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Corruption in International Arbitration: Challenges and Consequences

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Summary

Despite worldwide anti-corruption efforts, corruption remains a persistent problem in many countries. This is particularly true in the Americas, where the majority of countries still fall below the global average on corruption indices.[1] The ongoing ***Operation Car Wash*** investigation in Brazil, which has reached across industries and up to the top levels of the Brazilian government, illustrates corruption's pervasiveness.

Although there are several international legal instruments relevant to corruption,[2] these instruments largely operate through the institution and enforcement of national anti-corruption laws. Thus, corruption allegations typically arise and are prosecuted pursuant to national laws, by domestic enforcement agencies, in national courts. The United States Foreign Corrupt Practices Act is a premier example of a national anti-corruption regime with international effect.

In recent years, however, corruption allegations have also arisen more frequently in international arbitration. In this context, states or state-owned entities have increasingly asserted corruption allegations as a defence to claims brought against them. Unlike in the domestic context, the rules and instruments relevant to the arbitration are typically silent on how arbitrators should address corruption allegations.

Arbitral tribunals faced with such allegations must thus determine several issues that may significantly affect the outcome of the arbitration. We address four key issues that arbitrators may face: (i) where corruption fits in the context of an arbitral proceeding, (ii) the applicable standard of proof, (iii) whether domestic court findings on corruption are relevant to the proceedings, and (iv) the legal consequences that may result from corruption allegations.

WHERE DOES IT FIT?

International arbitration tribunals have taken different approaches in analysing where corruption allegations fit into the arbitration proceeding. In the investment context, tribunals appear more likely to treat corruption as an issue of jurisdiction when the alleged corruption is said to have induced the investment and when the treaty expressly specifies that investments must be made legally, and to treat such allegations as an issue of admissibility or merits when the alleged corruption arises later during performance. In the commercial arbitration context, publicly available awards indicate that tribunals more often treat corruption as part of the merits.

In ***Metal-Tech v Republic of Uzbekistan***, the tribunal considered the alleged corruption as a jurisdictional matter. In that case, Uzbekistan alleged that the claimant had violated Uzbek law by paying over US$4 million to government officials in return for approval of its investment and other favourable treatment.[3] The tribunal concluded that it lacked jurisdiction. It observed that the treaty contained an express legality requirement within the definition of an 'investment,' which included 'any kind of assets, implemented in accordance with the laws and regulations' of the contracting party.[4] It then held that there was no lawful 'investment' as required under the relevant treaty. The tribunal justified this result as follows:

> [T]he rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear - and rightly so - that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability.[5]

Many of the cases where tribunals have considered allegations of corruption or other illegality to pose a jurisdictional bar involved an express legality requirement.[6] However, some tribunals have held that a legality requirement need not be express, but may be implicit.[7] For example, in ***World Duty Free v Kenya***, the tribunal refused to entertain the merits of the dispute, even though the underlying agreement contained no express legality requirement, finding that 'bribery is contrary to . . . international public policy.'[8] In ***Phoenix v Czech Republic***, the tribunal stated that 'conformity of the establishment of the investment with the national law . . . is implicit even when not expressly stated in the relevant BIT.'[9]

Irrespective of whether a legality requirement exists, some tribunals have refused to treat corruption allegations as a jurisdictional matter where the alleged corruption does not relate to the making of the underlying contract or investment. For example, in ***Niko Resources v Bangladesh***, the tribunal held that jurisdiction was proper even though it found proof of certain corrupt acts, because the corruption occurred after the conclusion of the underlying agreement.[10] The tribunal agreed with the view expressed in ***World Duty Free*** that 'the prohibition of bribery forms part of international public policy,' but reached a different result, finding that there was 'no link of causation between the established acts of corruption and the conclusion of the agreements' or other reasons for dismissing the case on jurisdictional grounds.[11]

Like in ***Niko Resources***, the tribunal in ***Kim v Uzbekistan*** found that jurisdiction was proper because the alleged corruption occurred during the performance of the investment, and not when it was made. The tribunal explained that the alleged corruption could not violate the relevant legality requirement because that requirement was limited to illegal action in the making of the investment.[12] In reaching this conclusion, the tribunal made clear that its focus was on jurisdictional matters and, therefore, on corruption that pertained 'only' to the initial investment.[13]

In the commercial arbitration context, available sources indicate that tribunals are more inclined to treat corruption allegations as part of the merits.[14] One oft-cited exception is the ICC Case 1110 of 1963, in which Judge Lagergren declined jurisdiction over a claim by an agent retained to bribe government officials to secure a contract.[15] Apart from this exception - which involved a request to enforce an illegal contract, rather than an otherwise legal contract procured by an illegal act - commercial arbitral tribunals faced with illegality or corruption allegations have 'ordinarily' entertained such claims and made awards on the merits, rather than dismissing such disputes on jurisdictional or non-arbitrability grounds.[16]

Prevailing on jurisdiction does not, however, assure success. Some tribunals have considered corruption as an issue of admissibility, which may effectively lead to dismissal as if the issue concerned jurisdiction. In ***Al-Warraq v Indonesia***, for example, the tribunal first determined that the corruption allegations were 'not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration.'[17] However, at the merits phase, it concluded that the investor's claims were inadmissible owing to its having engaged in wrongful acts - namely, fraudulent banking transactions - in violation of the treaty.[18] The treaty contained a somewhat unusual provision binding the investor to 'refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest.'[19] In ***World Duty Free***, the tribunal also treated the corruption allegations as an issue of admissibility, though in that case no party had made any jurisdictional objections.[20]

Other tribunals have treated corruption allegations as part of the merits of the dispute. For example, in its decision on jurisdiction, the ***Kim*** tribunal stated that any matters regarding corruption that arose after the initial investment were 'more appropriately addressed at the merits stage'.[21] Of course, consideration of corruption allegations during the merits stage may also be a consequence of when respondents raise the allegations. For example, following the jurisdictional phase, the respondents in ***Niko Resources*** filed additional submissions alleging that the underlying contracts were 'procured through corruption'.[22] While it had already dealt with corruption issues in the jurisdictional phase, the tribunal agreed to examine the new corruption charges in light of 'the seriousness of corruption offenses' and its 'responsibility for upholding international public policy'.[23] A decision on these issues is pending.

HOW IS IT PROVEN?

When faced with corruption allegations, arbitral tribunals may also have to determine the applicable standard of proof.

As a general matter, the rules of arbitral procedure are typically silent on the applicable standard of proof. Some tribunals have applied a 'clear and convincing evidence' standard when assessing corruption allegations.[24] In doing so, tribunals have justified the heightened evidentiary standard by pointing to the severe consequences of corruption on the investor's claims.[25] For example, in ***Fraport v Republic of the Philippines***, the tribunal held that:

> [C]onsidering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the [treaty] protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the [p]arties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the [t]ribunal has come to the conclusion that [r]espondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport.[26]

Others have rejected the idea that 'allegations of fraud or other serious wrongdoing' automatically require a 'heightened standard of proof,'[27] or they have applied a different standard. For example, the ***Metal-Tech*** tribunal stated that it would 'determine on the basis of the evidence before it whether corruption has been established with reasonable certainty', noting in this context 'that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.'[28]

In ***Getma v Guinea***, the tribunal similarly rejected the argument that corruption claims require a higher standard of proof, but nevertheless applied a 'clear and convincing evidence' and 'reasonable certainty' standard.[29] On this basis, it found the evidence submitted insufficient to prove corruption. The tribunal also found significant that Guinea had provided no justification for its failure to pursue domestic remedies with regard to the alleged corruption, which would have allowed Guinea to assemble the evidence needed to carry its burden, stating that Guinea 'had prioritized the defense of corruption over pursuit of the corrupt'.[30] It thus concluded 'that the State did not itself believe that such evidence exists'.[31]

Although the 'clear and convincing evidence' standard arguably sets a higher bar than a 'preponderance of the evidence' standard, in practice, it may be difficult to assess the impact

of any standard of proof. First, the essential facts were largely undisputed in many of the relevant cases. For example, in ***Niko Resources***[32] and ***World Duty Free***[33] the parties did not contest the underlying acts found by the tribunal to constitute corruption. Similarly, in ***Metal-Tech***, the claimant did not dispute that payments had been made to certain individuals, but disputed whether those payments constituted bribery or corruption or were instead made for legitimate purposes.[34]

Second, even in cases where the parties disputed the underlying facts, several tribunals have found that the evidence provided is so clearly insufficient that the standard itself is less relevant. For example, in ***EDF v Romania***, the tribunal applied the 'clear and convincing evidence' standard, but also noted that the allegations were 'far from' meeting that standard.[35] Similarly, in ***Kim***, the tribunal found that 'regardless of whether the standard of proof is "reasonable certainty" or "clear and convincing evidence" . . . the allegations of bribery and corruption have not been established by the evidence presented.'[36]

In commercial cases, arbitral tribunals may treat the standard of proof as a question subject to the governing law. Under English law, for example, the standard of proof may vary with the gravity of the allegations. As the High Court of Justice held, 'although the standard of proof is the civil standard, the balance of probabilities, the cogency of the evidence relied upon must be commensurate with the seriousness of the conduct alleged.'[37]

WHAT TO MAKE OF DOMESTIC COURTS' FINDINGS?

Where the corruption allegations at issue are the subject of domestic criminal proceedings, the tribunal may also decide whether to consider domestic courts' findings.

The ***Niko Resources*** decision on jurisdiction illustrates the various ways in which domestic criminal proceedings may be relevant to a tribunal's analysis. In that case, the claimant had been convicted of corruption by a Canadian court following a guilty plea, leading the tribunal to conclude that the claimant had 'committed the acts of corruption which were sanctioned in the Canadian conviction'.[38]

The ***Niko Resources*** tribunal found, however, that the respondent had not satisfied its burden of proof with respect to other alleged acts of corruption because investigations by the local authorities had 'not led to any trial, let alone conviction for acts of corruption that may be attributed to the [c]laimant'.[39] The tribunal also pointed to the Supreme Court of Bangladesh's finding that the underlying contract 'was not obtained by flawed process by resorting to fraudulent means'[40] and the Canadian court's finding that Niko 'ha[d] never been convicted of a similar offence nor . . . sanctioned by a regulatory body for a similar offence.'[41] As such, the tribunal appeared to give some credence to the findings of domestic courts in determining whether the respondent had carried its evidentiary burden.

By contrast, in ***Inceysa v El Salvador***, the tribunal rejected the view that it was required to defer to local court findings relating to the legality of the investment in determining whether the claimant satisfied the applicable legality requirement. In that case, the respondent argued that the claimant had submitted false documents and violated bidding rules in connection with its investment. The claimant argued that the Supreme Court of Justice of El Salvador had already upheld the bidding process, and thus that the tribunal was bound to this ruling.[42]

The tribunal rejected the claimant's argument, noting that the legality of the investment was 'a premise' for its jurisdiction and thus 'the determination of such legality [could] only be made by' the tribunal.[43] As a result, it rejected the argument that the determination of the

alleged illegal character of the investment was a matter that had already been resolved by the Supreme Court of Justice of El Salvador and that those decisions constituted res judicata.[44]

WHAT ARE THE LEGAL CONSEQUENCES?

Tribunals have also grappled with identifying the appropriate legal consequences of corruption on a party's claims, and determining the factors that are relevant to this analysis. While traditionally tribunals may have taken a binary, all-or-nothing approach to corruption, more recently commentators and some tribunals have considered a more proportional approach.

The traditional approach draws on the principle that a contract procured by corruption is voidable at the election of either party. ***World Duty Free*** is the iconic case applying the traditional approach to corruption.[45] In that case, the claimant had paid US$2 million to the President of Kenya in connection with an agreement to allow duty-free complexes to operate in Kenyan airports. The tribunal concluded that this payment constituted a bribe and found the claims inadmissible on this basis, notwithstanding the fact that the President of Kenya had accepted the bribe.[46]

Under the traditional approach, the consequences are severe - a complete bar to the investor's claims.[47] As such, all the consequences appear to fall on the investor, with no investment consequence for the state.[48] Some have justified this approach by pointing out the seriousness of corruption, and its harmful effect in countries where government officials have enriched themselves at the expense of their citizens.[49] Given this seriousness, they argue that the law should have the strictest incentives to prevent bribery and other forms of corruption.[50]

In ***Metal-Tech***, for example, the tribunal acknowledged that the outcome in corruption cases might 'appear unsatisfactory' in seeming to grant an 'unfair advantage to the defendant party'.[51] However, it found that this approach was justified because the idea 'is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act'.[52]

Some commentators have observed that adopting an all-or-nothing approach fails to account for any consideration of proportionality, effectively introducing the risk that the punishment may outweigh the crime and lead to an unjust result.[53] Others have also noted that this approach may create a perverse incentive for states to continue to tolerate corruption among government officials.[54]

In response to these concerns, at least one tribunal has rejected the traditional all-or-nothing approach in favour of one that takes proportionality concerns into account. In ***Kim***, the tribunal stated that its approach in considering the corruption allegations was 'guided by the principle of proportionality'.[55] It thus found that it was required to 'balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the [treaty] in total'.[56] As a result, it concluded that the denial of the treaty protections 'is a proportional response only' in the event of 'noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State'.[57]

Some national courts have recently echoed this approach. For example, in ***Patel v Mirza***, the Supreme Court of the United Kingdom observed:

> In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. . . . Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.[58]

Since corruption by its nature involves the participation of at least one government official, some tribunals have also considered the effect, if any, of the state's conduct. ***World Duty Free*** addressed this question in the context of attribution. There, the tribunal found that the action of Kenya's President in accepting the bribe was not attributable to Kenya, and thus did not affect its analysis on the inadmissibility of the claims.[59] Some commentators have questioned this potential asymmetry:

> Whereas the corrupt acts of an investor's corporate officers and intermediaries always generate severe consequences against the investor itself, in the case of public officials of the host State, participation in corruption almost never seems to engage the responsibility of the State.[60]

This approach - in which tribunals refuse to attribute the illegality of a state official's actions to the state - is arguably inconsistent with principles of attribution under international law in other contexts.[61] It may also deviate from principles of law found in some domestic legal systems, where courts have estopped equally culpable defendants from raising illegality as a contract defence.[62]

Beyond the question of attribution, some tribunals have found that the state's conduct affected other aspects of the proceeding. As discussed above, the ***Getma*** tribunal, in concluding that there was insufficient evidence of corruption, appeared strongly influenced by the fact that the state had never attempted to prosecute the alleged corruption, despite having known about the allegations for some time.[63] Further, the tribunal in ***Metal-Tech*** - while denying jurisdiction over the investor's claims - did acknowledge the state's 'participation' in the corruption, and as a result, ordered the respondent to share in the costs of the arbitration.[64]

CONCLUSION

Corruption allegations have increasingly arisen in international arbitration and there is no reason to think that this trend will slow down in the immediate future. Tribunals faced with such allegations will, therefore, continue to develop a coherent approach that balances the importance of promoting anti-corruption with fairness to the parties.

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Notes

1. TRANSPARENCY INT'L, ***Corruption Perceptions Index 2016*** (25 Jan. 2017) www.transparency.org/news/feature/corruption_perceptions_index_2016#resources.
2.

See, e.g., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 Dec. 1997, S. Treaty Doc. No. 105-43; Inter-American Convention against Corruption, 29 Mar. 1996, 35 I.L.M. 724.

3. See, e.g., ***Metal-Tech Ltd. v. Republic of Uzbekistan***, ICSID Case No. ARB/10/3, Award, paragraph 279 (4 Oct. 2013).
4. ***Metal-Tech***, supra note 3, paragraph 164 (emphasis omitted).
5. Id., paragraph 422.
6. See, e.g., id. paragraph 372; see generally Jean Kalicki, Dmitri Evseev & Mallory Silberman, ***Legality of Investment***, in BUILDING INTERNATIONAL INVESTMENT LAW -THE FIRST 50 YEARS OF ICSID 127, 132-34 (M Kinnear et al. eds. 2015).
7. See ***Kalicki***, supra note 6, at 133 ('[A] number of tribunals have recognized that, irrespective of whether the applicable treaty contains an express "in accordance with law" provision, only investments that are lawfully made can obtain the substantive protections of an investment treaty, including access to investor-State arbitration.').
8. ***World Duty Free v. Republic of Kenya***, ICSID Case No. ARB/007, Award, paragraph 157 (4 Oct. 2006).
9. See ***Phoenix Action, Ltd. v. Czech Republic***, ICSID Case No. ARB/06/5, Award, paragraph 101 (15 Apr. 2009); see also ***SAUR Int'l S.A. v. Argentine Republic***, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, paragraph 308 (6 June 2012) (noting that the legality requirement 'is a tacit condition' in every BIT) ('La condition de ne pas commetre de violation grave de l'ordre juridique est une condition tacite, proper à tout APRI.') (unofficial translation); ***Inceysa Vallisoletana, S.L. v. Republic of El Salvador***, ICSID Case No. ARB/03/26, Award, paragraph 257 (2 Aug. 2006) (inferring legality requirement from the treaty's travaux préparatoires); ***Plama Consortium Ltd. v. Republic of Bulgaria***, ICSID Case No. ARB/03/24, Award, paragraph 139 (27 Aug. 2008) (finding that, despite the lack of a legality provision in the Energy Charter Treaty, 'the substantive protections of the ECT cannot apply to investments that are made contrary to law').
10. See, e.g., ***Niko Resources v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Co. Ltd., & Bangladesh Oil Gas and Mineral Co.***, ICSID Case Nos. ARB/10/11 & ARB/10/18, Decision on Jurisdiction, paragraphs 471, 484-85 (19 Aug. 2013) (holding that jurisdiction was proper because the corruption occurred once 'the [joint venture agreement] had already been concluded', and not during the making of the contract).
11. Id. paragraphs 455, 475.
12. ***Vladislav Kim v. Republic of Uzbekistan***, ICSID Case No. ARB/13/6, Decision on Jurisdiction, paragraph 377 (8 Mar. 2017).
13. Id. paragraph 553.
14. See Michael Hwang S.C. & Kevin Lim, ***Corruption in Arbitration - Law and Reality***, Arbitration-icca.org, paragraphs 92-93 (4 Aug. 2011) (expanded version of Herbert Smith-SMU Asian Arbitration Lecture), www.arbitration-icca.org/media/0/13261720320840/corruption_in_arbitration _ paper_draft_248.pdf; see also Antonio Crivellaro, ***Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence***, in MONEY LAUNDERING,

CORRUPTION AND FRAUD, DOSSIERS - ICC INSTITUTE OF WORLD BUSINESS LAW 109, 113-14 (Karsten & Berkeley eds., 2003) (surveying cases and noting only one publicly reported award in which the arbitrator refused jurisdiction on the basis of the claimant's illegal conduct).

15. *Argentine Engineer v. British Company*, Case No. 1110 of 1963, 21 Y.B. Comm.Arb. 47 (ICC Int'l Ct. Arb.).
16. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 989 (2d ed. 2014).
17. *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, paragraph 99 (21 June 2012).
18. *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, paragraph 683(6) (15 Dec. 2014).
19. Id. paragraph 155.
20. *World Duty Free*, supra note 8, paragraph 187; see also *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award (27 Dec. 2016) (noting that treating corruption as either an issue of admissibility or jurisdiction would result in dismissal of claims) (not public, see https://www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/).
21. *Kim*, supra note 12, paragraph 553.
22. *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Prod. Co. Ltd. & Bangladesh Oil Gas and Mineral Corp.*, ICSID Case Nos. ARB/10/11, ARB/10/18, Procedural Order No. 13, paragraph 1 (26 May 2016).
23. Id. paragraph 7.
24. *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Final Award, paragraph 479 (10 Dec. 2014); *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, paragraph 221 (8 Oct. 2009) ('The 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.').
25. *Fraport*, supra note 24, paragraph 479.
26. Id.
27. *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, paragraphs 125-26 (2 Sept. 2011) (quotation marks omitted); see also *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, paragraph 124 (26 July 2007) (outlining the various standards of proof).
28. *Metal-Tech*, supra note 3, paragraph 243.
29. *Getma Int'l v. Republic of Guinea*, ICSID Case No. ARB/11/29, Award, paragraph 184 (16 Aug. 2016).
30.

Id. paragraph 221 (unofficial translation) ('La Défenderesse a donné priorité au moyen de défense que constitue la corruption, plutôt qu'à la poursuite des corrompus.').

31. Id. paragraph 226 (unofficial translation) ('En l'absence de toute justification de la part de la Défenderesse pour son omission d'utiliser ses pouvoirs pour apporter la preuve, le cas échéant, de la corruption, le [t]ribunal arbitral ne voit pas d'autre conclusion possible à tirer de cette omission que celle que l'Etat ne croyait pas lui-même que la preuve existe.').
32. ***Niko Resources***, Decision on Jurisdiction, supra note 10, paragraph 373.
33. ***World Duty Free***, supra note 9, paragraph 66 (4 Oct. 2006).
34. ***Metal-Tech***, supra note 4, paragraph 30.
35. ***EDF***, supra note 24, paragraph 221.
36. ***Kim***, supra note 12, paragraph 545; see also ***Libananco***, supra note 27, paragraph 126 (finding that because, even if proven, the allegations of 'fraud and other wrongdoing' were not dispositive, the question of standard of proof was 'of academic interest only').
37. ***JSC BTA Bank v. Ablyazov*** [2013] EWHC 510 (Comm).
38. ***Niko Resources***, Decision on Jurisdiction, supra note 10, paragraph 423.
39. Id. paragraph 426.
40. Id.
41. Id. paragraph 427 (emphasis omitted).
42. ***Inceysa***, supra note 9, paragraphs 53-63, 67, 209, 212.
43. Id. paragraph 209.
44. Id. paragraph 212.
45. ***World Duty Free***, supra note 8, paragraph 188.
46. Id. paragraph 185.
47. See, e.g., ***Metal-Tech***, supra note 3, paragraph 389.
48. See John R. Crook, ***Remedies for Corruption***, 9(3) WORLD ARB. & MEDIATION REV. 303, 311 (2015) ('The binary rule makes an investor bear a heavy price for the actions of the State's agents or representatives, while the State potentially typically bears no consequences for misconduct of its agents.'); see also Niko Resources, Decision on Jurisdiction, supra note 10, paragraph 465 (noting that if it accepted the state's position on this issue, the state entities 'could invoke the arbitration clauses but Niko could not'.).
49. See, e.g., Andrea J. Menaker, ***The Determinative Impact of Fraud and Corruption on Investment Arbitrations***, ICSID REVIEW (2010) 25 (1): 67-75; Carolyn B. Lamb, Hansel T. Pham, & Rahim Moloo, ***Fraud and Corruption in International Arbitration***, 10(3) TRANSNAT'L DISP. MGMT. 699, 711 (outlining public policy concerns related to corruption).
50. See ***Menaker***, supra note 49; see also ***Metal-Tech***, supra note 3, paragraph 389.
51. ***Metal-Tech***, supra note 3, paragraph 389.

52. Id.
53. See José María de la Jara & Eduardo Iñiguez, ***The Case Against the Corruption Defense***, EFILA BLOG (16 May 2017), https://efilablog.org/2017/05/16/the-case-against-the-corruption-defense.
54. See ***Crook***, supra note 48, at 311 (arguing that the all-or-nothing approach of the corruption defense as posing a jurisdictional bar is inequitable, allows for unjust enrichment, and has negative effects on the arbitration system.
55. ***Kim***, supra note 12, paragraph 413.
56. Id. paragraph 396.
57. Id. (emphasis omitted).
58. ***Patel v. Mirza*** [2016] UKSC 42.
59. ***World Duty Free***, supra note 8, paragraph 185.
60. See, e.g., Aloysius P. Llamzon, ***State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration***, 10(3) TRANSNAT'L DISP. MGMT. 1, 3 (2013).
61. See U.N. INT'L LAW COMM'N, ***Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries***, art. 7, in Work of Its Fifty-Third Session, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) ('The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.').
62. See, e.g., ***Murray Walter, Inc. v. Sarkisian Bros.***, 107 A.D.2d 173, 177-78 (N.Y. App. Div. 1985) (stating that courts have estopped equally culpable defendants from asserting an illegality defense to a breach of contract).
63. ***Getma***, supra note 29, paragraph 221-26.
64. ***Metal-Tech***, supra note 3, paragraph 422; see also ***Spentex***, supra note 20 (holding that claimant's corruption rendered claims inadmissible, but 'urging' respondent to make a donation of US$8 million to a United Nations anti-corruption fund or face an adverse order on costs and fees, in light of its own role in the corruption).

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