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ARBITRATION AND CORRUPTION: A TOOLKIT FOR ARBITRATORS*

Kathrin Betz**

ABSTRACT

In international commercial or investment arbitration proceedings, the appointed arbitral tribunal may suspect or one of the parties may allege that corruption, especially in the form of foreign public bribery, has influenced the underlying dispute between the parties. Over the past 25 years, the international and domestic legal frameworks to combat economic crime, including foreign public bribery, have become much stronger. Arbitrators therefore cannot ignore suspicions or allegations of corruption but, at the same time, they have limited means to address such suspicions or allegations, and they have to handle conflicting priorities. In short, they are in a dilemma. After introducing the wider context of international commercial and investment arbitration, this article outlines the arbitrators' dilemma in more detail and presents a current effort to draft a so-called toolkit for arbitrators. The toolkit aims to help arbitrators address corruption issues in a comprehensive manner and to find solutions in accordance with the applicable laws.

1 THE CONTEXT

Today, major contracts in international trade and investment — for example, infrastructure projects or contracts in the extractive or the defence industries — frequently are secured by arbitration clauses. National investment laws, or bi- or plurilateral investment treaties between states, may envisage arbitration as a dispute settlement mechanism. Hence, disputes arising between the parties,

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** Dr Iur, Senior Researcher at the Competence Centre: Arbitration and Crime (arbcrime.org). Email: kathrin.betz@arbcrime.org.

whether between two private parties or between investors and states — for example, claims for performance of the contract by one party or compensation claims by an investor for alleged expropriation by the host state — are not adjudicated in the conventional courts. Instead, they are the object of international arbitration proceedings and arbitrators decide the claims.

International arbitration is based always on the consent of the parties to this kind of dispute settlement mechanism. In principle, the parties can choose freely the seat of the arbitration, the applicable arbitration rules, the arbitrator(s), and the applicable (substantive and procedural) law. If the parties do not choose the applicable law, the arbitral tribunal may decide which law to apply. For the parties, arbitration can be an attractive alternative to court proceedings because arbitration proceedings may be less time-consuming, not open to the public and the chosen arbitrators may have specific expertise. However, arbitration as a dispute settlement mechanism can be (very) expensive. With regard to disputes that involve suspicions or allegations of corruption, the lack of transparency in international arbitration can be a problem because foreign public bribery, by definition, involves public officials and, therefore, these issues are in the public interest.

International arbitration can be institutional or *ad hoc*. In disputes related to international commerce (and investment), one possible avenue for which the parties may opt is arbitration administered by the International Court of Arbitration at the International Chamber of Commerce (ICC) in Paris.[1] The International Court of Arbitration is not a court in the traditional sense. Rather, it judicially supervises ICC arbitration proceedings. The Court is responsible, *inter alia*, for confirming, appointing and replacing arbitrators (and for deciding on any challenges made against arbitrators); for monitoring the arbitral process to ensure proper performance, as well as speed and efficiency; and for scrutinising and approving ICC arbitral awards to reinforce quality and enforceability. The ICC has developed its own Arbitration Rules[2] that apply in arbitrations and which are updated regularly.

The Permanent Court of Arbitration (PCA) in The Hague also offers a range of dispute resolution services for disputes involving various combinations of states,

1 See https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration (visited 15 November 2018).

2 International Chamber of Commerce (ICC), Arbitration Rules, in force as of 1 March 2017, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration (visited 15 November 2018).

state entities, international organisations and private parties.[3] The PCA is an intergovernmental organisation established in 1899 by treaty and which today counts 121 contracting parties. It has its own Arbitration Rules[4] which are revised regularly and offers arbitration, mediation/conciliation, fact-finding/commissions of enquiry and other services and forms of alternative dispute resolution.

Further avenues of international commercial arbitration are offered by such institutions as the London Court of International Arbitration (LCIA),[5] the Swiss Chambers' Arbitration Institution (SCAI),[6] and the Singapore International Arbitration Centre (SIAC).[7] Each of these institutions has developed its own set of arbitration rules. Whereas these institutions have country seats, the general principle is that arbitrations governed by the LCIA Rules,[8] the Swiss Rules[9] and the SIAC Rules[10] may be held anywhere in the world.

Although many Africa-related disputes toady are settled in the US or in Western Europe, arbitration is on the rise on the African continent.[11] African arbitration institutions include the Lagos Court of Arbitration (LCA),[12] the Cairo Regional Centre for International Commercial Arbitration (CRCICA),[13] and the Mauritius International Arbitration Centre (MIAC).[14]

As to international investment dispute settlement, an important institution is the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank in Washington DC, which describes itself as the "world's leading institution devoted to international investment dispute settlement".[15] ICSID is not

3 See https://pca-cpa.org/en/home (visited 15 November 2018).
4 Permanent Court of Arbitration (PCA), Arbitration Rules 2012, effective 17 December 2012, available at https://pca-cpa.org/en/documents/pca-conventions-and-rules (visited 15 November 2018).
5 See http://www.lcia.org (visited 15 November 2018).
6 See https://www.swissarbitration.org (visited 15 November 2018).
7 See http://www.siac.org.sg (visited 15 November 2018).
8 LCIA Arbitration Rules (2014), available at http://www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx (visited 15 November 2018).
9 Swiss Rules of International Arbitration 2012, available at https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws (visited 15 November 2018).
10 SIAC Rules 2016, available at http://www.siac.org.sg/our-rules/rules/siac-rules-2016 (visited 15 November 2018).
11 See https://www.africanlawbusiness.com/news/8105-the-rise-and-rise-of-arbitration-in-africa (visited 15 November 2018).
12 See https://www.lca.org.ng (visited 15 November 2018).
13 See https://crcica.org (visited 15 November 2018).
14 See http://www.miac.mu (visited 15 November 2018).
15 See https://icsid.worldbank.org/en/Pages/about/default.aspx (visited 15 November 2018).

an arbitral tribunal but an administrative body established in 1966 by the ICSID Convention,[16] a treaty which has been ratified by 154 states.[17] ICSID offers settlement of disputes by arbitration, conciliation or fact-finding. ICSID arbitration in principle is based on the ICSID Convention and the ICSID Convention Arbitration Rules.[18] Also, if a dispute is not covered by the ICSID Convention, there is the possibility of arbitration under the ICSID Additional Facility Rules.[19]

Finally, as noted above, international commercial or investment arbitration does not have to be institutional. It can also be *ad hoc.* For example, it may be based on the UNCITRAL Arbitration Rules which were adopted in 1976 and revised in 2010.[20] In 2013, a new article 1.4 was added to the UNCITRAL Arbitration Rules incorporating the UNCITRAL Rules on Transparency.[21] Another possibility for *ad hoc* arbitration is according to rules as agreed by the parties themselves.

International commercial and investment arbitration is concerned with the settlement of disputes about financial interests. International arbitral tribunals are not criminal courts and are, in principle, not concerned with criminal conduct. However, it may happen that, during the course of international arbitration proceedings, one of the parties raises the allegation — or the arbitrators suspect it themselves — that the underlying contract has been influenced by corruption or, to be more precise, by foreign public bribery. This can take different forms: the arbitrators might suspect, for example, that a party is trying to enforce a bribery pact (especially in commercial arbitration); or a party might allege that an investment was procured by corrupt means; or a party might claim that bribes were paid during course of an investment.

An instructive example is the current case of *BSGR* v *Guinea*.[22] It is an ICSID arbitration about Guinea withdrawing rights from the Israeli investor Benny

16 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entry into force 14 October 1966).

17 See https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx (visited 15 November 2018).

18 ICSID Convention Arbitration Rules (2006), available at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx (visited 15 November 2018).

19 See https://icsid.worldbank.org/en/Pages/process/Overview-ICSID-Additional-Facility-Arbitration.aspx (visited 15 November 2018).

20 United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules (as revised in 2010), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (visited 15 November 2018).

21 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (visited 15 November 2018).

22 ICSID cases No ARB/14/22 and ARB/15/46.

Steinmetz (acting through three investment companies) to exploit the Simandou and Zogota iron ore mines, on the strength of an anti-corruption investigation that had accused the investors of bribery. Criminal proceedings in the US, the UK, Guinea, Switzerland and Israel are taking place parallel to the ICSID proceedings. The investors are arguing that the corruption allegations must fail because the alleged main bribe taker — a wife of late President Lansana Conté — was not a public official at the time of the alleged bribery.[23] The case is interesting and worth following because much of it is public.[24]

In the past, in cases of alleged or suspected corruption in relation to the underlying dispute, arbitrators sometimes have been hesitant to address these issues. At least, the outcomes in such cases varied a great deal. In fact, if allegations or suspicions of corruption arise in arbitration, arbitrators are in a difficult situation, for a number of reasons as considered below.

2 THE ARBITRATORS' DILEMMA

2.1 Role and Powers of Arbitrators

As explained above, international arbitration is a dispute settlement mechanism based on party autonomy. Arbitrators are not appointed state judges, but chosen by the parties to the particular dispute. Nevertheless, they have a function similar to state judges in the sense that arbitral awards become final and binding and, in principle, are enforceable in the respective states.

Notably, in the face of criminal suspicions or allegations, arbitrators do not have coercive powers as do public prosecutors. Their means to investigate are limited, but they can request the parties to produce certain evidence.

2.2 The Risk of Challenge to an Award

Recognition and enforcement of foreign arbitral awards on the domestic level is governed by the New York Convention of 1958 which has 159 states parties.[25] The Convention foresees that an arbitral award may be set aside by the courts at the

23 Charlotin D "BSGR v Republic of Guinea: as case enters its final stage, a primer on the parties' debate about the proof and consequences of corruption" *Investment Arbitration Reporter* 5 November 2018.

24 See https://www.italaw.com/cases/3688 (visited 15 November 2018), as well as a number of videos of the hearings available on YouTube.

25 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (entry into force 7 June 1959), United Nations Treaty Series (Vol 330, 38).

tribunal's seat if it violates public policy,[26] or that its enforcement may be refused if it would be contrary to the enforcement state's public policy.[27]

Therefore, if the arbitrators simply ignored allegations or suspicions of corruption in a case, they would risk the award being challenged before a court of law (be it at the tribunal's seat or in the enforcement state(s)) at the enforcement stage. The award might be set aside or might not be enforceable. In ICSID arbitration, a party might ask for annulment or revision of an award. Since arbitrators are expected to issue an enforceable award, they have good reason to address alleged or suspected corruption and not to sweep the issue under the carpet.

2.3 The Potential Impact of the Corruption Objection (or Defence)

If corruption is proved in international arbitration proceedings, the impact of this corruption objection (or defence) can be massive. For instance, in the 2006 case of *World Duty Free v Kenya*,[28] which was based on a contract, the tribunal did not admit the investor's claims because it found corruption which was contrary to transnational public policy. The case was somewhat special because the claimant itself brought the evidence of bribery, namely, cash payments of US$2 million to former Kenyan President, Daniel Arap Moi. However, it did not consider the payments to be a bribe because they had been made in terms of a local custom called "Harambee". The tribunal did not accept the claimant's argument and concluded that the payments did amount to bribes to secure the conclusion of the investment agreement. As a result, the claimant lost protection under the ICSID investor-state dispute settlement mechanism. Notably, according to the former Kenyan Attorney-General Amos Wako, the investor's claim in this case exceeded Kenya's budget at that time. Mr Wako emphasised that, had the claimant succeeded, this might have halted the country's development and turned it into a failed state.[29]

The case of *Metal-Tech* v *Uzbekistan* of 2013 was based on a bilateral investment treaty.[30] The tribunal found that there had been corruption in relation to the establishment of the investment and that there was a breach of the Uzbek Criminal Code. It reached this conclusion on the basis of circumstantial evidence and by drawing an adverse inference from the non-production of requested

26 Article V(1)(e) of the New York Convention.
27 Article V(2)(b) of the New York Convention.
28 ICSID case No ARB/00/7.
29 Llamzon A (2014) *Corruption in International Investment Arbitration* at 117.
30 ICSID Case No ARB/10/3.

documents by the claimant (the tribunal had asked the claimant to substantiate what services certain consultants actually had rendered). Thus, the investment violated the host state's law and did not qualify as an investment.[31] Consequently, because there was no investment, there was no consent by the host state to ICSID arbitration and the tribunal lacked jurisdiction.[32]

Those two examples show that if the corruption objection (or defence) can be substantiated with sufficient evidence, it can decide the outcome of a case. The two cases considered must be seen as part of a bigger picture, though. It remains very difficult to prove corruption in international arbitration proceedings and the cases where this happens are rare.

2.4 The Risk of Unsubstantiated Corruption Allegations

As the impact of the corruption objection (or defence) is decisive, there is obviously a certain risk that a party may raise corruption allegations that are speculative, in the sense that there is no real evidence that would substantiate the allegations. An example of a case in which the tribunal concluded that there was just no evidence of corruption is *African Holding v Democratic Republic of Congo*.[33] One difficulty for arbitrators, in simple terms, is to distinguish real corruption cases from fake ones.

2.5 Preliminary Conclusion

Arbitrators face a genuine dilemma in cases of alleged or suspected corruption in relation to the underlying dispute. They have to handle conflicting priorities, in particular party autonomy and public policy issues. Party autonomy certainly is important, but it must be pointed out that the international legal framework against corruption (implemented in domestic laws) has become much stronger over the past 25 years[34] and will not go away, making it difficult to dispute that corruption is contrary to transnational public policy. Hence, arbitrators must take into account the international and/or domestic anti-corruption legal framework.

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31 Article 1(1) of the Israel-Uzbekistan Bilateral Investment Treaty.

32 Betz K (2017) *Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence* Cambridge: Cambridge University Press at 110-119.

33 ICSID Case No ARB/05/21.

34 This framework includes the United Nations Convention against Corruption of 2003; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997; the Organisation of American States Inter-American Convention against Corruption of 1996; the African Union Convention on Preventing and Combating Corruption of 2003; and the Council of Europe Criminal Law Convention on Corruption of 1999.

Addressing the arbitrators' dilemma as presented above in a coherent manner is therefore, in the long run, in the best interests of international arbitration itself.

3 A TOOLKIT FOR ARBITRATORS

One attempt to help arbitrators resolve their dilemma is the so-called toolkit for arbitrators referred to in the subtitle of this article. The toolkit is an effort to which a number of experts (arbitrators, lawyers, forensics analysts and academics) have contributed. Similar efforts, but with a different focus, are being undertaken by the International Chamber of Commerce and the International Bar Association.

Currently, the toolkit for arbitrators is a work in progress. The ensuing discussion reflects the author's thoughts and ideas about the project. The toolkit will be made available to all interested parties once it has been finalised. The toolkit does not aim to create a blueprint for arbitrators on how to proceed and decide in cases of alleged or suspected corruption. It is understood that arbitrators independently lead their cases and make their decision on the basis of a free evaluation of the evidence. Rather, the toolkit wants to offer a number of steps which arbitrators may take and tools they may use in the face of alleged or suspected corruption. Arbitrators are free to tailor these steps and tools to the specifics of their case. The toolkit contains three parts:

- corruption in substance;
- evidence; and
- legal consequences of the establishment of corruption.

These three parts and their related issues are presented briefly below.

3.1 The First Part: Corruption in Substance

In principle, the parties to international arbitration are free to choose the applicable substantive and procedural laws. While some choices are more practical than others, parties may choose any domestic law and/or international law. However, in cases of alleged or suspected corruption, a mandatory legal element is introduced, in that criminal law must be applied and is not at the disposition of the parties.

When the parties choose the (private) law to govern their dispute, they usually will not be thinking of criminal law issues. The question is, therefore, which domestic and/or international criminal law provisions ought to apply and whether their application ought to be mandatory? In the author's view, it makes sense to find applicable criminal law provisions according to relevant criminal law principles (in particular, the principles of territoriality and nationality). In addition,

international anti-corruption treaties may apply, especially where the applicable domestic criminal law falls behind the international standard. If all else fails, arbitrators can rely on transnational public policy (since corruption is contrary to such policy).

The advantage of identifying specific criminal law provisions is that they detail the requirements of the offence (for example, of foreign public bribery) and make clear what the evidence needs to prove. This does not make it easier to prove corruption (indeed, it might become more difficult), but it is makes things fair and transparent for the parties and helps arbitrators ask the right questions and request specific evidence.

3.2 The Second Part: Evidence

Finding evidence for corruption in international arbitration proceedings certainly is not an easy task. This article can touch only briefly upon the complex evidentiary issues that arise if corruption is alleged in arbitration. The first question concerns what arbitrators ought to do if they suspect, or a party alleges, bribe payments in relation to the underlying dispute. Should they take the issue seriously?

3.2.1 The Duty to Investigate

If arbitrators suspect, of their own accord or because a party alleges it, that corruption has influenced the underlying dispute, they should not hesitate to investigate the matter *sua sponte*. They should investigate even if the parties do not wish it, because issues of criminal law are not at the disposition of the parties. For example, arbitrators can make use of procedural orders to request evidence from the parties. As already mentioned, if arbitrators fail to inquire into the corruption issues, they risk the award being challenged in a court of law at the enforcement stage.

3.2.2 Circumstantial Evidence, Red Flags and Adverse Inferences

A key issue is whether direct evidence is needed to prove corruption or whether circumstantial evidence is sufficient. What is the role of so-called red flags? On the one hand, red flags can serve as an indicator of corruption. On the other hand, they constitute a form of circumstantial evidence. In order to prove corruption in arbitration, circumstantial or indirect evidence is sufficient — direct evidence is not prescribed (for, in many cases, there will not be any direct evidence of bribery).

An important form of indirect evidence upon which arbitrators can rely are adverse inferences. If arbitrators request a party to produce certain evidence — for instance, documents that would prove that an intermediary actually delivered a

tangible work product — and the requested party fails to produce these documents without a convincing reason, the arbitrators may draw an inference that this evidence would be adverse to the interests of that party. Adverse inferences are a legitimate type of indirect evidence, but they must be used diligently. In particular, it must be clear what specific evidence a party is requested to produce.

3.2.3 Burden and Standard of Proof

International arbitration proceedings are, by their nature, civil proceedings. In contrast to domestic court proceedings, no procedural law applies automatically. It is again, in principle, the parties who choose the applicable procedural law, or the arbitrators who decide if the parties make no choice. The question is, if arbitrators have to decide about alleged or suspected criminal conduct, do the proceedings remain entirely civil or should arbitrators apply criminal law standards, for example, the criminal law standard of proof? Generally speaking, in criminal proceedings, the proof beyond reasonable doubt is the applicable standard. However, using such a standard in arbitration proceedings would make it nigh impossible to prove corruption. Also, it would not be logical to do so, because the high criminal law standard is balanced by the powers of prosecutors — which arbitrators do not enjoy — to collect evidence by the deployment of coercive measures. Therefore, it appears judicious to apply a civil law standard of proof in cases of corruption in arbitration.

Another question is whether the burden of proof can be shifted to the party alleged to have paid bribes if the alleging party offers *prima facie* evidence of bribery? Arguably, the party accused of bribery may be asked to produce rebuttal evidence, without technically shifting the burden of proof to it. In other words, if the party alleging bribery is able to substantiate the allegation with *prima facie* evidence, the defendant has to contest the allegation with evidence which undermines it.

This short presentation of some of the evidentiary issues which arise if corruption is alleged in arbitration merely hints at the many related difficulties. However, if the arbitrators are — after freely evaluating the evidence — convinced that there was corruption in relation to the underlying dispute, they then will have to decide upon the legal consequences of this finding.

3.3 The Third Part: Legal Consequences of the Establishment of Corruption

Clearly, arbitrators do not impose sanctions for criminal conduct. This is the competence of criminal courts. Rather, arbitral tribunals have to decide upon the impact of corruption on the underlying contract. The legal consequences differ in

accordance with whether the case concerns commercial or investment arbitration, and they depend on the particular corruption scenario at stake.

3.3.1 Three Potential Corruption Scenarios

In commercial arbitration, one possible scenario is that a party tries to enforce a bribery pact. For example, an intermediary may demand payment of a commission promised to him by company X, while part of this commission in fact is forwarded by the intermediary to public officials in country Y as a bribe to induce the officials to favour company X when it does business in country Y. If the commission agreement between the intermediary and company X contains an arbitration clause or if the parties otherwise agree to settle their dispute by recourse to arbitration, arbitrators will be confronted with the situation that the intermediary is attempting to enforce a bribery pact.

A quite different scenario occurs if, for example, company A investing in host country B, offers, promises or conveys bribe payments to certain public officials of country B in order to secure favourable treatment regarding the investment. A dispute may arise years later between company A and country B, for instance, with company A claiming compensation from country B for expropriation. On the basis of an investment treaty, a national investment law or an agreement between the parties, the dispute may be brought to international investment arbitration. In the course of these arbitration proceedings, country B well may argue that the investment was procured by bribery.

Yet another scenario is that the investor company A legitimately procures the investment and the initiation phase is corruption-free. However, at a later stage, during the performance of the investment, company A offers, promises or conveys bribes to public officials of the host country B to obtain favourable treatment when doing business there. This scenario also may involve the corruption objection (or defence).

3.3.2 The Legal Consequences

The question pertaining to all three of the above scenarios is: what are the legal consequences of the establishment of corruption in arbitration? In principle, the legal consequences will depend on the applicable law. Nevertheless, it is possible to make a few general comments regarding the first scenario outlined above — the bribery pact. Such a pact very likely will be null and void or unenforceable in most legal systems. This means that the arbitral tribunal will not admit the claims of the intermediary who tries to enforce a bribery pact in the form of a commission agreement. Arbitrators in international commercial arbitration, however, will not

deny jurisdiction in such a case, because the arbitration agreement has a separate existence from the main contract (the bribery pact), and even if the main contract is null and void, the arbitration clause remains valid. A different question is whether a party could claim restitution regarding sums already paid, or whether such a claim would be considered abusive?

Regarding the second scenario — an investment procured by bribery — it is more difficult to make general comments about the legal consequences. They depend on the applicable law as well as on whether the arbitration is based on an investment treaty, a national investment law or a contract clause. The legal consequences in ICSID arbitration, where the ICSID Convention must be taken into account, are different from those in non-ICSID institutional or in *ad hoc* investment arbitration. In this regard, it is particularly significant that Article 25 of the ICSID Convention requires an "investment". If there is no investment (according to a number of bilateral investment treaties, an investment must comply with the host state's law to qualify as one), the tribunal may decide to deny jurisdiction.[35] Nowadays, in probably every country, an investment procured by bribery will not be in accordance with host state's law.

Depending on the circumstances, an (ICSID or non-ICSID) investment arbitral tribunal may affirm jurisdiction in a case of corruption in arbitration and decide whether or not the claims are admissible at the merits stage. In this case, the tribunal faces a delicate question. Simply put, corruption always involves at least two parties, the one who offers the bribe and the one who takes it. How should arbitrators handle the situation where the host state, which now relies on the corruption objection (or defence), was in fact part of the bribery scheme? This question is the subject of debate. In my view, one needs to be careful when trying to invoke state responsibility in corruption cases, thereby attributing the conduct of corrupt public officials to the state itself. In essence, large-scale corruption is a crime that undermines the state and weakens its institutions, to the detriment of the population which, potentially already poor, eventually carries the cost. Thus, one could try to hold the host state responsible for the corruption of its public officials, in the sense that the state would have to pay compensation or damages to a foreign investor (for example, for expropriation). However, this means that where the investment was procured by bribery, it is the citizens and (potentially) tax-payers who ultimately will foot the bill for the corrupt behaviour of some public officials. One needs to consider the impact of the bribe payments (that may be hard to measure — for example, a corrupt foreign investor may build bridges but

35 See, for example, the *Metal-Tech v Uzbekistan* case in §2.3 above.

the work and material may be substandard, causing the bridge to collapse after a few years). Therefore, in my view, in cases of an investment procured by bribery, tribunals either should deny jurisdiction or not admit the investor's claims.

As to the third scenario considered above — corruption during the performance of an investment — a more balanced approach may be appropriate. If the investor did abide by the host state's laws at the initiation of the investment and only later, during the performance of the investment, engaged in bribery, the tribunal might elect to dismiss the investor's claims only as regards the part of the investment that is tainted by corruption. One needs to consider, however, that bribes related to the initiation of an investment do not have to be paid in advance but may be paid years later into the investment. It also is difficult to decide when the initiation stage of an investment actually has been completed. An investment usually is not merely a simple contract, but a complex web of legal relationships.

4 CONCLUSION

Corruption relating to the underlying dispute in international commercial or investment arbitration proceedings is a topic that needs to be addressed and discussed. From a legal point of view, it is a cross-cutting issue, involving private (international) law, public international law, criminal law and procedural law. On the level of practice, arbitrators, lawyers, forensics experts, academics and sometimes judges and prosecutors play a role in such cases. The topic is as complex as it is important in a globalised economy, in which disputes arising in relation to international trade and investment preferably are settled in arbitration proceedings. The strong international and domestic legal frameworks to combat corruption and foreign public bribery establish that corruption is contrary to transnational public policy and must be taken seriously by arbitrators. It is important for arbitrators to develop a coherent approach to cases of corruption in arbitration, in accordance with the applicable law. The current effort to draft a toolkit for arbitrators seeks to be a step in this direction.