Chapter V: Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof

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I. Introduction

Corruption has been part of human life for thousands of years. (1) Lawmakers have been fighting without too much hope of totally eradicating it. Whether it is a human phenomenon that is outright bad or whether a more differentiated view is more appropriate is not a topic for this article. (2)

The working definition of corruption for this article is: Corruption is a transaction between a natural or legal person and any person who performs a public service function in any branch of government which involves a direct or indirect exchange or an offer to exchange any kind of benefit in return for an act or an omission to act by a person performing a public service function. This is not necessarily the definition employed by domestic laws or international conventions.

This article deals with two aspects in the context of corruption: issues of evidence and the legal aspects on the basis of typical BIT guarantees.

A. International Conventions

Recent international legal instruments dealing with the issue of corruption are:

- Inter-American Convention Against Corruption (3)
- Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (4) *page "539"*
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (5)
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- Council of Europe Criminal Law Convention on Corruption (6)

- Council of Europe Civil Law Convention on Corruption (7)
- African Union Convention on Preventing and Combating Corruption (8)
- UN Convention Against Corruption (9)

The Conventions (with the exception of the Civil Law Convention on Corruption) cover in particular the following topics (in the order of decreasing frequency):

- Criminal sanctions for bribery in the public sector
- International cooperation, such as, mutual assistance and extradition
- Money laundering in the context of corruption
- Liability of corporations or heads of business
- Criminal sanctions for bribery in the private sector
- Preventive measures, such as, standards of conduct
- Criminal sanctions for the trading of influence
- Transparent accounting
- Protection of witnesses and whistleblowers
- Role of media and the civil society.

The Civil Law Convention on Corruption is the only Treaty focusing on the domain of civil law as opposed to criminal law. It directs State Parties to establish a private cause of action for persons who have suffered damage as a result of corruption and to enable them to recover compensation for such damage. The statute of limitation shall not be less than three years. The State Parties shall provide in their domestic laws that contracts undermined by corruption are void, employees reporting corruption are protected, strong accounting practices are established and interim measures during civil proceedings are available.

page "540"

B. Arbitration cases

Corruption allegations have been a topic in a number of commercial arbitrations. (10) They mainly focus on two issues:

- Is the main contract null and void because it was procured by corruption?
- Is the agency agreement with the agent, who engaged in corrupt practices for the principal, enforceable?

1. Main contract

Several arbitration cases where corruption was an issue involved an investor, and the host state or a state-owned entity. (11) The dispute typically arose during or after the realization of the investment, when

typically arose during or after the realization of the investment, when the host state breached its contractual obligations depriving the investor of a significant part of the future profit or sometimes of the entire investment. (12) Corruption was usually invoked by the state or a state entity as a defense against performance of the main contract.

page "541"

Three reasons were advanced in support of the argument that the contract should be found automatically null and void due to corruption. (13) First, the application of the governing domestic law renders a contract null and void. This was followed by an ICSID arbitral tribunal in World Duty Free Ltd. v. Kenya, where the arbitral tribunal refused to enforce a contract based on the argument that under English and Kenyan laws (which governed the contract) a contract infected by corruption is unenforceable. (14) Second, international public policy would render a contract induced by corruption invalid. (15) The defenses based on national law and on international public policy are usually pursued in parallel.

A third theory advances the defect in consent to the contract by a host state as an additional reason for avoiding the main contract. (16) This view has support in Article 50 of the Vienna Convention on the Law of Treaties, which provides for corruption as a reason for invalidating a Treaty, and Article 8 (2) of the Civil Law Convention on Corruption of the Council of Europe, which provides that State Parties to the convention shall provide in their internal law for the possibility of declaring a contract void when the contract was undermined by an act of corruption.

2. Intermediary Agreement

In the majority of instances, the investors employ an intermediary to act on their behalf. (17) The investors enter into an agency agreement with the intermediary, calling it a legal or fiscal consultancy agreement for assisting investors in obtaining a certain public procurement or infrastructure contract. Under such agreement, the investor is obligated to pay an agent a – usually very high – commission upon successfully obtaining the contract with the host state. (18) The dispute usually arises when the investor refuses to pay the commission.

The intermediary agreement may be invalid for two reasons: If it is established that the primary object of the intermediary agreement is to bribe foreign officials, the agreement is void for violation of international public policy and usually under the national law applicable to the contract. (19) Second, the domestic laws of many counties prohibit the use of intermediaries in public procurement

page "542" matters. (20) Basing the nullity of an intermediary contract on such domestic laws of a state is not without risk: An arbitral tribunal with the seat in a different country may find that it is not bound to apply laws belonging to the purely domestic public

not bound to apply laws belonging to the purely domestic public policy of another country. In the Hilmarton case, the arbitrator nullified the intermediary agreement by applying Algerian law. (21) This award was, however, later set aside by the Swiss Federal Court, holding that the arbitral tribunal's ruling violated Swiss public policy for disregarding the principle of *pacta sunt servanda.* (22)

3. World Duty Free v. Kenya

With the growth of investment protection, it would not be surprising that the issue of corruption started to show up on the desks of arbitral tribunals sitting in investment protection cases. However, to this day only one award dealt with corruption as the main issue on the merits: World Duty Free Company Limited v. Republic of Kenya. (23)

In 1989, the Government of Kenya (via Kenya Airport Authority) entered into a contract with the World Duty Free Company, Ltd. (the "World Duty Free") for the construction, maintenance and operation of duty-free complexes at Nairobi and Mombassa Airports. Various Kenyan officials involved in the formation of the contract, including the then President of Kenya, solicited bribes from World Duty Free's representative, which he paid and fully documented in the company's books. (24) Kenya did not fulfill the agreement and World Duty Free brought an arbitration claim against Kenya. Kenya argued that the 1989 contract was procured by paying a bribe to the then President of Kenya, and, therefore, illegal and could not be enforced.

The contract between World Duty Free and Kenya contained an arbitration clause referring all investment disputes to ICSID. (25) Thus, the contract between the Parties and not an investment treaty was the basis for the tribunal's jurisdiction. (26)

The arbitral tribunal agreed with Kenya's argument and concluded that World Duty Free was not entitled to maintain any of its pleaded claims under the contract as the contract was voidable at the discretion of each party and Kenya successfully voided it. The arbitral tribunal based its decision on international public policy as well as on English and Kenyan law (both being the laws applicable to the contract). (27) Although the international conventions on corruption were *page "543"* not in force when the bribery occurred, which the arbitral tribunal noted is a prerequisite for their application, (28) the arbitral tribunal referred to the conventions as an expression of the international consensus that corruption offended public policy and morality. (29)

The arbitral tribunal mentioned three additional legal considerations. First, it declined to recognize any local custom in Kenya purporting to validate bribery. (30) Second, it dismissed the submission that the bribe was an independent collateral transaction since it was confidential and not covered by agreement, reasoning that the secrecy is in the nature of the bribe and allowing severability argument on the basis of secrecy would save every illegal

argument on the basis of secrecy would save every illegal transaction. (31) Finally, it ruled that Kenya did not know of the bribery in 1989 because the knowledge of a state officer cannot be automatically attributed upon the state.

The arbitral tribunal concluded that it cannot enforce the claims based upon the illegally obtained contract.

II. Proof of Corruption

The allegation of corruption is in most cases difficult to prove. (32) Corrupt payments will usually be hidden by seemingly legal transactions. (33) Even when this is not the case, the parties to corrupt payments will endeavour not to leave incriminating documented traces. A person attempting to extort a bribe will generally take care to avoid documentary or other unambiguous evidence of such attempts. The existence of corruption or an attempt to extort a bribe is generally *page "544"* vigorously contested by one of the parties. The question of how corruption can be proven may therefore be decisive when a party bases a claim or defense on corruption.

Most of the arbitration rules, national arbitration laws and international arbitration conventions do not contain rules on the burden and standard of proof. (34) An arbitral tribunal having to decide on an allegation of corruption will, in the first place, need to decide which laws or rules apply to the burden and standard of proof. Therefor, the authors will examine the different approaches to determining the burden and standard of proof and their relevance for investment arbitration in a first section of this chapter. The second and third parts examine the legal doctrine and the arbitral practice on evidence of corruption with a particular focus on the standard of proof. A fourth part discusses factors that may be relevant to determine the standard of proof for corruption in investor-state arbitration.

A. Laws and Rules Applicable to the Burden and Standard of Proof

The UNCITRAL Rules are a rare example of international arbitration rules that contain specific provisions on the allocation of the burden of proof. Article 24 (1) of the UNCITRAL Rules provides that “[e]ach party shall have the burden of proving the facts relied on to support his claim or defense”. (35) There seems to be a consensus among commentators that Article 24 (1) only states the general principle and does not overrule specific rules on the burden of proof and legal presumptions contained in the applicable substantive law. (36) Article 18 (1) of the Rome I Regulation and Article 22 (1) of the

Rome II Regulation, which provide that the substantive law governing the contract applies also to presumptions of law and the burden of proof if it contains such provisions, confirms this approach. The issue will, however, rarely be decisive with regard to corruption. There are, in our knowledge, no laws containing a presumption of

There are, in our knowledge, no laws containing a presumption of corruption. The general rule of *actori incumbit probatio*, as stated in Article 24 (1) of the UNCITRAL Rules, will usually apply when a party makes an allegation of corruption. (37) Arbitral tribunals applying international law frequently refer to the principle of *actori incumbit* *page "545"* *probatio* when allocating the burden of proof between the parties. Some arbitral tribunals applying international law referred to the principle as a general principle of law. (38)

There is little discussion about the standard of proof applied by arbitral tribunals. Generally, arbitrators will try to avoid basing a decision solely on the burden and standard of proof and will try to establish the relevant facts with reasonable certainty irrespective of the burden and standard of proof. In “ordinary” contractual arbitrations, the parties will usually adduce sufficient evidence for the arbitrators to determine the facts without having to refer to rules of evidence. As a consequence, the standard of proof is rarely discussed in arbitral awards. (39) In addition, the view that the evidentiary standards in different jurisdictions in practice lead to the same result is widespread. (40)

On the other hand, in corruption cases, the standard of proof applied by an arbitral tribunal will often be critical. In many cases there will only be circumstantial evidence. Cases with obvious corruption like in World Duty Free v Kenya (41) are the exception. (42) There are, in our knowledge, no arbitration rules, laws or conventions providing rules on the standard of proof.

The standard of proof is part of the procedural law in some jurisdictions (43) and part of the substantive law in others. (44) The doctrine is divided as to whether the standard of proof is governed by the law applicable to the procedure or by the substantive law. Some commentators argue that the substantive law determined by the arbitral tribunal or chosen by the parties should always govern the applicable standard of proof. The reason put forward for this is that the standard of proof determines to a large extent the value of a claim. The parties expect the substantive law to govern all issues concerning the value of a claim. Party autonomy and the greater foreseeability would therefore favour applying the rules on the standard of proof contained in the substantive law. (45) This approach using the standard *page "546"* of proof of the substantive law was applied by the arbitral tribunal in the Westinghouse (46) case. Other commentators seem to take the view that in international arbitration the standard of proof should be determined by the applicable procedural rules and laws, and, in their absence, by the procedural discretion of the arbitrators. (47)

Be that as it may, in a case based on the application of an investment protection treaty or on customary international law, usually neither the applicable investment treaty or customary international law nor the applicable procedural rules contain provisions on the standard of proof. The arbitral tribunal thus has

relative factual freedom in determining which standard of certainty is necessary to prove an allegation of corruption. The freedom is, of course, limited: A reversal of the burden of proof in corruption cases without a basis in the applicable substantive or procedural rules would seem to be contrary to the general principle of law that each party has the burden of proving the facts on which it relies.

B. The Standard Required to Prove Corruption

There are two different approaches towards the required evidentiary standard to establish corruption: The approach based on the common-law tradition distinguishes between the normal "civil" standard of proof, which requires a "preponderance of evidence", and a higher standard of "clear and convincing" evidence for allegations of corruption and fraud. (48)

The origin of the two standards in common law jurisdictions seems to be that the jury system provided for a distinction "between a balance of probabilities" standard in civil cases and a higher "proof beyond reasonable doubt" standard in criminal proceedings. (49) In civil law cases involving allegations of criminal conduct, the distinction was upheld to a certain degree: While the criminal standard was not completely transposed to civil cases involving criminal conduct, more "serious" allegations still require a higher standard of proof in accordance with the seriousness of the allegation. Denning LJ said in Bater v Bater: *page "547"*

> [I]n civil cases the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion. (50)

In jurisdictions with European continental tradition, the relevant standard usually is whether the available evidence suffices to convince the judge or arbitrator of the existence of a fact. (51) The standard therefore refers to the "inner conviction" of the judge or arbitrator. (52) The difference to the standard developed in the common-law tradition seems, irrespective of whether there is also a difference of substance, to be one of perspective: The continental standard is expressed from the point of view of the judge, without describing objectively what is necessary to come to the inner conviction. It is, however, recognized that the conviction of a judge or arbitrator must be based on objective factors. (53) The "preponderance of evidence" and "beyond reasonable doubt" standards describe the objective, external threshold necessary for a member of a jury or a judge to conclude that a certain fact exists.

The “inner conviction” standard does not distinguish between different standards for more or less “serious” allegations. Some authors argue that also continental law jurisdictions would require an enhanced standard of proof for questions of bribery or fraud. (54) This may be so as a matter of fact, but the continental jurisdictions usually do not contain different legal standards of proof for allegations of illegality or corruption. (55) In addition to this, due process and the equality of the parties were invoked to support a uniform standard applicable also to allegations of corruption: Due process would require that the arbitral tribunal applies one standard to all issues of fact without disadvantaging the party alleging corruption. (56)

page "548"

C. Standard of Proof in the Arbitral Practice

Arbitral tribunals have flexibly applied the standards developed by the legal doctrine. An overview of the published awards shows that arbitral tribunals are generally reluctant to base their findings of fact solely on the burden and standard of proof, but rather attempt to establish the truth on the basis of the available evidence. The arbitral practice generally does not apply uniform formulae of standard of proof.

1. Weighing of Evidence without Reference to a Specific Standard of Proof

Many arbitral tribunals have found that fraud or corruption existed or did not exist without making any statements as to which standard of proof is required.

In World Duty Free v Kenya, after Kenya raised the defense that the claimant had bribed the Kenyan President, the CEO of claimant testified in detail that he had handed over the equivalent of US$ 2 million in cash to the President of Kenya and others. (57) The arbitral tribunal concluded:

> Under these circumstances, such as described by Mr. Ali [Claimant's CEO] himself, the Tribunal has no doubt that the concealed payments made by Mr. Ali on behalf of the House of Perfume to President Moi and Mr. Sajjad could not be considered as a personal donation for public purposes. […] The Tribunal considers that those payments must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement. (58)

Inceysa v El Salvador did not concern allegations of corruption, but the allegation of fraud by the investor. The arbitral tribunal found that fraud had been “fully proven”, without discussing the standards required for such a finding. (59) The tribunal said:

required for such a finding. The tribunal said:

> The analysis of the arguments and evidence presented by the parties, in their written and oral submissions, allows this Tribunal to decide that the financial statements submitted by Inceysa with its tender in the Bid did not reflect the real financial condition of the Claimant […]. (60)

The arbitral tribunal continued to elaborate that it was "fully demonstrated" (61) , "clear and fully proven" (62) and "obvious" (63) that the Claimant had made several false statements before obtaining an investment contract.

page "549"

Conversely, in Wena v Egypt (64) , 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. After noting that it was regrettable that Egypt failed to investigate the allegedly corrupt intermediate, the arbitral tribunal held:

> 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 over-payment 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. (65)

Similarly, many arbitral tribunals in commercial cases found or denied that corruption existed without discussing the required standard of proof. The discussion of the evidence by the arbitrators indicates that the arbitrators decided on the basis of their personal conviction of the existence of certain facts. This was, for instance, the case in the ICC awards No. 3913 (66) and No. 3916, (67) in which the arbitrators found that the evidence established that an intermediary contract actually served as a vehicle for corruption. While in the award ICC No. 3913 the corrupt intent was confirmed by several witnesses, the arbitrator in the award No. 3916 determined that the circumstances of the intermediary contract indicated a corrupt purpose. (68)

In the ICC award No. 1110, the sole arbitrator Gunner Lagergren summarized after an extensive discussion of the available evidence:

> As might be expected the documents drawn up seem on their face to be legal and bear the semblance of ordinary commercial documents. However, it is, in my judgement, plainly established from the evidence taken by me that the agreement between the parties contemplated the bribing of Argentine officials for the

> purpose of obtaining the hoped-for business. (69)

A similar reasoning is given in the award in the ICC arbitration No. 6248, in which the arbitral tribunal found, after an extensive discussion of the circumstances of a tripartite contractual relationship, that the corrupt scheme of the parties "results from the evidence presented in this arbitration" (70) and "[t]he documents in the file establish further examples of efficiently exercising influence [which] were planned and realized". (71)

page "550"

Other arbitral tribunals rejected the allegation of corruption without discussing the standards that would have been required to establish a finding of corruption. In an ad hoc award, the sole arbitrator Claude Reymond noted:

> Claimant has unquestionably satisfied its burden of proof in establishing that the three agreements had the genuine purpose of securing the advice and help of the Claimant for the obtention of the […] contracts. […] The Arbitrator gives particular weight to the contemporary documents which evidence the advice required from and given by Claimant during the negotiation period. They are in marked contrast with the scanty evidence offered in certain arbitrations on commissions claimed by intermediaries […] (72)

The sole arbitrator continued to state that Defendant had the burden of proof to support its contention of corruption "by further and direct evidence". (73) In context, it is clear that the arbitrator did not exclude indirect or circumstantial evidence for establishing the defendant's allegation of corruption. The expression rather seems to underline that the defendant has not discharged its burden of proving corruption. In doing so, the arbitrator notes that the evidence of both parties supports his findings of fact. This is clear when the arbitrator concludes:

> [T]he evidence offered by both sides attests the genuine character of the agreement and the actual performance of services by Claimant. In other words, the weight of evidence is clearly in favour of Claimant. (74)

Other awards similarly rejected the contention of corruption without going into the detail of which standard would have been required to prove corruption. (75) In the award in the ICC case No. 9333, the arbitral tribunal found that the absence of "circumstantial evidence" mandated the dismissal of the corruption allegations. (76) It is interesting to note that the case concerned a commission of almost 30% of the value of the contract. The arbitral tribunal further considered the fact that the respondent wanted to enter into a "strategic market", the concluded contract did not fall into the habitual activity of the respondent and the absence of written proof

as indices for the absence of corruption. (77)

page "551"

2. Standards applied by Arbitral Tribunals

Other arbitral tribunals define the evidentiary standard applied by them to establish corruption. Two decisions of the Iran-US Claims Tribunal had to make pronouncements on allegations of corruption. In Oil Field of Texas v Iran, the arbitral tribunal did not specifically discuss whether a finding of corruption would require a higher standard of proof. Referring to Iran's allegation of corruption, it held:

> The burden is on NIOC to establish its defense of alleged bribery in connection with the Lease Agreement. If reasonable doubts remain, such an allegation cannot be deemed to be established. […] The Tribunal therefore concludes that there is not sufficient evidence of bribery in connection with the Lease Agreement […]. (78)

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.

The decision in Dadras v Iran dealt with an allegation of forgery of contractual documents. Although the award is not directly dealing with the proof of corruption, the standards discussed in the award are frequently applied to allegations of corruption. Relying on the required standard of proof found in English and American law, and on the decision in Oil Field of Texas v Iran, the tribunal held that an allegation of forgery required "enhanced standards of proof". The award reads:

> The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as 'clear and convincing evidence', although the Tribunal deems that precise terminology is less important than the enhanced proof requirement that is expresses. (79)

It is interesting to note, however, that the arbitral tribunal does not actually rely on the enhanced standard with regard to the forgery allegations. In a careful and lengthy discussion of the adduced evidence, the majority of the arbitral tribunal rejects each of the contentions put forward to support the allegation of forgery, and it is evident from the discussion that the majority was convinced that no forgery occurred. 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. (80)

page "552"

Arbitral awards in the field of commercial arbitration are less uniform in their discussion of the required standards of proof. The awards tend to indicate that allegations of corruption and illegality require some higher standards, such as, proof by "clear" evidence or "serious indices". The reasoning of the arbitrators shows, however, that these statements are often not determinative since either the seemingly higher standards are also fulfilled or a claim of corruption fails under any standard.

In Himpurna v PLN (81), an ad hoc arbitration governed by the UNCITRAL Rules, the arbitrators applied higher standards for a finding of corruption and invalidity of the contract allegedly induced by corruption. The arbitral tribunal held that a "finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof". (82) The arbitral tribunal based this determination on a policy argument:

> However tempting it may be in the context of a particular case for a public-sector respondent to seek relief from liability by invoking illegality, the fact is that such a posture puts into question the reliability of undertakings […]. [O]ver-readiness by international arbitrators to accept illegality defenses may harm an international mechanism which benefits numerous countries that rely on access to international funding, technology, and trade. (83)

These statements are, however, *obiter dicta.* The arbitral tribunal concluded that there simply was "no evidence of corruption". (84)

In the ICC case No. 8891, the arbitral tribunal held that corruption may be proven through indices, provided they were "serious". (85) After a careful examination of the available circumstantial evidence, the arbitral tribunal found that the actual payment of bribes could not be established "with certitude". However, the circumstantial evidence examined by the arbitral tribunal led it to the conclusion that the consultancy agreement concluded between the claimant and the defendant had the object of bribing officials. The circumstances deemed relevant by the arbitral tribunal were: a short performance of the consultancy agreement, the impossibility for the consultant to produce evidence of his activity, and the extremely high consultant's commission (18.5% of the value of the contract).

In the Westinghouse case (86), 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 the law of the Philippines, the place of *page "553"* 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. The arbitral tribunal concluded that the respondents did not meet that standard, but added that the respondents also did not meet the lower "preponderance of

evidence" standard.

In some cases, the standard of proof adopted by an arbitral tribunal may have been decisive for the outcome. In an arbitral award in the ICC case No. 4145, the arbitral tribunal stated that corruption may be proven by "circumstantial evidence", but added that such circumstantial evidence must lead to a "very high probability". (87) Although the intermediary had already received a commission of US$ 50 million and had not performed the work he claimed he had performed, the arbitral tribunal found, on balance, that there were not sufficient reasons to conclude that there was an agreement for bribery. The decisive circumstances were that the principal witness of the respondent, who alleged corruption, categorically denied that there had been corruption, and that the project was under the supervision of the World Bank. The arbitral tribunal found that "[i]t would have been a very hazardous enterprise to start bribing all these people or to bribe only part of them". (88)

In the well-known Hilmarton (89) case, the arbitrator found that bribery was not proved "beyond doubt". The arbitrator noted some circumstances indicating corrupt practices: The consultant was unable to prove that he had performed his tasks under the consultancy agreement, and some documents ambiguously referred to payments "which would have been made by defendant directly to local representatives" and which were deducted from claimant's fee. (90) These circumstances did not, however, meet the threshold applied by the arbitrator.

In the Westacre (91) 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 defense of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere 'suspicion' by any member of the arbitral tribunal […] is entirely insufficient to form such a conviction of the arbitral tribunal. (92)

The arbitral tribunal applied, in fact, a high standard for the proof of corruption. The dispute concerned a consultancy agreement in relation to the sale of tanks for an amount of approximately US$ 500 million. The commission for the *page "554"* intermediary was approximately 15% of the contract value, which the arbitral tribunal qualified as "disproportionately high and unusual". (93) The consultancy agreement exonerated claimant from any proof of services rendered. The only proof available for services rendered by the consultant seems to have been letters and faxes sent to the defendant. (94) The reason for the arbitral tribunal's finding may have been that the respondent raised the bribery defense only late during the oral hearing and the arbitral tribunal was not wiling to investigate these allegations. (95)

In the ICC case No. 6497, the arbitral tribunal considered that the

evidence adduced with regard to an addendum to a consultancy agreement showed a "high degree of probability that the real object of Product Agreement Q [the addendum] was to channel bribes to officials in country X". (96) The arbitral tribunal added that "[s]uch probability is high enough for the arbitral tribunal to consider that such allegation presented by respondent is to be admitted". (97) The arbitral tribunal took into account that a commission of 33.33% was extremely unusual. The contract did not describe the services to be rendered. Further, the respondent did not cooperate to establish the destination of payments made under the agreement. Nevertheless, the standard of proof applied by the arbitral tribunal seems to have been high. The parties had concluded other consultancy agreements, and Respondent alleged that these agreements also partly served to channel bribes. The tribunal noted that the claimant refused to disclose allegedly existing subcontracts and give a precise indication about the structure of its group, the amount of the commission was "relatively important" compared to the costs and respondent testified that he know about 70% of the persons receiving bribes. However, the tribunal found these indices "not conclusive" (98) , basing this primarily on the refusal of the respondent to disclose the names of the persons allegedly receiving bribes.

D. The Standard Applicable in Investment Arbitration

The summary of the arbitral practice shows that no uniform standard has been established for the proof of corruption. Some conclusions may nevertheless be drawn for the proof of corruption in cases based on investment protection treaties. The arbitral practice both in commercial and investment arbitration *page "555"* shows that the actual evaluation of evidence is more important than the abstract definition of the applied standard. (99) Many awards applying a very high standard apparently do this to reinforce their conclusion. The discussion of the evidence in the awards often shows that the allegation of corruption or illegality failed under any standard. (100) On the other hand, awards which found that corruption or fraud existed often did not discuss the required standards of proof. In case of World Duty Free v Kenya and Inceysa v El Salvador, the reason for this may have been that the evidence was beyond doubt and the arbitrators were convinced that any standard of proof was fulfilled. Other awards in commercial cases are less clear in this respect.

It is recognized that circumstantial evidence may be sufficient to establish corruption. (101) Some arbitral tribunals add to this that circumstantial evidence must be "clear" (102) or indices of corruption must be "serious". (103) Rather than being an expression of a higher standard, these decisions seem to indicate that circumstantial evidence, because of its nature, requires a multitude of indices which allow one to conclude that corruption is established. Some indices for corruption may, of course, be given more or less weight than others in the circumstances of each case, and no rigid rules may be stated in this respect.

may be stated in this respect.

Some tribunals defined and applied a higher standard for corruption by either directly applying laws of the common law tradition, (104) or establishing a genuine higher standard. (105) In the case that the higher standard is based on the law chosen by the parties or determined by the arbitral tribunal, the application of this standard is simply a matter of correctly applying the substantive law. In the absence of such substantive standards, the application of a higher standard sometimes seems to be based on the proposition that the more outrageous an allegation is, the higher the standard of proof must be.

This conclusion is in our opinion not generally warranted. Establishing corruption is, as a matter of fact, difficult. The evidence is usually not readily available. The opposing party will usually not cooperate to establish the facts, even if the production of evidence is ordered by the arbitral tribunal. Putting an additional burden on the party alleging corruption may unduly disadvantage this party and endanger the equality of the parties. Arbitral tribunals applying such higher standards may, however, simply have expressed their view that there are no lower standards for the establishment of corruption, even if corruption is difficult *page "556"* to prove. (106) On the other hand, a presumption in investor-state arbitrations that no corruption occurred for "diplomatic reasons" (107) has no basis in the applicable substantive or procedural standards and would violate due process.

The various conventions on corruption in our opinion do not only express a substantive standard, but also warrant against an unduly high standard of proof. In particular, the Civil Law Convention on Corruption requires the State Parties to provide "effective" remedies for persons who have suffered damages as a result of acts of corruption. (108) With regard to state responsibility, the Convention requires "appropriate procedures" for the recovery of damages caused by corruption. (109) The Convention further requires "effective procedures for the acquisition of evidence". (110) Also the United Nations Convention against Corruption is concerned with providing effective remedies for the civil law consequences of corruption. Article 35 requires that the states take the necessary measures to ensure that persons who have suffered damages as a result of corruption have the right to initiate legal proceedings in order to obtain compensation. (111) With regard to evidence, the Convention provides that knowledge, intent and purpose as elements of an offence may be established from "objective factual circumstances". (112)

If effective civil remedies are understood as part of the public policy against corruption, the standard of proof applied in cases of corruption should provide reasonable opportunity to prove an allegation of corruption. This would also apply in investor-state arbitrations. The exact content of the standard remains to be defined. While a high or very high standard of proof for corruption

may be justified in criminal cases, investment arbitration only deals with the civil consequences of corruption. The consequences of a finding of liability for the host state for corrupt practices are no different than a finding of liability for a breach of contract, or any other standard applicable to foreign investments.

The decision in World Duty Free v Kenya indicates an increasing awareness of the arbitrators with regard to the difficulties of proving corruption. In the Westacre case, the arbitral tribunal refused to investigate the allegation of corruption, seemingly because it was raised late in the procedure. (113) In World Duty Free v Kenya, the arbitral tribunal invited the parties to present additional submissions and evidence specifically on the issue of Kenya's public policy defense, i.e. the bribery allegation, at a later stage of the procedure. (114) The attitude of the arbitral tri *page "557"* bunal in World Duty Free v. Kenya seems to be realistic in view of the delicate question for a party and its counsel to raise a corruption allegation. Alleging bribery without sufficient evidence may be detrimental to the credibility of a party. Decisive evidence may only be obtained later in the procedure.

III. Corruption as a Basis for Claims and Defenses in Investor-State Arbitration

Corruption was in the past mainly used by the host state as a defense against the enforcement of an investment agreement. However, the extortion of a bribe may also be a basis for a claim of the investor. The following sections examine issues of state responsibility in relation to corruption.

A. Attribution

The arbitral tribunal in World Duty Free v. Kenya touched upon the issue of attribution when it considered whether Kenya validly avoided the agreement on the basis that it was illegal due to corruption. Under English law on voidable contracts, the injured party must take positive action to set it aside. (115) Such action must be timely or it will be considered that the party chose to continue with the enforcement of the agreement and thereby waived its right to set the agreement aside. (116) Thus, the issue of voidability turned on the question of when Kenya learned about the bribe. (117) The arbitral tribunal found that Kenya first learned about the bribery of its former President only when it received the World Duty Free's Memorial. (118) Less than a year later, Kenya validly avoided the agreement by filing an application to dismiss the World Duty Free's claims on the basis that the agreement was tainted by bribery and therefore illegal. (119) The arbitral tribunal rejected the World Duty Free's argument that the knowledge of the Kenyan President was attributable to Kenya and thus Kenya knew about the bribe long before the arbitral proceedings. (120) The arbitral tribunal reasoned that under the laws governing the case (English and Kenyan), no basis existed for

attributing knowledge of a state officer to the state. (121)

The tribunal's examination of the attribution of knowledge concerns the possibility of the State to avoid performance of the contract due to its own corrupt behaviour. A state cannot escape liability under international law by relying on the page "558" lack of knowledge of the state of the illegal actions of a state organ. The Draft Articles on State Responsibility specify that the conduct of a state authority, which covers any person or entity which has that status, is attributable to that state (122) even if it exceeds its authority. (123) The same principle underlies article 5 of the Civil Law Convention on Corruption, which stipulates that "[e]ach [State] Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State".

B. Guaranties Which May be Breached Through Corrupt Actions of the State

Traditionally, investment protection treaties provide protection under the following headings:

- Fair and equitable treatment

  Fair and Equitable Treatment covers various forms of infringement upon investor's legal position. Its primary aim is to promote stable and predictable investment environment in a host state. (124) The fair and equitable standard includes (i) transparency and investor's legitimate expectations, (ii) state's compliance with contractual obligations, (iii) procedural propriety and due process, (iv) good faith and (v) freedom from coercion and harassment. (125)

  Transparency and the investor's legitimate expectations are closely related principles that constitute a most common ground for fair and equitable treatment claims. (126) Transparency refers to visibility of the legal framework of the host state. (127) The investor's legitimate expectations are based on the legal

  framework as well as on any undertakings and representations of the host state. (128)
- Expropriation

  The most drastic form on infringement on the investor's property is expropriation without due compensation. (129) The definition of expropriation includes not only the formal taking of title, but also indirect expropriation. (130) Indirect expropriation leaves the investor's title intact yet deprives him of the ability to oper

  page "559" ate the investment in a profitable manner. (131) Such taking typically results from changes in the regulatory system. (132)

  Investment treaties do not prohibit expropriation as this would

violate the international law notion of territorial sovereignty recognizing the host state's right to expropriate alien property. (133) However, the treaties impose conditions for lawful expropriation. The conditions require taking to be for a public purpose, non-discriminatory and, most importantly, for a prompt, adequate, and effective compensation. (134)

- Umbrella clauses

An umbrella clause is a provision in an investment treaty that obliges the host State to observe its obligations under domestic law which it assumed vis-à-vis the investor. (135) Under an umbrella clause, a violation of a contract between the investor and the host state, or other binding commitments by the host state, or both, is a violation of an investment treaty. (136)

- Protection from arbitrary or discriminatory measures

Arbitrary conduct has been defined as “found on prejudice or preferences rather than on reason of fact”, (137) “wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”, (138) “measures […] without engaging in a rational decision-making process”. (139) Arbitrary standard has a lot in common with Fair and Equitable Treatment, yet many arbitral tribunals examined them as two separate standards (140) , noting that “characteriz page "560" ing the measures as not arbitrary does not mean that such measures are characterized as fair and equitable”. (141) A finding of discrimination is autonomous of a violation of domestic law since domestic law may be the cause for discrimination. (142) A finding of discrimination also does not require a finding of intent to discriminate; it suffices that the measure has a discriminatory effect. (143)

- Full protection and security

The “full protection and security” standard imposes an obligation upon the host state to actively protect the investment from adverse actions by the host state itself, by its authorities or by third parties. (144) The standard contemplates (i) protection from physical violence against the assets and individuals connected with an investment and (ii) protection of investor's legal rights. (145) Protection of legal rights comprises the right to certainty of legal system and access to judicial system. (146)

C. Possible Scenarios

Several situations may be distinguished when looking at corruption scenarios. Describing these factual scenarios does, of course, not imply any judgement as to whether assumed claims may have a

imply any judgement as to whether asserted claims may have a legal basis in the circumstances of a particular case or not.

1. Contractual Stage

A contract, such as in World Duty Free v. Kenya, may be procured by a corrupt payment. It is noteworthy that World Duty Free v. Kenya was not a case under public international law.

page "561"

There are two different ways how the corruption situation may become the topic of an investment protection arbitration:

- The investor raises claims relating to the contract, such as, claims for performance under an umbrella clause (147) , or on the basis of the violation of legitimate expectations where the contract has at least one element.
- The investor files claims based on the corruption, such as, reimbursement of the corrupt payment or adjustment of the contract.

The main defense of the host state may be in both cases that there is no investment. Some BIT's provide that an investment has to be made “in accordance with the laws and regulations of the [host State]”, or similar language. (148) Should domestic law provide for the absolute nullity of a contract procured by corruption, this requirement would not be met. Therefore, jurisdiction would be denied.

If the BIT does not contain such a requirement, the state is likely to invoke corruption as a defense on the merits. The likely defense will be the absolute nullity of the investment contract. However, arguments supporting the validity of the contract procured by corruption have been advanced. (149) The arguments are based on the principle of state responsibility, requiring states to be accountable for violations of international law. (150) According to international consensus, the extortion of corruption is considered a violation of international law. States should be held responsible for acts of corruption; otherwise, the state could profit from its own violation of international law. (151) Furthermore, it is argued that the principle of state responsibility shifts the focus from the nullity of contract to the remaining validity of the contract instead of corruption. (152)

The scenario has been invoked in the award in the ICC case No. 1110, where the arbitrator accepted the testimony that it was impossible to do business in Argentina without the payment of certain bribes. (153) Curiously, if the bribery defense defeats any protection under investment protection treaties, the more widespread corruption is, the more likely is a State to escape international responsibility.

Corruption may also occur at a later stage of the investment. The bribe may assure the continuation of the investment. The main defense mentioned above ("no investment") may not work in this situation. Whether the defense on the merits is successful may depend on the topic involved. If the bribe was required to avoid disturbances and harassment, then the nullity argument will fail. In this case, it is difficult to justify the loss of protection under an investment protection treaty as the state is both at the origin of the harassment and the bribe.

In case the payment of a bribe is made to favour the continuation of an existing relationship or the amendment of a contract, it could be argued that the same principles apply as in case of the first conclusion of a contract.

2. Refusal of the Investor to Pay a Bribe

Either the investor or a person attributable to the host state may initiate a corruption attempt. Here, we will only look at the second scenario. In this case, either the investor concedes to the corruption request or not. In the first situation, the main legal issues will be the ones set forth above under III.C.

In case of the unsuccessful corruption attempt by a person attributable to the host state, the investor may react in at least three different ways:

- the investor refuses the request with any further communication on this topic ("first type"),
- the investor engages in "diplomatic" negotiations with the aim to try to be able to make or maintain the investment without engaging in any corrupt activity ("second type") or
- the investor starts true negotiations which fail for reasons such as disagreement on the amount of the bribe ("third type").

The first type of reaction does not seem to raise any issues with regard to the protection of the investor under the Treaty. If retaliation occurs because of the non-compliance of the investor with the bribery request, the issue is the legal impact of the second and third type of reaction of the investor on the investment protection guarantees. Some may say that any gesture of the investor does no longer allow reliance on any investment protection guarantees. Others may see a legal difference between the second and the third reaction, notwithstanding the obvious evidence issues to distinguish the two. Such a view could be based on concepts of criminal law, seeing punishable attempts only in the third type of reaction. Another point of view may be that criminal law concepts are not applicable and all that counts under public international law is that no corrupt payment was made, whatever the reasons may be.

3. Retaliation of the State

Should an unsuccessful corruption attempt not trigger any retaliation, it will in all likelihood not become a matter to be decided in an investment protection arbitration. If the state retaliates with actions violating in and of themselves the protection standards, then the issue of corruption may be an important aspect com *page "563"* pounding the illegality of the state's actions, but will as such not be decisive on the question of liability. The failed corruption attempt may be an important (psychological) element, but, in the end, it could be argued, not of legal relevance.

However, what is the legal situation if the retaliation action as such is not a violation of the investment protection guarantees? Even in case of an action where, under the applicable public international law, the host state had liberty to act, would this be a violation of investment protection guarantees because of the retaliation motive? The question should, in our view, be decided with regard to the particular requirement of each standard. For instance, an act of expropriation may become unlawful even if the other requirements of a lawful expropriation are met. Retaliation as a motive for *per se* lawful regulatory action will generally violate basic notions of due process and transparency. Such actions will generally be violations of fair and equitable treatment, as well as violations of full protection and security, and will constitute an arbitrary measure.

IV. Conclusions

In case of investment protection arbitration there may be an attitude of restraint with regard to findings of unlawful conduct of state authorities. This was referred to as “diplomatic reasons”. (154) Other awards have stated that it is “contrary to all experience that a state-owned institution […] whose director is appointed by the head of State, engages in activities that is contrary to the mandatory law of that country”. (155) The facts established in World Duty Free v. Kenya show that there is no basis for such a presumption.

One may argue that the remainder of this attitude transpires even from World Duty Free Ltd. v. Kenya, where at the very beginning of the award, the arbitral tribunal finds it important to note at the outset that the former President of Kenya, Mr. Daniel arap Moi, was not a party to these arbitration proceedings and was not legally represented in these proceedings.

Public international law does not contain specific presumptions in favour of the legality of the actions of entities attributable to the state. The public policy condemning corruption also concerns claims relating to corrupt activities outside the domain of criminal law. The standard of proof applied in investor-state arbitrations in cases of corruption should provide reasonable opportunity, both for states and investors, to prove an allegation of corruption. To avoid issues of due process, it may be advisable that the arbitrators are explicit about the standard they are going to apply at the outset of the arbitration. As regards the legal consequences of the different types of corruption situations, these merit some further attention, taking account of the legal consequences of the behaviour of both

taking account of the legal consequences of the behaviour of both the investor and the state. *page "564"*

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1 *See, e.g.*, John T. Noonan, Bribes (1984) whose book starts at 3.000 B.C.

2 *See, e.g.*, on the positive and negative effects: David H. Bayley, *The Effects of Corruption in a Developing Nation;* Joseph S. Nye, *Corruption and Political Development. A Cost-Benefit Analysis; both in:* political corruption: A handbook 935 and 963 (Heidenheimer et al. eds., 1989).

3 Inter-American Convention Against Corruption, 29 March 1996, *available at* http://www.oas.org/juridico/english/Treaties/b-58.html (last visited 16 November 2008).

4 Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 26 May 1997, Official Journal C 195 of 25 June 1997.

5 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, *available at* http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html#Text_of_the_Convention (last visited 16 November 2008).

6 Criminal Law Convention on Corruption, 27 January 1999, CETS No.173, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm (last visited 16 November 2008).

7 Civil Law Convention on Corruption, 4 November 2008, CETS No. 174, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm (last visited 16 November 2008).

8 African Union Convention on Preventing and Combating Corruption, 12 June 2003, *available at* http://www.africa-union.org/root/AU/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf (last visited 16 November 2008).

9 UN Convention against Corruption, 29 September 2003, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last visited 16 November 2008).

10 World Duty Free Ltd. v. Kenya, ICSID Case No. ARB/00/7, Award 4 October 2006, *available at* http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf (last visited 17 November 2008); Wena v. Egypt, ICSID Case No. ARB/98/4, 41 I.L.M. 896, Award 8 December 2000 *available at* http://ita.law.uvic.ca/documents/Wena-2000-Final.pdf (last visited 17 November 2008); Himpurna California Energy (Bermuda) v. PT Persero (Indonesia), Yearbook Comm. Arb. XXV 13, 44 ff (2000); Westinghouse et al. v. National Power Company and the Republic of the Philippines, ICC No. 6401, Mealey's International Arbitration Report, B(1) (January 1992); Claimant (Argentina) v. Company

Report, B(1) (January 1992), Claimant (Argentina) v. Company A/Argentina, ICC Case No. 1110, Arbitration International, Vol. 10, No. 3, 282 (1994); UK Company v. French Company/African Country, ICC Case No. 3913, Collection of ICC Arbitral Awards 1974–1985 497–498 (1990); Claimant (Iran) v. Defendant (Greek Company/Iran), ICC Case No. 3916, Collection of ICC Arbitral Awards 1974–1985 507 (1990); Agent (Liechtenstein/Arab) v. Construction Company (South Korea), ICC Case No. 4145, Collection of ICC Arbitral Awards 1974–1985 559 (1990); Hilmarton, Broker v. Omnium, Contractor, ICC Case No. 5622, Revue de l'arbitrage, No. 2, 327–341 (1993), Yearbook Comm. Arb. Vol. XIX, 105–123 (1994), ASA Bull. 247 (1993); Consultant v. Contractor, ICC Case No. 6248, Yearbook Comm. Arb. Vol. XIX, 124 (1994); Partner (USA) v Partner (Germany), Partner (Germany), Partner (Germany), Partner (Canada), ICC No. 6286, Yearbook Comm. Arb. Vol. XIX, 141–161 (1994); Consultant (Liechtenstein) v. Contractor (Germany), ICC Case No. 6497, Yearbook Comm. Arb. Vol. XXIV, 71 (1999); Westacre (UK) v. Jugoimport (Yugoslavia), ICC Case No. 7047, ASA Bull. 301 (1995); Frontier AG and Brunner Sociedade v. Thomson CSF, ICC Case No. 7664, *summarized* in Tribunal Fédéral, Ière Court Civile, Decision of 28 January 1997; Agent (Syria) v. Trading Company (Germany), ICC Case No. 8113, Yearbook Comm. Arb. Vol. XXV, 324 (2000); ICC No. 8891, JDI 1076 (2000); Agent (North Africa) v. Contractor (France), ICC Case No. 9333, ASA Bull. 757 (2001), JDI 1093–1106 (2002); see for an overview of arbitral awards on corruption A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*, Transnational Dispute Management, Volume I, Issue 2 (2004); Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration 90 (2004).

[11] World Duty Free Ltd. v. Kenya; Wena v. Egypt; Himpurna California Energy (Bermuda) v. PT Persero (Indonesia), *supra* note 10.

[12] *See* Hilmar Raeschke-Kessler, *Corruption in Foreign Investment – Contracts and Dispute Settlement between Investors, States, and Agents*, The Journal of World Investment & Trade, 53 (2008).

[13] *Id.*, at 10, 11.

[14] World Duty Free Ltd. v. Kenya, *supra* note 10.

[15] *Id.*, at paras 137–157, with further references to decisions of arbitral tribunals; Raeschke-Kessler, *supra* note 12, at 10–11.

[16] Raeschke-Kessler, *supra* note 122, at 11.

[17] Ahmet El Kosheri & Philippe Leboulanger, *L'arbitrage face à la corruption et au traffic d'influence*, Rev. Arb. 3 (1984); Ibrahim Fadlallah, *Les instruments de l'illicite*, in l'ilicite dans le commerce international 291 (Kahn & Kessedjian eds., 1998).

[18] Raeschke-Kessler, *supra* note 122, at 9.

[19] *See* ICC Case No. 8891, JDI 1076 (2000) with note Dominique Hascher summarizing the relevant doctrine and decisions.

[20] *See, e.g.*, the award in Hilmarton, Broker v. Omnium, *Contractor, supra* note 100, applying Algerian law prohibiting intermediaries.

[21] *Id.*

[22] Swiss Federal Tribunal, 17 April 1996, ASA Bull. 358 (1996)

[22] Swiss Federal Tribunal, 17 April 1990, ASA Bull. 253 (1993).

[23] World Duty Free Ltd. v. Kenya, *supra* note 100.

[24] *Id.*, at para 19.

[25] *Id.*, at para 19 (Article 9 of the Contract between World Duty Free and Kenya).

[26] *Id.*, at 4 (Article 9 of the Contract between World Duty Free and Kenya).

[27] The arbitral tribunal found that under English law "[w]here a contract is illegal as formed, …, the courts will not enforce the contract, or provide any other remedies arising out of the contract … No court will lend its aid to a man who found his cause of action upon an immoral or illegal act … The 'effect of illegality is not substantive but procedural', it prevents the plaintiff from enforcing the illegal transaction". The arbitral tribunal reasoned that this legal principle is two hundred years old and no deviations from it may be justified. The arbitral tribunal recognized that "the balance of illegality may not be factually identical between" World Duty Free and the then Kenyan President, but found this fact of no consequence on the legal outcome of the case. The arbitral tribunal recognized that the deviation from the strict rule may be possible in cases with an innocent party "unwittingly caught in an incidental and peripheral illegality". Yet, in the present case no indications of innocence existed – the bribe was not accompanied by coercion or oppression or force, and was not induced through a "hostagefactor" – World Duty Free had no investments or other commitment in Kenya at the time of the bribe.

[28] Para 146.

[29] Para 143–146.

[30] Para 172.

[31] Para 174.

[32] Fadlallah, *supra* note 177, at 296; Yves Derains in Les Comissions Illicites, ICC Dossiers 61, at 65 *et seq.* (1992); Karen Mills, *Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto*, ICCA Congress Series No. 11, 288 (2003).

[33] El Kosheri & Leboulanger, *supra* note 177, at 5.

[34] Andreas Reiner, *Burden and General Standards of Proof*, AI, Vol. 10, No. 1, 328, 329 (1994).

[35] Article 24 (1) UNCITRAL Rules. Article 27 of the Arbitration Rules of the Netherlands Arbitration Institute gives the arbitrators discretion to freely determine the allocation of the burden of proof. However, in our opinion the discretion of the arbitrators should not overrule provisions of the burden of proof of the substantive law.

[36] 2 Jean-François Poudret & Sébastien Besson, Comparative Law of International Arbitration, 551 (2007); Reiner, *supra* note 34 at 329; Paolo Michele Patocchi, *UNCITRAL-Schiedsgerichtsordnung, in* Institutionelle Schiedsgerichtsbarkeit, 749 (Schütze ed., 2006).

[37] Lotfi Chedly, Arbitrage Commercial International & Ordre Public International, 250 (2002); *see* Lunik v. Soliman, ASA Bull. 210, at 217, para 40 (1998).

[38] AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, 30 I.L.M. 577

[38] AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, 30 I.L.M. 577, Award, 27 June 1990, *available at* http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf (last visited 17 November 2008); Tradex v. Albania, ICSID Case No. ARB/94/2, Award, 29 April 1999, *available at* http://ita.law.uvic.ca/documents/tradex_award.pdf (last visited 17 November 2008).

[39] Claude Reymond, *The Practical Distinction Between the Burden of Proof and Taking of Evidence – A Further Perspective*, AI, Vol. 10, No. 1, 323 at 326 (1994).

[40] Arthur L. Marriott, *Evidence in International Arbitration*, AI, Vol. 5, No. 1, 280 at 283 (1989); Alan Redfern & Martin Hunter, Law and Practice in International Commercial Arbitration, 321 (2004); Paolo M. Patocchi & Ian L. Meakin, *Procedure and the Taking of Evidence In International Commercial Arbitration: The Interaction of Civil Law and Common Law Procedures*, Revue de droit des affaires internationales 884, 889 (No. 7 1996).

[41] World Duty Free Ltd. v. Kenya, *supra* note 100.

[42] Matthias Scherer, *Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals*, Int.A.L.R. 29 (2002).

[43] Germany, Austria.

[44] Switzerland, England.

[45] Klaus Peter Berger, International Economic Arbitration, Vol. 9, 444–450 (1993); Poudret & Besson, *supra* note 366, at 551; Reiner, *supra* note 344, at 331, 332; 2 Peter Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 542 (1989); Reymond, *supra* note 39, at 326; Robert B. von Mehren, *Burden of Proof in International Arbitration*, ICCA Congress Series No. 7, 123, 126 (1996).

[46] Westinghouse et al. v. National Power Company and the Republic of the Philippines, *supra* note 100.

[47] Gerhard Wagner, *Germany* in Practitioner's Handbook on International Arbitration 753 (Weigand ed., 2002); Patocchi, *UNCITRAL-Schiedsgerichtsordnung, supra* note 366, at 749.

[48] Richard H. Kreindler, Strafrechtsrelevante und andere anstössige Verträge als Gegenstand von Schiedsverfahren, 31 (2005); José Rosell & Harvey Prager, *Illicit Commissions and International Arbitration: The Question of Proof*, AI, Vol. 15, No. 1 329 at 347 (1999); Richard H. Kreindler, *Aspects of Illegality in the Formation and Performance of Contracts*, TDM, Vol. 3, Issue 2, 209 at 223 (April 2006).

[49] Adrian Keane, The Modern Law of Evidence, 83 (1996).

[50] [1951] P 35 at 37.

[51] Bernard Hanotiau, *Satisfying the Burden of Proof: The Viewpoint of a "Civil Law" Lawyer*, AI, Vol. 10, No. 3, 350 (1994).

[52] *Id.*, at 343; Rosell Prager, *supra* note 488, at 347; Reiner, *supra* note 344, at 335.

[53] For Austria: Walter Rechberger *in* Kommentar zu den Zivilprozessgesetzen III, 557 (Fasching & Konecny eds., 2nd ed. 2004).

[54] Reiner, *supra* note 344, at 336; Rosell & Prager, *supra* note 488, at 347.

[55] For Austria: Walter Rechberger *in* Kommentar zu den Zivilprozessgesetzen III, 556 (Fasching & Konency eds., 2nd ed. 2004).

[56] Hilmar Raeschke-Kessler, *Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects, in* Arbitrating Foreign Investment Disputes, 497 (Horn ed., 2004).

[57] World Duty Free v Kenya, *supra* note 100, at 37 et seq.

[58] World Duty Free v Kenya, *supra* note 100, at para 136.

[59] Inceysa v El Salvador, ICSID Case No. ARB/03/26, Award 2 August 2006, para 118 *available at* http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_002.pdf (last visited 17 November 2008).

[60] *Id.*, at para 103.

[61] *Id.*, at para 108.

[62] *Id.*, at para 109.

[63] *Id.*, at para 118.

[64] Wena v Egypt, *supra* note 100.

[65] *Id.*, at 117.

[66] ICC Case No. 3913, *supra* note 100.

[67] ICC Case No. 3916, *supra* note 100.

[68] ICC Case No. 3913, ICC Case No. 3916, *supra* note 100.

[69] ICC Case No. 1110, *supra* note 100, at 293, para 17.

[70] ICC Case No 6248, *supra* note 100, at 137, para 51.

[71] *Id.*, at 138, para 56.

[72] Ad hoc arbitration, Final award of 28 July 1995 rendered by Professor Claude Reymond, ASA Bull. 742, at 746 (1995).

[73] *Id.*, at 747.

[74] *Id.*

[75] Arbitral Award rendered in 1989 with Jrgen Dohm as sole arbitrator, ASA Bull. 216 at 232 (1993); Award in ICC Case No. 6286, Collection of ICC Arbitral Awards 1991–1995, 256 at 262 *et seq.*

[76] ICC Case No. 9333, *supra* note 100, J.D.I. 1100.

[77] *Id.*, at 1098.

[78] Oil Field of Texas, Inc. v. Islamic Republic of Iran, Case No. 43 (258-43-1), Award of 8 October 1986, *reprinted in* 12 Iran-U.S. C.T.R. 308 (1987) 315 at para 25.

[79] Dadras International v. Islamic Republic of Iran, Case. Nos. 213/215, Award of 7 November 1995, *reprinted in* 31 Iran-U.S. C.T.R. 127 (1995), 162 at para 124.

[80] *Id.*, at para 241.

[81] Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perrusahaan Listruik Negara (Indonesia), Award, 4 May 1999, *supra* note 100.

[82] *Id.*, at para 116.

[83] *Id.*, at para 114.

[84] *Id.*, at para 118.

[85] ICC Case No. 8891, *supra* note 100, at 1079.

[86] Westinghouse et al. v. National Power Company and the Republic of the Philippines, *supra* note 100.

[87] ICC case No. 4145, *supra* note 100, 58 para 28.

[88] *Id.*, at para 32.

[89] Hilmarton, Broker v. Omnium, Contractor, *supra* note 100, Yearbook Comm. Arb. 107.

[90] *Id.*, at 111.

[91] Westacre (UK) v. Jugoimport (Yugoslavia), *supra* note 100.

[92] *Id.*, at 343.

[93] *Id.*, at 334.

[94] Westinghouse et al. v. National Power Company and the Republic of the Philippines, *supra* note 100, at 326.

[95] *Id.*, at 343 "The word 'bribery' is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate."

[96] Award in ICC case No 6497, *supra* note 100, at 79.

[97] *Id.*, at 79.

[98] *Id.*, at 73–75.

[99] Reiner, *supra* note 344, at 340.

[100] Himpurna California Energy (Bermuda) v. PT Persero (Indonesia), *supra* note 100; Dadras International v. Islamic Republic of Iran, *supra* note 79.

[101] Scherer, *supra* note 422.

[102] Lunik v. Soliman, *supra* note 377, at 217.

[103] ICC Case No. 8891, *supra* note 100, at 1079.

[104] Westinghouse et. al. v. National Power Company and the Republic of the Philippines, *supra* note 100.

[105] Hilmarton, Broker v. Omnium, Contractor, *supra* note 100.

[106] *See, e.g.*, Lunik v Soliman, *supra* note 377, at 217, where the arbitral tribunal states that there can be no "presumption of corruption".

[107] Reiner, *supra* note 344, at 336; Westacre (UK) v. Jugoimport (Yugoslavia), *supra* note 10, at 319, *cited by* Himpurna California Energy (Bermuda) v. PT Persero (Indonesia), *supra* note 100.

[108] Civil Law Convention on Corruption, *supra* note 7, at Article 1.

[109] *Id.*, at Article 5.

[110] *Id.*, at Article 11.

[111] United Nations Convention on Corruption, *supra* note 9, at Article 35.

[112] *Id.*, at Article 28.

[113] Westacre (UK) v. Jugoimport (Yugoslavia), *supra* note 10.

[114] World Duty Free Ltd. v. Kenya, *supra* note 100, at 52.

[115] *Id.*, at para 183.

[116] *Id.*, at para 164.

[117] *Id.*, at para 182–185.

[118] *Id.*, at para 182.

[119] *Id.*, at para 182.

[120] *Id.*, at para 185.

[121] *Id.*, at para 185.

[122] UN Draft Articles on State Responsibility for Internationally Wrongful Acts, Chapter II, Article 4, (2001) http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 17 November 2008).

[123] *Id.*, at Chapter II, Article 7.

[124] Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law, 140, (2008).

[125] *Id.*, at 133.

[126] *Id.*, at 133.

[127] *Id.*, at 133–134.

[128] *Id.*, at 134.

[129] *Id.*, at 89.

[130] *Id.*, at 90.

[131] *Id.*, at 92.

[132] *Id.*, at. 90.

[133] *Id.*, at 89, 90.

[134] *Id.*, at 90.

[135] *Id.*, at 153.

[136] *Id.*, at 156.

[137] *Id.*, at 173 (*citing* Black's Law Dictionary).

[138] *Id.*, at 173 (*citing* Case concerning Elettronica Sicula S.p.A. (U.S. v. Italy), I.C.J. Rep 15 (1989), Judgment 20 July 1989, para 76).

[139] LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para 158, *available at* http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf (last visited on 17 November 2008).

[140] Occidental Exploration and Production Co. v. Ecuador, LCIA Case No. UN3467, Award, 1 July 2004, paras 159–166 *available at* http://ita.law.uvic.ca/documents/OxyEcuadorFinalAward_001.pdf (last visited 17 November 2008); Ronald S. Lauder v. The Czech Republic, Award, 3 September 2001, paras 214–228 *available at* http://ita.law.uvic.ca/ documents/LauderAward.pdf (last visited 17 November 2008); Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001, paras 368–371 *available at*

http://ita.law.uvic.ca/documents/Genin-Award.pdf (last visited 17 November 2008); Noble Ventures v. Romania, ICSID Case No. ARB/01/11, Award, 11 October 2005, paras 175–180 *available at* http://ita.law.uvic.ca/documents/Noble.pdf (last visited 17 November 2008); Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 385–393 *available at* http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf (last visited 17 November 2008); Siemens v. Argentina, ICSID Case No. ARB/02/8, Award, 6 February 2007, paras 310–321, *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf (last visited on 17 November 2008).

141 LG&E v. Argentina, *supra* note 139, at para 162.

142 Ronald S. Lauder v. The Czech Republic, *supra* note 140, at para 220.

143 Siemens v. Argentina, *supra* note 1400, at para 321; LG&E v. Argentina, *supra* note 13939, at para 146.

144 Dolzer & Schreuer, *supra* note 1244, at 149.

145 *Id.* at 149; *See also* August Reinisch, Standards of Investment Protection 131 (2008).

146 Reinisch, *supra* note 1455, at 144 (*citing* Tecnicas Medioambientales Tecmed S.S. v. The United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, 29 May 2003, para 171, *available at* http://ita.law.uvic.ca/documents/Tecnicas_001.pdf (last visited 17 November 2008); Case concerning Elettronica Sicula S.p.A. (US v. Italy), I.C.J. Rep. 15 (1989) Judgment 20 July 1989, para 111; Ronald S. Lauder v. The Czech Republic, Award, 3 September 2001, *supra* note 1400, at para 314; Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, 17 March 2006, *available at* http://ita.law.uvic.ca/documents/SalukaPartialawardFinal.pdf (last visited 17 November 2008)); Dolzer & Schreuer, *supra* note 1244, at 149 (*citing* Azurix Corp. v. The Argentine Republic, Award, 14 July 2006, *supra* note 1400).

147 Dolzer & Schreuer, *supra* note 1244, at 153 seq.; Stephan W. Schill, *Enabling Private Ordering-Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, IILJ Working Paper 2008/9.

148 Dolzer & Schreuer, *supra* note 1244, at 353, 361 (*citing* Agreement Between the Government of the People's Republic Of China and the Government of […] .on the Promotion and Protection of Investments, Article 1 (1) (2003); Accd entre le Gouvernement de la Republique Francaise et le Gouvernement de [] sur l'Encouragement el la Protection Reciproques des Investissements, Article 1 (1) (2006)).

149 Raeschke-Kessler, *supra* note 11, at 11; *see* Westacre (UK) v. Jugoimport (Yugoslavia), *supra* note 100, *cited* approvingly in Himpurna California Energy (Bermuda) v. PT Persero (Indonesia), *supra* note 100.

150 *Id.*, at 11.

151 *Id.*, at 11–12.

152 *Id.*, at 12–13.

153 ICC Case No. 1110, *supra* note 100.

154 Reiner, *supra* note 344.

155 Westacre (UK) v. Jugoimport (Yugoslavia), *supra* note 100, at 319.