

TRANSPARENCY IN INVESTOR-STATE DISPUTE SETTLEMENT

**LAW, PRACTICE,
AND EMERGING TOOLS AGAINST
INSTITUTIONAL CORRUPTION**



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Transparency in Investor-State Dispute Settlement:

Law, Practice, and Emerging
Tools Against Institutional
Corruption

By Nikolaos Theodorakis

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About the Author

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Nikolaos has worked for the U.S. Committee on Capital Markets Regulation, the Library of Congress, and the UK Sentencing Council, Ministry of Justice. Nikolaos has received fellowships and awards from, *inter alia*, the ESRC, the British Academy, the Greek Parliament, the Greek State Scholarships Foundation, the EU Bursaries, and the Corfield foundation.

His research agenda currently revolves around three pillars: different forms of Corruption and how they intertwine with International Development; effective regulatory regimes for banking institutions and corporations; and relevant compliance strategies pertaining to International Trade and Competition Law.

Foreword

More light!

Johann Wolfgang von Goethe's Last Words (1749-1832)

Start with what is right rather than what is acceptable

Franz Kafka (1883-1924)

Corruptissima re publica plurimae leges

In the most corrupt state are the most laws

Terence (c. 195/185 – c. 159 BC)

Chapter 1: Introduction to Institutional Corruption and Investor-State Dispute Settlement

1.1. The Nexus between Corruption and Investor-State Dispute Settlement

Corruption remains one of the largest challenges for the international community. The nature and scope of corruption varies, yet it harms the financial interests of states, institutions, and corporations universally. It stalls international development, hampers trade, jeopardizes human rights, and reduces public finances. In the EU alone, the estimated costs incurred by corruption amount to EUR 120 billion per year, or otherwise 1% of the EU GDP and only a little less than the annual budget of the EU.¹

Incidents of corruption are even more frequent in issues of foreign direct investment, particularly when the investment is directed from a developed to a developing country. In fact, it is not unlikely that a multinational corporation wanting to invest in a particular country resorts to bribery or other forms of facilitation payments to ensure preferential treatment in securing the tender contract. Incidents of corruption might complicate things even further in case a dispute arises between the parties. Depending on the dispute resolution clause, corporations or states might initiate arbitral proceedings asking for relief.

¹ Report From the Commission to the Council and the European Parliament, “EU Anti-Corruption Report” (Brussels 2014), http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

Issues of institutional corruption and investment arbitration are therefore of particular relevance to this book. Chapter 2 will explore the existing legal framework that regulates activities of investment arbitration, as well as international texts against corruption. Chapter 3 will follow, examining relevant case law. Chapter 4 will analyze the recently concluded UNCITRAL Rules on Transparency and the UN Convention on Transparency, and assess whether it could be a game changer in international dispute settlement trends.

The core thesis of this book is that transparency will enjoy a leading role in investor-state dispute settlement in the forthcoming years. In particular, it will act as the spearhead against institutional corruption since all the documents and discussions can be made available to the broader public. Scrutinizing every part of the arbitral process will render corporations and states more vigilant towards any illicit behavior. Granting open access, save for exceptions, to the documents relevant to the arbitral procedure increases transparency, and subsequently minimizes the danger of an incident of corruption arising.

The book will, therefore, discuss the nexus between transparency and institutional corruption through the lenses of investment arbitration. The new path that the UNCITRAL Transparency Rules pave is inviting a long debate as to whether this effort will yield the aspired fruits of increased accountability and openness. In doing so, we will discuss how these notions interconnect, how transparency can be key to effective arbitral proceedings in the future, and what is the way forward.

1.2. Introduction to the Problem of Corruption

The Greek philosopher Plato suggested that democracy is the fairest and the most inspiring of all forms of constitutional government; however in his work *The Republic* he suggested that ultimately a democracy would collapse due to incidents of jealousy

and improper decision-making that would lead to chaos. Despotism would then take the place of order and stability as the only resort of administration. Similarly, the Greek historian Polybius noted that the desire for luxury, bribery for the sake of political power, and the substitution of eagerness for wealth *in lieu* of wise governance, results in corruption. Both these scholars thus perceived corruption, both institutional and private, as a severe defect of democracy.

Many centuries have passed since, yet white-collar crime currently costs on average about 20 times as much as street crimes each year, notwithstanding the cost of preventing, regulating and prosecuting these crimes. Similarly, in 2003 the World Bank Director for Global Governance, Daniel Kaufmann, said that a rough but conservative estimate of the cost of corruption was 5% of the world economy or about USD 1.5 trillion per year.² Current estimates insist that the cost of corruption equals more than 5% of global GDP (USD 2.6 trillion), with over USD 1 trillion paid in bribes each year. Corruption further adds up to 10% of the total cost of doing business globally and it may add up to 25% of the cost of procurement contracts in developing countries.³

1.3. The Problem of Institutional Corruption

Lawrence Lessig of Harvard Law School has defined institutional corruption as “the consequence of an influence within an economy of influence that illegitimately weakens the effectiveness of an institution especially by weakening the public trust of the institution.”⁴ In a similar fashion, most of the legal instruments

² Joseph W. Koletar, *Fraud Exposed: What You Don 't Know Could Cost Your Company Millions*, (John Wiley and Sons, 2003).

³ OECD, CleanGovBiz Background Brief, “The Rationale for Fighting Corruption” (2014), <http://www.oecd.org/cleangovbiz/49693613.pdf>.

⁴ Lawrence Lessig, “Institutional Corruptions,” *Edmond J. Safra Working Papers*, No. 1 (2013).

define public corruption as the violation of a public official's duty of faith in his or her community. Its root lies in the Latin verb "*corrumpere*" which means to spoil. It usually occurs when an official is offered an item of value or a favorable transaction in exchange for a favorable decision that would not otherwise be taken in terms of form and speed.

Potential perpetrators include the federal state, the local elected officials, or overall anyone who can affect a ruling, through an appointed or elected post. Potentially a legislator's vote, a judge's ruling, or a contract for work can all be susceptible to incidents of institutional corruption. In order for an act to be considered as an event of institutional corruption, the illegality must be observed within the official duties of the person in question. Various forms of corruption exist depending on the state, the jurisdiction, and the governmental function, but the most well known include bribery, extortion, cronyism, nepotism, patronage, and embezzlement.

Further, individual actions may be legal in one country and illegal in another as the boundaries between legality and illegality can be fragile and open to interpretation; what may be considered as bribery in one state may be perceived as a legitimate gift exchange in another as Hofstede has pointed out in his cultural index.⁵ It is, therefore, important to note that apart from the strict governmental functions, variables of societal perception and cultural structure may mold actions potentially considered as corruption. It is remarkable that according to the estimates, bribery alone amounts to over 1 trillion U.S. dollars annually.⁶

Possible explanations for corruption include the government's size, the decentralization, the democratization and the lack of

⁵ See the Hofstede Center, "Cultural Insights," <http://geert-hofstede.com/>.

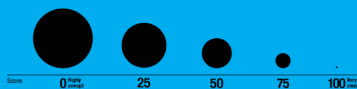
⁶ Transparency International UK, "Why Corruption Matters," <http://www.transparency.org.uk/corruption/why-it-matters>.

freedom of press and protection of civil rights. Even though every nation has criminal laws to regulate institutional corruption, it is still a widespread crime. In addition to penalties, many nations have adopted ethical guidelines for public administration to limit the opportunity to misuse, or improperly influence, the public authority.

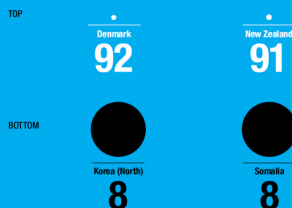
1.4. Significant Consequences of Corruption

All forms of corruption jeopardize healthy development, undermine democratic principles, the relationship between the state and citizens, and dilute the public will and the principle of socially beneficial actions. They further lead to inefficient public administration services and erode the overall interaction between the state and the society. Finally, they promote the lack of respect, trust and tolerance in the entire country. The effects of such offenses are multiple and revolve around the economy, society, culture and democratic values. If institutional corruption occurs systematically, it might threaten the overall well being and the stability of a nation.

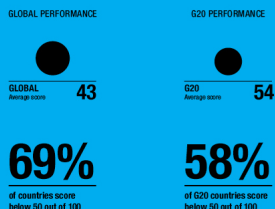
CORRUPTION PERCEPTIONS INDEX 2014



COUNTRY CONTRAST



CORRUPTION PROBLEM



RESULTS BY REGION

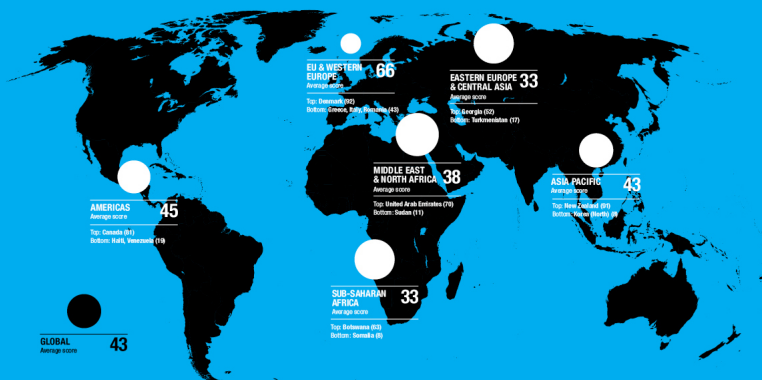


Figure 1: Corruption Perceptions Index Main Findings

In this regard, the Corruption Perceptions Index ("CPI") from Transparency International, published since 1995, measures each year how corrupt do public sectors perceive their countries to be. The data can be analyzed in several ways and reveal issues of, *inter alia*, openness, transparency and investment traits. Results from the latest CPI, published in 2014, are seen below.

Institutional corruption, in particular, causes economic distortion by diverting public investment destined for societal growth, to projects tainted by bribery. Corruption may also lead to environmental damages and construction-related violations. Solutions are often ineffective and harm the society both economically and in terms of development. Economists even claim that different levels of economic development in Africa and Asia may relate to corruption that has far-reaching consequences and is omnipresent in certain countries.

Public corruption practically endorses environmental destruction since the incidents of bribery overpower the environmental legislation in place. Several rights are unavoidably affected by this development ranging from social rights, pension schemes, and social rights. Public corruption does not discriminate in terms of poor and developing as it may occur at any given instance.⁷

1.5. Types of Institutional Corruption

The major examples of institutional corruption exist in the areas of legislation; judicial body; regulatory; contractual and law enforcement. Legislative corruption and judicial corruption both refer to specific incentives offered to judges and legislators in order to guarantee a favorable ruling. Regulatory corruption deals with

⁷ Nikolaos Theodorakis, "Public Corruption," in Lawrence Sallinger, ed., *Encyclopedia of White-Collar and Corporate Crime* (Sage Publications, 2013), 758-762.

governmental investigators, whereas contractual corruption embraces the illegal forms of persuasion connected to the distribution of government contracts. Finally, law enforcement corruption refers to an unlawful attempt to bribe police officers discouraging them from pursuing their duties in full. In the vast majority of public corruption events, the gratuities required are not of extraordinary value; indicatively they include tips, expensive watches, cash, meals and entertainment, jobs for family members, free home improvements and having bills paid directly.

For the sake of brevity, this section will focus on bribery, extortion, and patronage as the most popular manifestations of institutional corruption.

1.5.1. Bribery

Bribery is considered the most well known type of corruption. Bribe is a payment given personally to a governmental official in exchange for his influence exerted in relation to a case. Two actors interact during a bribe, these being the person who gives and the one who receives the bribe. For purposes of definition, it does not matter which part initiates this illegitimate exchange. It is sometimes the case that bribes are so widespread that a job cannot be executed efficiently without delays; the public service system functions so bureaucratically that it indirectly obliges the interested party to indulge in corruption. A bribe may be taken for numerous requests, mainly ignoring a legal requirement, facilitating a formal process or bypassing a regulation.

Bribery can be classified as active and passive. Furthermore, it is easier to prosecute and collect valid court evidence given how bribery is overall a difficult crime to prove, particularly if instead of an explicit deal there is a mutual understanding that both parties honor.

1.5.2. Extortion

Another form of corruption is extortion, whereby organized criminals exert their influence on governmental officials or businesses through threats and intimidation. Mafia groups often act in ways of extortion in order to procure tax benefits or have their opponents legally prosecuted. In these cases the more disorganized the country is, the more often these incidents occur. However, corruption is not always associated with money only; it can also take the form of favoritism and promote the interest of one person or persons over others having similar requests.

What is more, trading in influence is defined as a situation where a person is offering his influence as a tradable commodity to a third party to help him resolve a particular case in his favor. From a legal point of view, however, the role of a third party does not matter although the party can be an accessory in some instances. It is hard to draw the boundaries since they might be blurred in the case of lobbying.

1.5.3. Patronage

Patronage is another well-known case of public corruption as it refers to the cases of favoring supporters via means of employment, social benefits, pensions and similar material. It is legal up to a point as it is a *sine qua non* that a newly elected government will choose the administrative staff it wants to employ in the top posts. However, if the government selects incompetent staff without meritocratic criteria in exchange for a prior support, it is contended that it is illegitimate. In various cases, the public administration is staffed with standards of loyalty instead of ability or particular characteristics of desirability for the government in office. Closely related violations are favoring relatives (through nepotism) or personal friends (through cronyism) in various posts of public administration.

1.6. Ways of Controlling Institutional Corruption

Even though states have followed concrete steps towards greater transparency, there is still a long way to go to significantly reduce corruption. An international strategy to combat public corruption and fraud should take into account the differences as well as the similarities between countries. Overall, integrity and trust must be widely cultivated to prevent such incidents from occurring as often. There have been multifarious suggestions on how to fight corruption. The most common one suggests different combinations of the “carrot and stick” approach. Some advocate that the public servant wages should increase under the premise that well-paid staff would resist the temptation of bribes.

However, wages would have to increase significantly before they would have any substantial effect on institutional corruption. In other words, although a raise in civil servants’ salaries may potentially mitigate corruption, the costs might nonetheless outweigh the benefits. Increasing public sector wages places a heavy burden on budgets. Others suggest that those who uncover corrupt activities, as whistle-blowers, should receive financial compensation. Moreover, job rotation could also act preventively to incidents of corruption.

There are various agencies that actively combat corruption worldwide. International instruments are also in place to actively prevent incidents of corruption. A notable example was the initiative by the European Community, the Council of Europe and the OECD in 1996 to combat corruption through a Program of Action against Corruption and the issuance of various directives. The outcome led to the Criminal Law Convention on Corruption (ETS 173); the Civil Law Convention on Corruption (ETS 174); The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); the Twenty Guiding Principles for the Fight against Corruption (Resolution (97) 24); the Recommendation on Codes of Conduct for Public Officials (Recommendation No. R (2000) 10); and the

Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Rec(2003)4).

World Bank is another International Organization that analyzes a range of data on corruption, including a survey organized among over 100,000 firms worldwide and having a set of indicators of governance and institutional quality. Worldwide Governance Indicators include the control of corruption, defined as the extent to which power is used for private gain. Answers vary across countries whereas the global coverage of these datasets has led to their widespread adoption most notably by the Millennium Challenge Corporation.

Overall, institutional corruption is a unique and widespread form of misuse of public power; even though it is executed through the public sector, it is usually initiated by the private sector, the society itself.

1.7. Case Study on Combatting Corruption: European Union Countries

The most prominent European Union agency that combats fraud and corruption is the OLAF (Office Européen de Lutte Anti-Fraude) or “European Anti-Fraud Office.” According to OLAF's goals, it is destined to protect the interests of the European Union through fighting fraud, corruption, and any similar irregular activity. It conducts both internal and external investigations and reports to the European Parliament. It is also in close cooperation with the member states in order to develop crime prevention policies and widen its scope of action.

To this end, OLAF also helps the Commission to issue guidelines for national authorities and reference documents on fraud and other irregularities. It elaborates on the Annual Report of the Commission, as provided under Article 280 of the EC Treaty. OLAF can also conduct administrative investigations within the institutions

(EC Decisions 1999/394 and 1999/396), the bodies and organs of the Community. Overall, OLAF tries to safeguard the interests of the Union and insulate it from incidents of organized crime and related fraudulent activities.

In terms of domestic legislation, in 1998 the Council of Europe recommended to the member states that they consider amending their respective criminal codes in order to include corporate criminal liability. This suggestion included four pillars of action: (i) the perpetrator's act should relate to his or her employment, even if the offense is alien to the corporation's purposes; (ii) liability exists regardless of whether a natural perpetrator is identifiable; (iii) the enterprise can be exonerated if it followed all reasonable and required steps to inhibit the behavior; and (iv) corporate liability should be imposed in addition to individual responsibility.

The European Commission has implemented more Directives that combat forms of corporate crime including money laundering and corruption. The most representative Directives are 2006/70/EC “laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of ‘politically exposed person’ and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis” and Directive 2005/60/EC of the “European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and financing of terrorists.” In February 2013 the Commission further adopted two proposals to reinforce the existing rules on anti-money laundering and fund transfers.

Various countries enacted corporate and state liability statutes, including Austria, Hungary, Italy, Luxembourg, Poland and Switzerland. Some of these statutes carefully reflect the EU and COE rules, whereas others adopt holistic models of liability that vary

depending on the severity of the crime.⁸ For instance, the French criminal code excludes the state itself from the category of moral persons that can be held criminally liable and thus imposes special restrictions on proceedings against local authorities. However, prosecutions against non-profit organizations are permitted.

Nonetheless, most of the countries have an anti-corruption framework that they try to implement and do not follow the dogma of development at any cost. The issue of definition is the last one raised by the experts since it is a discussion of rules and principles and how they apply. The lack of uniformity in deterring economic crime leads to discrepancies and undesirable situations whereby some countries follow certain rules that others do not.

Four out of five EU citizens regard corruption as a major problem in their state⁹, and there is a pressing need to restore trust in the effectiveness of anti-corruption policies and further political commitment to bring peace and prosperity to international transactions. In this context, the Stockholm Program provides the mandate to measure actions in the fight against corruption and develop a comprehensive EU anti-corruption policy, in cooperation with the Council of Europe Group of States against Corruption (GRECO).

In addressing the global danger that exists regarding corruption, the Commission set up a mechanism for the periodic assessment of EU States' efforts in the fight against corruption which helps create the necessary momentum towards firmer political commitment by the EU decision-makers. This evaluation will

⁸ Mark Pieth and Radha Ivory, eds., *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer, 2011).

⁹ See European Commission – Migration and Home Affairs, “Corruption” (2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/index_en.htm.

facilitate the exchange of best practices, identify EU trends, gather comparable data on the 28 EU member states and stimulate peer learning and compliance with EU and international commitments.

Relevant EU efforts include the 2003 Framework Decision on combating corruption in the private sectors aiming to criminalize both active and passive bribery. The second implementation report showed that the transposition is not satisfactory since several EU states still have to transpose the most detailed provisions on criminalization of all elements of active and passive bribery, and the rules on the liability of legal persons. In fact, the Commission might wish to propose a Directive that will replace the Framework Decision in the near future.

Even though anti-corruption legal instruments are in place at the European and international level, the implementation by EU States remains insufficient. EU States have ratified most of the existing international anti-corruption instruments, yet States will need to ratify the Council of Europe Criminal Law Convention on Corruption, its additional Protocol, the Civil Law Convention on Corruption, the United Nations Convention against Corruption (approved by the EU in 2008) and/or the OECD Anti-Bribery Convention.

1.8. The Dialectic of Investor-State Dispute Settlement

Investor-State Dispute Settlement (“ISDS”) is an arbitral procedure that allows for an impartial, law-based approach to resolve conflicts and has been a positive contributor that increases development, and safeguards the rule of law and good governance around the world. As a process, it does not, and cannot, require countries to change any law or regulation they might have enforced.

ISDS appeared for the first time in a bilateral trade agreement between Germany and Pakistan in 1959. The rationale was to

encourage foreign investment through protection of investors against discrimination or expropriation.

Ever since, arbitration has been increasingly considered the preferred way to resolve disputes since it is, in principle, faster, less expensive, and more reliable than court proceedings. Investors feel safer to include an arbitral clause, which partly guarantees that their claim is taken into consideration prior to any further action. So far, the record-breaking amount of introduced cases was in 2012, when a total of 59 cases required investment arbitration.

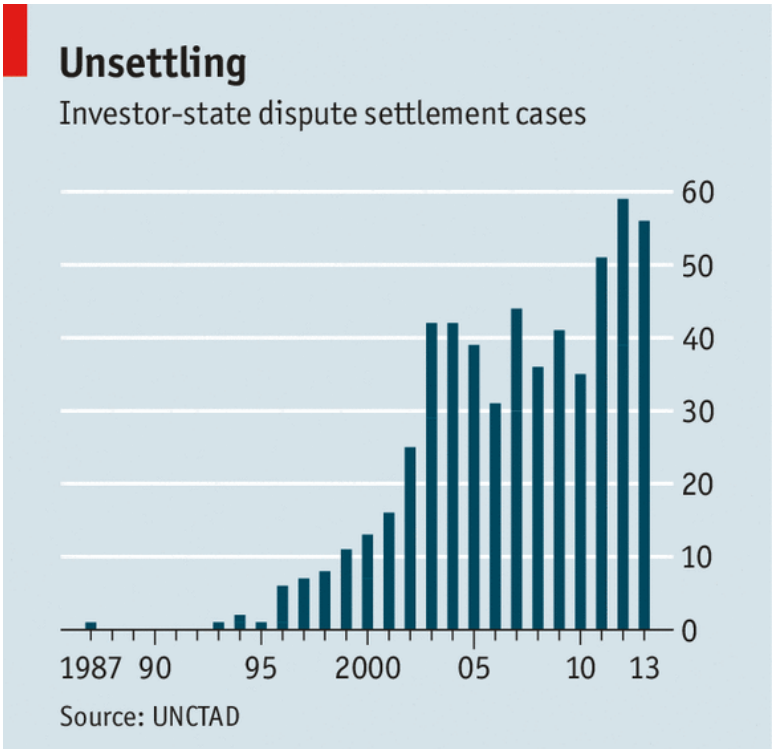


Figure 1: Investor-state dispute settlement cases

The Investor-state dispute settlement is an instrument of public international law, which allows the investor to use specific

dispute settlement proceedings against a foreign government. Its provisions exist in several bilateral investment treaties, in specific international trade treaties (e.g. North American Free Trade Agreement, Chapter 11) and in international investment agreements (e.g. the Energy Charter Treaty).

The simplest example of ISDS is when an investor from country A (Home State) invests in country B (Host State), whereby the parties have an agreement under the ISDS rules, and an arbitral tribunal governs their relationship in case a dispute arises.

The rules of ICSID (International Centre for Settlement of Investment Disputes) are mostly followed during arbitral proceedings. Other international arbitral tribunals that follow different rules include the London Court of International Arbitration and the International Chamber of Commerce, among various others.

At the moment, the legal protection of Foreign Direct Investment under provisions of public international law exists through a network of more than 2750 bilateral investment treaties (BITs), Multilateral Investment Treaties and Free Trade Agreements. The majority of the agreements were concluded in the late 1980s and early 1990s, before the large wave of investor claims under treaties that began in the late 1990s.

The clauses include issues of legal protection, the right to “fair and equitable treatment”, “full protection and security”, “free transfer of means” and the right not be directly or indirectly expropriated. Overall, out of approximately 500 arbitral cases in 2012, 244 were concluded, of which approximately 42% were

decided in favor of the Host State and approximately 31% in favor of the investor. Approximately 27% of the cases were settled.¹⁰

1.9. Controversy in International Investment Arbitration

Debate has arisen as to the impact of ISDS on the capacity of governments to implement reforms, and legislative and policy programs related to public health, environmental protection, and human rights. Opponents argue that ISDS clauses hamper the freedom of governments to legislate for issues of health and environmental protection, labor rights or human rights. By using ISDS clauses, investors circumvent the domestic legal system, and the state might not be able to legislate, or enforce its laws, as it wishes. For example, if the state wants to introduce a law regarding environmental protection, which might consequently affect an investment agreement in force, it might face an arbitral procedure initiated by the firm concerned.

On the other hand, the counterargument to this acclaimed penetration in a state's sovereignty is that the states have not in fact forfeited their right to regulate, but rather that the ground rules protect the basic investors' rights. The accession to instruments of public international law guaranteeing such rights is an exercise of democratic constitutional power and binds the acceding state, even if its future government changes. Nonetheless, this has certain restrictions since it would be a paradox, and legally unacceptable, to allow one governmental policy to bind another for decades to come.

A major concern that relates to the current book is the often-secretive nature of the arbitration process, and the lack of any

¹⁰ Esme Shirlow, "Looking behind the Statistics for Investment Arbitration," Kluwer Arbitration Blog (2015), <http://kluwerarbitrationblog.com/blog/2015/02/24/looking-behind-the-statistics-for-investment-arbitration/>.

requirement to consider a precedent. These provisions practically allow for a wide scope of creative adjudications. They also restrict openness and transparency since a secretive process means that the documents are withheld and that any claims, including the ones of corruption, are much more difficult to be proven. Transparency is key in investment arbitration procedures, and it should further be borne in mind that the *de facto* publication of documents is a strong ally in reducing corruption, increasing accountability and overall enjoying consistent processes throughout.

Academics are also questioning if the ISDS delivers the acclaimed benefits in the form of increased foreign investment. Foreign investors have the underlying rationale of protecting themselves against egregious governmental abuse by purchasing political-risk insurance. That being said, Brazil remains a hub of foreign investments although it has repeatedly refused to sign any treaty related to an ISDS mechanism.

Within this wave of skepticism, other countries wish to, or are thinking of, following Brazil's example. For example, South Africa is considering withdrawing from treaties that include ISDS clauses, as is the case with India. Indonesia, also, is planning to let such treaties lapse when they come up for renewal. In addition, Australia has engaged in a lengthy debate regarding the ISDS viability and forswore it in the wake of a complaint by Philip Morris regarding its requirements for health warnings on cigarette packaging. Its new government is considering allowing such mechanisms in future treaties.

On such occasions, the investors will have to take their chances in local courts. However, such a development would severely impede trade and international investment. One solution to circumvent this problem would be to have treaties that use far more precise definitions of expropriation. The principal thesis of the book is that in order overcome the structural deficiencies that currently trouble investment arbitration, the most secure and reliable path

should be the one of further transparency. Opening up data and making them publicly available will facilitate the proceedings, render them more credible and, eventually, reveal more incidents of corruption. Openness has a double effect since by opening up this data, potential perpetrators will be aware of these incidents and will abstain from indulging in similar incidents in the future.

Thus far the most devoted regions in the current practice are North America and Europe; an example being the currently negotiated Transatlantic Trade Investment Partnership between Europe and the US. TTIP has a symbolic significance since it will be a marker for forthcoming negotiations for a bilateral trade deal with China. The US wants to set a precedent for China with the aim of creating a world-class template for trade agreements thus regarding the TTIP as a suitable tool for that purpose. Transparency is, therefore, a key point of transformation for investment arbitration given how all arbitration proceedings under the TTIP will be open and non-parties, including labor unions and civil society organizations, will be able to file briefs to inform the outcome of various cases. In any event, the TTIP has met considerable controversy since several stakeholders are against its ISDS provisions.

The transparency of the TTIP in ISDS provisions is, hence, of eminent importance. For that purpose, it is imperative to ensure maximum openness in documents and evidence during such proceedings. A relevant clause would boost the public's confidence in the said transparency, and international development would stay protected throughout an ISDS clause, rather than remaining secret.

On the other hand, others claim that confidentiality is a standard feature of nearly all arbitral proceedings and one that enables a constructive, de-politicized and fact-oriented atmosphere of dispute resolution. Traditional confidentiality is limited to disputes that affect the parties in question and not the broader public. For example, the confidentiality of the majority of ICSID awards creates

issues of transparency since several awards are not public whereas, in investor-arbitration at the International Chamber of Commerce, there is a requirement for blanket confidentiality for all aspects of a case.

In the past, incidents of discrimination from foreign courts against investors have led to the increased risk of bias. Governments have therefore looked into international arbitration to resolve such disputes. Most of the agreements to date share some form of neutral arbitration and their rationale is centered more on protecting investors abroad from discrimination and denial of justice, which might be indeed a negative externality of investing abroad. The objective of ISDS, apart from bringing about a speedy and reliable judicial decision, is sometimes compromised by the lack of openness and the incidents of institutional corruption.

1.10. Bridging the Gap: Validity of Corruption Claims in Investment Arbitration

The first question in relation to institutional corruption in international investment arbitration is whether corruption and bribery offend the general principles of international law. The latter are enshrined in Article 38(1) of the Statute of the International Court of Justice, and bribery in particular, as a manifestation of institutional corruption pertinent to investment arbitration, may further be seen as customary international law evidenced by its widespread inclusion in a variety of international conventions and treaties, as well as under domestic laws of different jurisdictions.

Secondly, the very legality of the investment ought to be established. For example, both the ICSID Convention and the ECT provide for the jurisdiction of the Convention only if the dispute arises out of an investment or is related to an investment. It follows from the object and purpose of the ECT that the investments in question should be legal. The same could be derived from the preamble of the ICSID Convention, with both treaties referencing the application of international law. The legality of an investment was

confirmed in the Inceysa case whereby the Tribunal declined to exercise its jurisdiction due to an investment being “tainted” by corruption. Further, in the Kardassopoulos and Fraport cases, the Tribunal confirmed the application of general principles of international law to investment disputes (*see further Chapter 3*).

For example, the ICSID Convention requires both parties to have consented to its jurisdiction in accordance with Article 25 of the Convention. The same is mirrored in Article 26 of the ECT, which moreover presumes the legality of the investment by its reference to the compliance with international law. This provision may be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, which does constitute customary international law.

In reference to the “clean hands doctrine” (or also referred to as the “unclean hands doctrine”), the Tribunal should generally refuse a Claimant whose conduct in regard to the subject matter of the litigation has been improper. The unclean hands doctrine could equally qualify as a general principle of international law in light of Article 38 of the ICJ Statute. Albeit the doctrine was originally conceived as a common law doctrine, it is now accepted across manifold jurisdictions, those of a civil law tradition included. There are several Latin maxims associated with the unclean hands doctrine, the most popular one being the *ex injuria jus non oritur*, also known as *ex delicto actio non oritur*.

The maxim *ex injuria jus non oritur* states that legal rights cannot derive from an illegal situation. The Permanent Court of International Justice in the *Diversion of Water from the River Muse* case has first recognized the application of the unclean hands

doctrine to international relations.¹¹ The doctrine was also applied in the Advisory Opinion of the ICJ in the *Namibia* case¹² while dealing with South Africa's presence in the territory, and in the *Jurisdictional Immunities of the State* case.¹³ The ICJ has moreover raised the question of the unclean hands doctrine in the Advisory Opinion of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the *Oil Platforms* case, and in the *Arrest Warrant* case.

The *ex injuria jus non oritur* maxim was emphasized by Judge Anzilotti in the *Legal Status of Eastern Greenland Case*¹⁴ where he stated that “an unlawful act cannot serve as the basis of an action at law.” Both the PCIJ¹⁵ and the ICJ¹⁶ have affirmed that one party cannot avail itself of the fact that the other party has failed to fulfill some obligation if the former party has, by some illegal act, prevented the latter from fulfilling such obligation. In light of the above, one could soundly conclude that the unclean hands doctrine forms a general principle of law as enshrined in the ICJ Statute.

The unclean hands doctrine has also recently been seen as a general principle of law in international investment arbitration. The

¹¹ Individual Opinion of Mr. Hudson and Dissenting Opinion of M. Anzilotti, *Diversion of Water from the River Meuse Case (Netherlands v. Belgium)*, P.C.I.J., series A/B, No. 70 (1937).

¹² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 45, para. 132.

¹³ *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, I.C.J. Reports 2012.

¹⁴ Dissenting Opinion of M. Anzilotti in *Legal Status of Eastern Greenland (Denmark v. Norway)*, P.C.I.J., series A/B, No. 53, 1933 p. 95.

¹⁵ *Factory at Chorzów (Germany v. Poland)*, P.C.I.J., 1927, Series A, No. 9, p. 31.

¹⁶ *Military and Paramilitary Activities (Nicaragua v. United States of America)*, Merits, Judgment I.C.J. Reports 1986, p. 392; Dissenting opinions of Judges Morozov and Tarazi, *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, 53-55, 62-63.

Tribunal in the *World Duty-Free* case explicitly takes note of the unclean hands doctrine and finds it to be a ground for dismissal of the investor's claim, tainted by corruption.¹⁷ The Tribunal also quoted Kerr LJ's opinion in *Euro-Diam* whereby he stated in respect to bribery that granting the Claimant the sought relief would be "affront to public conscience."

The question also arises as to whether the unclean hands doctrine directly affects the Tribunal's jurisdiction and the admissibility of the dispute. In other words, is the Claimant "estopped" from accepting the Respondent's offer due to its unclean hands? This question is viewed in light of the consent of both parties to submit the dispute under the relevant convention.

Overall, the nexus between institutional corruption and investment arbitration is one of thin lines, with multifaceted consequences. In order to shed more light on transparency in international investment arbitration, we will now examine the pertinent legal framework, case law, and ultimately the UNCITRAL Rules of Transparency as an example towards openness and accountability.

¹⁷ Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in Kaj Hobér, Annette Magnusson & Marie Öhrström, eds., *Between East and West: Essays in Honour of Ulf Franke* (JurisPub, 2010), 309-322.

Chapter 2: Legal Framework for Corruption and Investment Arbitration

This chapter will examine the pertinent legal framework vis-à-vis corruption, and the policy framework for parties that wish to resolve an arbitral dispute. First, we will analyze prominent examples of domestic law with a global reach, namely the Foreign Corrupt Practices Act and the UK Bribery Act. We will then focus on international instruments, including the UN Convention against Corruption and the OECD Anti-Bribery Convention.

Pursuant to the analysis of relevant legislation, which strengthens the fight against corruption, we turn to the tools available during an ISDS. In doing so, we focus on statistics that demonstrate the scope of ISDS and we analyze the nature of the UNCITRAL Arbitration Rules, NAFTA Chapter 11, ICSID, and the Energy Charter Treaty. We examine these tools under the prism of transparency and amicable settlement. The intertwinement of anti-corruption legislation with international arbitration instruments will, naturally, lead us to discuss their nexus *vis-à-vis* transparency in the next chapter of the book.

2.1. Domestic Legal Framework

2.1.1. The Foreign Corrupt Practices Act (FCPA)

The Foreign Corrupt Practices Act of 1977 (FCPA), as amended, 15 U.S.C. § 78dd-1, et seq., aims to regulate two issues; one of accounting transparency, and subsequently the bribery of foreign officials. It thus made it unlawful for certain persons and entities alike to pay foreign governmental officials to facilitate their business.

There is a wide list of prohibited actions regarding corrupt behavior, including any offer of payment, promise to pay, or authorization of the payment of money or anything of value to any person. Further, the knowledge that even a fraction of the money will be used for such purposes that may include a commission or omission of an act against the lawful duty of the civil servant for purposes that promote the corporation's interests also constitutes a punishable act. Finally, any amount of money that tries to secure an improper advantage that would assist either obtaining or retaining business is unlawful.

FCPA is widely known for its comprehensive reach; it applies to any person who has specific ties to the United States and at the same time engages in foreign corrupt practices. It initially applied to all U.S. persons and certain foreign issuers of securities. A 1998 amendment however expanded its scope to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.

The FCPA applies three principles when determining the exact reach of officials it can include in its provisions, namely the nationality principle, the protective principle, and the territoriality principle. The nationality principle of the Act denotes that irrespective of their physical presence in the U.S., any businesses and corporations that trade securities in the country or, American citizens, nationals or residents acting in the context of a foreign corrupt practice, are indictable. The protective principle of the Act provides that in the case of foreign natural and legal persons, the Act covers their actions in case they reside in the US at the moment of the illegal action. The territoriality principle describes that the Act governs not only payments to foreign officials but to any candidates who eventually act in the said capacity. The payments may not necessarily translate to pecuniary value but can nonetheless include anything valuable.

Certain FCPA provisions relate to transparent accounting provisions for corporations in order to avoid incidents of accounting fraud. In particular the Act requires corporations that fall under its rules to: (i) make and keep books and records that accurately and fairly reflect the transactions of the corporation and, (ii) devise and maintain an adequate system of internal accounting controls.

Lastly, notable cases of the application of FCPA include large corporations worldwide like Wal-Mart, BAE Systems, Monsanto, Siemens, Titan Corporation and Triton Energy Limited. The reach of the FCPA is practically global and the rigor of the prosecutions renders it one of the most efficient acts in the world. Nonetheless, certain scholars question its efficacy since statistical data from 1977 to 2008 demonstrate that the FCPA has not had a dramatic impact on US global corporate behavior despite its recent high profile coverage and the tough regulatory rhetoric about corporate compliance (Weismann, 2009).

2.1.2. The UK Bribery Act 2010

The Bribery Act of 2010 (c. 23) is the legal spearhead of the United Kingdom in the effort to combat corruption. It covers provisions of criminal law pertaining to bribery and it was introduced to Parliament in the Queen's Speech in 2009, received Royal Assent on 8 April 2010 and was put into force on 1 July 2011. It was designed to address better the provisions of the 1997 OECD anti-bribery Convention and it has done so by introducing a new strict liability offence for companies and partnerships failing to prevent bribery.¹⁸

The Act offers provisions for all bribery related offences including energetic and passive bribery, bribery of foreign public

¹⁸ The Explanatory Notes in order to inform policy goals against effectiveness of the Act are found in the Ministry of Justice, "Bribery Act 2010 – Explanatory Notes" (2010), <http://www.legislation.gov.uk/ukpga/2010/23/notes/contents>.

officials and the failure of commercial organizations to prevent bribery. The penalties included under the Act lead to a maximum of 10 years' imprisonment along with unlimited fine and the potential for the confiscation of property under the Proceeds of Crime Act 2002 along with the disqualification of directors under the Company Directors Disqualification Act 1986.

The Act deals only with bribery and not other forms of white-collar crimes like fraud, theft, accounting and recording offences, Companies Act offences, and money laundering offences or competition law.¹⁹ The main principles under the Act²⁰ revolve around the issues of proportionality, top-level commitment, risk assessment, due diligence, communication, and monitoring and review.

With regard to proportionality, the corporation should take an action that is proportionate to the risks it might face for the size of the business and the extent of its operations overseas. The Act is often compared to the United States Foreign Corrupt Practices Act but further establishes harsher penalties.²¹ It is far-reaching and its creation was driven by the need to safeguard the economic interests of the country and the will to combat corruption.

Criticism towards the Act include that it is one of the toughest anti-corruption legislation in the world that might, consequently, create barriers to commercial activity and preclude businesses from investing in the country in fear that any activity could be potentially punishable by law given its wide scope. Scholars and businessmen alike express their concern towards this legislation since it, according

¹⁹ Bruce W. Bean and Emma H. MacGuidwin, "Unscrewing the Inscrutable: The UK Bribery Act 2010," *MSU Legal Studies Research Paper* 10-22 (2012).

²⁰ Ministry of Justice, "Bribery Act 2010 – Quick Guide," (2010) <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf>.

²¹ *Id.*

to them, suppresses the competitiveness of the British industry whereas they stress out that cultural bias that exists in different countries for issues including corporate hospitality and facilitation payments will create such a discrepancy and vagueness that it will be very difficult for someone to practically follow the law promptly without any emerging grey zones.²²

2.2. International Legal Framework

Several legal instruments are borne in mind while examining anti-corruption tools. For the purposes of this book the following legal texts are considered relevant for further analyses: the UN Convention against Corruption (UNCAC); the Criminal Law Convention on Corruption (CETS No. 173), the Civil Law Convention on Corruption (CETS No. 173); the United Nations Convention against Transnational Organized Crime (UNTOC); and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (known widely as OECD Anti-Bribery Convention).²³

²² George Rosenberg, “New UK Bribery Act 2010- Draconian in Theory But Is It Enforceable in Practice?” *Construction Law International* 5.3 (2010): 19.

²³ Florian Haugeneder, “Corruption in Investment-State Arbitration,” *Journal of World Investment and Trade* 10.323 (2009): 323.

Figure 2: International Legal Framework for Corruption



2.2.1. UNCAC

The United Nations Convention against Corruption (UNCAC) is the first global, legally binding international anti-corruption instrument. It contains eight Chapters and 71 Articles, requiring the State Parties to implement several anti-corruption measures that may affect their laws, institutions and practices. In particular, considerable emphasis exists on preventing corruption, criminalizing certain conducts, strengthening international law enforcement and judicial cooperation. At the same time the provisions of the Act focus on effective legal mechanisms for asset recovery, technical assistance and information exchange. It is considered the most comprehensive, all-encompassing and ample piece of legislation *à propos* corruption.

As of June 2014, it includes 171 parties that strengthen its global enforceability, with the strongest economies that have not yet ratified it being Japan and Germany. Further, some African countries (e.g. Sudan, Chad and Somalia) have not even signed the treaty. Nonetheless its global reach facilitates cooperation, creating a solid

network against corruption and significantly raising the barrier of future corruption deterrence.

As for Chapter III (Articles 15-44) there are a plethora of criminal offences that relate to the Treaty. The Chapter refers to different cases of corruption and bribery, obstructions of justice and concealments, and conversions or transfers of criminal proceedings (money laundering). Towards this direction states are encouraged to criminalize passive bribery of foreign and international public officials, trading in influence, abuse of function, illicit enrichment, private sector bribery and embezzlement, and the concealment of illicit assets. These rules set the tone of zero tolerance for incidents of corruption and shed light on the stressing necessity to form a consistent legal policy of sanctions for these illegal acts.

Chapter IV (Articles 43-49) finally refers to the assistance that parties can provide among themselves for the purposes of combating corruption. This cooperation is the basis for future evolution in the field since a facilitated network that runs through states will render international prosecution, extradition and justice more attainable goals than they are today.

2.2.2. United Nations Convention against Transnational Organized Crime (UNTOC)

The United Nations Convention against Transnational Organized Crime (UNTOC) is a 2000 United Nations multilateral treaty against transnational organized crime, currently ratified by 179 states and in force since 2003. It comprises three Protocols, (i) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; (ii) the Protocol against the Smuggling of Migrants by Land, Sea and Air and (iii) the Protocol against the Illicit Manufacturing and Trafficking in Firearms. The United Nations Office on Drugs and Crime (UNODC) administers it.

The UNTAC contains provisions regarding international law and international violations including arms trafficking, human

trafficking and money laundering. It is an important step in the fight against transnational organized crime and signifies the recognition of various problems of international character and the consequent stressing need to tackle them in the most efficient way, and with the cooperation of countries. It has further led to the creation of domestic criminal offences including corruption, the adoption of new models of extradition, mutual legal assistance and law enforcement cooperation, and the promotion of training and technical assistance. Its importance is therefore paramount in the fight against corruption and the creation of a spherical global system of legal protection against international crimes. Its provisions, if needed, can further be used as a stepping-stone for the introduction of open data in the fight against impunity.

2.2.3. OECD Anti-Bribery Convention

The OECD Anti-Bribery Convention (Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) is a convention created by the OECD for the purpose of preventing corruption in both developing and developed countries throughout the world and introducing, and further enforcing, sanctions against bribery in international business transactions carried out by companies based in the Convention member states. Forty countries, including the UK, have ratified or acceded to the convention.

By seeking the criminalization of foreign public officials who give or receive bribes, the Convention has tried to convey a message of further enforcement and global legal action against corruption as a whole. It ultimately aspires to achieve transparency and accountability and by doing so, it will create an environment of safety and stability in international business transactions.

2.2.4. Criminal Law Convention on Corruption (CETS No. 173)

The Criminal Law Convention on Corruption entered into force in July 2002 and was ratified by the United Kingdom in 2003. It is a document created by the Council of Europe as an instrument

aiming at the coordinated criminalization of corrupt practices. It further aims at enhancing international cooperation when prosecuting corrupt offences.²⁴ Non-member States can access the Convention, and the Group of States against Corruption (GRECO) is monitoring its implementation.

It covers several behaviors that form corrupt behavior, such as “active and passive bribery of domestic and foreign public officials; active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies; active and passive bribery in the private sector; active and passive bribery of international civil servants; active and passive bribery of domestic, foreign and international judges and officials of international courts; active and passive trading in influence; money-laundering of proceeds from corruption offences and accounting offences (invoices, accounting documents, etc.) connected with corruption offences.”²⁵

This wide array of crimes creates a comprehensive network that includes many different crimes, stressing the importance that the Council of Europe gives in the fight against corruption. States are required to provide effective sanctions and measures including imprisonment and relevant policies that can further lead to extradition. The Convention also includes provisions regarding aiding and abetting, legal persons’ liability, the settling up of specialized anti-corruption bodies, protection of persons collaborating with the authorities, gathering of evidence and confiscation of proceeds.

²⁴ See, Criminal Law Convention on Corruption (Strasbourg, 1999), <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>.

²⁵ Id.

2.2.5. Civil Law Convention on Corruption (ETS No. 174)

The United Kingdom has signed (8/6/2000), yet not ratified, the Council of Europe Civil Law Convention on Corruption which entered into force in 2003 and deals with issues of compensation and civil liability for people who have suffered damages because of acts of corruption, thus enabling them to defend their rights and interests, and including the possibility of obtaining compensation for damage.

The convention, comprising three chapters, covers measures taken at the national level, international co-operation and monitoring of implementation²⁶ It looks into issues of liability, contributory negligence, contract validity, protection of employees reporting corruption (whistle-blowers), clarity and accuracy of accounts and audits, acquisition of evidence, court orders to preserve the necessary assets for the execution of the final judgment and international co-operation. GRECO equally monitors its enforcement.

2.3. Transparency and Scope of International Arbitration

ISDS has been traditionally confidential, as is the case vastly with other types of arbitration, yet recent developments allow for more openness and transparency throughout. For example, Article 29 of the US Model-BIT of 2004 provides that all documents pertaining to ISDS have to be made public and amicus curiae briefs are allowed. Nonetheless, no investment treaty allows other parties that have an interest in the dispute to enter the process, other than the claimant investor and the respondent government.

The World Bank's International Centre for the Settlement of Investment Disputes (ICSID) is required (according to ICSID Administrative and Financial Regulation 22) to make information on

²⁶ See, Civil Law Convention on Corruption, (Strasbourg, 1999), <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

requests for arbitration public, and indicate details on the termination of each proceeding. In case parties do not consent to the publishing of the award, ICSID may nonetheless publish excerpts that demonstrate the tribunal's reasoning behind the decision. The ICSID website often publishes the documents of completed arbitral proceedings. Investor-state arbitrations that exist outside the ICSID's institutional ambit are also available.

On April 1, 2014, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration entered into force. The Rules regulate a general duty of publishing all documents relevant to the ISDS procedure (Article 3), for a treaty concluded after 1 April 2014 or where the parties so consent, subject to certain confidentiality interests (Article 7). Proposals for making all UNCITRAL arbitrations under investment treaties public were not finally endorsed as certain states and representatives opposed the adoption.

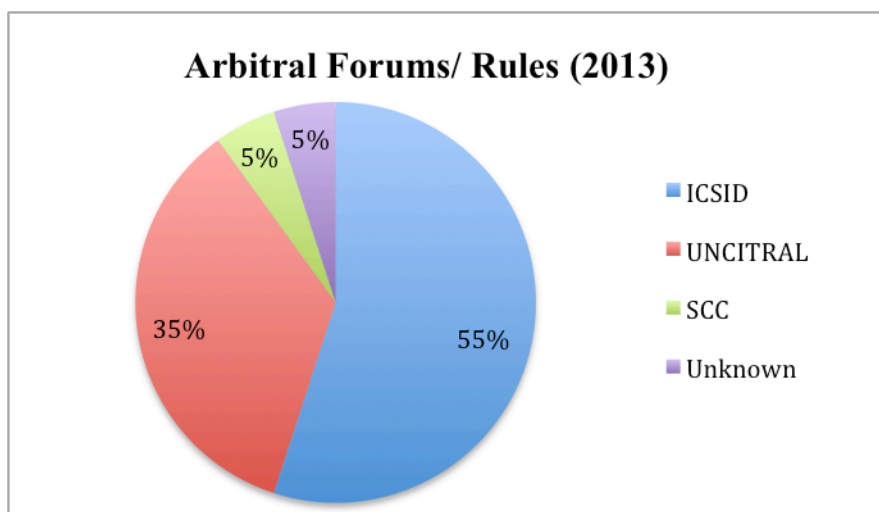
Overall, rules will be more transparent compared to the proceedings in domestic courts. For example; (i) information regarding the case are made available upon initiation of the procedure; (ii) the public will, save for exceptions, have access to procedural documents; (iii) non-disputing parties will be able to file submissions, and; (iv) hearings may be open to the public, including through the video-link.

In terms of scope, in 2013 investors initiated at least 57 known ISDS cases pursuant to international investment agreements (IIAs). This comes close to the previous year's record high number of new claims.

Investors continue to use the ISDS mechanism vividly. In 2014, claimants initiated 42 known treaty-based ISDS cases. With 40 percent of new cases initiated against developed countries, the

relative share of cases against developed countries has been on the rise (compared to the historical average of 28 percent).²⁷

Out of the 57 new disputes in 2013, 31 were filed with the International Centre for Settlement of Investment Disputes (ICSID), 20 under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and three under the Stockholm Chamber of Commerce (SCC). For three cases, the rules and venues are still unknown.²⁸

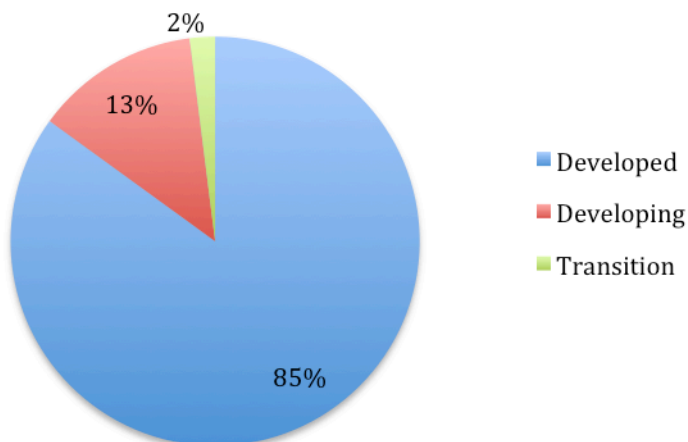


²⁷ European Commission, “Investor-to-State Dispute Settlement (ISDS): Some facts and figures” (2015), available at :

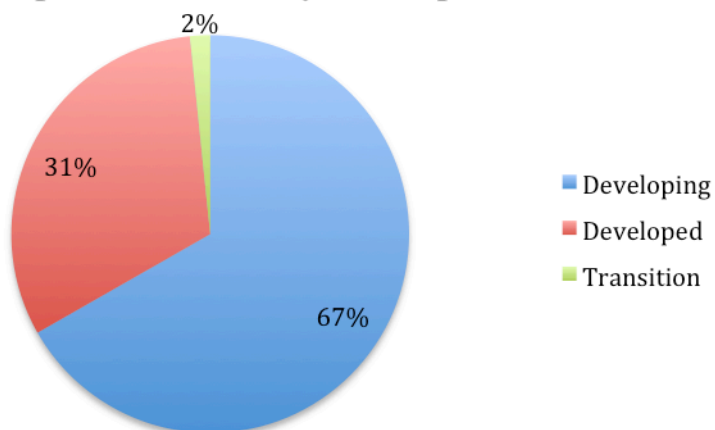
http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf

²⁸ Id.

Home States by Level of Development

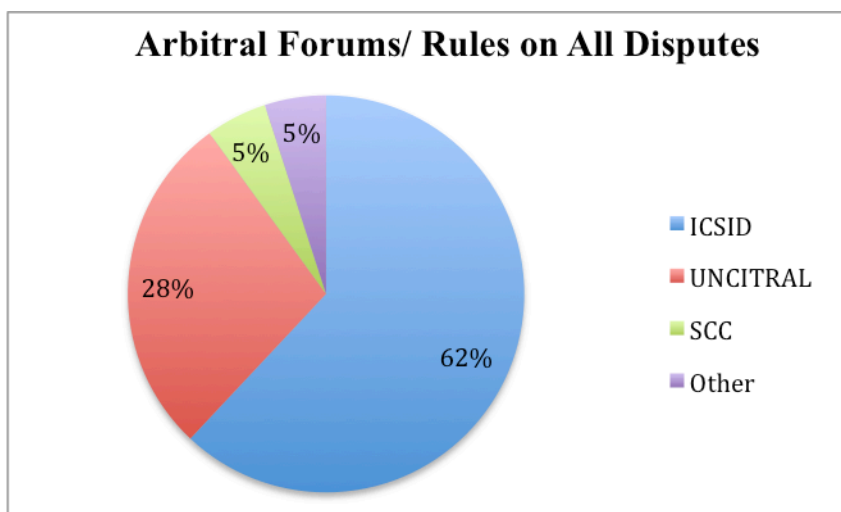


Respondent States by Development Status



In terms of the respondent states, in total at least 98 governments have been respondents to one or more investment treaty arbitration, whereas about three-quarters of all known case were brought against developing and transition economies.²⁹ Investors from developed countries made the overwhelming majority (85%) of ISDS claims.

The majority of cases were brought under the ICSID Convention and the ICSID Additional Facility Rules (353 cases) and the UNCITRAL Rules (158). Other venues have been used rarely, as the 28 cases of the Stockholm Chamber of Commerce and six at the International Chamber of Commerce demonstrate.³⁰



In the overall number of concluded cases (274), approximately 43 percent were decided in favor of the state and 31 percent in favor of the investor. Approximately 26 percent of cases

²⁹ Id.

³⁰ Id.

were settled, in which case the terms of settlement typically remained confidential.³¹

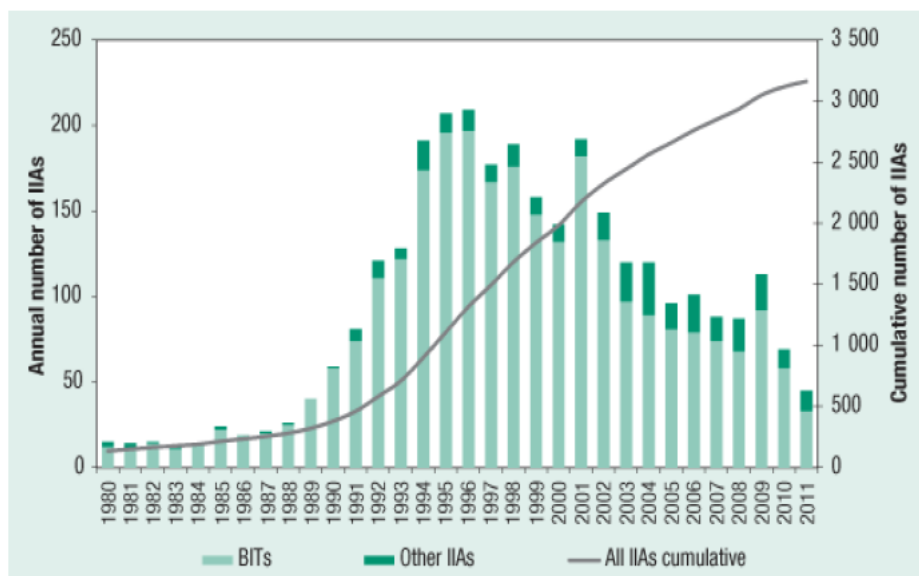


Figure 3: International Investment Agreement- Source: UNCTAD

2.4. Pertinent Framework for Investor-State Dispute Settlement

2.4.1. *UNCITRAL Arbitration Rules*

The UNCITRAL Arbitration Rules were created in 1976, following extensive deliberations. The revised rules were introduced in 2010, to reflect the evolution in arbitral practice since 1976. The

³¹ Id.

2010 Rules are presumed to apply to arbitration agreements that have been concluded after August 15, 2010, subject to Article 1(2) of the 2010 Rules.

The United Nations General Assembly has consistently recommended the use of the Rules in international commercial contracts, as a base of stability. The new Rules on Transparency may further apply in ad hoc proceedings or investor-state arbitrations under rules other than the UNCITRAL Arbitration Rules. The new Transparency Rules will be extensively analyzed in Chapter 4.

2.4.2. NAFTA Chapter Eleven

Chapter Eleven of the North American Free Trade Agreement (NAFTA) includes provisions that relate to cross-border investors and relate to the settlement of investment disputes. It permits an investor to seek relief for violation of the agreement, who initiates an arbitration process pursuant to the United Nations Commission on International Trade Law Rules ("UNCITRAL Rules") or the Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment Disputes (ICSID Additional Facility Rules).

NAFTA Article 1121 waives the local remedies rule since investors do not have to exhaust all the local remedies prior to filing Chapter 11 claims. This lenient provision has contributed to the explosion of investment treaty claims since the late 1990s.

Countries, Canada for example, criticize Chapter 11 for various reasons, including that it has not adequately taken into consideration important social and environmental concerns.

Only investors can challenge an agreement against states under investment treaties, and only states can be held liable to pay damages regarding the breach of a treaty.

2.4.3. The International Centre for Settlement of Investment Disputes (ICSID)

The International Centre for Settlement of Investment Disputes (ICSID) is an international arbitration institution that facilitates legal dispute resolution and conciliation between foreign investors. The ICSID is a member of the World Bank Group based in Washington, D.C. Its establishment dates back in 1996, as a specialized institution that endorses international development and investment, and mitigates non-commercial risks.

As of 2012, 158 member countries have contracted with and governed the ICSID. The ICSID Convention provides that contracting member states must agree to enforce arbitral awards. In the 1950s and the 1960s the Organization for European Economic Cooperation (now the Organization for Economic Co-operation and Development) initially tried, unsuccessfully, to develop a framework that would apply for international investments. The efforts revealed conflicting views on best ways to provide compensation regarding the expropriation of foreign direct investment.

The International Bank for Reconstruction and Development (IBRD) had the initial idea of putting in place a multilateral agreement towards resolving individual investment disputes on a case-by-case basis. Consultations followed to determine the particulars, which led to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The convention was available to sign on 18 March 1965, and entered into force on 14 October 1966.

Details of trials

From its launch, to 30 June 2012, the ICSID has registered 390 dispute cases. These cases comprise 88 percent convention arbitration, 2 percent convention conciliation cases, 9 percent additional facility arbitration cases, and 1 percent other facility conciliation cases.

As of 30 June 2012, the ICSID registered cases that are distributed across the following sectors:

- (i) oil, gas, and mining (25%)
- (ii) electricity and other energy (13%)
- (iii) other industries (12%)
- (iv) transportation industry (11%)
- (v) construction industry (7%)
- (vi) financial industry (7%)
- (vii) information industry and communication industry (6%)
- (viii) water industry, sanitation, and food protection (6%)
- (ix) agriculture, fishing, and forestry (5%)
- (x) services and trade (4%)
- (xi) and tourism industry (4%).

According to 2012 statistical data, 246 of ICSID's 390 registered cases were concluded. Out of those cases, the ICSID tribunal resolved 62 percent of disputes while 38 percent were settled or discontinued. Overall 75 percent of the conciliation reports failed to reach agreement, and only 25 percent recorded agreement among parties.

Between 2009 and 2012 representation cost has approximately been at US\$ 1 million and 7.6 million. The approximate duration of a case was overall 3.6 years.³²

The Administrative Council governs the ICSID, consisting of one representative from each member state. The President of the

³² Inna Uchkunova, "ICSID: Curious Facts," Kluwer Arbitration Blog, October 2012.

World Bank Group ("WBG") chairs the council. The Secretary-General of the ICSID leads the ICSID regulations in conducting the proceedings. The Secretary-General is overall responsible for legally representing the ICSID and serving as the registrar of its proceedings.

The 158 member states that have signed the Convention include 157 United Nations member states and Kosovo. Out of those, 150 are contracting member states, meaning that they have ratified the Convention. Former countries include Bolivia and Ecuador,³³ and Venezuela.³⁴ All the ICSID contracting member states recognize the ICSID Convention and arbitral awards irrespective of whether they have been members to an individual dispute.

2.4.4. Energy Charter Treaty

The Energy Charter Treaty is another legal document that provides a comprehensive system to settle disputes on matters that the Treaty covers. The two primary forms of binding dispute settlement are (i) the state-to-state arbitration on the interpretation or application of almost all aspects of the Treaty (except for competition and environmental issues), and (ii) the investor-state arbitration for investment disputes. Special provisions, based on the WTO model, exist to resolve inter-state trade issues. The Treaty also offers conciliatory agreements for transit disputes.

The starting point is the desirability of an amicable agreement between the parties to any dispute. Nonetheless, in the event this does not prove possible, the Treaty opens a number of additional avenues to promote and reach a settlement.

³³ Withdrew in 2009.

³⁴ Withdrew in 2012- Elisabeth Eljuri, "Venezuela Denounces the ICSID Convention," *Norton Rose*, January 2012. Retrieved 19 February 2015.

In particular, there are various dispute settlement mechanisms available under the Energy Charter Treaty:

(i) Disputes between parties to the Treaty: Annex D describes trade disputes that relate to a non-WTO member that is a contracting party to the ECT. Article 27 applies to any dispute between contracting parties except the ones covered by Article 29, which would fall under the procedure laid in Annex D, Article 5, which comprise of the WTO issues³⁵, and Article 6 (competition).³⁶ Equally, Article 27 provides for an *ad hoc* arbitration tribunal unless otherwise agreed by the parties, with the UNCITRAL rules on arbitration;

(ii) Disputes between investors and host governments: Article 26 provides various options for investors to take host governments to international arbitration in the event of an alleged breach of the Treaty's investment provisions. The mechanism established for the purpose of settling disputes between investors and contracting parties is a cornerstone of the ECT. In particular, only NAFTA and the ECT are multilateral agreements that focus on a viable mechanism for investor-state disputes.³⁷ The scope of this provision reflects on a wide range of available mechanisms for the investor to address its dispute with a Contracting Party to the ECT. In particular, Article 26.1 provides the following: *"Disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably."*

³⁵ See Article 28, ECT.

³⁶ Article 6.7, ECT.

³⁷ For a comparative analysis of both multilateral agreement see Lawrence L. Herman, "NAFTA and ECT: Divergent Approaches with a Core of Harmony," *Journal of Energy & Natural Resources Law* 15 (1997): 129 -154.

(iii) Transit disputes: Article 7.7 provides for a specialized conciliation mechanism for transit disputes, which allows a faster and more casual procedure;

(iv) Trade Disputes: Annex D relates to Article 29 of the ECT and examines interim provisions on trade related matters. It applies to trade in energy material between Contracting Parties when one of them is not a party to the GATT. The transitional nature of the provisions relates to the fact that not all the Soviet Countries had acceded to the GATT during the ECT negotiations.³⁸ Article 29 and Annex D further include a mechanism, following the WTO model, that settles trade disputes between Energy Charter member states provided that at least one of them is not a WTO member;³⁹

(v) Competition and environmental issues: As for disputes concerning competition (Article 6) and environmental issues (Article 19), the Treaty provides for bilateral (in cases of competition) or multilateral (in cases of environmental protection) non-binding consultation mechanisms.

In case of a dispute, there are overall three possible avenues:

(i) The International Centre for the Settlement of Investment Disputes (ICSID);

(ii) A sole arbitrator or an ad hoc arbitration tribunal established under the rules of the United Nations Commission on International Trade Law (UNCITRAL);

³⁸ In fact, there are still countries which have ratified the ECT yet have not acceded to the WTO (e.g. Bosnia and Herzegovina, Kazakhstan, Tajikistan, and Uzbekistan).

³⁹ Esa Paasivirta, "The European Union and the Energy Sector: The Case of the Energy Charter Treaty," in Martti Koskeniemi, ed., *International Law Aspects of the European Union* (The Hague 1998), 197 - 214.

(iii) An application to the Arbitration Institute of the Stockholm Chamber of Commerce.

The plethora of options when dealing with an arbitration case is significant in encouraging states to pursue an arbitral proceeding and assist member states in observing their Treaty obligations and promoting a stable environment for investments in line with the Treaty goals.

2.5. The Future: TTIP

The EU is currently negotiating with the US towards a new trade and investment agreement, namely the Transatlantic Trade and Investment Partnership (TTIP). The agreement examines, *inter alia*, provisions on investment protection and ISDS.

The Commission wishes to use the opportunity to put the investment provisions in place in order to protect the investments by EU-based companies in the US, and vice versa. This is not to say, however, that states will not have the right to regulate in the public interest. One of the suggested actions is also a code of conduct that will ensure that the arbitrators are chosen fairly and act impartially. Further transparency will lead to maximum accountability and reduce corruption.

It is noteworthy that the TTIP has been the most open trade and investment agreement under negotiation thus far since all the documents of the negotiations, all the stakeholders involved, and more, are made available online for the citizens to access.

This has naturally led to the TTIP receiving unprecedented public interest, also reflected in the Commissioner's determination to secure the right balance between protecting European investment interests and upholding governments' right to regulate in the public interest.

This agreement is particularly important since the EU is the world's largest foreign direct investor and the greatest recipient of foreign direct investment in the world.

The international investment policy of the EU is overall geared towards maintaining the efficiency found in the current system of dispute resolution along with making these rules clearer, more transparent, and more impartial than they are today. It is, therefore, important to increase transparency from the negotiation to the implementation stage. Thus, in the future, all EU investment agreements, including the TTIP, will set out new rules, including a code of conduct, to ensure arbitrators are chosen fairly and that they perform their duties impartially. The new rules will also open up arbitration proceedings to the public.

In the long run, all 28 EU countries and the US will benefit from a single set of investment protection rules in EU trade and investment agreements, reflecting the best practices available for bilateral agreements. Such a development would subsequently mean that the TTIP would replace EU countries' bilateral investment agreements with the US, with the most up to date rules.

Chapter 3: Case Law Analysis of Alleged Investor Corruption in Dispute Settlement

3.1. Introduction

Allegations of corrupt behavior are not very frequent during an investment arbitration process.⁴⁰ Yet, the current chapter examines all the cases that relate to dispute settlement and involve an investor-state connection. In doing so, we examine all the investment arbitration cases that included a corruption allegation. Out of those, we will focus on and analyze the most substantive in terms of legal standing and contribution to the broader debate of investment arbitration.

The importance of the included cases relates to four major pillars vis-à-vis transparency and accountability in investment arbitration:

- Cases that involve corrupt behavior tamper with the principles of free market and open economy since the parties do not conclude the most beneficial agreement but rather a tainted one;
- Corrupt behavior hampers international development since the concluded agreement is much less productive than it could have been;
- Corrupt behavior exists against the principles of transparency and accountability through anti-competitive regimes, which lead to a vicious circle of corrupt activity;

⁴⁰ Jason W. Yackee, “Investment Treaties and Investor Corruption: An Emergent Defense for Host States?” University of Wisconsin Legal Studies Research Paper, No. 1181 (2011).

- Corrupt behavior violates human rights since it reduces the overall state welfare due to these incidents.

The cases analyzed below have an element of corruption and are considered to be the leading cases involving investor corruption.⁴¹ These cases will act as a bridge to the next section which will in turn explore the benefits of the new UNCITRAL Rules on Transparency and the UN Transparency Convention.

As a background to corruption in investment arbitration, the most quoted decision in literature is the one by Judge Lagergren in a 1963 *ad hoc* award. In Lagergren's Award (ICC Case No. 1110),⁴² the claimant sought its contractual entitlement to 10 percent of commission payments for all Argentinean energy contracts awarded to the respondent. The parties openly admitted that the contract's rationale was to bribe Argentine officials.

The parties did not challenge the Judge's authority to decide the merits of the dispute, yet Lagergren examined his jurisdiction on *proprio motu*, on the ground that the contract was "condemned by public decency and morality."⁴³ He suggested that "[s]uch corruption is an international evil; it is contrary to good morals and an international public policy common to the community of nations." For the aforementioned reasons, Judge Lagergren stated that he was therefore forced to decline jurisdiction over the case. In other words, he could not judge on the merits of the case, since the parties had forfeited their right to justice. The parties must therefore realize that they have forfeited any right to ask for assistance of justice.

⁴¹ Florian Haugeneder, "Corruption in Investment-State Arbitration," *Journal of World Investment and Trade* 10:323 (2009) : 323.

⁴² Loukas A. Mistelis and Stavros L. Brekoulakis, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009).

⁴³ *Id.*

Arbitral proceedings have changed since, yet this decision stands as a stark example of how a tribunal should address allegations of corruption, set the barrier of proof, and act upon establishment of an illicit activity.

3.2. World Duty Free Co. Ltd. v. Republic of Kenya

The *World Duty Free Co. Ltd. v. the Republic of Kenya*, ICSID Case No. ARB/00/7, is possibly the most well known case of investment arbitration that involves corrupt activity.

In *World Duty Free Company Limited v. the Republic of Kenya*, the claimant alleged that the Kenyan government had expropriated its two duty free complexes in the Nairobi and Mombassa International Airports.⁴⁴ The case was decided in October 2006 and is considered a monumental decision since it is the only award in which an ICSID tribunal directly correlated corruption with the outcome of the decision in a determinative way.

The tribunal retained jurisdiction, finding facts that surrounded the allegation of bribery that were not disputable. In particular, the Tribunal held that a US\$2 million payment made by the Investor to former Kenyan President Daniel Arap Moi in relation to its duty-free concession was a bribe. Consequently, based on the conclusion that bribery violates transnational public policy, the tribunal found that the contract was void and consequently dismissed the claimant's claim.

Further, the investor's former CEO openly admitted to making the payments. In the witness statements, the CEO suggested making a "personal donation" to President Moi worth US\$ 500,000

⁴⁴ Gary Born, "Bribery and an Arbitrator's Task," Kluwer Arbitration Blog, 2011, <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/>.

in cash. In fact, during a personal audience with the president, he brought a brown briefcase containing the money, which he left by a wall. After the meeting with the President, he noticed that the briefcase no longer contained cash, but rather fresh corn. The former CEO stated that this appeared to him as a bribe, yet he thought it was part of the cost of doing business in Kenya.⁴⁵ The *World Duty Free* case is one of the few cases that establishes the validity of an allegation of corruption and, consequently, renders a contract void. The case cited Lagergren's award to affirm that bribery violated international public policy, as well as Kenyan and English law.

World Duty Free demonstrates how issues of corruption deterrence are embedded within the normative regime of international legal practice. In that direction, a plethora of legal documents (e.g. the OECD Anti-Bribery Convention) and the global diffusion of laws that criminalize corruption render the contract obtained through corruption, void. The *World Duty Free* decision has been, however, criticized since it accepted the corruption allegations as a complete defense, and avoided to address the more complex underlying causes of corruption in a case.

3.3. Metal-Tech Ltd. v. Republic of Uzbekistan

The *Metal-Tech Ltd. v. Republic of Uzbekistan*⁴⁶ addressed issues of investor claims against corruption defense. In October 2013 an ICSID tribunal decided on the investment treaty dispute initiated by the Metal-Tech Ltd, an Israeli company, and Uzbekistan. The tribunal found it lacked jurisdiction to rule on the merits of the case.

⁴⁵ Aloysius Llamzon, "The Control Of Corruption Through International Investment Arbitration: Potential And Limitations," *American Society of International Law Proc.* 102:203 (2008): 208.

⁴⁶ *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (2013).

In particular, the tribunal found payments directed towards Uzbek government officials, including even the brother of the then Prime Minister of the country, allegedly instructed by Metal-Tech. The transactions, of a total value of U.S. \$4 million, constituted corrupt behavior and were deemed illegal under Uzbek law.

In terms of background, in 2000 the public company Metal-Tech formed a joint venture with two state-owned companies in Uzbekistan. Metal-Tech manufactures molybdenum products and agreed to build and operate a plant for the production of these products. Pursuant to the contract, Metal-Tech was expected to contribute its technology, know-how, and marketability techniques to access international markets. It was also scheduled to contribute buildings, constructions, machines, equipment and relevant features for the plant.

In 2006, corruption allegations related to officials of the joint venture led to criminal investigations for the broader Tashkent Region in Uzbekistan. The Public Prosecutor's Office explored whether officials abused their authority and, consequently, caused harm to the country. The country's Cabinet of Ministers adopted a resolution as per the joint venture's right to purchase raw materials required for the production of molybdenum products and export these products. Eventually, Uzbek companies terminated their contracts and initiated bankruptcy proceedings. The joint venture was then liquidated and delisted from the state registry of legal entities in 2009.

In its request for arbitration, Metal-Tech claimed a breach of obligations under domestic laws and the Israel-Uzbekistan BIT. Uzbekistan denied the allegations and argued the tribunal lacked jurisdiction under the BIT and Uzbek law since it submitted counterclaims to recover damages allegedly sustained as a result of Metal-Tech's unlawful conduct. The tribunal, consequently, accepted the lack of jurisdiction under the BIT and the ICSID Convention that

referred the dispute to arbitration. Such consent (Ar. 8(1) of the BIT), was limited to disputes concerning an investment.

According to the tribunal, the requirement meant that the investment must be made “in compliance with the law at the time when it was established” (para. 193), pursuant to the arguments of Metal-Tech.⁴⁷ Since the tribunal proceeded to find facts regarding the commission of corruption, Uzbekistan was damaged in connection with the Metal-Tech’s investment in the country. The tribunal found lack of jurisdiction over Metal-Tech’s claims under Uzbek law, since the country did not consent to arbitrate claims independently of the BIT, and that “as a consequence of its having no jurisdiction over the claims, this tribunal has no jurisdiction over the counter claims.”⁴⁸

Overall, the investment was contrary to Article 1(1) of the BIT, and the Tribunal concluded that the dispute did not fall within Article 8(1), which was not covered by Uzbekistan's consent, and was contrary to requirements set out in Article 25(1) of the ICSID Convention (paras. 372-373).

As for the issues of burden and standard of proof that are required to sustain an allegation of corruption, this was due to corruption indicators and red flags. Specific red flags that led the tribunal to believe that funds were used illegally included: (i) the disproportionality of the amounts spent to the required actions, (ii) the fact they were made irrespective of whether the services required were eventually provided, (iii) there was a lack of professional qualification of the consultants that would justify both their selection and remuneration, (iv) the consultant’s payment arrangements were not disclosed, and (v) Metal-Tech failed to substantiate through evidence the reality, necessity, and proportionality of the services for

⁴⁷ *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (2013), para. 193.

⁴⁸ *Id.*, para. 413.

which payments were made. The tribunal found that the entire process followed a non-transparent path that compromised the legitimacy of the agreement.

The tribunal, hence, dismissed the Metal-Tech's case due to corruption; however, it did acknowledge Uzbekistan's participation in the corrupt conduct. It distributed the costs to each party to account for exactly this contributory negligence. The tribunal noted that this “does not mean...that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.”⁴⁹

3.3.1. Discussion: *World Duty Free* vs. *Metal Tech*

The *World Duty Free* and *Metal Tech* cases share several common points. Kenya ranks 136 out of 177 on Transparency International's Corruption Perceptions Index, whereas Uzbekistan ranks in the 168th position. Both countries are, hence, infamous for their practices, and rather unreliable when it comes to transparency. Further, the host states raised both cases of corruption allegations during the proceedings directly from the evidence provided by the claimant. What is more, although tribunals dismissed the claimants' respective cases of corruption, they acknowledged that the host states participated in the corrupt conduct.

In both cases, the party bore its costs for the case. In the *World Duty Free* this was a result of the tribunal's findings that "there can be no successful party on the merits in the traditional sense" since Kenya prevailed on the ground of "international public order and public policy.”⁵⁰ In *Metal-Tech*, this occurred because it

⁴⁹ Id., para. 422.

⁵⁰ *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7 (2006), para. 190

lacked protection under the BIT, and the host state avoided any potential liability. According to the tribunal this "does not mean . . . that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs."⁵¹

Notable differences, however, are also worth mentioning. First, in the World Duty Free case, the claimant's allegations were brought under a contract that was silent on the effects of illegality, whereas in the Metal-Tech case the claims under the BIT provided an explicit legality requirement for investments.

Similarly, in the World Duty Free case, the tribunal relied extensively on international and regional instruments, international standards, international arbitration awards and, ultimately, transnational public policy. In the Metal-Tech case, however, the tribunal only briefly referenced international law and the laws of the vast majority of States,⁵² international instruments that criminalize corruption, and previous decisions and awards. It relied mainly on the interpretation of the BIT, Uzbek law, and the ICSID Convention with its seemingly more "technical" decision to dismiss Metal-Tech's claims on the ground of lack of jurisdiction.

Second, in Metal-Tech there was not as much clear evidence of corruption as was the case in the World Duty Free. In the latter case, there was evident corruption, whereas in the former the decision was mostly based on "indicators" and "red flags." The tribunal had to engage much further with domestic law provisions in order to find that corruption took place in this case.

⁵¹ Id., para. 422.

⁵² Id., para. 290.

Corruption is particularly difficult to prove since tribunals have limited powers of investigation and compulsion, and also because allegations of corruption raise issues as to the burden of proof. On the other hand, corrupt activities mitigate towards lowering the burden of proof for the sake of public policy. An ensuing question is whether, exactly due to the seriousness of the offense, the tribunal should adopt a higher burden of proof.

Lastly, a largely debated issue is whether the tribunal should probe further once an issue of corruption arises or whether it should stop examining the case immediately. Metal-Tech however did not provide a clear and logical explanation as to why were the consultants so highly paid. The tribunal considered that the payments occurred in breach of Uzbek law and consequently dismissed the claim on the ground of lack of jurisdiction.

3.4. The Siemens A.G. v. Argentina Case

The *Siemens A.G. v. Argentine Republic case* (ICSID, Case No. ARB/02/08) is a well-known example of how corrupt activities can alter the facts of cases in investment arbitration. Siemens A.G. filed a request with the International Centre for Settlement of Investment Disputes in 2002, requesting arbitration proceedings against the Argentine Republic. ICSID acknowledged receipt pursuant to Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules).⁵³

⁵³ Mike McClure, “Consistently Inconsistent: Another Contrasting Decision on ‘Most Favoured Nation’ Provisions, Another Split Decision,” *HSF Notes* (2012), <http://hsfnotes.com/arbitration/2012/09/06/consistently-inconsistent-another-contrasting-decision-on-most-favoured-nation-provisions-another-split-decision/>.

Eventually, the ICSID tribunal declined jurisdiction, and the decision sparked the debate of whether a claimant can successfully invoke a Most-Favored-Nation (MFN) clause to access an expedited arbitration process. In particular, the claimant suggested that Argentina took measures that negatively impacted its oil and gas operations for three reasons: (i) it prevented Siemens from receiving dividend payments from its Argentine subsidiary; (ii) it impaired the legal and contractual rights of its Argentine subsidiary, and (iii) it violated a number of the substantive protections afforded to investors under the Argentina-Germany bilateral investment treaty, which included the prohibition against any form of expropriation.

Despite a provision in the Argentina-Germany BIT that provides the ability to introduce disputes before Argentinian courts, the corporation submitted its claims to arbitration on the ground of the MFN clause. The corporation suggested that this was the most favorable dispute settlement procedure it could use.

The tribunal declined jurisdiction over the dispute, based on two major findings: (i) that the claimant could not avoid compliance with procedural requirements included in the Argentina-Germany BIT, and (ii) that the Claimant could not rely on the MFN clause in Article 3 of the Argentine-Germany BIT to avoid compliance with those requirements.

It is noted, however, that previous arbitral tribunals have granted investors direct access to arbitration in light of similar procedural hurdles, accepting the legal argument of jurisdiction despite the prior, contrary argument regarding the levels of jurisdiction. Siemens's attempt to invoke MFN protection was a sound jurisdictional question, yet the ruling of the tribunal confirms the unpredictability that applies when examining the scope and

applicability of certain rules, including the MFN clause, in international investment law.⁵⁴

Siemens was initially awarded over \$200 million for Argentina's unlawful expropriation of the company's investment in the design and construction of an information technology system that the government had previously commissioned. Siemens's claim was irrelevant to the financial crisis, yet Argentina was unwilling to honor the award.

Five months after the award, Argentina filed a petition for annulment. Back then, the annulment was more of an administrative rather than a substantial nature since little, if any, evidence suggested that facts were different than the ones that led to the conviction. The common expectation was that the Committee would discard the claim for annulment that Argentina raised.

Yet, U.S. and German anticorruption agencies retrieved evidence that Siemens executives had adopted a corporate culture of endorsement, rather than tolerance, towards bribing public officials. This culture of bribery existed on a large scale for the purpose of facilitating transactions. Siemens soon found itself in a typhoon of bribery investigations. One of the investigations revealed evidence against a Siemens's Argentine subsidiary, involving conspiracy through which the corporation made, or caused to be made, over US\$ 30 million in improper consulting payments. These payments aimed to secure that Siemens would assume the contracts distributed by the Argentine government, including the IT contract relevant to the award in question.

⁵⁴ Jason W. Yackee, "Investment Treaties and Investor Corruption: An Emergent Defense for Host States?" University of Wisconsin Legal Studies Research Papers, No. 1181 (2011).

In light of this massive scandal, Siemens chose to settle pursuant to anticorruption laws and accepted fines of a total value of U.S. \$1.3 billion. Following Argentina's procedurally infrequent move to ask ICSID to revise the award, Siemens agreed to abandon the amount granted to it in exchange for Argentina's consent to discontinue the annulment and revision proceedings. Hence, the correlation between Siemens's corruption and the dispute was never settled via the tribunal. Siemens also pledged to reform its compliance techniques and reinvent its corporate culture. It is currently investing a significant amount of money in corporate ethics, funding scholarships that promote compliance, and overall taking care of its corporate image.⁵⁵

The Siemens case demonstrates how proof of corruption can alter the development of a case. It further sets the example of how transparency and openness can increase accountability since incidents of corruption are otherwise difficult to establish. If one were to enquire as to what would have happened if Argentina raised and proved the corruption allegation during the original proceedings, the likelihood is that the tribunal would simply deny jurisdiction.

3.5. Plama Consortium Ltd. v. Republic of Bulgaria

The *Plama Consortium Ltd. v. Republic of Bulgaria* case involved a dispute that arose under the Energy Charter Treaty (ECT). Plama Consortium Limited (PCL), a Cypriot Company, acquired shares of Plama AD, a Bulgarian oil refinery. PCL filed claims of US\$ 300 million against Bulgaria under the Bulgaria-Cyprus BIT and the ECT. Bulgaria was able to obtain dismissal of the claims under the Bulgaria-Cyprus BIT for lack of jurisdiction. The foundation of the decision revolved around the MFN clause.

⁵⁵ Id.

In fact, the tribunal found that the claim would fail, even if the claimant were entitled to the relevant protections as set out by the ECT. The tribunal thus concluded that all the substantive claims that PCL raised lacked merit. PCL had argued, in particular, that Bulgaria:

- (i) failed to create stable, equitable, favorable and transparent conditions for the investment,
- (ii) failed to provide the investment with fair and equitable treatment,
- (iii) failed to provide the investment constant protection and security,
- (iv) subjected the investment to unreasonable and discriminatory measures,
- (v) breached its contractual obligations vis-à-vis PCL, and
- (vi) subjected the investment to measures having an effect equivalent to expropriation.

The tribunal examined the merits under the ECT, discovering that the investment focused on misrepresentation of identity. The tribunal overall found that the claimant did not substantiate its allegations, and made a number of notable observations that related to the ECT's substantive protections. It also held that a balanced interpretation, relevant to the totality of the ECT, is appropriate. The tribunal therefore accepted Bulgaria's point that the investment was void *ab initio* under Bulgarian law.

The tribunal did not refuse jurisdiction in hearing the case, yet it did bar PCL from seeking protection under the ECT since the investment in Nova Plama AD was obtained by fraud: "[t]he investment in Nova Plama was . . . the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian

authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities . . .” required to continue with its operations.⁵⁶

PCL’s investment overall violated both domestic and international law. It jeopardized the principle of good faith, the principle of *auditor propriam turpitudinem allegans* (nobody can benefit from his own wrong), and international public policy. It is a contract obtained with illegitimate means and, is therefore, void. The tribunal reaffirmed the importance of the clean hands doctrine when concluding business.

3.6. Inceysa Vallisoletana S.L v. Republic of El Salvador.

In the ICSID *Inceysa Vallisoletana S.L. v. Republic of El Salvador* case, the tribunal declined jurisdiction for claims of breach of contract and expropriation asserted by the Spanish company (Inceysa Vallisoletana SL) against the Republic of El Salvador.⁵⁷ The tribunal decided it lacked jurisdiction since Inceysa’s investment was discordant with domestic law.

In the facts of the case, the El Salvador Ministry of the Environment and Natural Resources (MARN) did not execute a concession contract for the operation of vehicle inspection services. MARN also retained two other companies to provide similar services and terminated the contract in domestic courts. Inceysa sought more than US\$ 120 million in damages as a result of the contract termination.

El Salvador supported the claim that the BIT protection only extends to lawful investments, and not to products of fraud. Inceysa

⁵⁶ Id., 737-8.

⁵⁷ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (2006).

allegedly obtained the concession using fraudulent methods during the public bidding process. These methods included, *inter alia*, submission of false financial documentation, intentional misrepresentation of its qualifications and concealment of its relationship with another bidder.

El Salvador thus maintained that the consent to the ICSID jurisdiction was expressly limited to “disputes involving investments otherwise entitled to protection under the Treaty,” i.e. investments made in accordance with Salvadoran law. The tribunal agreed that Inceysa’s investment was made in an illegal way, and that it should consequently not be included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT. Thus “the disputes arising from it [we]re not subject to the jurisdiction of the Centre.”⁵⁸

The tribunal postulated that El Salvador did not extend its consent in the BIT to investments that were made illegally. In fact, the tribunal assessed El Salvador’s written consent to the ICSID tribunal’s jurisdiction, which, flowing from Article 25(1) of the ICSID Convention, the tribunal recognized that it does not constitute a *carte blanche*, but rather an agreement based in good faith and legality.

The tribunal consequently denied the investor the benefits set out in the BIT since the general principle of negotiating and acting in good faith was compromised as a result of their actions. The principle was expected to be respected while making investments, and is in accordance with the Latin maxim of *ex dolo malo non oritur actio* (an action does not arise from fraud).⁵⁹

⁵⁸ Id.

⁵⁹ Id., 737.

The tribunal also found that Inceysa's actions barred it from accepting the unilateral offer to arbitrate disputes before the ICSID that were contained in El Salvador's national investment law. This led the tribunal rule it had no jurisdiction whatsoever to decide on the merits of the case.

3.7. Hub Power Company Limited (HUBCO) v. Pakistan WADPA & the Federation of Pakistan

In *HUBCO*, the dispute involved a private investor and WADPA, a Pakistani governmental agency. The Supreme Court of Pakistan held there was *prima facie* evidence demonstrating that state contracts were obtained through fraud. Settling the dispute according to the contract's arbitration clause would be in violation of public policy.

In particular, the question in hand was whether allegations of corruption and illegality form a dispute that falls out of the scope of a foreign arbitration clause and that hence the tribunal could not decide on its merits.

HUBCO operated as a foreign owned private company, generating and selling electric power to WAPDA under a 1992 Power Purchase Agreement (PPA). Schedule VI to the PPA contained provisions for tariff calculations and payments made to HUBCO by WAPDA during the project. WAPDA accused HUBCO of revising the Schedule VI through collusion and illegality for the purpose of vastly inflating the tariff payments due.

Upon discovery of the event, WAPDA repudiated three amending contractual documents for being "illegal, fraudulent, collusive, without consideration, mala fide and designed to cause wrongful loss to WAPDA." Following WAPDA's filing of a criminal complaint that involved officers in the commission of various offences in the procurement of tainted amendments, it filed a

suit in Lahore for recovery of over paid tariff of a total value of Rs. 16 billion.

Eventually, the Honorable Supreme Court was called to solve this case. The Court ruled on “whether the nature of the dispute and the question of mala fide, fraud, illegalities and the legal incompetence raised preclude resolution of the matter through arbitration as a matter of public policy and as such the dispute between the parties is not arbitrable and cannot legitimately be subject-matter of ICC arbitration?”⁶⁰ For the purposes of public policy, the Court held that the alleged criminality claim was not referable.⁶¹

3.8. Dadras v. Iran

The *Dadras v. Iran* case examined allegations of forgery in contractual documents. The award was unrelated to proof of corruption *per se*, yet the standards discussed applied to allegations of corruption altogether. The tribunal referred to the required standard of proof in English and U.S. law. The tribunal also suggested that forgery is not a stand-alone allegation but rather, that it required enhanced standards of proof. The tribunal held that: “The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as 'clear and convincing evidence,'

⁶⁰ Justice Umar Ata Bandial, "Limitations on Arbitrability of International Commercial Disputes Under Pakistani Law," <https://www.international-arbitration-attorney.com/wp-content/uploads/1.pdf>.

⁶¹ Justice Umar Ata Bandial, "Limitations on Arbitrability of International Commercial Disputes Under Pakistani Law," <https://www.international-arbitration-attorney.com/wp-content/uploads/1.pdf>; see also Mark Kantor, "International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?" *Fordham International Law Journal* 24 (2000): 112.

although the Tribunal deems that precise terminology is less important than the enhanced proof requirement that is expressed.”⁶²

It is interesting to note, however, that the tribunal did not rely on the enhanced standard as per the forgery allegations, but rather the majority of the arbitral tribunal rejected the contentions regarding supports of allegation of forgery, as well as it is evident that the majority was convinced that no forgery occurred altogether.

The arbitral tribunal said: “In light of the foregoing, the Tribunal concludes that the Respondents have not proved by clear and convincing evidence, or even by a preponderance of evidence, that the Contract [was] forged.”⁶³

3.9. The Westacre Case

In the *Westacre* [Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd] case “the arbitral tribunal defined the applicable standard of proof as the "conviction" of the arbitral tribunal: "If the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere 'suspicion' by any member of the arbitral tribunal [. . .] is entirely insufficient to form such a conviction of the arbitral tribunal.”⁶⁴

The tribunal asserted jurisdiction over the dispute, despite the allegation of bribery, investigated and eventually rejected the bribery allegations, issuing an award on the relevant merits.

⁶² Id., 334.

⁶³ *Westacre Investments Inc. v. Jugoimport-SDRP Holding Co. Ltd.*, Court of Appeal England and Wales EWCA Civ 1401 (1999).

⁶⁴ Id.

The tribunal also defined the applicable standard of proof as the “conviction” of the arbitral tribunal. If the claim can be voided by the bribery defense, the tribunal should ensure there is a strong case towards bribery. The tribunal thus supported that suspicions that are not fully reinforced are entirely insufficient in forming such a conviction.⁶⁵

3.10. The Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited

The *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8) is an example of a corruption allegation arising quite late in the litigation stage, and its evidentiary basis was never fully developed. The state company argued that the investor bribed certain officials and that it was, thus, entitled to annul the agreement. The tribunal however did not upkeep the bribery allegations since the only admitted paid and received sum was less than US\$ 200 “holiday gift package” that was given to a state corporation official.

The state company counter-argued that this amount was used to get the assistance of the official in supporting the investor’s project, yet there was no robust evidence towards this direction. In particular, no proof was provided that if it were not for the alleged bribe the official would have voted otherwise, nor that the official’s support was significant, or that it changed the natural course of events.

The tribunal held that even if it accepted the evidence presented, it would not be sufficient to render a contract void and

⁶⁵ Florian Haugeneder and Christoph Liebscher, “Chapter V: Investment Arbitration” in Christian Klausseger, Peter Klein, et al., eds., *Corruption and Investment Arbitration: Substantive Standards and Proof* (Austrian Arbitration Yearbook, C.H. Beck, Stämpfli & Manz, 2009), 539–564.

change the particulars since the evidence was (i) continuously denied, and (ii) even if it were not, only U.S. \$200 allegedly changed hands.⁶⁶ This case demonstrates, among other things, that the value of the monetary dispute is a decisive element in establishing corruption.

3.11. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines

In *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* is another example where allegations of bribery arose. The tribunal examined the Germany-Philippines BIT, which covered investments as “any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State.”⁶⁷

The tribunal further interpreted this provision as one that established a jurisdictional limitation *ratione materiae* (subject-matter jurisdiction) that required it to examine whether Fraport’s investment in an airport construction project was made in accordance with Philippine laws.

The majority of the tribunal found that Fraport had “consciously, intentionally and covertly structured its investment in a way which it knew to be a violation” of the Philippine Anti-Dummy Law, which was structured to prevent foreigners from exercising control over certain investments. The tribunal considered this violation to be egregious, and hence it had no jurisdiction over the dispute.⁶⁸

⁶⁶ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) (2007), para. 323.

⁶⁷ *Id.*, para. 129.

⁶⁸ *Id.*

3.12. *Wena v. Egypt*

The *Wena v. Egypt* case records issues of bribery. In this case bribery was conceptualized to investigate corruption at different stages of the investment arbitration.

In *Wena v. Egypt*, the arbitral tribunal found that Egypt's allegation that Claimant had sought to bribe Egyptian officials was not substantiated without discussing the required standard of proof. The tribunal noted that it is rather regrettable that Egypt did not investigate the allegedly corrupt intermediate, stating that "moreover, with the exception of the coincidence in the timing of the payments and the signing of the Luxor and Nile hotels (and the apparent overpayment of Mr. Kandil [the intermediate]), the Tribunal notes that Egypt – which bears the burden of proving such an affirmative defense – has failed to present any evidence that would refute Wena's evidence that the Contract was a legitimate agreement to help pursue development opportunities in Misr Aswan."⁶⁹

The *Wena v. Egypt* case is therefore an example where the inertia of a government to investigate a situation was to its own detriment.

3.13. *Lucchetti v. Peru*

In *Lucchetti v. Peru* (Award, Case No ARB 03/4, Feb. 7, 2005) the claimants submitted that they have obtained necessary permits for the construction of an industrial plant, yet the Municipality of Lima annulled the aforementioned permits based on environmental problems and relevant deficiencies.

⁶⁹ Florian Haugeneder and Christoph Liebscher, "Chapter V: Investment Arbitration," in Christian Klausseger, Peter Klein, et al., eds., *Corruption and Investment Arbitration: Substantive Standards and Proof* (Austrian Arbitration Yearbook, C.H. Beck, Stämpfli & Manz, 2009), 539–564.

Peru counter-argued that local court judgments allowed the investors to continue doing business even though local government regulations called to stop the operations due to bribery. The tribunal declined to rule on the case, since it concluded it lacked jurisdiction over the dispute on grounds of *ratione temporis*.⁷⁰

3.14. Methanex Corporation v. United States of America

Methanex Corporation v. United States of America (Chapter 11 of NAFTA and the UNCITRAL Arbitration Rules, Final Award, Aug. 7, 2005) is a case where allegations of corruption were not confirmed. The claimant supported that corruption occurred on behalf of the Californian government officials for the purpose of banning the use of MBTE in California for environmental and human health reasons. Methanex produced a major component out of this substance – methanol itself, and thus had a vested interest in the matter.

Nonetheless the tribunal failed to confirm that the allegations of corruption were founded since the legislative process was overall transparent and in accordance with the rules of due process and peer review. It did not, therefore, overturn the findings of the Californian legislative process, but importantly, it made significant efforts to explore any potential allegations of corrupt activity. While doing so, the tribunal used the “connect-the-dots” approach and confirmed that the facts did not support the allegations in question.

⁷⁰ Aloysius Llamzon, “The Control Of Corruption Through International Investment Arbitration: Potential And Limitations,” *American Society of International Law Proc.* 102:203 (2008): 208.

3.15. Westinghouse Case

Finally, in the *Westinghouse case*, the tribunal supported that “where the arbitral tribunal applied the standard of proof of the applicable laws in the States of Pennsylvania and New Jersey, the laws applicable to the merits of the dispute, and of the laws of the Philippines, the place of performance of the contract. The arbitral tribunal concluded that rules of evidence in all three jurisdictions provided for a higher standard of proof, namely “clear and convincing” evidence, in cases concerning corruption.”⁷¹ The Swiss Federal Tribunal affirmed an arbitral tribunal’s exercise of jurisdiction over a matter involving allegations of bribery.

3.16. Concluding Remarks

The main remarks pertaining to corruption that emerge from the case law analysis are as follows:

- (i) Corruption might be used both as a substantive and procedural defense to the enforcement of an investment contract in the context of contract-based arbitration. In particular, the World Duty Free case is an example where corruption was used as a valid defense against contract-based arbitration. In fact, the corrupt behavior led to the annulment of the contract;
- (ii) In investment treaty arbitration, the respondent State may invoke corruption as a defense to jurisdiction as has happened in certain cases in the past. Corruption is seen as a jurisdictional defense in investment arbitration, as established by the World Duty Free case, as well as the *Inceysa* case. An additional case where this is prevalent is the *TSA v. Argentina* case, where the Tribunal did face a corruption allegation, yet it denied jurisdiction on other grounds.

⁷¹ Id., 335.

(iii) A State may rely on corruption as a measure to defend itself against the substantive protection standards that are contained in an investment protection treaty. Further, corruption may be invoked as a substantive defense in investment-state arbitral proceedings, especially if a treaty between the parties lacks the clause on the compliance with local law. Hereby, the relevant cases are *Fraport*, *Plama*, and *Incesysa* as discussed previously.

(iv) An investor can claim damages pursuant to incidents of corruption, or equally claim damages that he suffered in retaliation for the refusal to pay bribes. Specifically, corruption may be the investor's cause of action pursuant to Article 35 of the UN Convention against Corruption, and similarly according to Article 3 of the Civil Law Convention on Corruption. The applicable standard of proof that establishes corruption in a case is relevant for all cases that deal with corruption.⁷²

(v) The most pertinent element of bribery or corruption allegations in investment arbitration is the standard of proof, often very difficult to satisfy, and there is a paucity of cases whereby one of the parties admits corrupt acts, as it occurred in the *World Duty Free* case. The general principle of the standard of proof may be found in Article 24 of the UNCITRAL Rules. The two different approaches to the standard of proof are the civil and the common law one.⁷³

The standard of proof that relates to arbitral practices is relatively flexible. For example, the Iran-U.S. Claims Tribunal established a relatively high threshold for the standard of proof in allegations of corruption. In this regard, two decisions of the Iran-US Claims Tribunal had to make pronouncements on allegations of corruption and fraud. In *Oil Field of Texas v. Iran*, the arbitral

⁷² Haugeneder, 324.

⁷³ See *Id.*, 333.

tribunal applied a high standard of proof without discussing specifically the reason it does so.

It is not apparent from the discussion of the arbitral tribunal if the allegation of corruption would have been established if a lower "preponderance of evidence" standard had been applied. It is of particular concern to decide the sanction for corrupt investor behavior. Tribunals will treat investor corruption not as a jurisdictional or preliminary issue, but rather as an issue that should be balanced at the merits stage. The investor's approach is therefore balanced against the state's own involvement in the scheme, potentially allowing the investor some measure of recovery despite the corrupt origins of his investment.

Chapter 4: The UNCITRAL Rules on Transparency as a Tool against Institutional Corruption

4.1. Introduction to the United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL has overall been considered as the core legal body of the United Nations system in the field of international trade law. A legal body with universal membership that specializes in commercial law reform for over 40 years, UNCITRAL's business relates to the modernization and harmonization of rules on international business.

UNCITRAL is committed to faster growth for trade, higher living standards, and new opportunities via commerce. Ways to achieve that include:

- Conventions, model laws and rules which are acceptable worldwide;
- Legal and legislative guides and recommendations of high practical value;
- Updated information on case law and enactments of uniform commercial law;
- Technical assistance in law reform projects; and,
- Regional and national seminars on uniform commercial law.

4.1.1. The Commission

The Commission discusses its work at annual sessions, held in alternate years at the United Nations Headquarters in New York or at the Vienna International Center in Vienna.

Every working group of the Commission holds one or two sessions a year, relevant to the subject matter covered. Additionally

to member states, all states that are not members of the Commission, and interested international organizations, are invited to attend sessions of the Commission and its working groups as observers. The observers participate in discussions at various meetings of the Commission and its working groups work to the same extent as members.

4.1.2. Working Groups

Six working groups exist on topics within the Commission's program of work. The six working groups and their current topics are as follows:

- Working Group I – Micro, Small and Medium-sized Enterprises;
- Working Group II – Arbitration and Conciliation;
- Working Group III – Online Dispute Resolution;
- Working Group IV – Electronic Commerce;
- Working Group V – Insolvency Law; and,
- Working Group VI – Security Interests.

As seen above, UNCITRAL provides technical assistance pertinent to law reform activities, including assisting Member States to review and assess their law reform needs, and draft the legislation required for the purpose of implementing the relevant texts. One of its fundamental legal texts is the recently concluded Rules on Transparency.

4.2. Background to the UNCITRAL Rules on Transparency and the UN Convention on Transparency

In 2008, UNCITRAL mandated its Working Group II to undertake work related to transparency in ISDS since it consensually agreed “on the importance of ensuring transparency in investor-State dispute resolution.”⁷⁴ The Government of Canada took the lead in advocating for such a development since it supported that a failure to endorse the need for transparency in ISDS in UNCITRAL’s procedural rules would be “contrary to fundamental principles of good governance and human rights upon which the United Nations is founded.”⁷⁵

Pursuant to this call, the Working Group II started working on these tasks two years later, in 2010. The work culminated in two primary texts, these being:

- (i) The adoption of the rules on transparency in treaty-based investor-State arbitration, which came into effect on 1 April 2014 (the Rules); and,
- (ii) The convention on transparency that was finalized by the Commission in July 2014 (the Convention).

The Rules overall provide a transparent procedural regime under which investment treaty arbitrations are followed. They might work in investor-state arbitrations initiated under UNCITRAL

⁷⁴ See Report of UNCITRAL on the work of its forty-first session, UN document A/63/17 (2008), para. 314.

⁷⁵ See also Report of UNCITRAL on the work of its forty-first session UN document A/CN.9/662 (2008). Special Representative Ruggie also made a statement in support of the initiative, emphasizing that transparency lies at the foundation of what the UN and other authoritative entities promulgate as precepts of good governance. See Statement to the UNCITRAL Commission, 41st session, UNHQ, New York, USA, 16 June-3 July 2008, (“2008 Ruggie Statement”).

arbitration rules, including other institutional arbitration rules or in ad hoc proceedings.

In particular, the Rules include: (i) provisions on the publication of documents, (ii) open hearings, (iii) and the possibility for the public and non-disputing treaty parties to make submissions. The Rules further assist with robust safeguards to protect the dissemination of confidential information and safeguard the smooth arbitral process.

In 2011 Professor John Ruggie, then Special Representative of the UN Secretary-General on Business and Human Rights, delivered a statement to the UNCITRAL Working Group on Arbitration and Conciliation (Working Group II) which described how the work he had carried out in his business and human rights mandate could inform UNCITRAL's discussions relating to ISDS.⁷⁶ Professor Ruggie advocated in favor of an expansive approach to transparency since "adequate transparency in such arbitration processes where human rights are concerned is essential if societies are to be aware of proceedings that may affect the public interest and therefore their own welfare."⁷⁷

The work of UNCITRAL to promote transparency in investor-State arbitrations is not just described as the consequence of certain years of negotiation among Member States and UN observers, but rather belongs to a broader zeitgeist.

⁷⁶ Special Representative John Ruggie framed the nature of investment treaty disputes in less prosaic terms: *"These are not issues of purely private transaction and consequence. Therefore, they cannot be conducted through an entirely private process if good governance is to have any meaning in practice."* See Statement to the UNCITRAL Working Group II (Arbitration and Conciliation), 54th session, UNHQ, New York, USA, 7 February 2011, ("2011 Ruggie Statement").

⁷⁷ Id.

In particular, the trend of greater openness is evident not only in investor-State dispute settlement, but also in treaty negotiations. For example, the on-going European Union's TTIP negotiations are holding public consultations that relate to key investment protections and further compare to ISDS issues in the negotiations. The TTIP is the most openly negotiated treaty so far, and its rounds of negotiations are publicly available. This new era of transparency appears to have a momentum against corruption, existing through the newly enforced transparency convention.

Further, the ICSID amended its procedural rules in 2006⁷⁸ to include, among other changes, provisions that increase transparency in its proceedings. They may consider further amendments regarding the rules, mimicking the UNCITRAL's work in transparency.

Recently, the European and Inter-American Courts of Human Rights have construed the right to freedom of expression, as that being inclusive of the right to receive information in certain circumstances.⁷⁹ Transparency exists in recent model bilateral investment treaties and free trade agreements that have further promoted transparency both in ISDS and in investment practices.⁸⁰

In 2011, the UN Human Rights introduced a set of Guiding Principles on Business and Human Rights (UNGPs). The rationale behind that is to assist governments, businesses and other actors to better manage the business and human rights challenges they face. They revolve around three main premises:

- (i) The duty of States to protect against human rights abuses within their territory and/or jurisdiction, including by businesses;

⁷⁸ ICSID Convention, Regulation and Rules, ICSID/15 (April 2006).

⁷⁹ See e.g. *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (19 September 2006); *Társaság v. Hungary*, European Court of Human Rights, 37374/05 (14 April 2009).

⁸⁰ See, e.g., 2012 US Model BIT; 2009 Australia-Chile FTA.

- (ii) The corporate responsibility that relates to the respect of human rights; and,
- (iii) The need to create more effective access to remedies for the individuals that have suffered from abuse.

Both the Guiding Principles and the UNCITRAL's work on transparency relate to the mutual espousal of procedural and legal transparency, as well as their practical approach to achieving the said aim.

4.3. The New UNCITRAL Rules on Transparency

On July 10 2014, the United Nations Commission on International Trade Law (UNCITRAL) approved the draft Convention on Transparency in Treaty-Based Investor-State Arbitration (draft Convention) at its 47th session in New York. The rules in the Treaty-based Investor-State Arbitration adopted by the relevant Commission in 2013 provide a procedural framework to make information available to the public in investment arbitration cases that arise under relevant investment treaties. The new Convention forwards a level of transparency that is unprecedented in international arbitration. With the new rules, ISDS will be more transparent than most domestic courts.

The complementing press release mentioned that "the purpose of the convention on transparency is to provide a mechanism for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to arbitration cases arising under almost 3,000 investment treaties concluded before 1 April 2014."

The Rules on Transparency are overall a set of procedural rules that will make treaty-based investor-State arbitrations open and accessible to the public. The rules have the purpose of increasing transparency between investors and States since such cases are often of public interest, involving taxpayers' money and disputes on natural resources or environmental issues. The Transparency

Registry (repository) is a central, online source that publishes all information that can be made public under the Rules.

The Rules that came into effect on 1 April 2014 for investment treaties concluded for rules on or after that date, and the Rules apply if included in the treaties. As for treaties concluded before 1 April 2014, the Rules can apply if parties to the treaties or parties to the disputes agree on their application. The rules must apply following inclusion in an investment treaty, and the parties cannot derogate from them unless the investment treaty permits them to do so. Hence the Rules on Transparency apply to existing treaties for States amending the existing investment treaties to allow their use. That being said, States will probably wish to avoid such an option since it would overcomplicate the international economic relations currently concluded with their trade allies.

Prior to the newly enforced Rules on Transparency, no arbitration rules used in investor-State arbitration had mandated transparency throughout the arbitral process. Indeed, most arbitration rules referred to in investment treaties are (except for provisions requiring both disputing parties' consent to open hearings) regularly silent on the issue of transparency, neither mandating confidentiality nor requiring disclosure.

As was previously developed in the case law section, the link between investment treaty arbitration, transparency and human rights is quite palpable. In fact, disputes that involve an investor and a state jeopardize the public interest, as well as the state budget. For example, a dispute might arise from an agreement that relates to environmental issues, access to water, public health and indigenous people's rights.

Issues of accountability and corruption can emerge from such a situation. Thus the provisions of transparency in investor-state dispute settlement promote public awareness and participation in disputes that relate to issues of public importance. The State is held accountable both under its international law obligations that stem

from the investment treaty, and to the broader public interest or human rights issues.

Through allowing free and open access to all the documents that relate to a certain case, the benefits are multiple:

- (i) Citizens become aware of the merits and the particulars of the case;
- (ii) Any interested party can contribute to the case with relevant information;
- (iii) Every document is put under strict scrutiny, which maximizes the exposure to public control;
- (iv) Transparency increases the accountability of every interested party;
- (v) The openness acts as a deterrent for any party that considers any unlawful activity in an investment; and,
- (vi) It will affect the perception corruptions index in a way that citizens will trust their countries more.

4.4. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)

During the UNCITRAL discussions, a point of the debate was whether the new rules should apply to the several investment treaties that are already in force. In fact, particular countries including Argentina, Australia, Canada, Mexico, Norway, South Africa and the US have favored universal application. The Commission decided to create a convention that governs the application of the transparency rules regarding disputes that arise under existing treaties.

Addressing, hence, the lacuna in the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration before 1 April 2014, the UN General Assembly adopted on 10 December 2014 the Mauritius Convention on Transparency.

By becoming parties to the Mauritius Convention on Transparency, States and regional economic integration organizations agree to apply the Rules on Transparency to arbitrations arising under their existing investment treaties, whether on a bilateral or unilateral basis. The Convention contains reservations that allow Parties to exclude from the scope of the Convention certain investment treaties, certain sets of arbitration rules, or the unilateral application.

Together with the Rules on Transparency and the Transparency Registry, the Convention contributes to the enhancement of transparency in treaty-based investor-State arbitration. The Convention is an efficient and flexible mechanism for recording such agreement.

The Transparency Convention has been open for signature in Port Louis, Mauritius, and from that point onwards at the United Nations Headquarters in New York, from 17 March 2015 in the most significant step towards their implementation. The "Mauritius Convention on Transparency" will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession.

At the time of the writing of the current book⁸¹ the following countries have signed the Mauritius Convention on Transparency:⁸²

1	Canada	17/03/2015
2	Finland	17/03/2015
3	France	17/03/2015

⁸¹ Last update 6 April, 2015.

⁸² See United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

4	Germany	17/03/2015
5	Mauritius	17/03/2015
6	Sweden	17/03/2015
7	Switzerland	27/03/2015
8	Syrian Arab Republic	24/03/2015
9	United Kingdom of Great Britain and Northern Ireland	17/03/2015
10	United States of America	17/03/2015

4.5. What is made public under the Transparency Rules?

The Rules make public information and documents available in the arbitration process. Nonetheless, certain safeguards do apply, which include the protection of confidential information.

Pursuant to the "notice of arbitration" stage of the proceedings, the following information is published; the name of the disputing parties, the economic sector involved, and the investment treaty under which the claim is being made.

Equally, each published case will include the following:

- (i) The notice of arbitration;
- (ii) Response to the notice of arbitration;
- (iii) The statement of claim;
- (iv) The statement of defense;
- (v) Further written statements or written submissions by a disputing party;
- (vi) Table listing all exhibits to those documents;
- (vii) Any written submissions by the non-disputing treaty Party/Parties and by third parties;

- (viii) Transcripts of hearings, where available; and,
- (ix) Other decisions and awards of the arbitral tribunal.

Expert reports and witness statements are published upon request by the arbitral tribunal and are subject to confidentiality provisions in the Rules. Hearings will also be open, subject to certain safeguards for the protection of confidential information or the integrity of the arbitral process.

Third parties (*amicus curiae*) and non-disputing treaty parties can, under circumstances, also make submissions.

This is not to suggest however that the Rules on Transparency do not protect confidential information. In particular, under the rules, arrangements will be made to prevent any confidential or protected information from being made available to the public. Further safeguards in the Rules ensure that submissions do not disrupt or unduly burden the arbitral proceedings, or equally unfairly prejudice any disputing party.

These rules are overall a significant step towards openness throughout the arbitral proceedings, and the subsequent increased transparency.

These new rules demonstrate a sophisticated mixture of careful negotiations and widely approved templates that can serve as a model on how to conduct investor-State arbitrations transparently. The model is consistent with the broader worldwide trend that recognizes the importance of transparency.

In particular, transparency is seen as a facilitator towards effective democratic participation, good governance, accountability, predictability and the rule of law.⁸³

4.6. Structure of the Rules on Transparency

In terms of the structure of the rules, they include one article that relates to the scope and manner of application of those provisions (Article 1); three articles that mandate disclosure and openness (Articles 2, 3, and 6); two governing participation by non-disputing parties (Articles 4 and 5); one setting forth exception from the disclosure requirements (Article 7); and one regarding management of disclosure through a particular repository (Article 8).

UNCITRAL firstly debated on whether the rules would only be guidelines, whether they would be a stand-alone instrument or an integral part of the UNCITRAL Arbitration Rules. It determined that they would be (i) a part and parcel of the UNCITRAL Arbitration Rules and, (ii) available as a stand-alone instrument for application in disputed governed by other arbitral rules. In order to accomplish the goal of incorporating the Rules on Transparency as an integral part of UNCITRAL arbitrations, UNCITRAL amended its 2010 general arbitration rules by a new paragraph (4) in Article 1 of the said rules.

4.6.1. Article 1 – Scope of application

The Rules on Transparency will apply on a default basis to UNCITRAL investor-State arbitrations conducted under investment treaties concluded after the new rules came into effect on April 1, 2014. State parties can amend this default rule and "opt out" for future treaties. Towards this direction, there needs to be an explicit

⁸³ "Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International levels," Report of the Secretary-General, A/66/749, (2012).

exclusion of the application of the UNCITRAL Rules on Transparency or, instead, that the “UNCITRAL Arbitration Rules, as adopted in 1976” will apply. In UNCITRAL arbitrations that were concluded prior to April 1, 2014, the Rules on Transparency may not apply unless States or disputing parties explicitly then opt for the new rules.

The Rules on Transparency can also be used with arbitrations under other arbitral rules. During the negotiations, various arbitral institutions, including the Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID) confirmed that the Rules on Transparency could apply to proceedings that were conducted under their rules of procedure.

Certain provisions in the Rules on Transparency required the tribunal to exercise discretion. In those cases, the rules dictated that a tribunal should take into account:

- (i) The public interest and,
- (ii) The disputing parties’ interest in a fair and efficient resolution of their dispute.

The Rules on Transparency also address the tribunal's authority to allow or require transparency in UNCITRAL arbitrations without using the Rules on Transparency, and aim to provide any potential presumption against transparency. Certain transparency already exists under the general UNCITRAL Arbitration Rules (2010 or 1976) and it is in no way intended to be reduced through a non-application of the Rules on Transparency. The limits also refer to the ability of States to evade the application of the Rules on Transparency where these apply.

As for the legal hierarchy, the Rules on Transparency overpower conflicting provisions in applicable arbitration rules (Art. 1(1) of UNCITRAL Arbitration Rules 1976, 2010, 2013). In case of conflict with the provisions of the relevant treaty, the treaty

provisions prevail. The principle that the arbitration rules cannot prevail over mandatory laws also applies.

The UNCITRAL rules for dispute resolution do not apply to BITs that require the use of other arbitration rules (such as the ICSID rules), nor other types of arbitrations that are subject to the UNCITRAL commercial rules. It follows that whether the Rules will apply at all to an investor-State arbitration under UNCITRAL rules will depend upon when the BIT was executed.

4.6.2. Article 2 – Publication of information at the commencement of arbitral proceedings

Article 2 provides for speedy disclosure of particular sets of facts if there is evidence that the respondent has received notice of arbitration. This information will not require the exercise of subjective judgment or discretion by the repository, whereas, in some cases, the disputing parties do not necessarily consensually agree on whether or not the Rules on Transparency apply. Article 2 requires that each disputing party and the repository take action before a tribunal in order to resolve the disputes regarding the issue. The notice of arbitration will also be subject to automatic mandatory disclosure in line with Article 3, yet only after the constitution of the tribunal.

4.6.3. Article 3 – Publication of documents

Article 3 provides for disclosure of documents that are submitted to, or issued by, the tribunal along three categories:

- (i) An extensive set of documents submitted to or issued by the tribunal during the proceedings is to be mandatorily and automatically disclosed;
- (ii) Documents, such as witness statements and expert reports, are to be mandatorily disclosed once any person requests their disclosure from the tribunal;

(iii) Other documents, including exhibits, may be published by an order of the tribunal depending on the exercise of its discretion.

In cases where disclosure is mandatory, the tribunal must send the required information “as soon as possible” pursuant to steps being taken to restrict disclosure of information deemed protected or confidential. The repository will then publish the information on the website.

With the commencement of the arbitral proceedings, usually marked with evidence that the respondent has received notice of arbitration, a set of facts is disclosed:

- (i) The names of the parties
- (ii) Economic sector involved and the underlying treaty.

In an effort to balance the provisions of disclosure, Article 7 provides that disclosure is subject to exceptions for confidential or protected information.

4.6.4. Article 4 – Submission by a third person

The Rules on Transparency affirm the authority of investment tribunals to accept submissions from amici curiae while incorporating detailed rules and guidelines. This recognition of authority concerns "written submission" and does not address other forms of participation in statements and hearings. Tribunals can, in certain instances, permit other forms of participation such as statements at hearings. Tribunals may allow other forms of participation relevant to their discretionary authority under Article 15 of the 1976 UNCITRAL Arbitration Rules and Article 17 of the 2010 and 2013 UNCITRAL Arbitration Rules.

The transparency rules overall affirm the authority of investment tribunals to accept submissions from amici curiae, while they incorporate detailed rules and guidelines found in Article 4. The Rules further require that tribunals accept submissions on issues of

treaty interpretation from non-disputing State parties to the relevant treaty, provided that the submission does not address other forms of participation, such as statements at hearings.

4.6.5. Article 5 – Submission by a non-disputing party to the treaty

The Rules on Transparency recognize that tribunals may accept submissions on issues of treaty interpretation from the non-disputing state parties to the relevant treaty, provided that the submissions does not “disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.”

They also authorize tribunals to invite submissions (both written and not) from non-disputing state parties on issues relevant to treaty interpretation under the same conditions. The tribunal can accept submissions on other matters that are relevant to the dispute from non-disputing State parties to the underlying treaty.

The Transparency Rules further require that tribunals accept submissions on issues of treaty interpretation from non-disputing (Article 5). Additionally, the tribunal may accept submissions that are relevant to dispute from non-disputing state parties.

4.6.6. Article 6 – Hearings

The Rules on Transparency establish open hearings, subject to three limitations:

- (i) For the purposes of protecting confidential information;
- (ii) In order to protect the integrity of the arbitral process; and,
- (iii) For logistical reasons.

Interestingly enough, the disputing parties cannot veto open hearings even if they consensually agree to that. The tribunal maintains the authority to decide on the ways to make hearings open, and may choose to facilitate public access through, inter alia, online tools. The third exception, logistical reasons, shall only apply narrowly in individual cases, and the provision must not be abused.

4.6.7. Article 7 – Exceptions to transparency

The Rules on Transparency recognize certain limitations to transparency, mostly due to the exceptions for confidential or protected information. The categories that constitute exception to transparency are:

- ***Confidential or Protected information***: This includes confidential business information, information protected against being made public under the treaty or under the law of the respondent state, or any other applicable laws, where it would be contrary to the essential security interests of the respondent state, and finally, information of the disclosure, which would impede law enforcement;
- ***The integrity of the arbitral process***: Where making information available to the public could hamper the collection of evidence, result in the intimidation of witnesses, counsels or members of the tribunal.

In fact, Article 7(2) includes four potentially overlapping categories that classify as confidential or protected. The reasons behind whether and what information could fall under these exceptions are decided on a case-by-case basis depending on the nature of the information and the applicable law.

Article 7(5) recognizes for the individual respondent states a self-judging exception to protect itself against the disclosure of information it might consider to be contrary to its essential security interests. There is also an exception regarding the transparency rules permitting tribunals to limit disclosure when necessary in order to protect the "integrity of the process." This integrity forms a category that is only intended to restrain or delay disclosure to cover exceptional circumstances (e.g. witness intimidation or comparably exceptional circumstances).

4.6.8. Article 8 – Repository of the published information

This Article regulates the repository of published information, reflecting that UNCITRAL shall act as the repository authority. When the Rules on Transparency were adopted, it was unclear whether UNCITRAL would have adequate resources to play this role. If, after April 1, 2014, UNCITRAL cannot serve as the repository, the Permanent Court of Arbitration will handle this function instead.

UNCITRAL's adoption of the Rules on Transparency represents crucial progress in the everlasting efforts to increase the transparency of treaty-based investor-State arbitrations under the UNCITRAL arbitration rules. This development ensures a real change since both UNCITRAL and the states ought to take a number of additional steps in order for the arbitration transparency dream to come true.

4.7. Significance of the Rules on Transparency

In a great struggle towards full transparency for investor-State treaty-based arbitration, the Rules constitute a significant contribution. By making openness the norm, they infuse the mentality of transparency and accountability throughout the entire arbitral proceeding.

However, this will also have a positive effect on investors since it enables the investors to assess the risk of their investments in different host states to a more accurate extent. Their application would, in this regard, introduce more consistency and cohesion.

On the other hand, efforts like the ones discussed could potentially backfire if investors feel more protected to pursue resolving the case individually. In particular, investors might want to solve disputes in public, which would be enabled only from a successful implementation of the upcoming UNCITRAL Rules.

Further, granting the right of public access to hearings and documents is essential for the institutions' perceived legitimacy. Consistent decisions form a more consistent reasoning in arbitral awards since the entire system would ensure:

- (i) Legal certainty;
- (ii) Promotion of effective democratic participation;
- (iii) Good governance;
- (iv) Accountability;
- (v) Predictability; and,
- (vi) The rule of law.

This relates to environmental issues or human rights. Previous versions of the UNCITRAL Arbitration Rules demonstrate that disputes between investors and states were often not made public, even with significant public concerns. A related challenge will be the potential change in how parties draft their pleadings for higher transparency, or the limitation as for the number of types of documents that parties submit, as a result of the intention to avoid potential disclosure requests.

Another point relates to the impact of the Transparency Rules to other convention texts, like the ICSID's. Will the UNCITRAL rules create a stream of transparency that the others will carefully follow or will this eagerness for transparency lead to the isolation of the UNCITRAL rules? Corporations might be incentivized to enforce one of the other conventions to avoid any element of transparency. This is not to suggest that companies would engage in a criminal act per se, but rather that they prefer confidentiality to exposure of all the relevant documents.

The Rules also leave less room for the abuse of proceedings through reducing the scope of procedural arguments that surround access to documents. In fact, providing a list of documents that would be subject to disclosure leads to Rules that will undoubtedly

diminish the possibility of these arguments. The Rules reduce the possibility for these arguments, yet the Rules do not exclude the likelihood for this discussion pertaining to witness statements, expert reports and exhibits. The biggest contribution of the new Transparency Rules is the underlying presumption toward openness, whereas they do not appear to introduce innovative nor hardly acceptable terms.

4.8. Arbitration and Transparency: The Status Quo Prior to the Rules on Transparency

The confidential character of international arbitration cancels the possibility of the public having access to information during the arbitral proceedings and, at times, the award itself. This subsection will focus on confidentiality provisions in the new UNCITRAL Rules on Transparency in comparison to the ICSID and the ICC rules.

Vis-à-vis international and national processes in other fora, arbitration is rather non-transparent by its structure alone. Confidentiality is undoubtedly one of the elements that parties find attractive when opting for arbitration. There is information parties often choose not to disclose to the public for a variety of reasons, the reputation of a company being the chief among them. Subsequently, the public is unable to follow proceedings, and awards themselves are often unpublished, or published partially as a digest. In addition, third parties seldom find ways to partake in arbitral proceedings. Among the arbitral proceedings, the ICSID has demonstrated its commitment to transparency, albeit this does not denote its absolute openness to the public. The ICSID amended both its Arbitration and the ICSID Additional Facility Arbitration Rules in 2006 in order to increase the transparency of proceedings. Current provisions include that:

- (i) Members of the public can attend oral hearings in an ICSID arbitration except if one of the parties object;

- (ii) ICSID tribunals can, upon relevant consultation with other parties, allow submissions from third parties; and,
- (iii) ICSID can publish the award if both parties consent to its publication.

Transparency in the ICSID context overall requires a consensus of the parties involved in the arbitration process. In any case, ICSID always publishes excerpts of the legal reasoning of the awards.

It is likely that arbitral proceedings under the new UNCITRAL Rules of Transparency will be the leader in the sphere of openness to public, and transparency itself. It is noteworthy in this regard to comparatively witness the shift from UNCITRAL's present procedural rules to the new transparency ones.

Until recently, the UNCITRAL proceedings provided no information to the public about the existence of a procedure, unlike the ICSID whereby the administrative and financial regulations require the Secretary-General to publish the registration of requests for arbitration. Moreover, the ICC and the ICSID tribunals alike are closed to the public, despite certain exceptions. These exceptions include the ICSID tribunal for instance permitting the public to sit during the entirety or a part of the proceedings, provided neither of the parties to the hearing objects. The ICC arbitral proceedings, on the other hand, provide in their respective rules that the proceedings are closed, unless the parties expressly demand that a part or the entirety of the procedure be made available to the public. Notwithstanding these exceptions, arbitral proceedings *talis qualis* remain closed to the admission of the public.

When it comes to the publishing of arbitral awards, the ICSID awards are published at times, albeit not necessarily in their entirety, yet the ICC awards remain more often than not unpublished. In respect to ICSID awards, the consent of the parties is a prerequisite for their publication. When the arbitral proceedings involve allegations of bribery or corruption, it is not unlikely that the parties

in such proceedings opt to have both the hearings and the award confidential and consequently not available to the public. Nonetheless, there are various cases where the parties have consented to the publication of awards addressing corruption or bribery claims. The publication of the ICSID awards does not aim at public awareness of the facts or legal reasoning of a particular proceeding, but rather, as stated in Regulation 22 of the ICSID Administrative and Financial Regulations, aims at furthering the development of international law in relation to investments.

The ICSID Tribunals indeed abide by the regulation mentioned above. In light of advancing international investment law, the tribunal still publishes parts of its legal reasoning from an award even when lacking the parties' consent. However, the excerpts containing the tribunal's legal reasoning do not reveal the facts of the case aligned with the parties' lack of consent. An example of this is the *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, where the tribunal's publication of its legal reasoning appears rather abridged and jumbled, in addition to the tardiness of the award's public availability.

In any event, when the parties consent to the publishing of an award, the hearings are often confidential, resulting in the public's limited awareness of the facts or the counsels' legal arguments. Instead, the summary contained in the award is all that the public may access.

The ICC Arbitration Rules are more constrained in comparison to the ICSID Regulations, as they do not even mention the publication of awards. Rather, the ICC Arbitration Rules provide in Article 34 that in respect to the awards, only copies may be delivered and that they shall be made available on request and at any time to the parties but to no one else. There is a paucity of available ICC awards, as the overall tendency is for the awards to be unpublished due to the confidentiality. However, when the ICC does publish the awards, it does so in a digest form, summarizing the

award and leaving the parties' names anonymous. Lacking the factual background and the corporate or state nature of the parties disrupts the whole context that could benefit public awareness. This disruption is especially true in awards pertaining to corruption and bribery claims since comprehending the award and the case *in toto* is hardly made easy to the public. As a consequence, the ICC awards are of little to no significance in the fight against corruption.

The confidentiality present in arbitral proceedings conflicts with the public interest in having the corruption allegations known. ICSID's recent effort to permit third-party participation has done little to smoothen this conflict. However, according to Article 37 of the ICSID Arbitration Rules and Article 41 of Additional Facility Rules, the Tribunal may allow the filing of written submissions by persons or entities that are not a party to the dispute, the so-called "non-disputing parties." The latter occurs after the Tribunal's consultation with the parties to the dispute. In considering a written submission filed by the non-disputing party, the Tribunal must assess whether such a submission would assist with the factual or legal issues in the proceeding. The submission must address a matter within the scope of the dispute thus remaining in boundaries of the Tribunal's *ratione materiae* jurisdiction. Finally, the non-disputing party must prove its significant interest in the proceeding. The written submission of the non-disputing party must not, however disrupt the proceeding or unduly burden or unfairly prejudice either party.

The UNCITRAL Arbitration Rules do not explicitly provide for third-party written submissions. However, pursuant to Article 17 of the Rules, the Tribunal "may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." This provision leaves enough room for interpretation, including the possibility to allow third-party submissions, provided that the Tribunal considers it appropriate.

Third-party submissions in ICSID and UNCITRAL arbitral proceedings could thus allow entities and organizations dedicated to anti-corruption to partake in the proceedings and benefit the Tribunal with their expert opinion. Proving corruption is highly labyrinthine, as the evidence required is often inadequate or lacking. Anti-corruption entities and organizations could not assist in this regard either. What they could do nonetheless is assist the tribunal in respect to its legal reasoning; this does not equate to more transparency about the proceedings, which might very well still be closed to public admission. Arbitral proceedings remain reasonably confidential and allowing for third-party submissions is merely touching the tip of the iceberg for public awareness and transparency.

In consequence, the new UNCITRAL transparency rules might initiate a new era of openness in arbitral proceedings. The new UNCITRAL rules appear to have a greater level of transparency than is currently present in arbitral proceedings under the ICSID rules. As per Articles 2, 3 and 6 of the UNCITRAL Arbitration Rules, the proceedings are open to public admission, publication of some information on an existing dispute is required, and both the award and the pleadings are public. Nevertheless, proceedings may be held in private for the protection of confidential information and the integrity of the arbitration. The new UNCITRAL transparency rules mark a shift towards transparency as a rule, rather than transparency as an option. The future will attest to the veracity of such a change with the number of disputes held under the UNCITRAL arbitration rules.

4.9. Discussion

The majority of investor-state disputes lie within the rules of International Centre for Settlement of Investment Disputes (“ICSID”) or UNCITRAL Arbitration Rules. The ICSID Arbitration Rules already recognize a certain level of transparency to investors, allowing for interested third parties to intervene in arbitral proceedings, at the discretion of the tribunal and attend the relevant

hearings. Currently, the ICSID does not publish the award without the consent of the parties, yet the Center is required to “promptly” include in its publication “excerpts of the legal reasoning” of the Tribunal.

The New UNCITRAL Rules on Transparency aspire to break the grounds and enforce transparency throughout, setting the new golden standard of openness. As we will discuss below, this might backfire since the parties involved might want to avoid applying transparency rules, which will necessarily deter them from choosing the UNCITRAL rules. However, this step aims at revolutionizing the arbitral process, involving the civil society, increasing public scrutiny and, ultimately, diminishing institutional corruption.

The new Rules therefore provide for public access to key documents prepared during the course of proceedings, except in limited instances where it is of paramount importance to safeguard confidential or protected information. In that respect, the definition of confidential or protected information is purposefully vague so that it provides adequate safeguards in the future.

Time will tell whether the new Rules will significantly increase transparency, the way the parties draft their pleadings, or how to limit the documents they refer to in order to avoid potential disclosure requests. Time will also reveal whether the increased level of transparency will have any impact on a party's decision to initiate an investor-state arbitration under UNCITRAL Arbitration rules or whether it would opt for other institutional rules.

The bet for UNCITRAL is to reinvent the way arbitral procedures work towards transparency and openness. It is not currently the leading forum to resolve disputes since the majority of parties opt for the ICSID rules. This bold move will, therefore, clarify its position in the future as well its ability to influence arbitral practice. A concrete test that will indicate the success of the new Rules will be in India's reaction to the new Rules since most of its BITs provide for arbitration within the framework of UNCITRAL

Arbitration Rules. For example, if the parties agree to set their BITs concluded prior to April 1, 2014 under the aegis of transparency, public access to key documents will contribute to the development of a new set of jurisprudence pertinent to India's BITs. Lastly, and since India is not a party to the ICSID Convention, the cases decided by the ICSID are not applicable to investment arbitration in India, hence the application of new Rules might prove to be most beneficial in the long run.

4.10. Implications for Investors

In principle, investors should be satisfied with the increased levels of transparency. In particular, proceedings against states under certain IIAs will be visible and the publication of relevant awards will help other investors to determine their rights, in case the same treaty governs their contractual relationship. Publication of the relevant documents can also lead to a consistency in decisions throughout, and a coherent reasoning in arbitral awards.

As previously discussed, however, an investor might wish to pursue an arbitral proceeding under different rules that will govern the dispute. If he can choose, the investor may not submit the dispute to arbitration in connection with the UNCITRAL Arbitration Rules.

These changes point towards the direction of more openness and transparency since the ideal way to reverse the trend is to demonstrate the highest standards in communicating the arbitration proceedings. The deficit of public trust in investment arbitration requires, however, significant work to rebuild, and more information necessarily needs to be obtained so that individuals can connect transparency with the current situation.

This openness and greater transparency does not come without a price, however. Parties to the proceedings and states might

not be pleased with these provisions since full transparency influences the strategies and tactics that the parties follow. The creativity and the freedom of their arguments might be considerably restricted and this factor is even more important regarding the defendant. A state is a constant and necessary participant in investment arbitration and transparency will unavoidably lead it to a more coherent and consistent position in terms of parallel or subsequent proceedings.

Wider public knowledge regarding state-investor disputes is also additionally inspired through further claims and requests for arbitration. This reaction is only temporary however and will not affect investment arbitration in the long run since investors are not immune from any possible misconduct by state authorities. Even though transparency is key to modern arbitration proceedings, increased openness and accountability, it does not resolve other structural problems including other forms of misconduct that might occur.

4.11. The Importance of the New Transparency Rules in the Fight against Institutional Corruption

The word transparency is an etymological transplantation of the Greek word “διαφάνεια” (δια+φαίνομαι) which stands for a clean surface, observable in both sides by everyone. The historical roots of transparency can be traced to the Athenian democracy where every public procurement contract was available to the citizens in a detailed form. Marble columns were engraved to include the call for proposals, the chosen contractor, the deadline for executing the contract, a detailed budget allocation and provisional penalties in case of delayed or deficient delivery.⁸⁴ This method deterred the

⁸⁴ Amongst numerous examples, one can find the Amphiaraos temple in Oropos, the Port of Zea and the Epidaurus Dome.

misappropriation of funds, increased transparency and included the citizens in the public life. Many centuries later, the use of transparency as a tool to prevent and detect institutional corruption is still a pressing and essential issue to analyze.

On the anti-corruption front, part of the value of transparency lies in the potential to create global cooperation among those interested in detecting incidents of corruption. Transparency is assumed to reduce institutional corruption in two main ways. First, it is expected to increase the rate of detection of institutional corruption, i.e., to increase the proportion of all corruption cases detected. Second, it is supposed to deter institutional corruption so that fewer cases of corruption occur.

One problem for research into this relationship is that it is difficult to disentangle the two effects when seeking to measure their impact, particularly when using data about institutional corruption prosecutions as the dependent variable. If the rate of detection increases, this will mean that the number of prosecutions of corruption will increase; it might thus appear that corruption has increased. If more cases of corruption were prevented, however, this would mean fewer prosecutions of corruption as well. Thus, the introduction of transparency might be successful in both detecting and preventing institutional corruption, but this would not be discernible from data about corruption prosecutions.

Academic research on transparency as an anti-corruption tool to date has yielded some valuable insights. Bauhr and Grimes⁸⁵ found that transparency only reduces corruption if it improves accountability; this is in line with Klitgaard's⁸⁶ model of corruption

⁸⁵ Monika Bauhr and Marcia Grimes, "Indignation or Resignation: The Implications of Transparency for Societal Accountability" *Governance* 27.2 (2013): 291–320.

⁸⁶ Robert Klitgaard, *Controlling Corruption* (University of California Press, 1991).

control, which postulates that increased accountability will reduce corruption. This underlines the importance of complementing transparency with a rigorous means for holding individuals accountable for their actions. Heald⁸⁷ has found that some types of data are relevant for countering corruption while others are not. Worthy,⁸⁸ focusing on the UK experience of implementing a Freedom of Information regime, argues that the impact of transparency depends very much on the way in which it is used by intermediaries, such as the media, civil society and parliament (in its oversight function).

The benefits that emerge via increased accountability, as manifested through the new Rules on Transparency, can, therefore, be significant and comprise four main pillars: i. Transparency; ii. Domestic and International Development; iii. Accountability and iv. Democratic Inclusion.

(i) Transparency safeguards the right of citizens to be informed about the actions of their government and to observe the process of finding contractual partners for various projects and eventually efficiently allocating public funds. A considerable part of transparency incidents relate to the interim process, from drafting a plan to assigning its execution to particular actors. Facilitation payments, preferential treatment and questionable outbidding procedures are only a few ways to misappropriate money. Transparency in investment arbitration can decisively contribute to the fight against institutional corruption through

⁸⁷ David Heald, "Why Is Transparency About Public Expenditure so Elusive?," *International Review of Administrative Sciences* 78.1 (2012): 30-49.

⁸⁸ Ben Worthy, "Some are More Open than Others": Comparing the Impact of the Freedom of Information Act 2000 on Local and Central Government in the UK" *Journal of Comparative Policy Analysis: Research and Practice* 15.5 (2013): 395-414.

the prompt and all-encompassing information distribution to all the parties involved and interested in any governmental activity.

(ii) Domestic and International Development relates to the financial and societal benefits that occur via the widespread enforcement of transparency in international arbitration. Governments can save billions of dollars through this transparent process since every person is a potential investigator of a corrupt activity or an erroneous budgetary calculation.⁸⁹ Thus, a simple cost-benefits analysis is enough to support the further penetration of openness in the global policy agenda. The positive externalities that arise relate to the obvious financial savings but also to the consequent development of infrastructure and the distribution of this money towards social benefits. Further, the gains can translate into the creation of innovative businesses, start-up companies and new services, which altogether amount to a revolution in knowledge and societal progress. This overall leads to improved efficiency and effectiveness of government services and greater impact of policies.

(iii) The third major pillar is accountability since potential perpetrators, breach of trust and violations of law are not going to remain unnoticed and consequently unpunished. The fight against impunity is a pressing request of local and international communities that report vast losses even up to 5 percent of global GDP from corrupt activities that stall development, and consequently undermine the rule of law. The feeling that these violations will no longer be kept secret but will be under strict scrutiny and can, therefore, be discovered by anyone sends a strong, concrete message to those eager to surpass the law. Enforcing transparency in arbitral procedures may significantly

⁸⁹ Eaves, D., “Case Study: How Open Data Saved Canada \$3.2 Billion,” <http://eaves.ca/2010/04/14/case-study-open-data-and-the-public-purse/>.

boost accountability and convey a sense of fairness and order to the majority of the society.

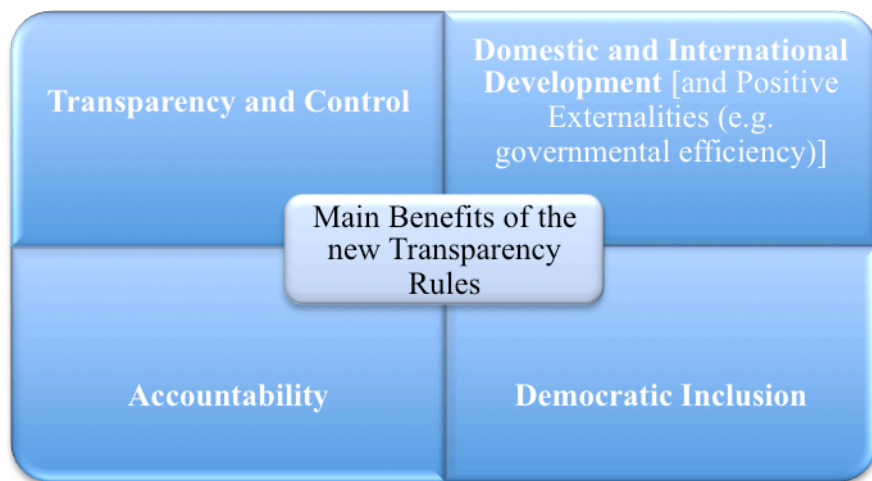


Figure 4: Benefits deriving from the use of the new Transparency Rules

(iv) Lastly, democratic inclusion is crucial since people can practically participate in good governance, affecting future investment decisions the states will make. Every single person can be a transparency investigator in arbitration proceedings irrespective of his or her expertise. They can probe into different contracts, combine and analyze data and ultimately reach fruitful findings. Since the state's resources against corruption are scarce vis-à-vis investigative bodies and international cooperation, inverting the process of scrutiny and offering ultimate transparency to citizens is an alternative. At the end of the day, this is the very essence of democracy, to inform and incentivize society to be actively involved in matters that affect its entirety, investment agreements included.

4.12. Conclusion

Corruption in international arbitration has sparked the debate among the scholarly world and the practitioners alike. Arbitral Tribunals have increasingly revisited the process on the allegations of corruption since the World Duty-Free award. Consequently, the role that the tribunals play in anti-corruption efforts has been widely discussed as a stepping-stone for the future eradication of corruption through the publishing of awards as a means of strengthening public awareness. The well-established fact of the evidentiary difficulty in proving corruption lessens the tribunals' role as they can seldom uphold corruption allegations.

Notwithstanding the parties' arguments on allegations of corruption, arbitral tribunals are sometimes deterred from deciding on these allegations. The intrinsic difficulty, together with substantial financial resources attributed towards substantiating a corruption allegation, render it extremely challenging for the tribunal to rule on a matter of corruption.

What is more, the relative scarcity of transparency in arbitral proceedings halts the power of the tribunal to contribute more meaningfully to anti-corruption efforts. In comparison to national jurisdictions, apt to assume a more decisive role in furthering the public awareness of corruption allegations, international arbitration is a field *ab ovo* allowing for less public admission. As a consequence, the lack of transparency in international arbitration, coupled with the inherent evidentiary difficulty for the parties to substantiate corruption allegations, confines the role that the tribunals could otherwise play – and perhaps still might under the new UNCITRAL rules.

Chapter 5: Concluding Remarks

The thesis of the book throughout has been that the nexus between transparency and institutional corruption is dynamic. Openness and transparency in arbitral proceedings will prevent institutional corruption both in terms of unveiling existing scandals, and deterring corporations from committing bribery in the future. After having reviewed the relevant legal framework and the case law that pertains to corruption in investment arbitration, we examined the Rules on Transparency as, potentially, the new paradigm of openness.

Transparency is overall commonly recognized as a desirable institutional value and a core attribute of good governance. In fact, transparency is often equated with the principle of freedom of information, which has been widely enforced in the UK and the U.S., through the relevant Freedom of Information Acts. The underlying rationale is that citizens can have access to any information by default, unless it should remain confidential or falls under certain exceptions. Freedom of Information law provisions now exists in over 70 countries that have incorporated it into their domestic laws. In doing so, they grant access to information that relates to, *inter alia*, public scrutiny, parliamentary enquiries and budget issues. The principles of freedom of information rules can, *mutatis mutandis*, apply to transparency in arbitral proceedings.

The current trend therefore provides *de novo* that arbitral proceedings will be open, unless there is a significant reason to consider otherwise. More information will be published, the public will engage further with cases of relevant importance, and democratic values will be more functional and effective. The impression of closed doors behind which decisions are made, will no longer exist. Investment arbitration will be, as it ought to be, an open and transparent procedure, which deters institutional corruption. The Rules on Transparency can help this process, leading by example.

Transparency will overall take the form of access to information, as is seen in various legal systems abroad. There, freedom of information takes the form of the general public which has a right to request access to information generated or possessed by public bodies; there is no need for the requester to provide reasons for the request, nor to establish particular interest; disclosure can only be refused pursuant to a legitimate reason and for the public interest; information can remain confidential for reasons of national security, and defense of international relations. Public bodies must also publish such information that helps the public understand and decipher the information it accesses.

There is a clear trend and gradual evolution of a general principle of international law that recognizes a right of access to information across various national jurisdictions. The end goal, as this book highlights, is the one of accountability, elimination of corruption, improvement of public trust, enablement of public scrutiny, facilitation of public participation and, more broadly, the effectiveness of governance.

With UNCITRAL's official recognition and recurring affirmation of the "importance of ensuring transparency" in treaty-based investor-State dispute resolution,⁹⁰ and its development and adoption of these new rules operationalizing that policy stance, there is a carefully negotiated and widely approved template that can serve as a model on how to conduct investor-state arbitrations. This model reflects and comes with consistency with broader worldwide trends

⁹⁰ Report of the United Nations Commission on International Trade Law, 41st session (June 16- July 3, 2008), Gen. Ass. 63rd session, sup. No. 17, A/63/17, para. 314; Report of the United Nations Commission on International Trade Law, 44th session (June 27- July 8, 2011), Gen. Ass. 66th session, sup. No. 17, A/67/17, para. 200; Report of the United Nations Commission on International Trade Law, 45th session (June 25-July 6, 2012), Gen. Ass. 67th session, sup. No. 17, A/67/17, para. 69.

recognizing the importance of transparency as a tool for promoting and ensuring effective democratic participation, good governance, accountability, predictability and the rule of law.⁹¹

The Rules on Transparency come in a broader momentum of desired transparency, with the recognition of the public interest in treaty-based investor-State arbitrations. It is, therefore, an important step towards making transparency, rather than confidentiality, the default rule for investor-state disputes in the future. Until recently, the confidentiality of arbitral proceedings was regarded as a key factor of arbitration. Albeit this might still be the case for commercial arbitration, in investment arbitration there is an emerging trend towards increased transparency.

The Transparency Rules, hence, reflect the enduring public and academic criticism about the lack of transparency in investor-state arbitration. The request for transparency has been a pressing demand from states and citizens. All companies that focus on foreign direct investment ought to be mindful of increased transparency when conducting business abroad. Being aware of transparency and the rules one must follow is a powerful deterrent on its own for incidents of institutional corruption.

It must be borne in mind that the UNCITRAL Transparency Rules do not necessarily apply to all investor-state arbitration proceedings initiated after 1 April 2014. The significance of these rules lies in that they are useful as a guide for future investment disputes. For example, the European Commission already reached a political agreement with Canada to introduce the UNCITRAL Transparency Rules in the upcoming EU-Canada free trade

⁹¹ “Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels,” Report of the Secretary-General (2012), A/66/749.

agreement and declared that it intends to push for similar provisions in its future investment treaties.

Summa summarum, this book aspired to serve as the launching pad in the research on the effect of transparency and openness in arbitral proceedings vis-à-vis the discovery and prevention of institutional corruption. When all is said and done, time will tell whether the UNCITRAL Rules on Transparency and the UN Convention on Transparency will solve the Gordian knot of institutional corruption, or whether they will lead to yet another Sisyphean task. Let's hope it is the former.

Appendix I: UNCITRAL Rules on Transparency

**Resolution adopted by the
General Assembly on 16 December 2013**

[on the report of the Sixth Committee (A/68/462)]

**68/109. United Nations Commission on
International Trade Law Rules on Transparency in
Treaty-based Investor-State Arbitration and
Arbitration Rules (as revised in 2010, with new article 1,
paragraph 4, as adopted in 2013)**

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations and the wide use of arbitration for the settlement of treaty-based investor-State disputes,

Recalling its resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010, in which it recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law,⁹²

Bearing in mind that the Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,

Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance,

Noting that the Commission, at its forty-sixth session, adopted the Rules on Transparency in Treaty-based Investor-State Arbitration⁹³ and amended the Arbitration Rules as revised in 2010 to include, in a new article 1, paragraph 4, a reference to the Rules on Transparency,⁹⁴

Noting also that the Rules on Transparency are available for use in investor-State arbitrations initiated under rules other than the Arbitration Rules or in ad hoc proceedings,

⁹² Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C; and Id., Sixty-fifth Session, Supplement No. 17 (A/65/17), chap. III and annex I.

⁹³ Id., Sixty-eighth Session, Supplement No. 17 (A/68/17), chap. III and annex I.

⁹⁴ Id., chap. III and annex II.

Noting further that the preparation of the Rules on Transparency was the subject of due deliberation in the Commission and that they benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having prepared and adopted the Rules on Transparency in Treaty-based Investor- State Arbitration⁹⁵ and the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),⁹⁶ as annexed to the report of the Commission on the work of its forty-sixth session;⁹⁷

2. *Requests* the Secretary-General to publish, including electronically, and disseminate broadly the text of the Rules on Transparency, both together with the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) and as a stand-alone text, and to transmit them to Governments and organizations interested in the field of dispute settlement;

3. *Recommends* the use of the Rules on Transparency in relation to the settlement of investment disputes within the scope of their application as defined in article 1 of the Rules, and invites Member States that have chosen to include the Rules in their treaties to inform the Commission accordingly;

4. *Also recommends* that, subject to any provision in relevant treaties that may require a higher degree of transparency than that provided in the Rules on Transparency, the Rules be applied through appropriate mechanisms to investor-State arbitration initiated

⁹⁵ Id., Sixty-eighth Session, Supplement No. 17 (A/68/17), chap. III and annex I.

⁹⁶ Id., chap. III and annex II.

⁹⁷ Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17).

pursuant to treaties providing for the protection of investors or investments concluded before the date of coming into effect of the Rules, to the extent that such application is consistent with those treaties.

68th plenary meeting

16 December 2013

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)⁹⁸ concluded on or after 1 April 2014 unless the Parties to the treaty⁹⁹ have agreed otherwise.

⁹⁸ For the purposes of the Rules on Transparency, a “treaty” shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

(a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

(b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.

⁹⁹ For the purposes of the Rules on Transparency, any reference to a “Party to the treaty” or a “State” includes, for example, a regional economic integration organization where it is a Party to the treaty.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

(b) The disputing parties' interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Article 2. Publication of information at the commencement of arbitral proceedings

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.

Article 3. Publication of documents

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (“third person(s)”), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written

statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

- (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
- (b) Disclose any connection, direct or indirect, which the third person has with any disputing party;
- (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 percent of its overall operations annually);
- (d) Describe the nature of the interest that the third person has in the arbitration; and
- (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

- (a) Whether the third person has a significant interest in the arbitral proceedings; and
- (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

- (a) Be dated and signed by the person filing the submission on behalf of the third person;
- (b) Be concise, and in no case longer than as authorized by the arbitral tribunal;
- (c) Set out a precise statement of the third person's position on issues; and
- (d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 5. Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (“hearings”) shall be public.

2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to

in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) Information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

(a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;

(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.

7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

Appendix II: UN Convention on Transparency

**Resolution adopted by the
General Assembly on 10 December 2014**

[on the report of the Sixth Committee (A/69/496)]

**69/116. United Nations Convention on Transparency in
Treaty-based Investor-State Arbitration**

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 68/109 of 16 December 2013, in which it recommended the use of the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration¹⁰⁰ and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),¹⁰¹

Recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

¹⁰⁰ Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), chap. III and annex I.

¹⁰¹ *Id.*, chap. III and annex II.

Believing that the Rules on Transparency contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance,

Recalling that, at its forty-sixth session, in 2013, the Commission recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency, to the extent that such application is consistent with those investment treaties, and that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties concluded before 1 April 2014 an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention,¹⁰²

Acknowledging that the Rules on Transparency might be made applicable to investor-State arbitration initiated pursuant to investment treaties concluded before 1 April 2014, the date of coming into effect of the Rules on Transparency, by means other than a convention,

Recognizing that all States and interested international organizations were invited to participate in the preparation of the draft convention either as members or as observers during the forty-seventh session of the Commission, with full opportunity to speak and make proposals,

Noting that the preparation of the draft convention was the subject of due deliberation in the Commission and that the draft

¹⁰² Id., para. 127.

convention benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

Noting with satisfaction that the text of the draft convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-seventh session,¹⁰³

Taking note with satisfaction of the decision of the Commission at its forty-seventh session to submit the draft convention to the General Assembly for its consideration,¹⁰⁴

Taking note of the draft convention approved by the Commission,¹⁰⁵

Expressing its appreciation to the Government of Mauritius for its offer to host a signing ceremony for the Convention in Port Louis,

1. Commends the United Nations Commission on International Trade Law for preparing the draft convention on transparency in treaty-based investor-State arbitration;

2. Adopts the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, contained in the annex to the present resolution;

3. Authorizes a ceremony for the opening for signature of the Convention to be held in Port Louis on 17 March 2015, and

¹⁰³ See A/CN.9/813 and Add.1.

¹⁰⁴ Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17), para. 106.

¹⁰⁵ *Id.*, annex I.

recommends that the Convention be known as the “Mauritius Convention on Transparency”;

4. Calls upon those Governments and regional economic integration organizations that wish to make the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration¹ applicable to arbitrations under their existing investment treaties to consider becoming a party to the Convention.

68th plenary meeting

10 December 2014

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

Preamble

The Parties to this Convention,

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

Noting the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 (“investor-State arbitration”).

2. The term “investment treaty” means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

Article 2. Application of the UNCITRAL Rules on Transparency

Bilateral or multilateral application

1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).

Unilateral offer of application

2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

Applicable version of the UNCITRAL Rules on Transparency

3. Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.

Article 1(7) of the UNCITRAL Rules on Transparency

4. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.

Most favoured nation provision in an investment treaty

5. The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.

Article 3. Reservations

1. A Party may declare that:

(a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;

(b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;

(c) Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

2. In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such

revision, declare that it shall not apply that revised version of the Rules.

3. Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made:

(a) In respect of a specific investment treaty under paragraph (1)(a);

(b) In respect of a specific set of arbitration rules or procedures under paragraph (1)(b);

(c) Under paragraph (1)(c); or

(d) Under paragraph (2);

shall constitute a separate reservation capable of separate withdrawal under article 4(6).

4. No reservations are permitted except those expressly authorized in this article.

Article 4. Formulation of reservations

1. Reservations may be made by a Party at any time, save for a reservation under article 3(2).

2. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

3. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

4. Except for a reservation made by a Party under article 3(2), which shall take effect immediately upon deposit, a reservation deposited after the entry into force of the Convention for that Party shall take effect twelve months after the date of its deposit.

5. Reservations and their confirmations shall be deposited with the depositary.

6. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit.

Article 5. Application to investor-State arbitrations

This Convention and any reservation, or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.

Article 6. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 7. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at United Nations Headquarters in New York by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty.

2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.

3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 8. Participation by regional economic integration organizations

1. When depositing an instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall inform the depositary of a specific investment treaty to which it is a contracting party, identified by title and name of the contracting parties to that investment treaty.

2. When the number of Parties is relevant in this Convention, a regional economic integration organization does not count as a Party in addition to its member States which are Parties.

Article 9. Entry into force

1. This Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State or regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 10. Amendment

1. Any Party may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to this Convention with a request that they indicate whether they favour a conference of Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties present and voting at the conference.

3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Parties for ratification, acceptance or approval.

4. An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties which have expressed consent to be bound by it.

5. When a State or a regional economic integration organization ratifies, accepts or approves an amendment that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance or approval.

6. Any State or regional economic integration organization which becomes a Party to the Convention after the entry

into force of the amendment shall be considered as a Party to the Convention as amended.

Article 11. Denunciation of this Convention

1. A Party may denounce this Convention at any time by means of a formal notification addressed to the depositary. The denunciation shall take effect twelve months after the notification is received by the depositary.

2. This Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

Appendix III: Arbitral Proceedings in UNCITRAL Arbitration Rules

(with new article 1, paragraph 4, as adopted in 2013)

Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting

the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of claim

Article 20

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

2. The statement of claim shall include the following particulars:

- (a) The names and contact details of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought;
- (e) The legal grounds or arguments supporting the claim.

3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Statement of defence

Article 21

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.

2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (art. 20, para. 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under article 4, paragraph 2 (f), and a claim relied on for the purpose of a set-off.

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Further written statements

Article 24

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Periods of time

Article 25

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Interim measures

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material

to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Evidence

Article 27

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or

other evidence within such a period of time as the arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

Article 28

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Experts appointed by the arbitral tribunal

Article 29

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A

copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

Default

Article 30

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of hearings

Article 31

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of right to object

Article 32

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

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There is a growing trend of institutional corruption and investor bribery, which plays a critical role in international investment arbitration disputes. Tribunals increasingly reject an investor's claim against countries on the grounds of illegally-obtained investment contracts. Corrupt payments by the investors to people linked to a country, including governmental officials and relevant institutions, are a frequent phenomenon, which, if proven, alleviates the obligation of relief pursuant to the investment treaty.

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