
ISBN 978-5-903604-05-0 (hardcover)

This edition of «New Horizons of International Arbitration» collects the articles of the speakers at the «Russian Arbitration Day — 2018» conference held in Moscow on 30 March 2018, one of the most successful arbitration events in Russia (www.arbitrationday.ru).

This is the fourth collection of articles for that conference. The first three RADs were held in 2013, 2014 and 2015. The first three collections of articles, «New Horizons of International Arbitration», were issued in the same years.

Articles in this book were selected through the strict competitive selection process by the moderators of «Russian Arbitration Day — 2018» with application of several criteria (in decreasing order of importance): novelty; depth of analysis; practical significance; and author. These diverse articles represent new approaches to development of practice of and academic studies in international commercial and investment arbitration in Russia and abroad.

This collection is intended for arbitrators and practicing lawyers, judges of the state courts, academics and other researchers, lecturers, postgraduates and students of legal universities and faculties, as well for all those who are interested in international commercial and investment arbitration.

www.arbitrationday.ru
http://rad.lfacademy.ru

ISBN 978-5-903604-05-0

All rights reserved.
© A.V. Asoskov, A.I. Muranov, R.M. Khodykin, 2018
© Association of Private International and Comparative Law Studies, 2018
CONTENTS

Preface by the Moderators and Academic Editors............................11
Partners and Media Sponsors..........................................................16
Information about the Academic Editors and Authors......................27

SECTION 1.
ISSUES OF ARBITRABILITY
AND ALTERNATIVE DISPUTE RESOLUTION

CONSTANTINE PARTASIDES
Rediscovering the Lost Promise of International Arbitration ..........48

MIKHAIL KALININ
Arbitrability of Disputes and the Russian Doctrine
of «Concentration of Important Public Elements»...........................58

OLESYA PETROL
Prospects of Inheritance Arbitration in Russia.................................86

DMITRY DAVYDENKO
Russia and the UNCITRAL Instruments on Enforcement
of International Commercial Settlement Agreements Resulting
from Mediation .................................................................................106
ANNA GRISHCHENKOVA
Some Psychological Aspects of Arbitrator Decision-Making ................. 128

SECTION 2.
SPECIFIC TYPES OF INTERNATIONAL ARBITRATION

SERGEY ALEKHIN, LEONID SHMATENKO
Corruption in Investor-State Arbitration – It Takes Two to Tango....... 150

DMITRY PENTSOV
Development of Norms of International Sports Law in Awards of the Court of Arbitration for Sport and Decisions of the Swiss Federal Tribunal Rendered in 2016–2017 .......................................................... 180

SECTION 3.
PROCEDURAL ISSUES IN INTERNATIONAL ARBITRATION

MICHAEL E. SCHNEIDER
Interactive Arbitrators? Optimistic Proposals and Cultural Baggage...... 216

SERGEY MOROZOV
Third-Party Funding of Arbitration: International Experience and Possible Use in Russia ................................................................. 238

ISABELLA PRUSSKAYA
Counsels’ Ethics in International Arbitration ........................................ 276
OLGA TSVETKOVA
Illegal Evidence in International Arbitration: Time for a Uniform Approach? 293

ANASTASIA MAGID
Ways to Implement Arbitration by Default 314

IRINA SUSPITCYN
Assistance of Arbitrators in Settlement between the Parties 337
PREFACE BY THE MODERATORS
AND ACADEMIC EDITORS

This edition of «New Horizons of International Arbitration» collects the articles of the speakers at the «Russian Arbitration Day — 2018» conference held in Moscow on 30 March 2018, one of the most successful arbitration events in Russia.

This is the fourth Russian Arbitration Day (RAD) and consequently this book is the fourth collection of articles for that conference. The first three RADs were held in 2013, 2014 and 2015 (http://arbitrationday.ru) with the support of the Russian Chamber of Commerce and Industry, the International Commercial Arbitration Court and the Maritime Arbitration Commission at that Chamber. The first three collections of articles, «New Horizons of International Arbitration», were issued in the same years.

In 2016 and 2017, Russian Arbitration Day did not take place due to difficulties in finding suitable premises (one of the principles of the conference is free participation for everybody) and various issues connected with the reform of the arbitration sphere in Russia, which culminated in 2017.

In 2018, Russian Arbitration Day is held with the support of the Arbitration Center at the Institute of Modern Arbitration (https://centerarbitr.ru) and the LF Academy Education Project (https://lfacademy.ru).

RAD — 2018 is based on the same principles as previous RADs:
• free participation for all, including the speakers. Unlike at other conferences, sponsors may not nominate speakers;
• encouraging new people to give presentations, and the promotion of new individuals in Russian arbitration;
• providing each speaker with 20–25 minutes to give a thorough report. We would like our conferences to be as informative as possible for all participants and accordingly we limit the number of speakers to give them more time;
• in-depth, competitive selection of reports by the moderators reached by analyzing preliminary applications and applying objective criteria
to determine the most original and well-presented topics. The chosen speakers must also provide articles in advance on the subject matter of their presentations;

- publication by the date of RAD of the collected articles of the speakers, in which additional information about the subject matter of such presentations should be given.

Preliminary applications were subject to the strict competitive selection process; at RAD – 2018 there were three candidates for each speaker position. The moderators applied several criteria in their selection process (in decreasing order of importance): novelty; depth of analysis; practical significance; and author.

Apart from the chosen speakers, two additional Russian applicants were invited to present their articles for this collection.

Eventually 11 articles selected through our competitive process have been included in this collection. Three Russian speaking authors have decided to provide their articles in English.

Two more articles (by Constantine Partasides QC and Michael E. Schneider) have been included in this collection without undergoing such selection processes: the authors well-known in the arbitration world have been individually invited to speak at RAD – 2018 and to present their articles.

The articles are arranged in this book in the same order in which their authors will make presentations at RAD – 2018: «Issues of Arbitrability and Alternative Dispute Resolution», «Specific Types of International Arbitration» and «Procedural Issues in International Arbitration».

Summaries and keywords for articles are prepared by their authors.

In the opinion of the moderators, academic editors and organizers of RAD – 2018, this collection of articles sees significant depth as well as diversity of content (as arbitration should do at all times).

We hope that this collection will be of interest for all who deal with arbitration in Russia and abroad, both in theory and in practice.

The academic editors express their deep gratitude to P.D. Savkin for his editing of this collection.

Anton Asoskov,
Alexander Muranov,
Roman Khodykin
ПРЕДИСЛОВИЕ МОДЕРАТОРОВ И НАУЧНЫХ РЕДАКТОРОВ


Это четвертый «Российский арбитражный день / Russian Arbitration Day» (РАД / RAD), и, соответственно, данная книга — четвертый выпус­к статей для указанной конференции. Первые три РАД состоялись, как известно, в 2013 г., 2014 г. и в 2015 г. (http://arbitrationday.ru) при уч­рении ТПП РФ, МКАС при ТПП РФ и МАК при ТПП РФ. В те же годы были выпущены первые три сборника «Новые горизонты международного арбитража».

Разноплановые статьи во всех этих сборниках представляют новые подходы к развитию практики и науки международного коммерческого и инвестиционного арбитража в России и за рубежом.

В 2016 г. и в 2017 г. «Российский арбитражный день / Russian Arbitration Day» не проводился из-за сложностей с поиском подходящих помещений (один из принципов конференции — бес­платное участие для всех), а также из-за различных вопросов, связанных с реформой сферы арбитража в России, завершившейся в 2017 г.


РАД — 2018 основывается на тех же принципах, что и ранее:
• бесплатное участие для всех, включая выступающих. Спонсоры, в отличие от других конференций, претендовать на выдвижение выступающего не могут;
Предисловие модераторов и научных редакторов

- поощрение к выступлениям новых лиц, выявление новых имен в российском арбитраже;
- предоставление каждому докладчику 20–25 минут для качественно-го выступления. Мы хотим, чтобы конференция стала максимально познавательной для всех, и поэтому, чтобы дать докладчикам больше времени, их количество ограничено;
- тщательный отбор докладов на конкурсной основе модераторами с рассмотрением предварительных заявок и с использованием объективных критериев для выявления наиболее оригинальных и глубоких тем, обязательное заблаговременное представление выбранными выступающими статей по теме докладов;
- публикация к моменту проведения РАД сборника статей лиц, выступающих на РАД, в которых темы их докладов раскрываются дополнительно.

Предварительные заявки прошли строгий конкурсный отбор: на каждое место выступающего на РАД – 2018 претендовали по три кандидата. В ходе отбора модераторами конференции использовались несколько критериев (по степени убывания значимости): новизна; глубина проработки заявки; практическая значимость; автор.

Кроме отобранных выступающих еще двум российским кандидатам было предложено представить статьи в настоящий сборник без выступления с докладом на РАД – 2018.

В итоге в настоящий сборник по результатам отбора вошло 11 статей. При этом три русскоязычных автора решили представить свои статьи на английском языке.

Еще две дополнительно включенные в него статьи (Константина Партасидеса и Михаэля Е. Шнайдера) предварительный отбор модераторов не проходили, поскольку эти авторы, учитывая их известность в мире арбитража, были индивидуально приглашены выступить на РАД / RAD – 2018 и представить свои статьи.

Распределение статей по разделам в настоящем сборнике и их порядок в данных разделах совпадают с распределением выступлений по сессиям и порядком выступлений авторов соответствующих статей на РАД – 2018: «Вопросы арбитрабильности и альтернативного разрешения споров»; «Особые виды международного арбитража»; «Процессуальные вопросы международного арбитража».

Аннотации и ключевые слова для статей подготовлены их авторами.
Данный сборник, по мнению модераторов, научных редакторов и организаторов РАД – 2018, получился не только глубоким по содержанию, но и весьма разноплановым (каким и следует быть подлинному арбитражу).

Мы надеемся, что он вызовет интерес у всех, кто занимается в России и за рубежом арбитражем как в теории, так и на практике.

Научные редакторы выражают большую благодарность П.Д. Савкину за редакторскую работу над данным сборником.

А. В. Асосков,
А. И. Муранов,
Р. М. Ходыкин
AUTHORS

SERGEY N. ALEKHIN is an associate at Willkie Farr & Gallagher specialized in international arbitration, registered with the Paris and Voronezh (Russia) bars. He has acted in proceedings conducted under the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID) as well as in ad hoc proceedings, including under the UNCITRAL Rules.

Sergey obtained a Master double-degree in Law and Economic Globalization from Sciences Po Paris and the University of Paris I Panthéon Sorbonne, a Master Degree in Law from the Russian Academy of State Service, and a Specialist Degree in International Relations from the Voronezh State University (Russia).

He is a member of the ICC Young Arbitrators Forum (YAF), and the LCIA Young International Arbitration Group (YIAG).

DMITRY L. DAVYDENKO is Chief expert of the Center of Arbitration and Mediation and Executive Secretary of the Maritime Arbitration Commission at the Russian Chamber of Commerce and Industry. Apart for that, he is the Director and a co-editor of the CIS Arbitration Forum (http://www.cisarbitration.com/), a collaborative project of scholars and practitioners focusing on commercial dispute resolution involving the former Soviet Union countries.

Dmitry is listed as a recommended arbitrator of International Commercial Arbitration Court and Maritime Arbitration Commission at the Russian Chamber of Commerce and Industry, as well as of other reputed arbitral institutions. He also took part as co-arbitrator in proceedings under the Arbitration Rules of the International Chamber of Commerce. He practiced as advocate at a leading Russian law firm and has a more than 10 years’ experience of advising Russian and international clients on business disputes and related legal matters.

Included in the list of best practitioners in arbitration in Russia (under 45) as of the year 2017 by «Who’s Who Legal» and «Global Arbitration Review».

ANNA V. GRISHCHENKOVA, a partner, LL.M. in US Law. Recommended by the international legal rankings Chambers Europe, Chambers Global, Legal 500 EMEA and Best Lawyers. In 2016 she was elected a
Mr. Schneider’s main areas of practice are disputes involving States and corporations in construction, industrial engineering and infrastructure projects, natural resources (in particular oil and gas), pharmaceuticals, telecommunications and investment disputes. He has specific experience in managing large and complex disputes, organizing and leading teams of specialists from different fields and different legal and cultural backgrounds.

Mr. Schneider is the immediate past president of the Swiss Arbitration Association (ASA). At ASA, he developed *inter alia* the Arbitration Practice Seminar organized annually since 1997 with civil law and common law practitioners. He was vice chair of the ICC Commission on Arbitration until 2014, and has been a member of several of its working groups (1998 and 2012 revisions of the ICC Rules, construction, pre-arbitral referee). He chaired the UNCITRAL Working Group II (Arbitration) at its Sessions in New York and Vienna (2006–2010) on the revision of the Arbitration Rules and on the revision of the Notes on Organizing Arbitral Proceedings (2014–2015) and is now Vice-Chair of the Commission. He is member of the Board of Trustees of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and president of the International Academy of Construction Lawyers.

Mr. Schneider lectures at the University of Fribourg LLM Programme and was Director of Studies at the Centre for Studies and Research at the Hague Academy of International Law (Transnational Arbitration and State Contracts). He studied law and history at the universities of Munich, Bonn and Geneva and completed the 1st and 2nd State examination (capacity to hold office as a judge). He completed postgraduate studies at the Graduate Institute of International Studies in Geneva and is a former AIESEC trainee with the Shell Company in Sierra Leone.

**LEONID G. SHMATENKO** joined *LALIVE* in 2017 and is a member of the international arbitration team, specializing in international commercial and investment arbitration. He has been involved as counsel and secretary in over twenty international arbitration proceedings conducted in German, English and French.

Leonid is a student fellow of the Chartered Institute of Arbitrators and a member of several international arbitration associations, including the Young International Council for Commercial Arbitration (Young ICCA), the German Institution of Arbitration (DIS) and DIS40, the LCIA Young International Arbitration Group (YIAG) and ASA Below 40.

Leonid studied law at Heinrich Heine University Düsseldorf from 2006 to 2011. He passed the First State examination (Dipl. iur.) in Düsseldorf in 2011.
and the Second State examination in 2015. He finished his doctoral thesis and awaits receiving his doctorate from Heinrich Heine University Düsseldorf. He currently teaches investment arbitration at the National Technical University of Ukraine «Igor Sikorsky Kyiv Polytechnic Institute».

IRINA I. SUSPITCyna is the head of projects (arbitration and mediation) at KIAP, Attorneys-at-Law. Irina has graduated from Lomonosov Moscow State University and received the Master of Laws degree (LL.M.) in arbitration at Stockholm University (Sweden). Irina has experience in representation of clients in disputes related to SCC Rules, ICC Rules, Rules of the ICAC at the Chamber of Commerce and Industry of the Russian Federation and Rules of the IAC at the Chamber of Commerce and Industry of the Republic of Belarus as well as in ad hoc arbitrations and Russian commercial courts with regard to recognition and enforcement of foreign arbitral awards and judgments. In 2014, she earned the degree of an Associated Member of the UK Chartered Institute of Arbitrators (ACIArb). Acted as co-author of the «Practical Commentary to the Russian Arbitration Laws» (RAA).

OLGA A. TSVETKOVA is attorney (senior associate) at Egorov Puginsky Afanasiev & Partners (Moscow). She is co-Chairperson of the Arbitration Association (RAA40) and co-Chairperson of the Council at the Institute of Modern Arbitration.

She holds an LL.M. from the University of Geneva program «Master of International Dispute Settlement», having previously graduated from the Lomonosov Moscow State University, Law Department.

Olga advises and represents clients’ interests in international arbitration disputes and state courts. She specializes in commercial and investment arbitration, coordination of complex cross-border disputes, as well as lawsuits arising out of the set aside, recognition and enforcement of arbitral awards. She is experienced in international public disputes including cases before the European Court of Human Rights, the European Court of Justice and the United Nations International Court of Justice.
Section 2
SPECIFIC TYPES
OF INTERNATIONAL ARBITRATION

Раздел 2
ОСОБЫЕ ВИДЫ
МЕЖДУНАРОДНОГО АРБИТРАЖА
In this article, the authors will provide a broad overview of the issue of corruption in investor-state arbitration, including such issues as burden and standard of proof (arguing, e.g., that it should be different for corruption and fraud). The main sections of the article will cover a special aspect of corruption in investor-state arbitration, which might have become widespread, but remains rarely discussed in academic literature, let alone treated by arbitral tribunals — namely that it takes «two to tango» in instances of corruption. The authors argue that instead of the approach adopted by many Tribunals of shifting the consequences of an act of corruption to one party only (i.e. the investor being then deprived of its protection under the BIT), in reality neither the investor, nor the Respondent State can be exonerated, but have to share the blame for an act of corruption, and therefore face investment arbitration-specific consequences. Finally, the authors look at specific ways in which States may be (and have been) penalized for such conduct in the limited number of investment arbitration cases reported to date.

Keywords: corruption; State responsibility; investor-state arbitration; burden of proof; standard of proof; sanctions for corruption.

1 The views expressed herein are the authors own and do not necessarily reflect the views of the firm they represent or any of its clients. The authors thank Ms. Maria-Rosa Rinne for her input and suggested technical edits.
В статье авторы анализируют вопросы, возникающие при рассмотрении аргументов о коррупции в инвестиционном арбитраже, в том числе такие проблемы, как бремя и стандарт доказывания (утверждая, в частности, что они должны быть разными для коррупции и простого мошенничества). Также рассмотрены особые случаи вовлечения в коррупцию обеих сторон в арбитраже между государством и инвестором, которые, будучи широко распространенными в настоящее время, тем не менее редко обсуждаются в академической литературе, не говоря уже об арбитражных трибуналах. Впреки подходу, принятому многими трибуналами, который предполагает возложение последствий нарушения только на одну сторону (т.е. отказ инвестору в защите при надлежащем ему праве), авторы утверждают, что ни инвестор, ни государство-ответчик не могут быть оправданы, но должны разделить вину за правонарушение и, следовательно, его последствия. Наконец, авторы рассматривают несколько практических примеров инвестиционно-арбитражных разбирательств и конкретные способы наказания, которые могут быть применены (и ранее применялись) к государству за такое поведение.

Ключевые слова: коррупция; ответственность государства; инвестиционный арбитраж; бремя доказывания; стандарт доказывания; наказание за коррупцию.

1. Introduction

This article was prompted by the 27 December 2016 Award in Spentex v. Uzbekistan, still unpublished, where the tribunal found that the Claimant (investor) engaged in corrupt practices in the making of its investment, dismissed its claims and — for the first time even in investment arbitration — reprimanded the Respondent State by urging it to make a substantial payment to an international anti-corruption institution, under threat of an adverse costs order.

In the authors’ view, the Spentex Award sets an important milestone in how investment arbitration tribunals (should) tackle the issue of corruption — if it is proven, the Tribunal should «penalize» both the investor that engaged in corrupt practices and the Respondent State that was implicated therein. Remarkably, while the definitions of corruption and its interplay with the
notion of public policy¹, the burden and standard of proof², the proper timing


of this defense\(^1\), the duties of an arbitrator faced with a corruption allegation\(^2\),


and the consequences of a finding of corruption for the claimant investor have been thoroughly discussed in the literature, the consequences of the same finding for the Respondent State remain largely outside of academic focus.


2 Several authors have touched upon the issue, but from various perspectives. Bernardo Cremades raised a number of questions for further academic discussion in his 2005 article, but was inconclusive as to, e.g., State responsibility for acts of corruption and the consequences of a finding of corruption for the Respondent State (see: Cremades, Op. cit.). In turn, Andreas Kulick and Carsten Wendler advocated for a balanced approach in dealing with corruption in investment arbitration by considering the matter at the merits, as opposed to jurisdictional stage (see: A. Kulick & C. Wendler, A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption, Legal Issues of Economic Integration, Vol. 37 (2010), Issue 1, p. 61–85). Furthermore, Stephan Wilske briefly criticized the World Duty Free v. Kenya Award for not holding the State accountable for a corrupt action by its former President (see: Wilske, Op. cit.). This criticism was expanded by Tamar Meshel and Daniel Litwin in their 2013 articles commenting on World Duty Free v. Kenya (see: T. Meshel, The Use and Misuse of the Corruption Defence in International Investment Arbitration, Journal of International Arbitration, Vol. 30 (2013), Issue 3, p. 267–282 <https://papers.ssrn.com/abstract_id=2368088> (last accessed – 18 February 2018); D. Litwin, On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption, Transnation-
It is thus rather common to discover in academic writings dealing with a positive finding by a tribunal of corruption that occurred before, while or after the investment was made, that the only apparent consequence of such a finding is the impossibility for the claimant investor to enjoy protection under the relevant investment treaty. In the investment arbitration context, this may be deemed a manifestation of the Common law «the loss lies where it falls» principle. Only a few authors have touched upon that «other side of the medal», namely the consequences of a positive funding of corruption for the Respondent State, assuming it was involved in or bears responsibility for inducing the claimant investor to commit an act of corruption.

The imbalance of academic research — and to some extent public attention — between the «supply side» (e.g., the giver of the bribe) and the «demand side» (e.g., the receiver of the bribe) of corruption is not unique to investment arbitration. Yet, curiously, this imbalance used to be inverted in the more general discussion and perception of this phenomenon. In fact, as recent as twenty years ago, the focus of both the academia and the public was, as one author put it, on «the demand side of the equation: on public officials who abuse their office for private gain» rather than on «[t]hose who pay bribes[,] sometimes


depicted as innocent parties, forced by ruthless officials to provide kickbacks». While this is no longer the case in the general anti-corruption framework, and both sides of the «equation» are arguably subject to comparable reprehension and sanctions, investment arbitration tribunals are lagging behind, in the sense that there is no jurisprudence constante as to how to deal with Respondent States implicated in corruption.

In drafting this article, the authors have reviewed twenty-four reported investment arbitration cases, including five where corruption was outcome-determinative, and nineteen where allegations of corruption were raised, either by Respondent States, or by claimant investors, but did not succeed. 


2. Chronologically: World Duty Free Company v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (4 October 2006); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award (6 February 2007); Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan, ICSID Case No. ARB/06/15, Award (8 September 2009); Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (4 October 2013); Spentex Netherlands, B.V. v. Republic of Uzbekistan, ICSID Case No. ARB/13/26, Award (27 December 2016).

3. Chronologically: Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 April 1988); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (8 December 2000); Tanzania Electric Supply Co. Ltd. v. Independent Power Tanzania Ltd., ICSID Case No. ARB/98/8, Award (12 July 2001); MethaneX Corp. v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005); International Thunderbird Gaming Corp. v. The United Mexican States, UNCITRAL, Arbitral Award (26 January 2006); F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14, Award (3 March 2006); Incysa Vallisoleetana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (2 August 2006); Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4, Award (7 February 2005); Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12, Award (10 December 2014); African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo, ICSID Case No. ARB/05/21, Sentence sur les déclins de compétence et la recevabilité (29 July 2008); Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (29 July 2008); Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, and Partial Dissenting Opinion of Professor Francisco Orrego Vicuña (11 April 2007); EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award (8 October 2009); RSM Production Corp. v. Grenada, ICSID Case No. ARB/05/14, Award (13 March 2009); Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Award (9 September 2009); Niko Resources (Bangladesh) Ltd. and People’s Republic of Bangladesh,
Cases where allegations of fraud, as opposed to corruption, were raised\(^1\) were also analyzed, but only from the perspective of the burden and standard of proof. The authors deem this limitation justified as in instances of fraud, the Respondent State could not arguably bear any responsibility or suffer consequences, as it acted upon a misrepresentation of the investor.

This article is structured into four parts. First part focuses on the burden of proof and standard of proof with respect to corruption allegations and fraud. In second part, the authors look at corruption in investment arbitration from two perspectives — as a «shield» raised in defense by Respondent States, and as a «sword» unsheathed by claimants as a substantive violation of their rights as foreign investors. In third part, the authors deal with the «Dark Side of the Moon», namely the consequences for Respondent States for proven instances of corruption, first touching upon the intricate topic of State responsibility for corruption, and then proceeding with an overview of the tools available to arbitrators confronted with corruption. Finally, in fourth part the authors provide a summary of their findings and outlook for future developments in this area.

2. Burden of Proof and Standard of Proof in Corruption Allegations

The burden of proof in investment arbitration is usually judged by the widely recognized international standard that each party bears the burden of proving the facts on which it relies\(^2\). This international standard is expressed, in a rather abstract and general way\(^3\), e.g., in Art. 24 of the UNCITRAL Rules

---

\(^1\) See, e.g.: Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, Decision on Jurisdiction, and Partial Dissenting Opinion of Professor Francisco Orrego Vicuña; Gustav F W Hamester GmbH & Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (18 June 2010).


and is also frequently applied in investment arbitration. Consequently, it is the party pleading corruption that has to prove it.

Investment tribunals also have affirmed that the burden of proof may shift to the other party. With respect to corruption and fraud allegations, several authors have also expressed the view that the tribunal may shift the burden of proof once prima facie evidence is presented, to account for the difficulty of proving corruption. Furthermore, in at least one reported commercial arbitration, an ICC tribunal expressly considered the possibility of shifting the burden of proof with respect to corruption allegations. As to investment arbitration cases, no instances are known where a shift of burden of proof regarding an alleged corruption was recognized. On the contrary, numerous tribunals have emphasized that the burden of proof for corruption allegations lies with the alleging party, such as in Wena Hotels v. Egypt, Oostergetel v. Slovak Republic, and ECE v. Czech Republic.


Corruption in Investor-State Arbitration – It Takes Two to Tango

*bears the burden of proving such an affirmative defense* has failed to prove its allegations⁴.

Equally and in the same vein the tribunal in *Oostergetel* held that «[w]hile such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence. In the present case, both are entirely lacking. *Mere insinuations cannot meet the burden of proof which rests on the Claimants*⁵.

Thus, the burden of proof for existing corruption allegations lies with the party relying on such misconduct. Shifting of the burden of proof, although discussed in academic literature, is yet to be applied in practice by investment arbitration tribunals.

The situation in regard to the standard of proof, *i.e.* how much evidence is needed to establish either an individual issue or the party’s case as a whole is somewhat more difficult. Already a general issue in international arbitration — in that the «degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition»³ — the standard of proof for allegations of corruption is even more problematic as on the one hand it arguably requires more convincing evidence than just a balance of probabilities⁴, and on the other hand, as numerous tribunals stated, «it is generally difficult to bring positive proof of corruption»⁵.

---

¹ *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, ¶ 77 (emphasis added).
² *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, ¶ 303 (emphasis added).
Turning to the legal basis, and taking ICSID arbitration as an example, the ICSID Convention and the ICSID Arbitration Rules do not provide for any particular provision on the standard of proof. Rather, Arts. 43 to 45 of the ICSID Convention and Arbitration Rule 34 grant tribunals the discretion to call upon the parties to produce evidence. ICSID Tribunals have usually applied high standards of proof to corruption allegations, however, in a rather flexible way. Somewhat disappointingly, ICSID tribunals have rendered inconsistent decisions regarding whether a higher standard of proof in cases involving allegations of corruption, fraud or illegality, as compared to the «balance of probabilities» standard, is warranted. More broadly, in reported investment arbitration case law, the range of standards of proof applied to corruption allegations varies from no references to any standards at all, to applying an «evidentiary standard», a standard relying on (clear) circumstantial evidence that makes it reasonable to believe that the facts, as alleged, have occurred, applying laws of the common law tradition (i.e. «balance of probabilities» or «preponderance of the evidence») or just establishing a genuine higher standard.

2 Losco, Charting a New Course: Metal-Tech v. Uzbekistan and the Treatment of Corruption in Investment Arbitration, p. 46.
For instance, in *Siag v. Egypt*, the ICSID Tribunal applied a high standard of proof, e.g., «clear and convincing evidence», which it referred to as an «American standard», to Egypt’s allegations of fraud. Of note, the *Siag* Tribunal adopted this approach by majority, with Professor Francisco Orrego Vicuña dissenting and suggesting that arbitral tribunals should have more discretion in this matter, «in accordance with the circumstances of the case and the nature of the facts involved». The majority’s approach in *Siag* had also been adopted by the tribunal in *EDF v. Romania*. That «clear and convincing evidence» standard is required for allegations of corruption remains, nevertheless, a minority view in commercial arbitration as well. A 2003 survey of ICC awards by Antonio Civellaro revealed that out of twenty-five awards analyzed, only in five instances did the Tribunals adopt this standard of proof.

However, in *Metal-Tech v. Uzbekistan*, the tribunal took another approach, thereby departing from previous ICSID case law, and applied a standard of «reasonable certainty». What is more, the tribunal justified the use of this standard of proof by referring to the difficulty of proving corruption, stating that it is «generally admitted that it can be shown through circumstantial evidence». This approach was followed by the *Oostergetel v. Slovak Republic* and *Fraport v. Philippines* Tribunals. Reliance on circumstantial evidence in view of the difficulties associated with securing direct evidence of corruption raises a related issue in the discussion about meeting the high standard of proof — the tribunals need to determine not only who, or to what extent one needs to prove corruption, but with what kind of evidence. Generally, both tribunals and commentators agree that the standard of proof can be met by any type of

---

3. *EDF (Services) Ltd. v. Romania*, Award, ¶ 221.
evidence, not only direct evidence (be it direct or circumstantial evidence). These types of evidence should be recognized and accepted by tribunals «when a party has genuinely encountered problems beyond its control in securing evidence»¹. The threshold for proving corruption, however, remains high.

The divergence between different standards of proof applicable that outlined above is clearly summarized in the Tokios Tokelės v. Ukraine Award, where the arbitral tribunal presided over by Lord Mustill distinguished three approaches to standard of proof: (i) «the usual standard, which requires the party making an assertion to persuade the decision-maker that it is more likely than not to be true»; (ii) «where the dispute concerns an allegation against a person or body in high authority the burden may be lower, simply because direct proof is likely to be hard to find»; and (iii) «the standard is higher than the balance of probabilities»².

In this regard, a significant number of Tribunals have applied a usual standard of proof justifying this choice in clear in precise terms, such as in Libananco v. Turkey³ and Rompetrol v. Romania⁴.

In Libananco v. Turkey the tribunal held that «In relation to the Claimant’s contention that there should be a heightened standard of proof for allegations of „fraud or other serious wrongdoing”, the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that „the graver the charge, the more confidence there must be in the evidence relied on“, this does not necessarily entail a higher standard of proofs»⁵.

The tribunal in Rompetrol v. Romania held that «while applying the normal rule of the „balance of probabilities“ as the standard appropriate to the generality of the factual issues before it, [the Tribunal] will where necessary adopt a more nuanced approach»⁶.

² Tokios Tokelės v. Ukraine, Award, ¶ 124.
³ Libananco Holdings Co. Ltd. v. Republic of Turkey, Award, ¶ 125.
⁵ Libananco Holdings Co. Ltd. v. Republic of Turkey, Award, ¶ 125 (emphasis added).
⁶ The Rompetrol Group N.V. and Romania, Award, ¶ 183.
This solution is justified for two reasons. The first is the nature of corruption that is characterized by secrecy and low availability of evidence, given the precautions taken to conceal such offenses. Indeed, demanding a higher evidentiary standard for such acts would inevitably make any demonstration of corruption a chimera. It would become impossible for the parties to prove corruption and render arbitral tribunals powerless to effectively fight this curse, thereby undermining the validity of awards1.

The second reason apparently originates from common law, that considers the two standards mentioned above: the standard dubbed «balance of probabilities» used in civil matters and the one known as «proof beyond reasonable doubt», applied in criminal matters.

Of note, in the most recent Spentex v. Uzbekistan Award, the Tribunal has reportedly adopted a rather novel «flexible approach» taking into account the evidence and the manner in which it was obtained «from a holistic perspective», including the extent of parties’ co-operation during the fact-finding phase of the arbitration2. The Tribunal was also notable for adopting a «connecting the dots» method as the appropriate standard of proof rather than «clear and convincing evidence» or «preponderance of evidence», as advocated by the parties3. In practical terms, this translated into looking at various «red flags» evidencing corruption.

In conclusion, a single standard of proof should arguably not be applied to all matters and arguments advanced by the parties, precisely because of the varying degree of readiness of evidence. Even within the group of «fraud, corruption and illegality» arguments, one could reason that the standard of proof for fraud should be higher than for corruption, as fraud, by definition, involves only one party (e.g., the Claimant) engaging in a misrepresentation towards Respondent, that the latter then discovered. In most instances of corruption, however, both parties may well have reasons to conceal corrupt activity, rendering the proof of corruption more difficult. This also

resonates well with the argument that unlike fraud, corruption — by definition — involves two parties — the «giver» and the «receiver». Put differently, establishing corruption as a matter of fact is difficult, and direct (let alone «clear and convincing») evidence might simply not be available, or at least not reasonably available.

In this regard, even if tribunals ordered the production of relevant documents that could and probably would prove corruption, the party ordered to do so will usually not cooperate. Drawing negative inferences, a technique often used by tribunals to conclude that the document not produced is supportive of the argument that the document sought might disprove, has its limitations in that such inferences may only be drawn when a «logical nexus between the probable nature of the documents withheld and the inference derived therefrom» exists.

By default, therefore, putting an additional burden on one of the parties, at least when it comes to proving corruption, would be inappropriate.

3. Corruption as a «Shield» and a «Sword»

The relatively recent «backlash» against investment arbitration, already widely discussed in academic commentary, and the corresponding negative stances of several governments, going as far as denouncing and withdrawing from ICSID, the rise of jurisdictional, admissibility and merits objections by the Respondent States with respect to the conduct of the investor, and — less
frequently — counter-claims against the investor\(^1\), arguably evidence that the investment arbitration system is far from one-sided.

One such common defense or objection raised by Respondent States is the «unclean hands» doctrine (of which corruption is arguably part). While case law and academic commentary remains divided as to whether this doctrine is a general principle of international law\(^2\), it is noteworthy that only corruption (as opposed to fraud or illegality of investment) possesses a binary aspect to it, in that it can be raised from either side of the dispute. Indeed, while historically corruption was raised by Respondent States as an «ultimate» defense (or «shield») against the investor’s claims, corruption has also been used as an offensive argument by the investors (as a «sword»), presented as a wrongdoing by the Respondent States in breach of the applicable investment treaty — with the caveat that to date there have been no reported cases where the same instance of corruption was used both as a «shield», and as a «sword». Put differently, when used as a «sword», the corruption line of argumentation would refer either to solicitation of bribes by a State official (and, logically, unconsummated corruption), or an unlawful act attributable to the Respondent State following an instance of corruption by a third party, acting in its own interest (and logically against the interest of the claimant investor).

\(\text{---}\)

\(\text{---}\)


As mentioned, historically and statistically, corruption remains overwhelmingly a defense for Respondent States\(^1\). Indeed, as early as in 1992, corruption was at the limelight of Egypt’s defenses, and vigorously rebutted by the claimant, SPP\(^2\). Perhaps somewhat disappointedly, corruption was not given sufficient attention by the majority of the Tribunal, but featured prominently in the dissenting opinion of Mr. El Mahdi, Egypt-appointed arbitrator, who apparently concluded that claimant did engage in corrupt behavior\(^3\).

From Respondent State’s side, corruption as a «shield» can then be raised at various junctions: jurisdiction, admissibility or merits of the case. In general, in bifurcated ICSID proceedings, the parties are free to plead corruption allegations both, at the jurisdictional and the merits phase\(^4\).

For instance, in *African Holding Company v. Congo* Respondents relied on allegations of corruption purportedly carried out by Claimants to undermine the Tribunal’s jurisdiction over the dispute\(^5\).

On the other hand, in *Azpetrol v. Azerbaijan*, it was the Claimants’ lead witness who revealed that Claimants have bribed Azerbaijani officials\(^6\). These admissions led to Azerbaijan’s objection regarding the admissibility of the claims on grounds that the investment was tainted by corruption and the Claimants’ conduct violated international public policy\(^7\).

Finally, though Respondent argued that its defense on corruption was an objection to jurisdiction, the Tribunal in *Malicorp v. Egypt* held that «defects

---


\(^2\) *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, Decision on Jurisdiction, ¶ 204.


\(^7\) Ibid., ¶ 7.
undermining the validity of the substantive legal relationship, which is the subject of the dispute on the merits, do not automatically undermine the validity of the arbitration agreement. Thus, an arbitral tribunal is competent to decide on the merits even if the main contract was entered into as a result of misrepresentation or corruption»¹.

However, the stakes being high, a confirmation of corruption generally leads to a dismissal of the claims, no matter whether the issue is treated as a matter of jurisdiction, admissibility, or merits. Even though tribunals struggle with where to address the issue, and it depends on the predominant context, the outcome will largely be the same and a finding of corruption will influence the outcome of the arbitral proceedings².

An allegation of corruption can also take the form of a «sword», e.g. where investors assert that bribe solicitation led to (or constituted) a breach of the State’s international obligations. To date, there are only five instances where claimants invoked corruption in their argumentation as to the liability of the Respondent State, either as a standalone offense, or as a contributory element to an offense:

(i) Methanex v. United States, where the claimant asserted regulations harmful to its investment were enacted further to illicit campaign contributions by a third party to the then governor of California in order to confer with a principal US producer of ethanol³;

(ii) F-W Oil Interests v. Trinidad and Tobago, where bribes were allegedly solicited by the host State’s official during the investor’s negotiation of an oil & gas development project⁴;


(iii) *Rumeli v. Kazakhstan*, where it was alleged that a Kazakh judge solicited a bribe from the investors to hamper the forceful seizure of their investment;

(iv) *EDF v. Romania*, where the Prime Minister of Romania allegedly solicited a bribe to extend the investment agreement; and

(v) *RSM v. Grenada*, where it was alleged that the investor’s competitor bribed the host State’s official to deny a license to the investor.

Empirically, it is far more common for corruption to be raised as a «shield» by Respondent States, to defend themselves against an investment claim, rather than a «sword» by Claimants, as a substantive breach by the State of its international obligations. One explanation to this may lie in the asymmetrical nature of the majority of international investment agreements imposing most of legal obligations not on the foreign investors, but on host States. Furthermore, raising corruption as a «sword» — either arguing that a State official took a bribe from a third party, as a result of which Claimant’s rights were impaired, or purporting that due to Claimant’s unwillingness to give a bribe its rights were impaired — may well incentivize the Respondent State or even the Tribunal (*sua sponte*) to look into potential misconduct by the Claimant itself, effectively transforming corruption from a «sword» to a «shield».

4. The Dark Side of the Moon — What Consequences for the State?

«*Investment arbitration has initiated and led the movement of zero tolerance towards corruption*»,
written Juan Fernández-Armesto in his 2015 article

---


2 *EDF (Services) Ltd. v. Romania*, Award, ¶ 221.

3 *RSM Production Corp. v. Grenada*, Award, ¶ 5.1.4.


on the effects of a positive finding of corruption in arbitral proceedings. It would seem a reasonable expectation for the reader of this passage to then be presented with a suggestion that this zero-tolerance approach applies both to the claimant investor and to the Respondent State. Alas. As highlighted in the introduction to this article, academic discussion on the consequences of a finding of corruption for the State is to date very limited. This is all the more so perplexing as several scholars have made remarks that respondents’ defenses of corruption advanced in order to dismiss the claim, where respondents were involved in one way or another in the instance of corruption, would be «unseemly».

In this part, the authors first tackle the issue of State responsibility in international law for corruption (Sec. 4.1), and then establish the toolset available to arbitrators in investment cases when dealing with instances of corruption (Sec. 4.2).

### 4.1. State Responsibility for Corruption

«States can act only by and through their agents and representatives», opined the PCIJ in its *German Settlers in Poland* Advisory Opinion nearly a century ago — a principle that was later transposed in the ILC Articles on State Responsibility. It would therefore seem logical that a State be held responsible for the corrupt actions of its officials, even if those were undertaken for private gain. Yet, while it appears hardly contested that the very act of corruption is an international wrong, uncertainties

---


4 *Betz*, Op. cit., p. 5. Of note, Bernardo Cremades highlights an important distinction between commercial and investment arbitration matters dealing with public policy questions (of which corruption would be part of): as there is no means to review an ICSID award on grounds of public policy, contrary to commercial arbitral awards that can be set aside on such grounds under the New York Convention and the UNCITRAL Model Law, issues relating to public
remain as to whether a State is responsible for such an act, perpetrated by a State official.

The authors posit that two separate scenarios should be analyzed when discussing the issue of state responsibility for corruption: (1) extortion of a bribe by a public official; and (2) the failure of the State to investigate a reported instance of corruption and / or prosecute the parties involved.

4.1.1. State Responsibility for Extortion of a Bribe by a Public Official

Under the first scenario, while it may seem on its face that an extortion of a bribe by a public official would indisputably be attributable to the State, the reality is far more nuanced. The basic tenet is the well-settled principle of international law, as embodied in Arts. 4, 5 and 7 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, that a State is responsible for acts committed by its officials in their official capacity, even when they exceed their authority or contravene instructions.

In this regard, it is notable that Bernardo Cremades opined in an article preceding any jurisprudence confirming the application of this principle to acts of corruption, that «if a public official accepts a bribe to exercise his public duties in a certain manner, for example by smoothing the regulatory path for a foreign investment, then the acts of that official are attributed to the State itself in public international law».

Nevertheless, this view is not unanimous, and some suggest that since solicitation and acceptance of a bribe is never «cloaked with governmental policy «must be examined by the arbitral tribunal... or they will not be examined at all» (Cremades, Op. cit., p. 212).

Of note, there is a clear distinction between international legal obligations incumbent on States ex contractu or ex delicto, e.g. the primary rules, and the rules of state responsibility, e.g. secondary rules (see: J. Crawford, State Responsibility: The General Part, Cambridge: Cambridge University Press, 2013, p. 38). Of interest, some scholars also highlight the interplay between the responsibility of a State in general international law (including, mostly, towards other States), and in investment law (to investors) (see: Z. Douglas, The Hybrid Foundations of Investment Treaty Arbitration, British Yearbook of International Law, Vol. 74 (2003), p. 184).


authority», a condition for an act to be deemed a State act under Art. 7 of the ILC Articles on State Responsibility\(^1\), such act cannot be deemed attributable to the State\(^2\). This appears to be an overly simplistic approach. Indeed, one can envisage a multitude of scenarios whereby a government official soliciting a bribe either exercises his public duties or, at the very least, purports to do so, thereby inducing the bribe-giver into believing that he is dealing with an official cloaked with governmental authority.

The decision of the Iran-US Claims Tribunal in *Yeager v. Iran*\(^3\) is illustrative here. In that case, the Tribunal was confronted with two successive instances of corruption: one by an Iran Air agent who demanded from the complainant extra money to issue an air ticket, and another by uniformed officers of the Revolutionary Guard, exercising customs functions, who «seized» (simply stole) the cash that the complainant had on him during a pre-flight inspection. Deciding on whether either of these acts was attributable to the State, the Tribunal looked at whether the Iranian officials represented to act on behalf of the State — this was the case with the Revolutionary Guards (who invoked their purported customs powers to undertake a pre-flight inspection), but not the case with the Iran Air agent, who solicited the bribe in his personal capacity\(^4\).

As to investment arbitration jurisprudence, the Award in *EDF v. Romania* is a noteworthy contribution to the topic of State responsibility for corruption. Although in this case corruption was raised as an offense by the investor (arguably making the precedent less relevant as compared to cases where Respondent States raised corruption as a bar to jurisdiction or admissibility of the investor’s claims), the Tribunal importantly found that solicitation of a bribe by a State agency would be a «violation of the fair and equitable treatment obligation owed to the claimant pursuant to the BIT as well as a violation of

---


4. Ibid., p. 110–111.
international public policy". Here, thus, State responsibility was triggered by an unconsummated instance of bribery.

Next, in *World Duty Free*, the Tribunal deemed that «[t]here is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal) of a state officer engaged as its agent in bribery». The Tribunal continued, stating that the corrupt act of an incumbent President is not attributable to the State itself, as «the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world».

While at first blush, this Award would seem to undermine the proposition of State responsibility for corruption, one should not, however, overestimate the importance of this Award. Indeed, it appears that the Tribunal there did not venture into an analysis of state responsibility for corruption under international law, rather limiting its findings to English and Kenyan law. This may well be due to the fact that the jurisdictional basis of the dispute at hand was contractual, as opposed to treaty-based. Indeed, were the dispute is treaty-based, international law would have been part of the applicable law, thus potentially resulting in a different conclusion on State responsibility.

---

1 *EDF (Services) Ltd. v. Romania*, Award, ¶ 221. In the same paragraph, the Tribunal (quoting Claimant’s Post-Hearing Brief (8 December 2008), ¶ 167) further observed that if the discretion of a host State is exercised on the basis of corruption, then «a fundamental breach of transparency and legitimate expectations» occurs.


4 Ibid., ¶ 181.


6 In this regard, see a comparative analysis on how corruption is dealt with in commercial and investment arbitration in: *Cremades*, Op. cit., p. 210. In particular, he notes that as «investment arbitration is permeated by public international law… this set it apart from international commercial arbitration in may significant aspects». 
More recently, in *Metal-Tech*, the Tribunal merely hinted that the State will not remain unpunished for a proven instance of corruption, but limited the said punishment to a costs order. It remains unclear whether the Tribunal in this case attributed corruption to the State merely for the purposes of an adverse costs order, or largely implied that the State is liable for corruption.

Finally, in the *Spentex v. Uzbekistan* matter, it would appear that the Tribunal did not delve into State responsibility for corruption in great detail. Rather the Tribunal has seemingly attributed corruption to both Claimant (by dismissing its claims) and Respondent (by blaming Respondent for failure to prosecute or even investigate, and adopting a creative approach to costs allocation, as discussed below).

The prevailing reluctance of tribunals to address the issue of State responsibility for a consummated act of corruption, at least prior to the *Spentex* Award, led some scholars to opine that the one-sided «sanctioning regime carries the implicit conclusion that host States are not internationally responsible for corruption in which its public officials [are] complicit». Arbitrators, too, have underscored the «powerful position» that a Respondent State would find itself in if the legality of the investor’s conduct is considered at the jurisdictional stage, whereas the legality of the host State’s conduct is dealt with (if the jurisdictional hurdles are cleared) at the merits stage.

The interim conclusion as to the State responsibility for solicitation of bribes by the State’s public officials would then be two-fold. Assuming the bribe was unconsummated, as was the case in *EDF v. Romania*, the responsibility of the State is clearly established. No conclusive response can be given however in case of a consummated bribe – both jurisprudence and academic literature have not settled on whether such an act would be attributable to the State. The authors lean toward the view that the distinction between unconsummated and consummated acts of corruption is somewhat

---

1. See: *Metal-Tech Ltd. v. Republic of Uzbekistan*, Award, ¶ 422 («The law is clear — and rightly so — that in such a situation [of an investment tainted by corruption] the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs»).


artificial — what matters for purposes of State responsibility is a representation made by the «receiver» of the bribe that he is acting on behalf of the State, or cloaked with the authority of the State.

4.1.2. State Responsibility for Failure to Investigate and / or Prosecute a Reported Instance of Corruption

Moving now to the second scenario, the question of whether the State is responsible for a failure to investigate, let alone prosecute, an instance of corruption, remains unsettled in jurisprudence and doctrine. Moreover, lines are yet to be drawn as to what would constitute a «failure»:

- is it any attempt to investigate; or
- a superficial investigation;
- what if a successful investigation is not followed by prosecution; or
- what if the prosecution leads to a new act of corruption, now to avoid liability of the public official initially involved?

In fact, it is remarkable that no reported investment arbitration case contains references to the States actually taking prosecutorial actions with respect to the official involved in alleged instances of corruption. To the contrary, various Tribunals have repeatedly noted — as a mere observation or with a certain degree of reprimand — the failure of States to undertake any attempts to prosecute the alleged culprit, as in Wena¹, World Duty Free² and Spentex³. The same sentiment is echoed in academic literature: Betz notes, for instance, that «the reality in foreign bribery cases is that the recipients of the bribes are never prosecuted»⁴. Curiously, but perhaps not inexplicably, parallel criminal investigations into allegations of corruption are a common occurrence in commercial arbitration⁵.

Some authors express the view that a decision by the State not to prosecute should not equate with acquiescence in corruption, in view of prosecutorial discretion, higher standards of proof in domestic proceedings than in arbitra-

¹ Wena Hotels Ltd. v. Arab Republic of Egypt, Award, ¶ 116.
⁴ Ibid., p. 300; see further: Cremades, Op. cit., p. 218 (noting that «[t]he implications of the State’s inaction when faced with the corruption of its own officials is a complex subject that awaits further development in case law»).
tion, and limited domestic resources\(^1\). However, this suggestion overlooks the fact that the criticism of Tribunals in the jurisprudence is directed not to the extent of successful domestic convictions but, most often, the complete lack of any domestic investigations, let alone prosecutions. Thus, while it may remain a factual matter whether or not specific (and proven) efforts of a State to investigate and prosecute instances of corruption are sufficient to allow a corruption defense in the arbitration proceedings, the State’s reluctance to demonstrate in good faith that it is genuinely concerned by the matter, beyond the realm of investment arbitration, should at the very least raise a «red flag» as to the real intentions of the State.

Conversely, some authors opine that a State can only raise a corruption defense if it has first demonstrated that it undertook genuine efforts to prosecute and punish the culprits\(^2\). Although viable, this suggestion is also not without criticism. On the most generic level, the difficulty of this approach would lie in the confrontation between the concepts of procedural fairness and equality of arms (on the one hand), and waiver or acquiescence (on the other hand). Put differently, while a party can hardly be prevented from raising a defense from a procedural point of view, it would be for the Tribunal to then give proper weight to this defense, in view of the party’s prior knowledge of the facts on which the defense is based on (and perhaps even a failure to act earlier on this knowledge).

This also raises the issue of timing. Indeed, if demonstrated that a State was not aware of corruption before the investment arbitration, and that it did not close its eyes on the same indicia it invokes in the arbitration, then the requirement to investigate or prosecute can arguably be dispensed with.

Furthermore, one could reasonably question what exactly would constitute «genuine efforts» to uncover an instance of corruption. It is also plausible that corruption becomes apparent only when specialized legal counsel are instructed for the purposes of defending the State in an investment arbitration, especially when such counsel adopt a «no stone left unturned» approach.

This shows that tying the corruption defense with the State’s prior efforts to investigate (and / or prosecute) same is essentially a case-specific issue that would need to be resolved based on individual fact patterns. This is in contrast with the general principles of responsibility of States for acts of corruption, analyzed in the preceding sub-section, where the debate is indeed more legal, than factual.

\(^1\) See, e.g.: Greenwald, Op. cit.
In conclusion, there is no universal formula as to State responsibility for corruption under international law. Unconsummated extortion of a bribe by a public official appears to render the State responsible therefor. In turn, a consummated bribe demonstrates a remarkable asymmetry in that while the claimant investor will be liable for corruption resulting in a dismissal of its claim, the State is likely to avoid liability due to lack of attribution, except in certain specific factual scenarios.

4.2. Arbitrator’s Toolset

Assuming State responsibility for an act of corruption is established, the question then arises as to what powers, and specific tools, does an Arbitral Tribunal have to penalize the State. A comprehensive review of case law and academic writings reveals the following tentative «toolset».

First, the Tribunal may simply condemn the Respondent State, or the specific public official involved in corruption. At first blush this may seem as an attempt by the tribunal to sua sponte extend its jurisdiction to a non-party to the arbitration. However, making a negative (condemning) statement regarding a proven instance of corruption, and, if applicable, naming the public official involved therein, does not equal prosecution or even sanctioning in any way that public official. This remains the realm of the Respondent State and, possibly, other States that may have jurisdiction over this instance of corruption under an applicable domestic or international legal instrument. This «tool» from the tribunal’s «toolset» was used in World Duty Free, where the Tribunal noted that the proven corruption of Respondent’s former President was a «highly disturbing feature», especially in view of the fact that Kenya was advancing corruption as a blanket defense against the investor’s claims. In Spentex, too, the Tribunal has scolded Respondent for the purported role of its officials in the corrupt behavior, reportedly noting that «it takes two to tango», and further reprimanded Respondent for its failure to disclose the name of the official involved in the corruption plot.

Understandably, condemnation is unlikely to have any tangible effect on the Respondent State. While investment arbitration proceedings tend to be more public than commercial arbitrations, the mere fact that an international tribunal has recognized the fact of corruption, and reprimanded the Respondent State, or the specific public official of that State, in writing may only translate in public indignation — assuming the fact of corruption was not previously known or suspected.

Second, the State may be prevented from relying on the corruption defense, if it fails to prosecute the corrupt public official (e.g., to show commitment to fighting corruption), as contemplated (but not implemented, for unspecified reasons) in Wena v. Egypt. In the Wena Award, the Tribunal merely noted that Egypt was aware of the alleged instance of corruption, but failed to prosecute the State official allegedly on the receiving end.

State courts have also frowned upon non-specific allegations of corruption not substantiated by any evidence of investigations into the matter. For instance, the Paris Court of Appeal held in its 14 October 2014 decision in the Congo v. Commisimpex set-aside proceedings that Congo’s referral to a general climate of corruption within its government — without specifying the persons involved in corruption or prosecuting them — were insufficient grounds to set aside an arbitral award against Congo.

However, to date no Tribunal has expressly refused to consider a corruption defense due to the State’s failure to investigate or prosecute it. Moreover, is a somewhat troubling development (at least from the perspective of corruption allegations), the Tribunal in Fraport v. Philippines decided not to entertain claimant’s argument that Philippines should be estopped from raising an illegality of investment defense since the State did not undertake any effort to prosecute this matter internally.

In view of the apparent lack of jurisprudence constante, and moreover the uncertainty of the legal basis for refusing to consider the corruption defense absent evidence of prior investigation by the host State, it is unclear whether this technique will ever attain widespread recognition.

Third, using their broad powers to allocate the costs as they deem fit, at least two ICSID Tribunals have taken into account the proven instance of corruption in deciding that Respondent should bear its own legal costs and

---

1 Wena Hotels Ltd. v. Arab Republic of Egypt, Award, ¶ 116 («...given the fact that the Egyptian government was made aware of the agreement by Minister Sultan but decided (for whatever reasons) not to prosecute Mr. Kandil, the Tribunal is reluctant to immunize Egypt for liability in this arbitration because it now alleges that the agreement with Mr. Kandil was illegal under Egyptian law»).


3 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12, Award, ¶ 377, 385–386.

4 ICSID Convention, Art. 61(2).
half of the arbitration costs — in Metal-Tech\(^1\) and Spentex. Indeed, a departure from the «losing party pays» principle in favor of allocating to costs equally (or even shifting them further upon Respondent) is in conformity with a «balancing approach» advocated by some authors\(^2\).

Fourth, and finally, the Spentex Award that prompted this article, proposed a novel and «creative» tool to reprimand the Respondent State complicit in corruption\(^3\). Namely, in addition to allocating the costs, the Tribunal recommended the State to take specific «compensatory» measures, e.g. by donating reportedly US$ 8 million to a UN Development Program Anti-Corruption Fund, with a threat to make a further adverse costs order in case of non-compliance. Notably, the Tribunal took into consideration the fact that: (i) Uzbekistan refused to disclose the names of the State officials involved in the alleged instance of corruption; and (ii) the State’s own witnesses denied corruption\(^4\).

A solution not yet seen in case law, and arguably applicable in only a narrow set of circumstances, is the application of the Common law «the loss lies where it falls» principle. While, as elaborated above, this seems to be the default view in investment arbitration case law and academic opinion with respect to the consequences of a positive finding of corruption on the investor, in the event that the Respondent State may have counter-claims against the investor, these would arguably also be deemed inadmissible further to the same positive finding of corruption.

In conclusion, the Tribunals appear to have readily available a number of tools that they can use to penalize Respondent States for being implicated in corruption. It would thus seem artificial — if not asymmetric and leaning to the interests of Respondent States — to merely suggest, as some authors do, that simply because investors that have engaged in corrupt behavior lose protection in arbitrating in a neutral forum, will lead to a reduction in foreign investment and may serve as an «added incentive for governments to take a harder line on reining in corruption within their own systems»\(^5\). A more immediate reaction to host States’ corrupt behavior is needed.

\(^1\) Metal-Tech Ltd. v. Republic of Uzbekistan, Award, ¶ 422.


\(^4\) Ibidem.

5. Summary and Outlook

While the diverging approaches that the investment arbitration tribunals take towards the responsibility of Respondent States for acts of corruption do not allow to speak of any *jurisprudence constante*, the authors submit that a positive trend can already be spotted in case law. As the corruption defense gets closer to being part of a common toolset of Respondent States (and their counsel) defending themselves against Claimant investors, it is hoped that the tribunals will also adopt a corresponding toolset to address the issue of corruption in a balanced way by penalizing Respondent States when circumstances so require.

However, even with such a toolset, tribunals alone may not well be in a position to address corruption effectively and comprehensively. Prosecutorial actions from States themselves are also needed, which raises a host of questions on the (possibility of) cooperation between tribunals and State authorities in investigating and prosecuting instances of corruption — a topic which is outside the scope of the present article.