FRAUD AND CORRUPTION IN INTERNATIONAL ARBITRATION

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I. INTRODUCTION

Allegations of fraud and corruption are often encountered in international arbitration. In most instances, such allegations arise in defending claims against a party that has engaged in fraud and corruption in relation to the subject matter of the dispute. As Dr. Cremades has made clear through his treatment of this subject, allegations of fraud and corruption are to be taken seriously and treated carefully.[2005] This chapter addresses the various issues that arise when evidence of fraud or corruption is presented to an international arbitral tribunal.

For the sake of clarity, it is important, at the outset, to understand what is meant by fraud and corruption. For the purposes of this chapter, fraud is defined as a knowing misrepresentation of the truth of a material fact to induce another to act in a manner that is detrimental to their interests.[2006] Corruption refers to any action of transferring something of value, including money, to a public official, for his or her own benefit, in order that the official act or refrain from acting in the exercise of his or her official duties.[2007]

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(2005) *See generally*, Bernardo M. Cremades & David. J. A. Cairns, *Transnational Public Policy in International Arbitral Decision-Making, in Arbitration: Money Laundering, Corruption and Fraud* 65 (2003); Bernardo M. Cremades, *Corruption and Investment Arbitration, in Global Reflections on International law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 203 (Gerald Aksen *et al.* eds., 2005).

(2006) *See* Black's Law Dictionary 685 (8th ed. 2004).

(2007) *See generally* United Nations Convention against Corruption, done at New York on 31 Oct. 2003 (entered into force 14 Dec. 2005), Arts. 15 and 16, G.A. Res. 58/4, U.N. Doc. A/58/422; *Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration* xxiii-xxiv (2004).

Though fraud and corruption often arise in different contexts, as will be seen in this chapter, an arbitral tribunal will face many similar issues when confronted with evidence of either. The second section of this chapter discusses matters of evidence in fraud and corruption cases. The third section discusses the transnational public policy against fraud and corruption and the relevance of such a policy in the commercial and treaty arbitration contexts.(2008) The fourth section addresses the consequences of a finding that a party has engaged in fraud or corruption with regard to the subject matter of the dispute.

II. MATTERS OF EVIDENCE IN FRAUD AND CORRUPTION CASES

Arbitral tribunals are faced with having to settle claims without the aid of coercive techniques, such as subpoena power. Thus, when a tribunal is faced with indicia of fraud or corruption, which are difficult to prove without party cooperation, it must use unconventional techniques to ensure the tribunal has reliable facts before it and a fair proceeding. Though the burden of proof remains on the party alleging fraud and corruption, a tribunal may use certain techniques, such as shifting the burden once *prima facie* evidence is presented or by drawing appropriate inferences, to account for the fact that not all the evidence may be available to them. Further, given the seriousness of the allegations of fraud and corruption, arbitral tribunals should use heightened scrutiny when confronted with such allegations. In fact, as Dr. Cremades has noted, a tribunal may initiate an investigation, on its own accord, if it encounters serious indicia of fraud or corruption during the course of its proceedings.(2009)

This section will discuss, in turn, the relevant burden and standard of proof in fraud and corruption cases and the use of adverse inferences in meeting the applicable standard of proof.

1. The Burden Of Proof

As a general rule the party alleging fraud or corruption, as with all factual issues, bears the burden of proving the fraud and corruption.(2010) Given the strong public policy against

(2008) In this chapter, treaty arbitration refers to arbitration between investors and states under investment treaties and, as such, under international law. Commercial arbitration refers to arbitration under contracts and, as such, the applicable law as selected by the parties. This is not to say that treaty arbitrations do not involve commercial matters-in fact most of the time they do. Rather, this terminology is adopted in keeping consistent with nomenclature often used in international arbitration literature generally.

(2009) Cremades & Cairns, *supra* note 1996 at 79 *et seq.*

(2010) Alan Redfern, *The Practical Distinction Between the Burden of Proof and the Taking of Evidence-An English Perspective*, 10 Arb. Int'l 317, 321 (1994) («The practice of nearly all international arbitral tribunals is to require each party to prove the facts upon which it relies to support its case.»); *Asian Agricultural Products. Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, ICSID Case n.° ARB/87/3, Award (27 June 1990), § 56, *published in* 6 ICSID Rev.-FILJ 526 (1991), («There exists a general principle of law placing the burden of proof upon the claimant... . The term *actor* in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved. Hence, with regard to the proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact.») (internal citations omitted). This rule is expressly stated in many arbitral rules. *See, e.g.*, UNCITRAL Arbitration Rules, Art. 24(1) («Each party shall have the burden of proving the facts relied on to support his claim or defence.»); ICDR International Arbitration Rules (28 Apr. 1976), Art. 19(1) («Each party shall have the burden of proving the facts relied on to support its claim or defense.»).

such actions, the difficulty of obtaining direct evidence of fraud and corruption, and the substantial risk of allowing such improprieties from going unpunished in the international arbitration context,(2011) some arbitral tribunals have engaged in a burden shifting approach so as to attempt to balance the rights of the two parties involved. In these cases, once a party shows sufficient indicia of fraud or corruption, the tribunal will still allow the other party to disprove the evidence of wrongful activity by shifting the burden of proof to that party. An example of such a case is *ICC Case n.° 6497* (1999), in which the tribunal stated:

> The «alleging Party» has the burden of proof [to demonstrate the existence of bribery]... The «alleging Party» may bring some relevant evidence for its allegations, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven (Article 8 or the Swiss Civil Code). However, such change in the burden of proof is only to be made in special circumstances and for very good reasons.(2012)

According to one commentator, burden shifting is especially appropriate in the context of corruption charges:

> Because of the difficulty of proving corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met.(2013)

Another argument in favor of burden shifting is that the party accused of corruption is typically easily capable, if it is actually innocent of the allegations, of producing countervailing evidence (*e.g.*, proof that an agent spent unusually large consulting fees on legitimate goods or services in support of the investment or proof that a nontransparent ownership structure is not meant to conceal wrongful activities).

2. The Standard Of Proof

The standard of proof for matters of fraud and corruption will ultimately depend on the applicable law and the various circumstances of the case. While the relevant applicable law in certain arbitrations may call for a heightened standard of proof with regard to fraud and corruption,(2014) the applicable standard of proof in proving a civil claim in the inter-

(2011) *See ICC Case n.° 1110*, Award of 1963, *reprinted in* 10 Arb. Int'l . 282 (1994) (Once evidence of illicit activity came to light, Judge Lagergren deciding to examine the issue of bribery on his own accord).

(2012) *ICC Award n.° 6497*, Final Award of 1994, XXIVa Ybk Comm. Arb. 71, 73 (Albert Jan Van Den Berg ed., 1999).

(2013) Karen Mills, *Corruption and Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto*, 5(4) Int'l Arb. L. Rev. 126, 130 (2002).

(2014) For example, in the treaty arbitration case of *EDF v. Romania*, the tribunal found that in the circumstances presented before it, a clear and convincing standard was required. *See EDF (Services) Limited v. Romania*, ICSID Case n.° ARB/05/13, Award (8 Oct. 2009), § 221, *available at* <http://www.investmentclaims.com> (where an alleged bribe request was the very act which was the basis of the claimant's BIT claim, the tribunal finding that «[t]he seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence.»).

national arbitration context generally will approximate the «preponderance of evidence» test.[2015] In fact, in a survey of twenty-five arbitral awards regarding bribery, only five tribunals «ruled that «clear and convincing» evidence was needed ... to declare the agreement invalid because of corruption.»[2016]

Regardless of the applicable burden and standard of proof, as determined by the tribunal under the applicable law, a tribunal is free to determine the weight and credibility to be accorded to the evidence presented.[2017] This authority granted to a tribunal becomes particularly important because direct evidence is rarely available to prove fraud and corruption.[2018] As one commentator explains, «like most crimes and intentional misconduct, and perhaps more so, acts of corruption ... are specifically designed not to be able to be identified or detected.»[2019] Indeed, as the United Nations recently recognized:

[T]he nature of major corruption cases makes such a high burden of proof particularly difficult to meet. Senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value becomes problematic at best.[2020]

The same can certainly be said with respect to cases of fraud. A party engaging in fraud is engaging in the sort of intentional misconduct where it would likely conceal any trail of its wrongdoing.

(2015) Robert B. Von Mehren, «Burden of Proof in International Arbitration, in Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration», *ICCA Congress Series n.° 7, 123, 127* (Albert Jan Van Den Berg ed., 1996). («The standard most generally applied in international commercial arbitration is probably the 'preponderance of evidence'. This standard reflects the general view that the proponent of a position must do more than create an equilibrium between its position and that of its opponent to prevail.»); Georgios Petrochilos, *Procedural Law in International Arbitration (2004)*, § 5.125 n. 230 («Subject to a contrary provision of law applicable on the merits, the standard of proof is the balance of probability or 'conviction in time'.»).

(2016) Antonio Civellaro, «Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence», in *Arbitration: Money Laundering, Corruption And Fraud 114, 117* (Kristine Karsten, Andrew Berkeley eds., 2003)

(2017) *See, e.g.*, ICDR International Arbitration Rules, Art. 20(6) («The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party.»); UNCITRAL Arbitration Rules, Art. 25(6) («The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.»); IBA Rules on the Taking of Evidence in International Commercial Arbitration («IBA Rules of Evidence»), Art. 9.1 («The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.»); ICSID Arbitration Rules, Rule 34(1) («The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.»); *See also* 1968 ICSID Arbitration Rules, *in ICSID Regulations and Rules (1968)*, Rule 33, Note A («Paragraph (1) of this Rule [now Rule 34(1)] reflects long-standing international practice. It confers on the Tribunal the power to determine the admissibility, relevance and materiality of evidence... . It is also unfettered, subject to the principle of equality of the parties, in its discretion in determining the relevance and in evaluating the materiality of any such evidence, i.e., in assessing its 'probative value'. Thus it can appraise its 'weight» according to the balance of probabilities.»).

(2018) *See, e.g.*, Matthias Scherer, «Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals», *5 Int'l Arb. L. Rev. 29, 32-33* (n.° 1, 2002).

(2019) Mills, *supra* note 2004 at 129.

(2020) *See* United Nations, *Anti-Corruption Toolkit 464* (2004), *available at* <http://www.unodc.org/ documents/corruption/publications_toolkit_sep04.pdf>.

Accordingly, arbitral tribunals may find indirect or circumstantial evidence of fraud or corruption to be sufficient for a party to discharge the applicable standard of proof. Commentators and cases confirm that, generally, tribunals should recognize circumstances where evidence is difficult to obtain and adjust their approach to weighing the evidence accordingly. As Professor Amerasinghe explains, «[i]nternational tribunals have, where a party has genuinely encountered problems beyond its control in securing evidence, more frequently than not recognized its hardship.»[2021]

Several international arbitral awards confirm this approach, especially in the context of allegations of corruption. For example, in the Iran-U.S. Claims Tribunal's *Rockwell* case-where the claimant was unable to obtain better quality evidence because the Iranian government was not willing to grant the claimant access to the relevant documents it had taken possession of-the tribunal explained that, «[p]rima facie evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn.»[2022] Similarly, in *Asian Agricultural Product Ltd. (AAPL) v. Sri Lanka*, the tribunal-also deciding a treaty-based claim-explained that «[i]n cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e. *prima facie* evidence.»[2023] Professor Crivellaro surveyed twenty-five arbitral awards involving bribery and corruption charges and concluded that arbitrators frequently rely on indirect evidence of corruption when credible allegations of corruption have been made.[2024]

In *ICC Case n.° 8891* (1998), the arbitral tribunal, assessing a corrupt «consulting agreement,» reviewed arbitral doctrine and jurisprudence and identified a set of indicia of corruption which may be taken into consideration when attempting to discharge the applicable standard of proof. The indicia of corruption considered in that case include: (1) the inability of the agent to provide evidentiary proof of his activity, (2) the very short duration of the agent's involvement in the contract, (3) remuneration in the form of a commission based on the value of the contract, and (4) a particularly high rate of commission.[2025]

In most cases it is not as difficult to prove fraud as it is corruption, given that there will usually be some evidence available to show that one party attempted to deceive the other (as opposed to the situation where both parties attempted to conceal corrupt activity). For example, in *Plama Consortium Limited v. Republic of Bulgaria*, the respondent's defense involved an allegation that claimant had misrepresented the true ownership of its company.[2026] To prove this, the respondent simply had to submit to the tribunal the correspond-

(2021) Chittharanjan Amerasinghe, *Evidence in International Arbitration 138* (2005).

(2022) Rockwell International Systems, Inc. v. Government of the Islamic Republic of Iran, *Award n.° 438-430-1* (5 Sept. 1989), reprinted in *23 Iran-US Cl. Trib. Rep. 150*, 188.

(2023) *AAPL, supra* note 2001 § 56.

(2024) *See* Crivellaro, *supra* note 2007 at 109.

(2025) *ICC* Case n.° 8891, in *Journal du Droit International 1076*, 1080-83 (2000). *See also*, José Rosell and Harvey Prager, Illicit Commissions and International Arbitration: The Question of Proof, 15 Arb. Int'l 329 (1999); *International Law Commission Articles on State Responsibility*, Art. 7 commentary 8. n. 157 (9 Aug. 2001), reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text & Commentaries* (2002).

(2026) *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case. n.° ARB/03/24, Award (27 Aug. 2008), § 128, *available at* <http://www.investmentclaims.com>.

ence received from the claimant describing its company, and evidence confirming the true ownership of the company.[2027]

From the above, it is clear that a tribunal is free to accord greater weight to indirect and circumstantial evidence in proving corrupt activity, and in some instances fraud, where a party demonstrates circumstances under which it would otherwise be difficult to obtain adequate direct evidence. Indeed, it will be helpful for a tribunal to hear testimony from experts on matters of fraud or corruption (as the case may be) assessing the various indicia of illicit activity in order to determine whether the evidence is sufficient to discharge the applicable standard of proof.

3. The Use Of Adverse Inferences

In fraud and corruption cases, a party already having engaged in willful misconduct, may continue to conceal evidence relevant to allegations of fraud and corruption during the course of the proceedings. As such, an important tool available to arbitral tribunals in order to ensure fair adjudication is the use of adverse inferences, especially because they lack subpoena and other enforcement powers. Without fear of being held in contempt, arbitrating parties may rebuff requests for documents and may engage in other dilatory tactics. To remedy such obstructive tactics, tribunals have inferred that the evidence being withheld would be adverse to the party refusing to produce it.[2028] According to Bin Cheng:

The absence of evidence in rebuttal is an essential consideration in the admission of prima facie evidence. Where the opposite party can easily produce countervailing evidence, its non-production may be taken into account in weighing the evidence before the Commission... The situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation.[2029]

Andreas Reiner has aptly commented:

If a party does not comply with its obligations in the arbitration, for instance by refusing to produce certain documents requested by the other side and/or by the arbitrators, this will not

(2027) *See generally id.* §§ 116-29.

(2028) Durward V. Sandifer, *Evidence Before International Tribunals 97* (1939) («[T]ribunals will accept less satisfactory evidence than would be required in municipal procedure if the opposing party fails to produce evidence in his possession, or if in the face of some proof he fails to substantiate his own claim by any acceptable evidence. In other words, a party cannot simply assert or deny a proposition, and then rest his case upon a technical rule throwing the burden of proof on the other party without running a risk of adverse inference being drawn from his failure to produce evidence.»); Von Mehren, *supra* note 2006 at 130 (noting that «the power of the tribunal to draw negative inferences from the failure of a party to produce evidence in its possession or control is a partial substitute for the power of a court to require documentary production from parties before it.»); Redfern, *supra* note 2001 at 318 («The tribunal will draw inferences from the evidence which has been presented; and in some cases from evidence which has not been presented, but which would have been expected to be forthcoming. The tribunal may also draw adverse inferences from the silence of a party in the course of the contractual relationship, in circumstances where such silence is inconsistent with the position taken by that party in the arbitration.»). *See generally* Jeremy K. Sharpe, «Drawing Adverse Inferences from the Non-production of Evidence», *22 Arb. Int'l 549* (2002).

(2029) Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals 324-5* (1953).

affect the burden and the standard(s) of proof, but the arbitral tribunal will «draw (adverse) conclusions», from that party's behaviour, that is to say, it will take the behaviour into account for the weighing of the evidence and for deciding whether the required standard of proof has been reached, i.e. whether the burden of proof has been discharged by the concerned party.[2030]

Similarly, Craig, Park and Paulsson have noted that «[a] party which refuses to comply with an order ... should be advised that arbitrators are likely to conclude that the document in question is unfavorable to that party.»[2031] The same authors correctly note, however, that an adverse inference should only be drawn where there is a «logical nexus between the probable nature of the documents withheld and the inference derived therefrom.»[2032]

The notion of adverse inferences is reflected in the IBA Rules of Evidence, Art. 9. In the event that a party fails to produce or make available evidence ordered to be produced «the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.»[2033] As indicated in the associated commentary to the IBA Rules of evidence «Arbitral tribunals routinely create such inferences in current practice.»[2034]

Adverse inferences are similarly used in treaty-based arbitration. Rule 34(3) of the ICSID Arbitration Rules alludes to this concept:

The Parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.[2035]

In the recent case of *Europe Cement v. Republic of Turkey*, the tribunal drew adverse inferences against the claimant with respect to its alleged purchase of shares in a Turkish entity in 2003.[2036] In that case, the Respondent adduced evidence and expert testimony that suggested that Share Purchase agreements produced by the claimant had been backdated in order for its investment to have been made at the legally relevant point in time.[2037] The tribunal found that the respondent's evidence «g[a]ve rise to a strong inference that there was no transfer of shares ... in May 2003»[2038] and that «[t]he Claimant could have rebutted this inference» by «produc[ing] the originals of the share agreements» or «the share certificates that it claimed it owned.»[2039] That «it never produced any documents» «contributes to the inference that the originals of the documents copied in its Memorial and on which its claim was based either were never in the Claimant's possession or would not

(2030) Andreas Reiner, «Burden and General Standards of Proof», *10 Arb. Int'l 328, 338* (1994).

(2031) Craig, Park & Paulsson, *International Chamber of Commerce Arbitration 450* (3d ed. 1998).

(2032) *Id.* at 451.

(2033) IBA Rules of Evidence, Arts. 9.4-9.5.

(2034) IBA Working Party, «Commentary on the New IBA Rules of Evidence in International Commercial Arbitration», *Bus. L. Int'l Issue 2*, 16, 36 (2000).

(2035) ICSID Arbitration Rules, Rule 34(3).

(2036) *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case n.° ARB(AF)/07/2, Award (13 Aug. 2009), *available at* <http://www.investmentclaims.com>.

(2037) *Id.* §§ 150-62.

(2038) *Id.* § 163.

(2039) *Id.* § 164.

stand forensic analysis, in which case the claim that Europe Cement had shares in CEAS and Kepez at the relevant time was fraudulent.»[2040]

Similarly, the Iran-United States Claims Tribunal has stated «it is an accepted principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal.»[2041] Judge Allison noted in *Levitt v. Iran*, «a party's deliberate non-compliance with the Tribunal orders gives rise to an inference that the production of the requested documents would not have supported that party's arguments.»[2042] He further observed that non-compliance «tends to enhance the credibility of the allegations of the other party that may not be fully documented but are consistent with the factual pattern established by the evidence in the case» while «diminish[ing] the credibility of the non-complying party's own allegation of fact.»[2043]

From the above analysis, one can draw certain conclusions regarding the circumstances under which it may be appropriate to draw adverse inferences to satisfy the applicable standard of proof in fraud and corruption cases. When deciding to draw adverse inferences, a tribunal must determine that: 1) the party requesting that an adverse inference be made has presented all relevant evidence in its possession and, in any event, has presented sufficient indicia of fraud or corruption to corroborate its allegations of illicit activity; 2) the party against whom the adverse inference is being made refuses to produce evidence, which it likely has access to and which it has been required to produce; 3) the inference being drawn is consistent with the facts in the record and logically related to the evidence being withheld.[2044] After satisfying itself of these criteria, a tribunal may decide to draw appropriate adverse inferences. Given that evidence of fraudulent and corrupt activity is often sparse, and a party cannot be compelled to produce evidence in international arbitration, the use of any adverse inferences drawn will often be critical for a party to meet its burden of proving fraud or corruption.

III. THE TRANSNATIONAL PUBLIC POLICY AGAINST FRAUD AND CORRUPTION

Given the serious threat that fraudulent and corrupt activities pose to society, there is a developing consensus that such activities are against the fundamental values of any state, or in other words, there is a developing transnational public policy against fraud and corruption. This next section discusses the development of the transnational public policy against fraud and corruption in the international arbitration context. First, however, this

(2040) *Id.*

(2041) *Arthur J. Fritz & Co. v. Sherkate Tavonie Sherkathaye Sakhtemanie* (STSS), *Award* n.° 426-276-3 (30 June 1989), reprinted in *22 Iran-U.S. Cl. Trib. Rep. 170*, 180. But in that case, the Tribunal refused to dismiss the action for lack of jurisdiction because the circumstantial evidence produced by the company was insufficient to establish an adverse inference against the STSS. *See also* Charles N. Brower & Jason Brueschke, *The Iran-United States Claims Tribunal 194-197* (1998) (discussing the Tribunal's use of adverse inferences); Howard M. Holtzmann, «Fact-Finding by the Iran-United States Claims Tribunal», in *Fact-Finding Before International Tribunals 101*, 127 (Richard B. Lillich ed., 1992) (same).

(2042) *Levitt v. Iran*, Award n.° 520-210-3e (20 Aug. 1991), *reprinted in* 27 Iran-U.S. Cl. Trib. Rep. 145, 188.

(2043) *Id.*

(2044) *See generally* Sharpe, *supra* note 2019.

section discusses the notion of transnational public policy generally, and its relevance for an international arbitral tribunal.

1. The Applicability Of Transnational Public Policy In International Arbitration[2045]

Although public policy is difficult to define, it is based on domestic conceptions of justice and morality.[2046] Transnational public policy is a reflection of global consensus on fundamental economic, legal, moral, political, and social values. It is a collection of universal standards, shared norms, and general principles that are widely accepted by the international community.[2047] For example, «[c]ertain activities are regarded as *contra bonos mores* virtually the worldover» including: «piracy, terrorism, genocide, slavery, smuggling, drug trafficking,»[2048] trading of stolen property, and trafficking of human organs.[2049]

These rules of transnational public policy are developed over time by indentifying international consensus on a particular issue.[2050] Consensus for the existence of rules of transnational public policy derives from the convergence of national laws, international conventions, arbitral case law and scholarly commentary.[2051]

(2045) For the purposes of this article, the phrase «transnational public policy» is used interchangeably with «international public policy» because both have been used to refer to the same basic concept. It is worth noting that, «international public policy» is also sometimes used to refer to public policy employed by domestic courts during an enforcement proceeding of an international arbitral award. This conception of «international public policy» is unrelated to the «truly international public policy» that corresponds to the understanding of «transnational public policy.» For a thorough discussion of the terminology *see* Pierre Lalive, «Transnational (or Truly International) Public Policy and International Arbitration», in *ICCA Congress Series* n.° 3, 258, 275-6 (1986) and Catherine Kessedjian, *Transnational Public Policy, in* ICCA Congress Series n.° 12, 857, 859 (2006).

(2046) Cremades & Cairns, *supra* note 1996 at 65, 67; Emmanuel Gaillard, Fouchard Gaillard, *Goldman on International Commercial Arbitration 863* (John Savage ed., 1999) (describing public policy as a «fundamental conception of justice»). For a discussion of the definition and origins of «public policy» see *Int'l Law Ass'n, Comm. on Int'l Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International awards 343-46* (69th Conference, London, 2000).

(2047) *See* Audley Sheppard, «Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?», *1 Transnat'l Disp. Mgmt. 1* (2004) (summarizing Int'l Law Ass'n, *supra* note 2037) (noting that transnational public policy encompasses «principles that represent an international consensus as to universal standards and accepted norms of conduct that must always apply.»); Kessedjian, *supra* note 2036 at 861-62 («[T]ransnational public policy is composed of mandatory norms which may be imposed on actors in the market either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world. These norms aim at being universal. They are the sign of maturity of the international communities (that of merchants and that of civil societies) who know very well that there are limits to their activities.»).

(2048) *Int'l Law Ass'n, supra* note 2037 at 361

(2049) Pierre Mayer, «Effect of International Public Policy in International Arbitration», in *Pervasive Problems in International Arbitration 63* (Loukas A. Mistelis & Julian D. M. Lew eds., 2006).

(2050) *See* Sayed, *supra* note 1998 at 287-88 («[W]hen one talks of transnational public policy or universal values, one is at some point bound to refer to values, which are perceived as (1) essential; (2) supported by a large adherence or what in a usual language is called large consensus, let alone a universal one; and (3) therefore requiring immediate application, regardless of any contrary agreement.»).

(2051) *See generally World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case n.° ARB/00/7, Award (4 Oct. 2006), § 141, *available at* <http://ita.law.uvic.ca/> («Tribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it though international conventions, comparative law and arbitral awards.»).

Critics have argued that the concept of transnational public policy is either too vague for tribunals to apply, because it is based on general principles and false assumptions of consensus, or that the concept of transnational public policy inappropriately provides justification for arbitrators own subjective predilections about fundamental values.[2052] Other commentators suggest that transnational public policy is redundant given that many of the purported prohibitions under transnational public policy are already outlawed under domestic law.

Many arbitral tribunals, however, recognize the existence and applicability of transnational public policy. For example, in *World Duty Free Company Ltd. v. Republic of Kenya*, an ICSID tribunal described transnational public policy as «an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.»[2053] Similarly, in *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, an ICSID tribunal characterized transnational public policy as «a series of fundamental principles that constitute the very essence of the State,» with the «essential function ... to preserve the values of the international legal system against actions contrary to it.»[2054] Many commercial arbitration tribunals have also recognized the existence and applicability of transnational public policy.[2055]

It is not contested that there will be overlap between the public policy of any given state and transnational public policy-in fact, transnational public policy should be reflected in the domestic public policy of most states.[2056] This universality of the public policy is exactly the reason for its relevance in international arbitration. It is because these rules are widely accepted by the public policies of most states that make their application imperative when deciding a case. As will be discussed, in both the commercial and treaty-based arbitration context, international arbitral tribunals must observe mandatory norms of transnational public policy that are widely recognized by all nations.[2057] Commercial arbitration requires the tribunal to consider transnational public policy to ensure the enforceability of awards, while treaty arbitration requires the tribunal to consult transnational public policy in the context of the applicable law, *i.e.*, public international law.

1.1. Transnational Public Policy in Commercial Arbitration

Transnational public policy is relevant in the commercial arbitration context by way of enforceability of arbitral awards. It is a generally accepted principle of commercial

(2052) *See* Mayer, *supra* note 2040 at 65-6.
(2053) *World Duty Free, supra* note 2042 § 139.
(2054) *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case n.º ARB/03/26, Award (2 Aug. 2006), § 245, *available at* <http://ita.law.uvic.ca/> (English Translation).
(2055) *See, e.g., ICC Case n.º 1110, supra* note 2000 at 292 («[I]t cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.» (citations omitted)); *Dalmia Cement Ltd. v. National Bank of Pakistan, ICC Case n.º 1664, in* Daniel Friedmann & Ernst Joachim Mestmacker, *Conflict resolution in International Trade: A Symposium 27* n.52 (2008) (holding that the arbitrator «was only obliged to respect truly international public policy.»).
(2056) Lalive, *supra* note 2036 at 306.
(2057) *Id.* at 271.

arbitration that the tribunal has a duty to make every effort to ensure that any award it renders is enforceable at law.[2058] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards («New York Convention») allows domestic courts to refuse the recognition and enforcement of an award if it is considered «contrary to the public policy of that country.»[2059] Similarly, the UNCITRAL Model Law on International Commercial Arbitration empowers enforcement courts to set aside awards which violate domestic public policy.[2060]

A tribunal's obligation to render a universally enforceable award encourages it to take into account transnational public policy to facilitate enforcement by avoiding subsequent review by domestic courts for circumvention of public policy.[2061] Preemptive consideration of public policy during arbitration can ensure enforcement and expedite the enforcement process.[2062] A failure to address issues of transnational public policy on the other hand will likely subject an award to invalidation on domestic public policy grounds.[2063] For example, any award that dismisses evidence of fraud or corruption carries a significant risk of subsequently being held in violation of domestic public policy and unenforceable by most courts. In addition to concerns about enforceability, commercial arbitration tribunals have a public responsibility to administer justice and uphold universally accepted principles of law which requires them to address violations of transnational public policy.[2064]

1.2. Transnational Public Policy in Treaty Arbitration

Transnational public policy is relevant in the treaty arbitration context by way of public international law, which governs the dispute. Unlike in the commercial context, where contractual agreements are the basis of arbitration, the substantive rights that give rise to investment arbitration are derived from treaties which are directly governed by international law. Article 31(3)(c) of the Vienna Convention on the Law of Treaties («Vienna Convention») requires that treaties be interpreted in light of the «relevant rules of international

(2058) *See, e.g.*, ICC Rules of Arbitration, Art. 35 (In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.»).
(2059) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (entered into force 7 June 1959), Art. V(2)(b), 30 U.N.T.S. 3.
(2060) *United Nations, Commission on International Trade Law, Model Law on International Arbitration (1985)*, Arts. 34(2)(b)(ii) & 36(1)(b)(ii), U.N. Doc. A/40/17 (providing uniform enforcement under domestic law and stating that an award may be set aside by the courts at the seat of the arbitration or denied recognition by a foreign court during enforcement if contrary to public policy).
(2061) *See* Cremades, *supra* note 1996 at 208-09; Emmanuel Gaillard, «Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules», *10 ICSID Rev. 208*, 223 (1995).
(2062) Robert Briner, «Philosophy and Objective of the Convention», in *Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 10* (1999).
(2063) *See, e.g., ICC Case n.º 1110, supra* note 2000 (acknowledging that concern about recognition and enforcement under the New York Convention requires consideration of public policy); *ICC Case n.º 10623*, reprinted in *21 ASA Bulletin 1*, 85 § 140 («A generally accepted principle of international arbitration, reflected in Article 35 of the ICC Rules, compels the Arbitral Tribunal to make every effort to ensure that any award it renders is enforceable at law.»).
(2064) Bernardo M. Cremades & David J. A. Cairns, «The Brave New World of Global Arbitration», *3 J. of World Investment 173*, 192-209 (2002); Cremades & Cairns, *supra* note 1996 at 80.

law applicable in the relations between the parties.»[2065] That international law governs investment treaty disputes is often reflected in investment treaty themselves. For example, the Energy Charter Treaty requires tribunals to apply «applicable rules and principles of international law,»[2066] and most bilateral investment treaties (BITs) adopt the same general language.[2067] Further, in an ICSID case, unless parties have explicitly agreed to the contrary, Article 42(1) of the ICSID Convention requires tribunals to decide disputes in accordance with applicable «rules of international law.»[2068] In a proceeding under Article 42(1) second sentence, even though a tribunal applies the host-State law in the first instance, that law must conform with international legal standards.[2069]

The Report of the Executive Directors on the ICSID Convention clarifies that «[t]he term «international law» as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.»[2070] Article 38(1) of the Statute of the International Court of Justice defines international law as follows:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

(2065) Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (entered into force 27 Jan. 1980), Arts. 31, 32, 115 U.N.T.S. 331, *available at* <http://untreaty.un.org/ilc/texts/instruments/english /conventions/1_1_1969.pdf>.

(2066) Energy Charter Treaty, done at Lisbon on 17 Dec. 1994 (entered into force 16 Apr. 1998), Art. 26(6), *available at* <http://www.encharter.org/fileadmin/user_upload/ document/EN.pdf>.

(2067) *See, e.g.*, 2004 U.S. Model BIT, Art. 30 (governing law) *available at* <http://www.state.gov/documents/ organization/117601.pdf> (Providing that the tribunal shall decide investment disputes «in accordance with this Treaty and applicable rules of international law.»).

(2068) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on 18 March 1965 (entered into force 14 Oct. 1966), Art. 42(1), 575 U.N.T.S. 159 [hereinafter ICSID convention]. *See also MTD Equity Sdn. Bhd & MTD Chile S.A. v. Republic of Chile*, ICSID Case n.° ARB/01/7, Award (25 May 2004), § 86, *available at* <http://www.investmentclaims.com> («Article 42(1) of the Convention is the relevant provision for determining the law applicable to the merits of the dispute between the parties. This article requires the Tribunal to 'decide a dispute in accordance with such rules of law as may be agreed by the parties.» This being a dispute under the BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law.»); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case n.° ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005), §§ 132-133, *available at* <http://www.investmentclaims.com>; *Aguaytia Energy LLC v. Republic of Peru*, ICSID Case n.° ARB/06/13, Award (11 Dec. 2008), § 72, *available at* <http://www.investmentclaims.com>; *Duke Energy v. Republic of Peru*, ICSID Case n.° ARB/03/28, Decision on Jurisdiction (1 Feb. 2006), § 134, *available at* <http://www.investmentclaims.com>.

(2069) *Amco Asia Co. and Others v. Republic of Indonesia*, ICSID Case n.° ARB/81/1, Decision on the Application for Annulment (16 May 1986), § 21, *reprinted in* 1 ICSID Rep. 509 (1993).

(2070) International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States § 40 (18 Mar. 1965).

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[2071]

While transnational public policy is not explicitly included in this list, it is tacitly incorporated through acknowledgment by all four sources of international law. As described above, international conventions can embody transnational public policy. Moreover, widespread consensus in national laws, affirmed by domestic courts and arbitral tribunals, can develop into customary international law reflecting transnational public policy. In addition, many legal scholars maintain that transnational public policy is an element of international law.[2072] Therefore, transnational public policy applies in the treaty arbitration context as a component of the applicable law.[2073] ICSID tribunals, for example, consistently recognize the applicability of transnational public policy under the rubric of international law and when resolving disputes.[2074] Similarly, commentators have confirmed that transnational public policy «may be considered to be a rather specialized part of public international law.»[2075]

2. The Transnational Public Policy Against Bribery And Corruption

The prohibition of bribery and corruption is widely recognized as a quintessential rule of transnational public policy.[2076] International consensus vehemently declares that bribery and corruption is morally and economically unacceptable. Everyone can agree that private benefit at the public's expense is fundamentally wrong. Moreover, bribery and corruption has serious detrimental repercussions on markets and efficiency.[2077] The prohibition and

(2071) Statute of the International Court of Justice, Art. 31(8), done at San Fransisco on 28 July 1945 (entered into force 24 Oct. 1945), *available at* < http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

(2072) *See, e.g.*, Mayer, *supra* note 2040 at 64; Lalive, *supra* note 2036 at 284.

(2073) *See, e.g., Inceysa v. El Salvador*, *supra* note 2045 at § 252; *World Duty Free v. Kenya*, *supra* note 2042, § 157; *Plama v. Bulgaria*, *supra* note 2017, §§ 141-143 (finding that transnational public policy is part of the «applicable rules and principles of international law» underlying the Energy Charter Treaty).

(2074) *See, e.g., Plama v. Bulgaria*, *supra* note 2017, §§ 140-46.

(2075) Martin Hunter & Gui Conde E Silva, «Transnational Public Policy and its Application», in *Investment Arbitrations, 4 J. of World Investment 367*, 378 (2003).

(2076) For a thorough account of the sources of global consensus which firmly establish a basis for the prohibition of bribery and corruption under transnational public policy *see* Sayed, *supra* note 1998 at 291-309.

(2077) *See* Cremades, *supra* note 1996 at 203 (noting that «[t]he demands of global commerce, international crime prevention, corporate governance, transparency and accountability in public sectors, together with a disturbing new understanding of the effects of corruption on economic development, political stability and the rule of law», give rise to international norms against bribery and corruption); Cremades & Cairns, *supra* note 1996 at 68, 77 (noting that bribery and corruption leads to «less competition, less foreign direct investment, lower tax revenues, lower public spending on health and education and a loss of legitimacy of the state with a consequent loss of capacity to provide institutions that support markets» and that the «increasing integration of world markets» and «distortive effects of corruption on competition» has «attracted a broad base of support, particularly amongst capital-exporting nations.»).

indignation of bribery and corruption is so universal that it has developed into a well-established example of a rule of transnational public policy. The condemnation of bribery and corruption in international commerce emanates from a convergence in national laws, broad international conventions, arbitral case law, and scholarly opinion.

2.1. *Convergence of National Law*

Bribery of government officials is explicitly sanctioned as illegal conduct by most countries.(2078) For example, in the United States the Foreign Corrupt Practices Act (FCPA) criminalizes bribery of foreign government officials.(2079) Some domestic courts recognize this convergence and acknowledge that bribery and corruption is more generally prohibited by transnational public policy.(2080) In the context of enforcement of arbitration awards, most countries disregard awards «induced or affected» by corruption as contrary to public policy.(2081)

2.2. *International Conventions*

Building on widespread domestic prohibition, many international conventions explicitly condemn bribery and corruption.(2082) This broad consensus in treaties is evidence that affirms the existence of a fundamental transnational public policy against bribery and

(2078) *World Duty Free v. Kenya*, *supra* note 2042, § 142 («[B]ribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries.»). *See*, Directorate for Financial and Enterprise Affairs, OECD Anti-Bribery Convention: National Implementing Legislation, *available at* <http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html> (linking to legislation of 38 states» domestic legislation criminalizing bribery of government officials).

(2079) Foreign Corrupt Practices Act (FCPA), Pub. L. 95-213, 91 Stat. 1494 (1977), as amended by *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. 100-148, Title V, § 50003(c), 102 Stat. 1107, 1419 (1988) (codified at 15 U.S.C. 78dd-1,2), and further amended by *The International Anti-Bribery and Fair Competition Act of 1998*, s.2375.

(2080) *See, e.g., Eur. Gas Turbines S.A. v Westman Int'l Ltd.*, Paris Court of Appeals (30 Sept. 1993), *quoted in* Sayed, *supra* note 1998 at 307) («a contract having influence-peddling or bribery as its motives or object is, therefore, contrary to French international public policy as well as to the ethics of international business as conceived by the largest part of the members of the international community.»).

(2081) *See, e.g.*, Australian International Arbitration Act of 1974, § 19; New Zealand Arbitration Act of 1996, Art. 36(3).

(2082) *See, e.g.*, United Nations Convention against Corruption, done at New York on 31 Oct. 2003 (entered into force 14 Dec. 2005), G.A. Res. 58/4, U.N. Doc. A/58/422 (currently 140 signatories, of which 136 have ratified) (noting, in the preamble, that corruption undermines stability, security, democracy, ethical values and justice); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed on 17 Dec. 1997 (entered into force 15 Feb. 1999), OECD Doc. n.° DAFFE/IME/BR(97)(20), *reprinted in* 37 I.L.M. 4 (1998) («bribery ... raises serious moral and political concerns, undermines good governance and economic development, and distorts competitive conditions.»); Council of Europe Criminal Law Convention on Corruption, done at Strasbourg on 27 Jan. 1999 (entered into force 7 Jan. 2002), CETS n.° 173, 38 I.L.M. 505 (1999); Council for Europe Civil Law Convention on Corruption, done at Strasbourg on 11 Apr. 1999 (entered into force 11 Jan. 2003), CETS n.° 174; The Inter-American Convention against Corruption, done at Caracas on 29 Mar. 1996 (entered into force 6 Mar. 1997), 35 I.L.M. 724 (1996), *available at* <http://www.oas.org/juridico/english/Treaties/b-58.html>; African Union Convention on Preventing and Combating Corruption, done at Maputo on 11 July 2003, 43 I.L.M. 5 (2004).

corruption.(2083) For example, the African Union Convention on Preventing and Combating Corruption renounces bribery because it «undermines accountability and transparency in management of public affairs as well as socio-economic development.»(2084) The United Nations Convention against Corruption declares concern about the «seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.»(2085) The Convention also explicitly permits a State to «consider corruption a relevant factor» in taking «any ... remedial action» against the party guilty of corruption.(2086) Even before the UN Convention against Corruption, the United Nations General Assembly adopted a Declaration against Corruption and Bribery in International Commercial Transactions recognizing the consensus against corruption.(2087)

As the *World Duty Free* tribunal noted: «[i]n concluding these Conventions, States have shown their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation. In doing so, States not only reached a new stage in the fight against corruption, but also solidly confirmed their prior condemnation of it.»(2088)

2.3. *Arbitral Case Law*

In light of the convergence of national law and international conventions, arbitral tribunals have recently recognized and applied the transnational public policy against corruption and bribery. For example, in *World Duty Free v. Kenya* an ICSID tribunal concluded:

In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.(2089)

Similarly, in *Wena Hotels Ltd. v. Arab Republic of Egypt*, an ICSID tribunal held that bribery and corruption is contrary to «international *bones mores*.»(2090)

In the commercial arbitration context, many ICC cases also confirm the existence of a transnational public policy against bribery and corruption.(2091) In the landmark ICC Case

(2083) *See* H. Lowell Brown, *Bribery in International Commerce 212* (2003) («[A]n international antibribery consensus has emerged. This consensus has led to the adoption of antibribery conventions by the OECD, the OAS, the European Union, and the Council of Europe.»).

(2084) African Union Convention on Preventing and Combating Corruption, *supra* note 2073.

(2085) United Nations Convention against Corruption, *supra* note 2073, pmbl.

(2086) *Id.* at Art. 34.

(2087) United Nations Declaration against Corruption and Bribery in International Commercial Transactions (16 Dec. 1996), G.A. Res. 51/191, U.N. Doc. A/RES/51/191, *reprinted in* 36 I.L.M. 1043 (1997).

(2088) *World Duty Free v. Kenya*, *supra* note 2042 § 146.

(2089) *World Duty Free v. Kenya*, *supra* note 2042 § 157.

(2090) *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case n.° ARB/98/4, Award (8 Dec. 2000), § 111, *reprinted in* 41 I.L.M. 896, 917 (2002).

(2091) *See, e.g., ICC Case n.° 1110*, *supra* note 2000 at 294; *ICC Case n.° 3916, in* Sigvard Jarvin & Yves Derains, *Collection of ICC Arbitral Awards 1974-1985*, 507 (1994); *ICC Case n.° 3913, ibid* at 497 («Not only is this solution in conformity with French internal public policy, but it equally is the result of the

n.° 1110, Judge Lagergren characterized bribery and corruption as a «gross violation of good morals and international public policy.»[2092] Judge Lagergren went on to state that:

Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations.[2093]

Similarly, in ICC Case n.° 3916, the tribunal stated:

Even if, in certain countries or during certain times, the corruption of public officials is a generally accepted practice in business relations; if one takes the point of view of good government or that of commercial ethics it would be impossible to close one's eyes to the destructive effect of such damaging practices.[2094]

From the above-referenced cases, it is clear that the transnational public policy against corruption and bribery is well-entrenched in international arbitral practice.

2.4. Scholarly Opinion

Reputable commentators, practitioners, and scholars have documented and confirmed the widespread proscription of bribery and corruption.[2095] Society at-large and non-governmental organizations also contribute to the development of these mandatory norms.[2096]

conception of international public policy as recognized by most civilized nations. Although those practices were found in certain countries, it is however patently clear that the international business community and most governments oppose corrupting practices.») (*translation in* Sayed, *supra* note 1998 at 308); *Frontier AG & Brunner Sociedade v. Thomson CSF, ICC Case n.° 7664* («A contract having for consideration and object the exercise of influence peddling through the payment of bribery is ... contrary to French international public policy as well as to the ethics of international business, as recognized by a great part of the States of the international community.») (*translation in* Sayed, *supra* note 1998 at 306-307); *see also Hilmarton v. OTV, ICC Case n.° 5622, in Revue de l'arbitrage 329* (1994); *Westacre v. Jugoimport, ICC Case n.° 7047, in Bulletin de l'Association Suisse de l'arbitrage* (1995) (*cited in* Sayed, *supra* note 1998 at 150); *ICC Case n.° 8891, in Journal du Droit International 1080* (2000); *ICC Case n.° 6248* («[T]here does exist a principle of truly international or transnational public policy which sanctions corruption and bribery contracts.») (*cited in* Sayed, *supra* note 1998 at 309); *ICC Case n.° 4145, in Collection of ICC Arbitral Awards 1974-1985*, 558, 563 (1990). A discussion of many of these cases is found in *World Duty Free v. Kenya*, *supra* note 2042 §§ 148-156; Sayed, *supra* note 1998 at 306-309; Crivellaro, *supra* note 2007 at 109; Timothy Martin, «International Arbitration and Corruption: An Evolving Standard», *1 Transnat'l Disp. Mgmt. 1, appendix* (2004), *available at* <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article45a.htm>.

(2092) *ICC Case n.° 1110, supra* note 2000 at 294.

(2093) *Id.* at 294.

(2094) *ICC Case n.° 3916* (1982) (*translated in* Sayed, *supra* note 1998 at 308).

(2095) Julian D. M. Lew, «Determination of Arbitrators» Jurisdiction and the Public Policy Limitations on that Jurisdiction», in *Contemporary Problems in International Arbitration 73*, 83 (Julian D.M. Lew ed. 1986) («Examples of international public policy ... include ... eliminating bribery and corruption.»); Audley Sheppard & Joachim Delaney, «Corruption and International Arbitration», *10th International Anti-Corruption Conference* («Most developed systems consider corruption to be *contra bonos mores* and illegal.»).

(2096) Kessedjian, *supra* note 2036 at 861 (noting that non-state actors help establish transnational public policy, for example «[b]ribery is unanimously condemned not only by societies around the world,

Bernardo Cremades and David. Cairns argue that «[t]here is no doubt today that suppression of corruption ... is an established part of international public policy and must be respected by international arbitrators.»[2097] Cremades and Cairns go on to highlight the fact that:

[B]ribery of a foreign public official and money laundering are now serious crimes in international law. They can no longer be considered as simply as reprehensible business practices, or unavoidable evils of doing business in difficult parts of the world. Bribery and money laundering have been widely and repeatedly condemned by the international community.[2098]

Further, Pierre Lalive notes that «[i]nternational interests and the general interest in a normal functioning of international trade appear to coincide and to justify the conclusion that there does exist a principle of truly international or transnational public policy which sanctions corruption and «bribery contracts."»[2099] Abdulhay Sayed, who wrote a seminal book on corruption in international trade and commercial arbitration, concludes that based on a «large consensus» «[t]he prohibition on corruption is a universal rule.»[2100] Richard Kreindler argues that:

[O]ver the last several years a number of states have acceded to multilateral conventions condemning illegal contracts, corruption, bribery of public officials, etc. These accessions have arguably contributed to, or confirmed, the development of certain national and transnational concepts of public policy in abhorrence of illegality of contracts.[2101]

In addressing the consequences of the transnational public policy against corruption in the commercial arena, Emmanuel Gaillard asserts «[t]here is now little doubt that ... a transnational rule has been established according to which an agreement reached by means of corruption of one of the signatories ... is void.»[2102]

3. The Transnational Public Policy Against Fraud

While there is emerging consensus, the prohibition on fraud as a rule of transnational public policy is not as widely recognized as the proscription of bribery and corruption. The treatment of fraud is somewhat more complex, «but certainly some manifestations of fraud, particularly those that might conceal illegal activities such as corruption and money laundering, are without doubt prescribed by international public policy.»[2103] Fraud can be present not only through misrepresentation in the underlying transaction but also present

but also by the major religious and moral schools of thought» and some corporations have unilaterally incorporated the policy); Sayed, *supra* note 1998 at 290 («[T]he prohibition of corruption has been reaffirmed by many international organization recommendations, as well as in the work of many non-governmental organizations.»).

(2097) Cremades & Cairns, *supra* note 1996 at 78.

(2098) *Id.* at 77; *see also*, Cremades, *supra* note 1996 at 203.

(2099) Lalive, *supra* note 2036 at 275-76.

(2100) Sayed, *supra* note 1998 at 290, 353.

(2101) Richard Kreindler, «Aspects of Illegality in the Formation and Performance of Contracts», in *ICCA Congress Series no. 11*, 209, 211 (Albert Jan Van Den Berg ed. 2003).

(2102) Gaillard, *supra* note 2052 at 214.

(2103) Cremades & Cairns, *supra* note 1996 at 68.

during proceedings if a party submits false documents or misleads the tribunal.[2104] The condemnation of fraud in international arbitration derives from a convergence in national laws, broad international conventions, arbitral case law, general principles of international law, and scholarly opinion.

3.1. *Convergence of National Law*

Most countries explicitly enumerate fraud as being illegal. An appropriate example comes from the arbitration context, where domestic courts will refuse to recognize or enforce arbitral awards obtained or affected by fraud.[2105] Similarly, domestic courts will not enforce contracts tainted by fraud.[2106]

Generally, domestic courts acknowledge that arbitral tribunals are empowered to address allegations of fraud under the rubric of public policy.[2107] For example, U.S. Courts express a willingness to allow arbitral tribunals to address allegations of fraud.[2108]

(2104) Bernard Hanotiau, Misdeeds, «Wrongful Conduct and Illegality in Arbitral Proceedings», in *International Commercial Arbitration: Important Contemporary Questions 261*, 273-7 (A. J. Van Den Berg ed., 2003); Gaillard, *supra* note 2037 at 958; Mauro Rubino-Sammartano, *International Arbitration law and Practice 14* (2001). *See, e.g., Eur. Gas Turbines S.A. v Westman Int'l Ltd., supra* note 2071.

(2105) Hanotiau, *supra* note 2095 at 272-79; Amazu A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation, and Institutional Development 199* (2001). *See, e.g.*, Australian International Arbitration Act 1974 § 19 (stating that an award is in conflict with the public policy of Australia if it was «induced or affected by fraud»); Belgian Judicial Code, Art. 1704(2)(a) & (3)(a)-(c) (stating that an arbitral award can be set aside if it was obtained by fraud or it is contrary to public policy); Bermuda International Conciliation and Arbitration Act of 1993 § 27; French Code of Civil Procedure, Art. 1502(5) (authorizing refusal to recognize arbitral award if it is contrary to international public policy); India Arbitration and Conciliation Act 1996 §§ 34(2)(b)(ii), 48(2)(b) («for the avoidance of any doubt» «an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption»); Netherlands Arbitration Act of 1986, Art. 1068 (allowing for revocation of arbitral awards if fraud is discovered); New Zealand Arbitration Act of 1996, Art. 36(3) (stating that an award is in conflict with the public policy of New Zealand if it was «induced or affected by fraud»); United Kingdom Arbitration Act of 1996, § 68(2)(g) (providing the ability to challenge an award «obtained by fraud» or other conduct «contrary to public policy»); United States Federal Arbitration Act, 9 U.S.C. § 10(a)(1) (authorizing courts to set aside awards obtained by fraud); Zimbabwe Arbitration Act of 1996, Arts. 34(5)(a), 36(3) (stating that if «the making of the award was induced or effected by fraud or corruption» it is in «conflict with the public policy of Zimbabwe») (*cited in* Asouzu, *supra* note 2096 at 199 n.78).

(2106) *See, e.g., United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1960) (deciding not to allow the enforcement of a government contract where, in the negotiations of the contract, the government had been represented by a consultant to the Budget Bureau who was at same time an officer in an investment bank which was expected to profit from the transaction by becoming a financial agent for the project).

(2107) Hanotiau, *supra* note 2095 at 269, 277. *See, e.g., Fougerolle S.A. v. Procofrance S.A*, Cour de Cassation (25 May 1992), *in 1993 Revue de l'arbitrage 91* (holding that an arbitral panel may rescind its own award «based on the general principles of the law regarding fraud.»). *But see* Nudrat B. Majeed, «Commentary on the Hubco Judgment», *16 Arb. Int'l 431*, 433-34 (describing decision by Supreme Court of Pakistan holding that allegations of fraud, illegality and corruption preclude arbitration as matters of domestic public policy).

(2108) *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (recognizing the arbitrability of allegations of fraud).

Many domestic courts will also themselves find that fraud violates public policy. For example, the Paris Court of Appeals in *Eur. Gas Turbines S.A. v Westman Int'l Ltd.* held that fraud, in the form of fictitious statements of expenses, constituted a violation of international public policy.[2109] Moreover, most countries denounce fraud and have enacted rules providing for the annulment of contracts induced by fraud.[2110]

3.2. *International Conventions*

Widespread consensus condemning fraud in international agreements reflects the development of a transnational public policy against fraud. The Treaty on the Functioning of the European Union encourages EU member states to denounce and counter fraud on an international scale.[2111] Moreover, several international conventions implicitly denounce fraud. In this context, as Dr. Cremades has noted, the OECD bribery convention contains articles requiring complete and accurate financial records to avoid off-the-books or secret accounts or transactions, non-existent or deceptive descriptions of expenditures, and the use of false documentation.[2112] Other Conventions deplore deceptive crimes such as money laundering or counterfeiting.[2113]

3.3. *Arbitral Case Law*

In light of the convergence of national law and international conventions, arbitral tribunals are beginning to recognize and apply the transnational public policy against fraud.[2114] For example, in *Phoenix Action Ltd. v. Czech Republic*, an ICSID tribunal stated that it could not «protect investments made in violation of the laws of the host State, or investments not made in good faith, obtained for example though misrepresentations, concealments, or corruption.»[2115]

In *Inceysa v. El Salvador*, an ICSID tribunal held that fraudulent misrepresentation in a bidding process for a government contract was a violation of «a principle of international public policy.»[2116] The tribunal noted that the existence of language in the BIT, requiring

(2109) *Eur. Gas Turbines S.A. v Westman Int'l Ltd., supra* note 2071.

(2110) Rubino-Sammartano, *supra* note 2095 at 449.

(2111) The Treaty of the Functioning of the European Union, done at Rome on 25 Mar. 1957 (entered into force 1 Jan. 1958), Art. 325 *reprinted in* O.J. C115/47 (9 May 2008), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

(2112) Cremades & Cairns, *supra* note 1996 at 76.

(2113) United Nations Convention Against Transnational Organized Crime (29 Sept. 2003), Art. 6, 2225 U.N.T.S. 209; International Convention for the Suppression of Counterfeiting (20 Apr. 1929), 112 L.N.T.S. 395.

(2114) *See, e.g., Wena Hotels Ltd. v. Arab Republic of Egypt, supra* note 2081 (addressing the concealment of the participation of officials and their family in an investment); *Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso*, ICSID Case n.° ARB/97/1, Award (19 Jan. 2000), *excerpts available at* <http://www.investmentclaims.com> (holding that a civil servant's fraudulent behavior in failing to disclose that he was the director of a private joint venture mining operation constituted a «breach of public order.»).

(2115) *Phoenix Action Ltd. v. Czech Republic*, ICSID Case n.° ARB/06/5, Award (15 April 2009), § 100, *available at* <http://ita.law.uvic.ca/>.

(2116) *Inceysa v. El Salvador, supra* note 2045 §§ 247, 249, 252.

that the investment be made «in accordance with law,» was «a clear manifestation of said international public policy, which demonstrates the clear and obvious intent of the signatory States to exclude from its protection investments made in violation of the internal laws of each of them.»[2117] The tribunal subsumed the prohibition of fraudulent conduct within a broader transnational public policy requiring compliance with domestic law:

It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If this Tribunal declares itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally.[2118]

Similarly, in *Plama Consortium Ltd. v. Republic of Bulgaria*, an ICSID tribunal acknowledged that fraudulent misrepresentation is prohibited by transnational public policy.[2119] The tribunal decided that «the investment was obtained by deceitful conduct» and to allow protection to such an investment would «be contrary to the basic notion of international public policy-that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by the tribunal.»[2120]

In the commercial arbitration context, several ICC cases also confirm the existence of a transnational public policy against fraud.[2121] In light of these recent decisions, there seems to be a growing trend in arbitral case law demonstrating a clear transnational public policy against fraud.

3.4. *General Principles of International Law*

The prohibition of fraud in international commerce also stems from a general principle of good faith acknowledged under public international law.[2122] An ICSID tribunal recently noted that «[t]his principle requires parties to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage.»[2123] Similarly, in discussing the principle of good faith in international law, the *Inceysa* tribunal stated: «In the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties.»[2124]

The ICJ has recognized the principle of good faith as «[o]ne of the basic principles governing the creation and performance of legal obligations.»[2125] Bin Cheng explains that «[t]

(2117) *Id.* § 246.
(2118) *Id.* § 248.
(2119) *Plama v. Bulgaria*, *supra* note 2017.
(2120) *Id.* § 143.
(2121) *See, e.g., ICC Case n.° 5943*, in *Collection of ICC Arbitral Awards 1996-2000*, 431, 434 (2003) (*cited in* Sayed, *supra* note 1998 at 322).
(2122) Cheng, *supra* note 2020 at 158 («Fraud is the antithesis of good faith.»).
(2123) *Phoenix Action Ltd. v. Czech Republic*, *supra* note 2106 at § 107 (citation omitted).
(2124) *Inceysa v. El Salvador*, *supra* note 2045, § 231.
(2125) *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 Dec. 1974, I.C.J. Reports 1974 at 457, 473, *available at* < http://www.icj-cij.org/docket/files/59/6159.pdf>.

he principle of good faith thus requires every right to be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated.»[2126] Courts and tribunals are reluctant to reinforce fraudulent conduct out of a sense of justice.[2127] The general principle of international law requiring good faith supports the existence of a consensus for a transnational public policy against fraud.

3.5. *Scholarly Opinion*

Practitioners and scholars note the development of a proscription on fraud as a norm in international commerce.[2128] Bernardo Cremades and David. Cairns acknowledge that «fraud has not been the subject of the same degree of international cooperation and rule making as bribery and money laundering. Nevertheless, some steps have been taken to combat this kind of misconduct, particularly with respect to fraudulent record keeping that might facilitate or conceal corruption, money laundering or other crime.»[2129] At the very least, there is agreement among scholars that contracts can be annulled on the basis of fraud or deceit.[2130] There seems to be consensus that transnational public policy requires arbitral tribunals to address «allegations of fraud in the procurement or performance of a contract,»[2131] and «that the award be challenged if it has been induced or affected by ... fraud.»[2132]

Based on widespread conventions and extensive convergence of national laws, recognized by several arbitral tribunals and prominent commentators, it is clear that there exists a strong uncontested transnational public policy against bribery, corruption, and fraud.[2133] From the international community's perspective, these actions are morally reprehensible. Moreover, these crimes stifle economic growth «undermin[ing] the integrity of international business,» through «pernicious macro-economic effects, including the distortion of competition and securities markets.»[2134] Accordingly, arbitral tribunals are increasingly looking to the transnational public policy against these crimes when adjudicating disputes.

(2126) Cheng, *supra* note 2020 at 123.
(2127) *Id.* at 159 («what normally constitutes a right will ... not be upheld if it is ... begotten by fraud.»).
(2128) *See, e.g.*, Martin Hunter & Gui Conde E Silva, «Transnational Public Policy and its Application in Investment Arbitrations», *4 J. of World Investment 367*, 370 (2003).
(2129) Bernardo M. Cremades & David J. A. Cairns, «Corruption, International Public Policy and the Duties of Arbitrators», *58 Disp. Resol. J. 76*, 82 (2004).
(2130) Sonja Kruisinga, *(Non—)conformity in the 1980 UN Convention on Contract for the International Sale of Goods: A Uniform Concept?* 203 (2004); Gaillard, *supra* note 2052 at 213 («For a contract to be binding on the parties, it must have been lawfully entered into, which means, in particular that the parties must have entered into the contract on the basis of informed consent and not as a result of fraud or mistake.»).
(2131) Alan Redfern, Martin Hunter et al., *Law and Practice of International Commercial Arbitration* 144 (2004).
(2132) Julian D. M. Lew, Loukas A. Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* 676 (2003).
(2133) Report of United Nations Commission on International Trade Law (21 June 1985), § 297, 40 U.N. Gaor Supp. (n.° 17), Annex I, U.N. Doc. A/40/17, *reprinted in* 24 I.L.M. 1302, 1362 (1985) (explaining that public policy is made up of «fundamental principles of law and justice in substantive as well as procedural respects» and that «corruption, bribery and fraud» are universally prohibited.»).
(2134) Cremades & Cairns, *supra* note 1996 at 77.

IV. THE EFFECT OF A POSITIVE FINDING OF FRAUD OR CORRUPTION IN INTERNATIONAL ARBITRATION

A logical question to ask at this point is: what is the effect of a violation of the transnational public policy against fraud and corruption? This next section attempts to answer this question, among others, in identifying the various consequences that international arbitral tribunals will accord to a positive finding of fraud or corruption. The consequences of a finding of fraud or corruption on the part of the claimant or respondent party in the treaty arbitration context are discussed separately from the consequences of the same finding in the commercial arbitration context.

1. The Treaty Arbitration Context

In the treaty arbitration context, there are three possible consequences to a positive finding of fraud and corruption. First, if an investor has engaged in bribery or corruption in relation to its investment, it may be prevented from relying on the arbitration agreement and a host-State's consent to arbitration contained in the relevant investment treaty. In such circumstances, a tribunal would not have jurisdiction to hear the dispute. Second, in the event that the applicable investment treaty limits protection to investments made «in accordance with the law,» disputes relating to investments procured through fraud or corruption will fall outside the jurisdiction of any tribunal established pursuant to that treaty. Third, to the extent that a tribunal finds that it does have jurisdiction, a claimant having engaged in significant fraud or corruption in relation to its investment would not be entitled to rely on the substantive legal protections contained in an investment treaty, *i.e.*, their claims will be inadmissible as a result of the «clean hands» doctrine in international law. Fourth, a claimant's claims will be deemed inadmissible as a result of a breach of transnational public policy in relation to the subject matter of its claims.

1.1. An Investor's Right to Rely on the Consent Contained in the Arbitration Agreement

The consent of a host-State to resolve disputes with investors is governed by certain overarching principles, including transnational public policy. Transnational public policy is relevant to the interpretation of a host-State's consent to arbitrate a dispute by way of the Vienna Convention on the Law of Treaties.[2135] Indeed, the Vienna Convention is applicable to the interpretation of all treaties. Of particular relevance to interpreting the consent to arbitration contained in an investment treaty is Article 31(3)(c), which requires the tribunal to consider «any relevant rules of international law applicable in the relations between the parties.»[2136] As explained earlier, the applicable law includes the transnational public policy against fraud and corruption.

(2135) Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (entered into force 27 Jan. 1980), Arts. 31, 32,, 1155 U.N.T.S. 331, *available at* <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

(2136) *See Camuzzi International S.A. v. The Argentine Republic*, *supra* note 2059 §§ 132-133 (noting that the Vienna Convention provides the rules for interpreting consent to arbitration under a treaty); Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 558-59 (4th ed. 2006)

The policy against fraud and corruption prevents a claimant who has engaged in such acts in the making of its investment from taking advantage of the open invitation contained in the treaty to seek redress for harm done to its investment.[2137] The same is true where the fraudulent or corrupt activity pervades the entirety of an investment. This principle was aptly explained by Dr. Cremades in the context of corruption as follows: «Where the investor has acted corruptly, the right to arbitrate can be treated in exactly the same manner as the other substantive treaty rights, i.e. the investor lacks clean hands and is estopped from claiming the benefit of the right to arbitration.»[2138] Dr. Cremades goes on to explain that corruption pertains to jurisdiction «insofar as a corrupt investor is estopped by its corruption from accepting the open offer to arbitrate made by the host-State in the BIT.»[2139] Given that the Claimants are not entitled to rely on the open offer made in the investment treaty, the arbitration agreement has not been concluded, and the tribunal does not have jurisdiction.[2140]

In *Inceysa v. El Salvador*, the tribunal decided, *inter alia*, that the claimant was not entitled «access to international arbitration to resolve disputes» due to the fraudulent nature of its conduct in relation to its investment.[2141] The tribunal stated:

> *Applying the first principle* [Nemo Auditur Propiam Turpitudinem Allegans] *to the case at hand, we can affirm that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, «nobody can benefit from his own fraud.»*[2142]

Given that host-States give their unilateral consent to arbitrate disputes under investment treaties in the treaty itself, it is appropriate to require an investor to comply with basic rules of transnational public policy in order to invoke that consent.

1.2. The Requirement In Some Investment Treaties That Investments Be Made In Accordance With The Law

Certain investment treaties require that only investments made in accordance with the host State's law are covered by the treaty.[2143] In such cases, only investments made in com-

(noting that, in the ICJ context, «[c]onsent that the Court should exercise jurisdiction is a form of international agreement, and on the international level it is governed by the general principles of international law which govern the exercise of the treaty-making power on the international plane.»).

(2137) *See Phoenix Action, Ltd. v. The Czech Republic*, *supra* note 2106 § 100 («The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments ... not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.»).

(2138) Cremades, *supra* note 1996 at 215.

(2139) *Id.*

(2140) *Id.*

(2141) In *Inceysa* the tribunal stated that it «must try to specify what was the will of the parties to determine the scope of their consent.» *Inceysa v. El Salvador*, *supra* note 2045, § 177.

(2142) *Id.* § 242.

(2143) *See, e.g.*, the Germany-Philippines BIT, the Italy-Morocco BIT and the Canada-Argentina BIT.

pliance with the law of the host State are covered. As such, if evidence that the investment at issue was not made legally comes to light, a tribunal will not have jurisdiction to resolve the dispute pertaining to that investment.

In one ICSID case, *Inceysa v. El Salvador*, the tribunal found that, based on the language of the BIT and its *travaux préparatoires*, «the will of the parties to the [El Salvador-Spain] BIT was to exclude from the scope of application and protection of the Agreement disputes originating from investments which were not made in accordance with the laws of the host State.»(2144) In that case, the tribunal found that the claimant had fraudulently misrepresented itself in a bidding process for government contracts. As a result, the tribunal found that it had no jurisdiction because Inceysa's investment did not meet the BIT's requirement of legality.(2145)

Similarly, the majority in *Fraport v. the Philippines* determined that the German-Philippine BIT «explicitly and reiteratedly» required that an investment, in order to qualify for BIT protection, had to be accepted in accordance with the host state's law.(2146) In that case, the majority found that the claimant «knowingly and intentionally circumvented the [Anti-Dummy Law]»—a law limiting a foreign investor's ability to intervene in the management, operation, administration or control of a Philippine public utility-and «concealed the agreements in violation of the ADL» from the Philippines.(2147) As a consequence, the claimant could not «claim to have made an investment «in accordance with law"» and the tribunal «lack[ed] jurisdiction *ratione materiae*.»(2148)

Most recently, the tribunal in *Desert Line v. Yemen*, composed of Pierre Tercier (President), Jan Paulsson and Ahmed El-Kosheri, confirmed that, generally, «in accordance with law» clauses «are intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations [like in *Inceysa*] or the dissimulation of true ownership [like in *Fraport*].»(2149)

Given that the laws of most host States will outlaw fraud and corruption, the presence of an «in accordance with law» clause in an investment treaty will normally bar coverage to any investments that are made fraudulently or through corrupt activity.

(2144) *Inceysa*, *supra* note 2045, § 195.
(2145) *Inceysa*, *supra* note 2045, § 335.
(2146) *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case n.° ARB/03/25, Award (16 Aug. 2007) § 398, *available at* <http://ita.law.uvic.ca>.
(2147) *Id.* § 400.
(2148) *Id.* § 401.
(2149) *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case n.° ARB/05/17, Award (6 Feb. 2008), § 104, *available at* <http://ita.law.uvic.ca>. *See also L.E.S.I. SpA et ASTALDI SpA v. Algeria*, CIRDI n.° Arb/05/3, Decision (12 Jul. 2006), § 83, *available at* <http://www.investmentclaims.com> («[L]a mention que fait le texte à la conformité aux lois et règlements en vigueur ne constitue pas une reconnaissance formelle de la notion d'investissment telle que la comprend le droit algérien de manière restrictive, mais, selon une formule classique et parfaitement justifiée, l'exclusion de la protection pour tous les investissements qui auraient été efectués en violation des principes fondamentaux en vigeur.»).

1.3. The Clean Hands Doctrine As It Applies To Substantive Legal Rights

The International Court of Justice has distinguished between issues of jurisdiction and admissibility. The Court stated in the seminal *Oil Platforms* decision: «Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.»(2150)

To the extent that a tribunal finds that a claimant is permitted to rely on the consent to arbitration provided in an investment treaty, a claimant that has unclean hands in relation to its investment may not seek the protection of substantive legal rights contained in the applicable investment treaty. International legal scholars have long explained that, «A Party who asks for redress must present himself with clean hands.»(2151) Under this principle, if an investor is shown to have engaged in significant misconduct directly related to its investment, it should not be able to pursue its claim.(2152)

The World Court has had the occasion to consider the clean hands doctrine. In the *Case Concerning the Diversion of Water from the River Meuse*, Belgium claimed that because The Netherlands had constructed certain works contrary to the terms of an 1863 treaty relating to the River Meuse, The Netherlands should not be permitted to invoke the treaty against Belgium. Based on its finding that The Netherlands had previously engaged in wrongful conduct, the Court concluded «[i]n these circumstances, the Court finds it difficult to admit that The Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.»(2153) Judge Hudson entered a separate opinion, confirming the basic principle that «a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper.»(2154) In referring to this principle, Judge Hudson concluded that «... in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.»(2155)

(2150) *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 Nov. 2003, I.C.J. Reports 2003 at 161, § 29, *available at* <http://www.icj-cij.org/docket/files/90/9715.pdf>.
(2151) Cheng, *supra* note 2020 at 155; John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party 2738-2739* (1995); Ian Brownlie, *Principles of International Law 503* (7th ed, 2008) (The clean hands doctrine under international law is a principle «according to which a claimant's involvement in activity illegal under either municipal or international law may bar the claim.»); *see also Chapman v. The United Kingdom* (ECHR), n.° 27238/1995, Judgment (18 Jan. 2001), § 5 (Separate Opinion of Judge Bonello) («The classic constitutional doctrine of 'clean hands» precludes those who are in prior contravention of the law from claiming the law's protection.»).
(2152) *See* Rahim Moloo, *A Comment on the Clean Hands Doctrine in International Law*, U. Durham L. J. (Fall, 2009). The requirement in some investment treaties that investments must accord with the law of the host-State is a reflection of the broader clean hands principle. *See id.*
(2153) *Case Concerning the Diversion of Water from the River Meuse (Netherlands v. Belgium)*, Judgment of 28 June 1937, PCIJ Series A/B n.° 70, at 25.
(2154) *Case Concerning the Diversion of Water from the River Meuse*, Separate Opinion of Judge Hudson, *supra* note 2144 at 77 (citations omitted).
(2155) *Id. See also Case Concerning the Diversion of Water from the River Meuse*, Dissenting Opinion of Judge Anzilloti, *supra* note 2144 at 49 (referring to the principle «*inadimplenti non est adimplendum*», noting that «it is one of these 'general principles of law recognized by civilized nations» which the Court applies in virtue of Article 38 of its Statute.»)

In another case before the World Court, the *Nicaragua case*, the dissenting opinion of Judge Schwebel is particularly helpful to illustrating the broad scope of the «clean hands» doctrine. Judge Schwebel explained as follows:

> *Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible — but ultimately responsible — for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.*(2156)

In that case, Judge Schwebel opined that misleading the Court with regards to its wrongful conduct in and of itself was sufficient to render the Claimant with unclean hands, requiring that the Claimant's claims should fail.

One famous commentator, Sir Gerald Fitzmaurice, has also commented on the clean hands doctrine as it applies in international law, stating that «He who comes to equity for relief must come with clean hands.»(2157) The same author concluded:

> *Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality-in short were provoked by it.*(2158)

Under this doctrine, a claimant who comes to the tribunal with unclean hands in relation to its investment, should not be permitted to pursue its claims to protect that investment. Under this proposition, a claimant who has engaged in significant fraud or corruption in relation to its investment, independent of whether those acts are in breach of transnational public policy, has engaged in wrongful conduct sufficient to prevent it from pursuing claims which have been tainted by that conduct.

Recent ICSID decisions have made clear that there is an implicit obligation in all investment treaties that a covered investment must accord with the law.(2159) In *Plama v. Bulgaria* the tribunal was faced with an investment treaty —the Energy Charter Treaty— that did

(2156) *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, I.C.J. Reports 1986 at 392, § 268, *available at* <http://www.icj-cij.org/docket/files/70/6523.pdf>. *Cf.* Stephen M Schwebel, «Clean Hands, Principle», in *Max Planck Encyclopedia of Public International Law* (R. Wolfrum ed. 2009), online edition, *available at* < http://www.mpepil.com> (summarizing the clean hands doctrine as argued before and applied by the World Court).

(2157) Sir Gerald Fitzmaurice, «The General Principles of International Law Considered from the Standpoint of the Rule of Law», *92 Recueil des Cours 119* (1957).

(2158) *Id.*

(2159) Of note, and as discussed herein, where the applicable investment treaty contains an «in accordance with law» clause a tribunal will have to engage in the analysis of the investment's compliance with the law at the jurisdictional phase (as the legality of the investment is a prerequisite to having a covered investment). On the other hand, where there is no express clause requiring compliance with the law, a tribunal would be more likely to dismiss the claimant's claims based on an illegal investment at the admissibility stage. *See* Moloo, *supra* note 2143.

not contain an «in accordance with law» clause.(2160) The tribunal however, still deemed that the claimant's claims were inadmissible because they were not made in accordance with host-State and international law. In that case, the investor's illegality involved fraud in the procurement of necessary approvals from the Bulgarian Privatization Agency when purchasing shares in Nova Plama, a Bulgarian entity.(2161) The tribunal found as follows:

> Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law...
>
> In accordance with the introductory note to the ECT «[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [...]». Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.(2162)

The tribunal relied on the *Inceysa* decision, among others, in concluding that there exists a general principle of law where «nobody can benefit from his own wrong» (*nemo auditor propriam turpitudinem allegans*).(2163) The *Plama* tribunal relied on this general principle contained in international law that a tribunal will not assist a claimant who has engaged in unlawful conduct(2164)—a principle based on the same concept as the clean hands doctrine.

The approach adopted by the *Plama* tribunal has been adopted in subsequent cases. For example in *Phoenix Action, Ltd. v. The Czech Republic*, the tribunal confirmed that «this condition-the conformity of the establishment of the investment with the national laws-is implicit even when not expressly stated in the relevant BIT.»(2165) Similarly, the tribunal in *Saluka v. Czech Republic* noted that «although not in terms part of the definition of an «investment», it is necessarily implicit in Article 2 of the Treaty that an investment must have been made in accordance with the provisions of the host State's laws.»(2166)

> The clean hands doctrine has also been applied in the other contexts. For example, in the *Jarvis* case, the American-Venezuelan Commission inferred that the claimant had violated his State's criminal law.(2167) It further found that the claimant had violated an international treaty

(2160) *Plama v. Bulgaria, supra* note 2017.

(2161) *Id.* § 133.

(2162) *Id.* §§ 138-139 (citations omitted).

(2163) *Id.* §§ 141, 143. The tribunal also referred to the decision in *World Duty Free v. Kenya*. That case, however, arose in a slightly different context as it was not based on an investment treaty, but on an investment contract. Though transnational public policy would still apply, the applicable law governing the contract itself was English law, and not international law.

(2164) *Id.* §§ 142, 145.

(2165) *Phoenix Action v. Czech Republic, supra* note 2128 § 101.

(2166) *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006) § 204, *available at* < http://ita.law.uvic.ca>.

(2167) *Jarvis Case*, 9 U.N.R.I.A.A. 208, 211 (1903) («The inference is strong, if not irresistible, that Jarvis violated the ...laws of the United States in such measure as to have rendered himself liable to a criminal prosecution therefor.»).

between his State and the respondent State as well as established rules of international law.[2168] The commission in that case cited, with approval, to a passage from the *Medea and Good Return* case on the nature of the clean hands doctrine:

A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality and against the policy of all legislation if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations... As the American Commissioner I could not sanction, uphold, and reward indirectly what the law of my country directly prohibits... He who engages in an expedition prohibited by the laws of his country must take the consequences. He may win or he may lose; but that is his own risk. He can not, in case of loss, seek indemnity through the instrumentality of the government against which he has offended.[2169]

As a result of its violations of host-State and international law, the claimant was not permitted to pursue its claim against Venezuela.[2170]

In the investor-State context, it is important to note that the fact of a government official sometimes being involved in the illicit activity of the investor does not absolve the investor of its wrongdoing. Indeed, the conduct of individuals who hold government office when they accepted bribes is attributable to the corrupting party, not to the government in which such individuals hold office. This principle is reflected in the ILC Articles of State Responsibility, as described in the commentary to Article 7 as follows:

> *One form of ultra vires conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. ... Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise ...*[2171]

As the *World Duty Free* tribunal correctly held, the receipt of bribery by an official, indeed, even the highest official in the State «is not legally to be imputed to [the State] itself.»[2172]

From the above discussion, it is clear that when an investor engages in significant fraud or corruption, the clean hands doctrine will preclude that investor from bringing any claims in relation to the investment tainted with illegality. This principle applies whether or not the applicable investment treaty expressly requires compliance with the law.

(2168) *Id.* at 212 («[The Claimant] did violate the treaty then existing between the United States and Venezuela. He did violate the established rule of international law, that when two nations are at peace all the subjects or citizens of each are bound to commit no act of hostility against the other.»).
(2169) *Id.* at 213.
(2170) *Id.* at 213 (quotingthe *Medea and Good Return* case for the proposition that «[a] party who asks for redress must present himself with clean hands» andconcluding that «[t]he claim must be disallowed»).
(2171) Articles on State Responsibility, *supra* note 2016, Art. 7.
(2172) *World Duty Free v. Kenya*, *supra* note 2042, § 169.

1.4. The Inadmissibility Of A Claimants' Claims For Breach Of Transnational Public Policy

Related, but separate to the consequences of having unclean hands, is the consequence flowing from a breach of transnational public policy. Breaches of transnational public policy may also prevent the admissibility of any claim that relates to an investment that involved fraud and corruption by the investor.[2173] For example, in *Inceysa v. El Salvador*, the tribunal recognized that *«[i]t is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy.»*[2174]

In a case based on treaty rights as opposed to contract rights, where a claimant has engaged in fraud or corruption in relation to its investment, the tribunal cannot void the treaty between State parties as it can a contract between the host-State and the investor. This does not mean, however, that where a claim is based on a treaty a claimant that has engaged in fraud or corruption in relation to its investment is able to rely on the legal rights contained in that treaty, where if its legal rights were contained in a contract it would not be entitled to do so. In this situation, the tribunal can and should declare inadmissible the claimants' claims which are tainted by fraud or corruption. On this point, Dr. Cremades has properly explained the rationale for preventing a claimant from being able to rely on the substantive rights contained in an investment treaty on grounds of admissibility. He has stated:

> *In international commercial arbitration the substantive rights of the claimant derive from the contract, and the usual effect of fraud or corruption in the execution or performance of the contract is to render it invalid or null and void. In investment arbitration the substantive rights result from a treaty between two State parties. The corruption of the investor cannot affect the validity of the treaty, and therefore the substantive rights remain intact. The effect of corruption on an investor's treaty rights must therefore be procedural. The corrupt investor will be estopped from claiming the benefit of the substantive rights in the BIT.*[2175]

Further, allowing claimants who have engaged in fraud or corruption in relation to their investment to rely on substantive legal rights to protect that investment would undermine the legal process. As alluded to above, this concept is part of the broader notion in international law that acts contrary to international law cannot give rise to legal rights. In 1947, Hersch Lauterpacht clearly explained this concept:

> *This construction of non-recognition is based on the view that acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer. That view applies to international law one of the «general principles of law recognized by civilized*

(2173) As noted *infra*, in most cases international law, which includes transnational public policy, governs the substance of treaty-based disputes.
(2174) *Inceysa v. El Salvador*, *supra* note 2045, §§ 249, 252. This is as opposed to the claimant's investment not being protected by the BIT because it breached the requirement in the BIT that all investments be made «in accordance with law.» *See also Fraport v. Philippines*, *supra* note 2137, Dissent of Bernardo Cremades, § 40 («In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim. Both good faith and international public policy were important in *Inceysa Vallisoletana S.L. v. Republic of El Salvador*. International public policy barred the claims in *World Duty Free v. The Republic of Kenya*.»).
(2175) Cremades, *supra* note 1996 at 214.

> *nations.» The principle ex injuria jus non oritur is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer. This does not mean that it cannot produce any legal results at all. For it gives rise to a legal liability of the lawbreaker; it may become, in the interests of intercourse and general security, a source of rights for third persons acting in good faith; it may, temporarily and provisionally, confer upon the wrongdoer a measure of protection of his possession; it may, if the rigid conditions of lapse of time and of other requirements have been complied with, crystallize into a legal right as the result of the operation of prescription. But to admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become suo vigore a source of legal right for the wrong-doer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot form an exception to that imperative alternative.*(2176)

The concept articulated by Professor Lauterpacht is no different than the concept at play in cases where an investor has engaged in fraud or corruption in relation to its investment. If an investor has engaged in bribery or corruption in relation to their investment and/or claim, that investor is clearly in breach of transnational public policy. As a result of this breach, those investors are not permitted to seek substantive legal protection of the applicable investment treaty for the investment in relation to which they have breached transnational public policy.

2. The Commercial Arbitration Context

A primary consideration in the commercial arbitration context is the law governing the substance and procedure of the dispute. Also of relevance, in the commercial arbitration context the rights at issue most-often flow from contractual obligations between the parties. Unlike a treaty, a contract may be invalidated if tainted by fraud or corruption. These key considerations explain why a tribunal will approach allegations of fraud or corruption differently in the commercial arbitration context from the treaty arbitration context.

2.1. Admissibility under the Applicable Law

One must consider the applicable law in determining the effect attributed to a finding that a party before a commercial arbitration tribunal has engaged in fraud or corruption.(2177) As such, in the commercial arbitration context, the admissibility of claims tainted by fraud or corruption will depend on the contents of the particular law that applies.(2178) That said, many states have adopted a principle similar to that of the clean hands doctrine, discussed herein, within their domestic law. In the event that such a principle is reflected in the domestic law, that principle will likely serve to bar any claims by claimants that have engaged in fraud or corruption in relation to the subject matter of the dispute.

(2176) Hersch LAUTERPACHT, *Recognition in International Law 420-421* (1947).
(2177) Michael PRYLES, «Reflections on Transnational Public Policy», *24 J. Int. Arb. 6* (2007) (noting that «when faced with an allegation that a contract is tainted by bribery [or] corruption», «the applicable law will generally provide the appropriate result... .»).
(2178) *See ICC Case n.° 6474 of 1992*, in *XXV Y.B Comm. Arb. 278* (A.J. VAN DEN BERG ed. 2000) (the tribunal assessing the question of admissibility under the applicable procedural and substantive law).

Separate from the issue of admissibility, a tribunal may assess the consequences of fraud or corruption on the merits of the case. Taking this approach, the law in many states will render a contract procured through fraud or corruption, or a contract for corrupt payments, to be void. As such, a claimant having engaged in such conduct will not be permitted to rely on the contract in issue in asserting its claims.

2.2. The Effect That A Breach Of Transnational Public Policy Has On Contracts

Many arbitral tribunals have denied claimants the ability to bring claims under a contract tainted by fraud or corruption as an extension of the transnational public policy against fraud and corruption. However, the cases in this context are not consistent in the way in which they dispose of a claimant's claims. In some instances tribunals have refused jurisdiction, in others they have deemed the claimant's claims inadmissible. Finally, in some cases the tribunal has deemed the contracts tainted by the claimant's illicit activity void. In most of these cases however, no matter what the approach taken by the tribunal, the tribunal will often rely on transnational principles alongside the applicable law.

In the seminal ICC Case 1110, Judge Lagergren was faced with a contract between the parties that contemplated bribing Argentine public officials. Commenting on the international abhorrence of corruption, Judge Lagergren stated:

> Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.(2179)

Judge Lagergren denied jurisdiction in that case, explaining that: «Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.»(2180) This is one of the few instances, in a commercial arbitration context, where a tribunal has refused jurisdiction altogether as a result of the claimant's corrupt or fraudulent activity.

In relation to a contract claim, the ICSID tribunal in *SIREXM v. Burkina Faso*, deemed the claimant's claims inadmissible as a result of its finding that the claimant had engaged in corrupt and fraudulent behavior in relation to its investment agreement.(2181) Specifically, the tribunal found that one of the main civil servants of the Ministry of Mining was also a key beneficiary of an award of a contract by that ministry to a company. The fact of the individual's involvement in the beneficiary of the award was not made known to Burkina Faso.(2182) The tribunal decided that, as a result of this fraud and corruption, the investment

(2179) *ICC Case n.° 1110, supra* note 2000 at 294.
(2180) *Id.* at 282.
(2181) *Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso*, ICSID Case n.° ARB/97/1, Award (19 Jan. 2000), *excerpts available at* <http://www.investmentclaims.com>.
(2182) *Id.* §§ 5.13, 5.33.

agreement at issue was void based on both the applicable substantive law,[2183] and as a result of the «breach of public order.»[2184]

In *World Duty Free v. Kenya*, a tribunal considered a contract that had been procured by the claimant through a bribe. The tribunal found that the claimant had violated national law (Kenyan and English Law)[2185] and international public policy.[2186] The tribunal appears to have deemed the claimant's claims inadmissible in this case, concluding: «The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract's applicable laws.»[2187] The tribunal found that international arbitral tribunals have routinely «refused to condone such [unlawful] practices,»[2188] by denying claimants' claims.

In another case, ICC Case n.° 3916,[2189] the tribunal rejected the claim of an Iranian intermediary, on the merits, for payment of commissions on contracts cut short by the Iranian Revolution. In following the decision in ICC Case 1110, the tribunal found that the contract for an illicit commission was violative of French and Iranian international public policy, as well as «ce qui est considéré être la moralité dans les affaires internationales.»[2190] Because the tribunal concluded that the claimant's activity was primarily the «influencing» of public officials, it declared the contract void and rejected the claimant's claims.[2191]

In each of the cases discussed above the tribunals considered applicable national law concurrently with its consideration of transnational principles, and dismissed claims as a result of the claimants' unlawful conduct under both.

V. CONCLUSION

Fraud and corruption are issues that the international arbitration community must address in a vigilant yet predictable manner. Indeed, allegations of fraud and corruption are serious and must be considered carefully by a tribunal.

Where allegations of fraud or corruption are involved, an arbitral tribunal must assess the evidence with heightened scrutiny. Given that it is often difficult to adduce direct evidence of fraud or corruption, circumstantial and indirect evidence will often be sufficient to satisfy the applicable standard of proof. If the party which is alleged to have engaged in

(2183) *Id.* §§ 5.26-5.33.
(2184) *Id.* §§ 5.39, 5.41.
(2185) *World Duty Free v. Kenya*, *supra* note 2042 §§ 158-87.
(2186) *Id.* §§ 138-57.
(2187) *Id.* § 188.
(2188) *Id.* § 156.
(2189) *ICC Case n.° 3916, in* Sigvard Jarvin & Yves Derains, *Collection of ICC Arbitral Awards 1974-1985*, 507 (1994).
(2190) *Id.* at 510. *See also ICC Case n.° 3913, cited in* Sayed, *supra* note 1998 at 308 («Not only is this solution in conformity with French internal public policy, but it equally is the result of the conception of international public policy as recognized by most civilized nations. Although those practices were found in certain countries, it is however patently clear that the international business community and most governments oppose corrupting practices.»).
(2191) Jarvin & Derains, *supra* note 2180 at 511.

fraud or corruption fails to produce requested evidence that would likely be in its possession, the tribunal should be willing to make appropriate inferences against that party.

In international arbitration, there is a well-established transnational public policy against fraud and corruption which is relevant to consider. This transnational public policy applies in the treaty arbitration context as part of the applicable law. In the commercial arbitration context, transnational public policy applies to ensure that an enforceable award is rendered.

If a tribunal finds that a party before it has engaged in significant fraud or corruption in relation to the subject matter of the dispute, that party should not be permitted to bring its claims. In the treaty arbitration context, a tribunal may deny the claimant the ability to invoke a State's consent in the investment treaty, thereby denying jurisdiction. Similarly, a tribunal will not have jurisdiction if a claimant has engaged in fraud or corruption in making its investment and the applicable investment treaty only covers investments made in accordance with the law. If the tribunal finds that it has jurisdiction, the claimant's claims will likely be deemed inadmissible, whether as a result of the clean hands doctrine or transnational public policy.

In the commercial arbitration context, a finding of fraud or corruption will similarly prevent a claimant from bringing its claims tainted by its wrongful conduct. A tribunal should take into account whether such claims are admissible under the applicable law. Further, as a result of a breach of the transnational public policy against fraud and corruption a tribunal will most likely find that the claimant's claims are inadmissible, though in some instances, tribunals have refused jurisdiction on this ground. Still other tribunals have decided that a contract tainted by fraud or corruption is void, thereby precluding the claimant from asserting any rights under the contract.

In any event, where a tribunal finds that a claimant has engaged in fraud or corruption, it must be clear in condemning such activity. As Dr. Cremades has articulated: «The position today is that the international arbitrator has a clear duty to address issues of bribery ... or serious fraud whenever they arise in the arbitration and whatever the wishes of the parties and to record its legal and factual conclusions in its award. This is the only course available to protect the ... integrity of the institution of international commercial arbitration.»[2192] No doubt, the same is equally true in the treaty arbitration context.

(2192) Cremades & Cairns, *supra* note 1996 at 86.