no physical evidence.⁷⁴ The case of *World Duty Free* is the one exception to the rule. In *World Duty Free*, the claimant's only witness, Mr Nassir Ibrahim Ali, freely and unequivocally admitted to paying USD 2 million as a *personal donation* to the Kenyan president in order to procure a concession contract:

Protocol in Kenya required that I should in addition make a 'personal donation' to President Moi. ... X advised me that the appropriate donation ... was US\$2 million. I was further advised by him that the donation should be in cash. ... I brought [part of the cash in Kenyan shillings] to my meeting with President Moi in a brown briefcase. When we entered the room where the President received us, [I] put the briefcase by the wall and left it there. After the meeting [I] collected the briefcase from where [I] had left it. On the departing journey I looked in the briefcase and saw that the money had been replaced by fresh corn.

In that case, the tribunal held that the claimant had procured the contract through a bribe to the former Kenyan president and that, consequently, the claimant had no right to pursue its claims.⁷⁵

Rarely will arbitrators be faced with such a straightforward task. The following section provides an overview of the different standards of proof of corruption ([1]), the burden of proof ([2]) and the time when corruption allegations should be made ([3]).

[1] Different Standards of Proof of Corruption

Another, more complicated question is how much evidence is needed to establish the standard of proof for allegations of corruption, as 'the degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition'.⁷⁶ In particular, different jurisdictions provide for different standards, and as

72. See Sébastien Besson, *supra* n. 70, p. 110.

73. See Sébastien Besson, *supra* n. 70, p. 110.

74. *EDF*, *supra* n. 57, p. 221.

75. *World Duty Free*, *supra* n. 54, para. 179.

76. N. Blackaby, et. al., *Redfern and Hunter on International Arbitration*, 388 (6th ed., Oxford: Oxford University Press, 2015).

a result, different tribunals may approach this issue differently, depending largely on whether the arbitrators have a common law or a civil law background.⁷⁷

In investment arbitration, when it comes to allegations of corruption, tribunals have rendered inconsistent decisions. For example, in *EDF* the tribunal rejected the claimant's allegation that it lost its investment because it refused to pay a bribe to state officials on the basis that the evidence was not 'clear and convincing'. To attempt to prove the acts of corruption, the claimant relied only on the testimony of its employees who had allegedly received bribe requests. The respondent's witness countered this allegation. The tribunal applied a high standard of proof to the allegation of corruption and found that:⁷⁸

[t]he seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.

This, nonetheless, is the minority view in investment arbitration.⁷⁹ Many hold the view that tribunals should apply the balance of probabilities standard instead.⁸⁰ In particular, commentators have opined that 'it should be recognized that the higher standard of proof, beyond-reasonable-doubt, which exists in criminal law, does not apply. In arbitration, the tribunal does not impose criminal sanctions, therefore it is unnecessary and undesirable for it to proceed with the same degree of caution as a criminal court would'.⁸¹ Furthermore, should the higher criminal standard of proof apply in arbitration, this might create a perverse incentive for states to benefit from their own omissions in allowing corruption.

In *Metal-Tech*, the tribunal applied the *reasonable certainty* standard of proof by referring to the difficulty of proving corruption and stating that it is 'generally admitted

77. In common law systems, the standard of proof is openly probabilistic based on different standards such as *probable cause*, *reasonable suspicion* or *reasonable doubt*, which requires the party who bears the burden of proof to establish by a preponderance of the evidence that the facts alleged are true. In contrast, the prevailing standard of proof in civil law systems is based on an inquisitorial model with rules of evidential weight, in which the judge must be firmly convinced that the facts alleged are true, based on his intimate conviction, experience and impartiality in the evidence analysis.

78. *EDF*, *supra* n. 57, para. 221.

79. See: A. Crivellaro, *Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence*, in K. Karsten & A. Berkeley (eds.), *Arbitration – Money Laundering, Corruption and Fraud, Dossiers of the ICC Institute of World Business Law Vol. 1*, ICC Publication No. 651, 114, 123 ff (2005).

80. Hwang S.C., Michael and Lim, Kevin, *Corruption in Arbitration Law and Reality*, *Asian International Arbitration Journal*, Vol. 8, 19 (2012).

81. H. Tezuka, *Chapter 3: Corruption Issues in the Jurisdictional Phase of Investment Arbitrations*, in D. Baizeau & R. Kreindler (eds.), *Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Vol. 13*, 60 (2015).

that it can be shown through circumstantial evidence'.⁸² This standard was also applied by the tribunals in *Oostergetel v. Slovak Republic*⁸³ and *Fraport*.⁸⁴

Finally, in *Glencore*, the tribunal applied the standard of *preponderance of the evidence*. The claimants acquired the Colombian company Prodeco, which held contractual rights for the exploration, construction and exploitation of a coal mine located in northern Colombia. The mining contract was concluded with Colombian state-owned mining agencies. In the arbitral proceedings, Colombia filed a jurisdictional objection alleging that the claimants had corrupted a Colombian state-owned mining agency director in order to obtain an amendment of the mining contract. The tribunal acknowledged that neither the applicable BIT nor the ICSID Convention imposed any standard of proof and decided to follow the traditional standard of *preponderance of the evidence*. The tribunal applied the red-flag methodology, previously used by the *Metal-Tech* and the *Spentex* tribunals. The methodology consists of assessing all individual indicia of corruption in detail (*red flags*⁸⁵) and *connecting the dots* to obtain a larger picture and to determine whether the most compelling explanation of the facts is that there was corruption.⁸⁶ The tribunal assessed the evidence presented to it; however, it did not find any *red flags* indicative of corrupt practices in the conclusion of the amendment to the contract.⁸⁷

Tribunals have rendered inconsistent decisions on the matter of standard of proof. As of today, there is no current body of precedents sufficient to provide a party or a tribunal with procedural predictability and certainty on the standard of proof with respect to corruption.

[2] The Burden of Proof

There is a difference between the burden of proof and the standard of proof. While the standard of proof is the degree to which a party must prove its case to prevail, the burden of proof determines which party has to prove it in order for its case to succeed.⁸⁸

82. *Metal-Tech Ltd. v. Republic of Uzbekistan* ('*Metal-Tech*'), Case No. ARB/10/3, para. 243 (ICSID Award, 4 Oct. 2013).

83. *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, para. 303 (UNCITRAL Award, 23 Apr. 2012).

84. *Fraport*, *supra* n. 13, para. 479.

85. *Red flags* in corruption analysis originated with U.S. Foreign Corrupt Practices Act as warning signs of possible illicit activity by an intermediary. See U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, 22-23 (2012).

86. *Glencore*, *supra* n. 9, para. 669.

87. Many signals may be considered *red flags*, e.g., unusual payment modalities (cash payment, bank transfers to third parties), corporate structures (use of intermediary companies and offshore companies), as well as disproportionate intermediary fees, or even the absence of due diligence in selecting subcontractors or agents, unusual speed of the bidding process, use of shell company with no previous activity and its suspicious cash flows, no tangible work product by the intermediary. Mark Pieth and Kathrin Betz, *Corruption and Money Laundering in International Arbitration, A Toolkit for Arbitrators*, 19 (AC Competence Centre Arbitration and Crime, Base Institute on Governance, 2019).

88. Hiroyuki Tezuka, *supra* n. 83, 58; *Rompetrol Group N.V. v. Romania*, Case No. ARB/06/3, para. 178 (ICSID Award, 6 May 2013).

With respect to the burden of proof, the general principle in international law is *actori incumbit probatio* (the party who alleges a fact has the burden to prove it).⁸⁹ This international standard has been applied by several investment arbitration tribunals such as *Flughafen*, *Metal-Tech*, *Glencore*, *Azurix*, *Agricultural Products*, *Tokios Tokelés*, *Wena*, *Jan Oostergetel*, and *ECE Projektmanagement*.⁹⁰ Therefore, the party pleading corruption is the one that has to prove it. Although the possibility of a shift in the burden of proof has been much debated by scholars, in practice there are no known instances of actual shifting of the burden of proof with respect to corruption allegations in investment arbitration.⁹¹

[3] Timing of the Corruption Allegations

Although there are no specific deadlines for when corruption issues should be submitted, when an allegation of corruption is raised, it may have significant consequences in the tribunal's assessment.

In *RSM*, the dispute involved the cancellation by Grenada of RSM's exploration licence for offshore hydrocarbon reserves. In the merits phase, the tribunal found that the cancellation had been made in accordance with the terms of the agreement and ruled in favour of the host state. RSM then brought new proceedings to reopen the prior tribunal's findings on the basis of new evidence indicating that Grenada had received corrupt payments from a third party in order to have it terminate the RSM licence and reissue the exploration licence to this third party. The successor tribunal declined to do so stating that the facts which gave rise to the alleged conduct had been available to RSM in the previous case but were not raised by the claimant then. The tribunal characterized this as follows:⁹²

no more than an attempt to re-litigate and overturn the findings of another ICSID Tribunal, based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revised application and over which the Prior Tribunal had jurisdiction.

In *Quiborax*, Bolivia alleged that the claimant had obtained the mining concessions through corruption. The tribunal found that the evidence marshalled by Bolivia

89. A. Redfern, *The Practical Distinction Between the Burden of Proof and the Taking of Evidence – An English Perspective*, in *The Standards and Burden of Proof in International Arbitration*, Arbitration International, Vol. 10, 317, 320 (1994).

90. *Flughafen*, *supra* n. 13, para. 136; *Metal-Tech*, *supra* n. 82, para. 237; *Glencore*, *supra* n. 9, para. 668; *Azurix Corp. v. The Argentine Republic*, Case No. ARB/01/12, para. 215 (ICSID Decision on the Application for Annulment of the Argentine Republic, 1 Sep. 2009); *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Case No. ARB/87/3, para. 56 (ICSID Award, 27 Jun. 1990); *Tokios Tokelés*, *supra* n. 25, para. 121; *Wena*, *supra* n. 51, para. 77. *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, *supra* n. 83, para. 148; 'The burden of proof is undoubtedly on the party alleging corruption', *ECE Projektmanagement v. The Czech Republic*, para. 4.873 (UNCITRAL Award, 19 Sep. 2013).

91. Lamm, Carolyn; Greenwald, Brody and Young, Kristen, *From World Duty Free to MetalTech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, ICSID Review, Vol. 29, 335 (2014).

92. *RSM*, *supra* n. 61, para. 7.3.6.

had been available to it at the earlier jurisdictional phase, and should have been submitted at that phase.⁹³ Albeit, rather than rejecting the objection, the tribunal agreed to examine this evidence in the final award given the gravity of the accusation. Eventually, the tribunal found respondent's allegation of corruption to be baseless and dismissed its allegations.⁹⁴

Summing up, although there are no strict procedural deadlines for when corruption allegations should be submitted, timing is a strategic consideration that the alleging party must take into account.

[E] CONCLUSION

From the initial securing of contracts, to obtaining licences and concessions, to the performance of contracts, the potential for corruption arises in several scenarios, and corruption allegations have become commonplace in investment arbitration.

While case law on corruption is still developing, as described in this chapter, recent decisions demonstrate that tribunals are increasingly willing to address this issue head-on. As a result, the applicable standards and criteria are in the process of being more precisely defined, which is a welcomed development. Tribunals faced with these allegations should continue to develop a coherent approach that balances the importance of fighting corruption with predictability and fairness to the parties.

93. *Quiborax*, *supra* n. 23, paras 130-132.

94. *Quiborax*, *supra* n. 23, para. 595.