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Summary of Young-OGEMID Symposium No. 19: "Illegality and Corruption in Investor-State Dispute Settlement" (February/March 2025)

by W. Shin

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Summary of Young-OGEMID Symposium No. 19: "Illegality and Corruption in Investor-State Dispute Settlement" (February/March 2025)

by Wooseok Shin[1]

Executive Summary

Young-OGEMID conducted its nineteenth virtual symposium, Illegality and Corruption in Investor-State Dispute Settlement (**ISDS**), from 24 and 26 of February (illegality) and 28 February and 3 March (proving corruption). It addressed the significant issues in ISDS, frequently raised by the State government as a jurisdictional objection.

Allegations of illegality and corruption are commonly observed in investor-state dispute settlement proceedings, sparking ongoing debate among scholars and practitioners. In recent years, some legal standards on illegality applied by tribunals have come under scrutiny, along with countervailing factors such as investor misconduct also gaining attention. Proving corruption also remains a complex challenge, often hindered by insufficient evidence in many cases. In this Young-OGEMID Symposium, our panelists will delve into these critical issues within ISDS, examining the challenges posed by illegality and corruption, and discussing potential developments that could strengthen justice in the realm of international investment law moving forward.

The structure of the symposium and list of speakers who kindly agreed to share their insights, as well as their respective topics, are as follows:

24 Feb 2025	**Prof. Yueming Yan**, *Alleged "Unclean-hands" Doctrine in ISDS*
26 Feb 2025	**Dr. Martin Jarrett**, *Investor's Misconduct concerning illegality and corruption in ISDS*
28 Feb 2025	**Dr. Martim Della Valle**, *Evidence of Corruption in International Arbitration*
28 Feb 2025	**Dr. Emmanuel O. Igbokwe**, *Inquisitorial Approach of the Tribunal on Corruption Issues*
3 Mar 2025	**Prof. Kamalia Mehitiyeva**, *Parallel illegality proceedings and proportionality in assessing illegality and corruption.*
3 Mar 2025	**Dr. Kathrin Betz**, *Proving Corruption in International Arbitration*

Wooseok Shin (Senior Young-OGEMID Rapporteur) acted as moderator of the Symposium.

Speaker 1 – Prof. Yueming Yan, Chinese University of Hong Kong

Seminar/Topic 1: Alleged "Unclean-hands" Doctrine in ISDS

Wooseok Shin officially opened the first session of the symposium by introducing the first

[1] **Wooseok Shin** is a New York-qualified lawyer specializing in investor-State dispute settlement (ISDS) and international commercial arbitration. Since 2023, he has served as a Senior Rapporteur for Young-OGEMID. He earned his LL.M. from Pepperdine Caruso School of Law as a JAMS Scholar and holds an LL.B. from Tsinghua University in China.

speaker, **Prof. Yueming Yan**.[2]

Prof. Yueming Yan shared her insights by outlining a couple of points to note with attached PDF material on this topic:

> "***The typical scenario of allegations of corruption***
>
> *In most ISDS cases where corruption is debated, it is typically the host State that raises corruption as an objection on jurisdiction or admissibility against the investor's claims. The respondent State would contend that the investment was procured through corrupt interactions between the investor and public officials of its government; such an investment is deprived of treaty protection or access to investor-State dispute settlement (ISDS).*
>
> ***A defense against the investor's claims***
>
> *While host States have relied upon various rules to defend against an investor's claims, investment tribunals have mainly confirmed three authorities: the legality requirement (such as in Metal-Tech v Uzbekistan), the 'clean hands' doctrine (such as in Spentex v Uzbekistan), and transnational public policy (such as the World Duty Free case).*
>
> ***Challenges with 'unclean hands' doctrine***
>
> *I wish to focus initially on the 'unclean hands' doctrine, which I argue should not be considered a valid or authoritative basis for tribunals to dismiss investor claims in the typical context involving allegations of corruption.* ***My objections are twofold****: firstly, the doctrine is poorly defined and lacks recognition as a source of international law; secondly, even if recognized, it typically does not apply to the usual pattern of corruption claims within ISDS contexts. If the doctrine were applicable, it would only be relevant in situations where there is an identical or reciprocal legal obligation between the parties involved. As demonstrated in my slides[3], the obligations breached by providing bribes and those violated by the State's regulatory measures (allegedly constituting unlawful expropriation or breaches of Fair and Equitable Treatment) are* ***neither identical nor reciprocal****.*
>
> ***Other considerations: legality requirement or transnational public policy***"

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[2] **Dr. Yueming Yan** is an Assistant Professor at the Faculty of Law, The Chinese University of Hong Kong (CUHK Law). Currently, she serves as a Co-Chair of the American Society of International Law (ASIL) Asia-Pacific Interest Group, an Editorial Board Member of the Journal of International Economic Law, and a Senior Fellow at The University of Melbourne, Law School. Yueming's research has been published journals such as the *Journal of International Economic Law*, *Journal of International Dispute Settlement*, *ICSID Review – Foreign Investment Law Journal*, *University of Pennsylvania Journal of International Law*, and *Melbourne Journal of International Law*. Her PhD dissertation – *Improving international investment law's treatment of (anti-) corruption: Towards a more balanced approach* – was granted the Award on International Investment Arbitration Law in memory of Piero Bernardini (2022). Additionally, Yueming received the 2023 Journal of International Economic Law (JIEL) Excellence in Reviewing Award. Before moving to Hong Kong, Yueming was affiliated with Singapore Management University and the Singapore International Dispute Resolution Academy as a Visiting Assistant Professor. She holds a PhD in law from McGill University.

[3] See Annex I - Dr. Yueming Yan, Chinese University of Hong Kong "Illegality and Corruption in ISDS", kindly reproduced with permission.

While concurring with Prof. Yan's assessment that the invocation of the "unclean hands" doctrine has emerged as a strategic instrument for respondent State, such as the case in the *Rusoro Mining v. Venezuela*, **Jorge Escalona** posted the following questions:

> "*1. When it comes to the nature of the unclean hands doctrine, is the legality requirement of a manifestation of the clean hands doctrine or it represents the doctrine itself?*
>
> *I note that some tribunals such as in Yukos v. Russia (Award, para. 1357) and Fraport v. Philippines (Award, para.328) seem to suggest that there is a difference among the two concepts.*
>
> *I think of this mainly in those cases where a legality requirement is not expressly contained, could there be a presumption or an implied condition of it by way of the unclean hands doctrine if it were to be pleaded by a party or considered by a tribunal as a principle of international law?*
>
> *2. Could the clean hands doctrine be applied not as a general principle of law but under the lens of transnational public policy? Mainly when the foreign investor illegality was of such amount (i.e. human rights violations) that it breached international public policy?*
>
> *…*
>
> *What are some of the recurring factual and legal issues that parties and tribunals face when allegations of corruption in the investor-State relationship arise? (i.e., burden of proof, attribution of responsibility, etc.). Your slides exemplify the clean hand's doctrine by depicting a two-way cycle of when bribery is configured, yet I am sensitive from personal experience that there is an addex complexity regarding the evidence required to prove bribery allegations. Mainly when corruption allegations involve a third-party intermediary who is not a party to the arbitration.*
>
> *For example, when it comes to evidentiary issues in bribery claims, how can you attempt to prove it when there might be little to no direct physical or documentary evidence of corruption? Could you pursue obtaining testimonies from public officials or politicians who have been bribed without exposing them to criminal liability in their home State? Could the tribunal adopt a more proactive approach where the evidence discloses a prima facie suggestion of corruption? Could it order the parties to produce specific evidence or even conduct an investigation on its own?*"

Prof. Yan thanked for the questions and addressed the first two questions of **Jorge Escalona** as follows:

> "*I have also observed, as you mentioned, that some tribunals contextualize the 'unclean hands' doctrine within the 'legality requirement', particularly in the absence of an explicit legality clause in the relevant BIT. The 'legality requirement' in a BIT mandate that investments be established 'in accordance with the laws of the host state'—a phrase whose precise material and sometimes temporal scope is indeed subject to extensive debate. Yet, the origin and parameters of the 'unclean hands' doctrine remain comparatively opaque; even the ICJ has had many opportunities to clarify this issue*

but has yet to define or acknowledge it as a source of international law.

Regarding whether this doctrine can be inferred when a legality requirement is not expressly stated in a BIT, I would argue that customary international law might interpret treaty terms as implicitly including a 'condition', depending on the language and context used. This condition could manifest as an implied legality or good faith requirement but does not necessarily extend to an implicit incorporation of the 'unclean hands' doctrine. In my view, the legality requirements are distinct from the doctrine of 'unclean hands.'

As for the transnational public policy, while there have been 'successful corruption claims' based on this policy, the precise relationship between this and the 'unclean hands' doctrine remains nebulous. The World Duty Free case did touch on 'unclean hands' very briefly (I recall only a couple of sentences) in its discussion of transnational public policy against corruption, but did not establish a clear or well-defined link between the two concepts.

The fact that the 'unclean hands' doctrine has been variably linked to concepts like legality requirements and transnational public policy (and more) further highlights the considerable ambiguity surrounding its exact nature."

Prof. Yan then added a few observations on **Mr. Escalona's** last question concerning evidentiary challenges proving corruption while noting that it may be answered with more expertise by other panelists in the next few days:

"*Some tribunals have recognized the use of 'red flag' or circumstantial evidence in proving corruption (such as in Glencore v. Colombia and in Tethyan v. Pakistan). The Unión Fenosa Gas tribunal has regarded circumstantial evidence 'as good as direct evidence in proving corruption'. In addition, a few tribunals have been proactive in investigating corruption, such as in Metal-Tech v Uzbekistan. Even when a tribunal has made a decision on given corruption claims, it may still allow new evidence and start a new round of examination of these claims, which was the case in Niko Resources v. Bangladesh.*"

Prof. Strong noted that this topic relates to whether equitable doctrines are recognized in the investment setting and asked "*whether the type of corruption would have to be identical to inspire the application of the doctrine, or whether another type of improper behavior would allow invocation of the doctrine in what might be seen as a form of equitable set-off.*" **Prof. Strong** then stressed that the doctrine is vaguely defined in the international setting which may be unfamiliar to civil law lawyers due to its common law roots, but similar concepts may exist elsewhere, making it a potential doctoral research topic.

To this question **Prof. Yan** elaborated as follows with the specific cases and investment treaties:

"*To my knowledge, arbitral tribunals have not employed other equitable doctrines to address corruption allegations, with the potential exception of the 'unclean hands' doctrine, if it is to be considered an equitable doctrine. However, I welcome any corrections to this observation.*

While the 'unclean hands' doctrine remains somewhat ill-defined in international law, if we were to attribute a specific legal character to it, I would argue that the 'principle of equity' is the most fitting description. This principle, as Professor Strong described using the term 'equitable doctrines,' aims to deny equitable relief to a complainant who has engaged in similar misconduct to that which they allege. For instance, if both Country C and Country D are parties to the same international treaty, Country C cannot accuse Country D of failing to comply with a treaty obligation if Country C is itself in violation of the same obligation. This application was notably advocated by Judge Hudson in the PCIJ's Diversion of Water from the Meuse case, emphasizing that the obligations in question must be reciprocal.

Drawing a parallel to investor-state arbitration involving corruption, such doctrine may be applied in one such scenario: a host state government, bound by an FET or MFN clause promising anti-corruption measures, faces officials who solicit bribes from investors. If an investor pays a bribe but fails to secure the investment and subsequently alleges a breach of the FET clause, as in EDF (Services) v. Romania, the government could counter with the argument that the investor's corrupt actions, as per the unclean hands or equitable doctrine, preclude them from claiming a breach of the FET clause.

Dutch Model BIT Article 9 frames anti-corruption within FET: "A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes: (e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct." Article 14 of the Slovakia-Islamic Republic of Iran BIT (2016) associates anti-corruption directly with MFN, stating that a measure breaches MFN if it serves a legitimate public purpose, such as eliminating bribery and corruption, and is reasonably connected to the stated purpose.

I think this example might illustrate a potential reciprocal relationship between the investor's corrupt act and the alleged breach of treaty obligations (such as MFN/FET). There could be other scenarios in foreign investment where such a reciprocal relationship can be established."

Speaker 2 – Dr. Martin Jarrett, Max Planck Institute for Comparative Public Law and International Law

Seminar/Topic 2: Investor's Misconduct concerning illegality and corruption in ISDS

Wooseok Shin introduced the second sub-topic of the symposium, **Investor's Misconduct concerning illegality and corruption in ISDS**, and the second panelist, **Dr. Martin Jarrett**.[4]

Dr. Jarrett opened the discussion by noting the relevancy of investor misconduct to the merits

[4] **Dr Martin Jarrett** is an Australian-qualified lawyer. He holds a Bachelor of Arts, a Bachelor of Laws (with first class honours), a Graduate Diploma of Legal Practice, and a Doctor of Laws (summa cum laude). He currently works as a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. His research focuses on international business transactions and international investment law, particularly the topics of causation and investor misconduct. He also regularly lectures on these areas of law at universities across Australia and Europe. Aside from his academic work, he works as a legal consultant. As part of his practice-orientated work, he works on a delegation at UNCITRAL Working Group III.

of a treaty-based dispute:

> "*Understanding the Issue*
>
> *Adjudicating on investor misconduct that is relevant to the merits of a treaty-based dispute presents a difficult problem for arbitral tribunals. Fundamentally, their role is to pass judgment on the States' treatment of the investment in question, as opposed to assessing the investor's conduct. However, the factual matrixes that give rise to treaty-based disputes sometimes contain elements of investor misconduct. To perform their main role, arbitral tribunals ask whether the State's conduct constitutes a breach of investment-protection standards. These standards impose obligations on States, not on investors. Quite the conundrum! Arbitral tribunals have the legal tools with which to assess States' conduct (the investment-protection standards), but what legal tools are there for adjudicating on investor misconduct?*
>
> *Jurisdiction-Relevant Tools*
>
> *As so helpfully explained by Prof. Yan, at the jurisdictional phase of an investment treaty arbitration, there are, in theory, three tools that arbitral tribunals can use. But as 'transnational public policy' and 'clean hands' are doctrinally dead or, at best, on life support, they are not particularly helpful. Investment-legality requirements do have real potential, but their temporal scope is usually limited to misconduct falling within the phase that is the 'making of the investment', as opposed to its operation.*
>
> *Merits-Relevant Tools*
>
> *The point is that certain instances of investor misconduct cannot be adjudicated on in the jurisdictional phase. This raises the question: what legal tools are there for arbitral tribunals to address investor misconduct in the merits phase? The most prominent tool is 'contributory fault'. It finds its doctrinal foundations in the ILC Articles on State Responsibility (Article 39), which can become applicable law in investment treaty arbitration because, in the relevant ISDS clause, there will usually be a provision to the effect that one source of applicable law is 'principles of international law'.*
>
> *A fundamental point needs to be made at the outset about contributory fault: it is a free-floating concept with which to sanction investor misconduct. Rather, any investor misconduct must be causally connected to the investor's loss. This causal connection can be either direct or indirect. As regards direct causal connections, the classic example involves an investor making an investment when it is foreseeable that the State will take the measures that the investor subsequently complains about. As regards indirect causal connections, they arise when the investor provokes the State's action that the investor subsequently complains about, with a prominent example being seen in the case Oxy v Ecuador (II).*
>
> *Once a causal connection has been established, the challenge does not end. The next step involves apportioning responsibility between the investor and the State. How should this be done? It is a question that I have my own thoughts on, but I hand it over to you to give your thoughts and to also challenge or comment on any of the content above.*"

Wooseok Shin asked the first two questions concerning issues raised by Martin: (i) given the apparent uncertainty and inconsistency in distinguishing between serious and minor illegality, whether there are discernible trends or instructive cases where tribunals have clearly articulated standards for assessing illegality in such contexts; and (ii) whether there are any principles and methodologies that should be applied in apportioning responsibility.

Dr. Jarrett thanked for the questions and responded as follows:

> "*Distinguishing Serious Illegality from Trivial Illegality*
>
> *Coming to your questions regarding the distinction between serious illegality and trivial illegality, perhaps the main point to note here is that if the misconduct has an element of corruption or fraud about it, then it is much more likely to be labelled 'serious'. Misconduct lacking these elements is much more likely to be labelled 'trivial illegality'. Of course, there will be some cases where the extent of corruption or fraud will be limited, which might mean that they are labelled 'trivial'. But, generally speaking, if there's corruption or fraud, then the investor might not satisfy any investment-legality requirement.*
>
> *This point actually introduces another question that I have recently considered, specifically: could an investment-related illegality be 'cured', with the result that it would not fall foul of an investment-legality requirement? It's a question that I have addressed in some recent scholarship, which will be published (open access) soon.*
>
> *Contributory Fault and the Apportionment of Responsibility*
>
> *Coming to your questions about the apportionment of responsibility, there are a number of different theories, but I'll give you my own. The foundation of my theory is that it depends on the directness of the investor's contribution to its loss. If the contribution is direct, then the investor should be apportioned a degree of the responsibility that corresponds with its degree of foresight of such loss.*
>
> *Apportionment in Cases of Direct Contributions*
>
> *Let me give you all an example to illustrate this idea. Suppose that, before the investor makes its investment, the State is making noises about introducing a tax that will have devastating impacts on the investor's proposed investment. Nonetheless, the investor goes ahead with the investment. Some years later after the investment has been operating, the tax is introduced, which, as predicted, has negative consequences for the value of the investment. The investor brings an investment-treaty claim vis-à-vis this tax. This claim is upheld, but the State counters it with a plea of contributory fault, which is also successful.*
>
> *Now, how should the responsibility be apportioned? According to my view, it is a matter of estimating the degree of foresight (in respect of the enactment of the tax into law) that the investor should have had at the time of making the investment. As there were only 'noises' in this case, that degree of foresight might be relatively low.*

Apportionment in Cases of Indirect Contributions

As regards indirect contributions, as previously noted, they can be thought of as investor conduct that provokes the State to perform the conduct that the investor complains about in the investment-treaty arbitration. I am not convinced that foresight should be used in this kind of case. I rather think that we should look at the gravity of the investor's misconduct. If the investor provokes the State, yet its conduct is faultless, then no responsibility should be apportioned to the investor. However, the greater the degree of fault, on the part of the investor, the more justified that the State's reaction can become, which means that the investor should be apportioned part of the responsibility."

In relation to **Dr. Jarrett**'s first post, **Dr. Stanislava Nedeva** concurred with the deficiency of tools available to tribunals when deciding on investor misconduct and asked whether a more overarching reform might be helpful in addressing this issue, with the aim of bringing a better balance between state and investor accountability. She noted Dr. Jarrett's involvement in a delegation at UNCITRAL Working Group III and inquired whether there have been specific discussions and negotiations at that level, and whether there should be. Finally, she asked whether the law should develop in a different way, rather than through reform at the international level.

Dr. Jarrett answered three questions addressed by **Dr. Nedeva** as follows:

"*Could the reform process at UNCITRAL bring better balance? The reform process is already going down this path, particularly because it is set to make counterclaims a feature of, let's call it, ISDS 2.0. In this regard, I draw your attention to the Draft Provisions on Procedural and Cross-Cutting Issues.*[5]

As you correctly point out, there is another question that needs to be asked, which is: should we be trying to create additional accountability measures at the international level for investors? There are different views on this. According to my view, if an investor engages in misconduct, then, ideally, that misconduct should be dealt with under local law in the host State, which might include prosecuting the investor. This is really the paradigm of the rule of law in action—something we should all want to see. Another point worth noting here is the perspective of judges in domestic courts, which is the default location for dealing with investor misconduct. If international-level adjudicators start applying the domestic law of the host State, this will provoke a reaction from judges in domestic courts.

This leads nicely to your last question, specifically on other measures for dealing with investor misconduct (rather than taking the 'international option'). Before getting to this question, I should note that creating 'international investor obligations' is one way to ensure that domestic law is not applied at the international level, but these obligations are also not a perfect solution, if only for the very practical reason that they haven't really gained any traction since they first came to light. What does this mean when we think more broadly about accountability for investor misconduct? I am afraid that the answer might be rather boring: the answer lies in a well-functioning legal system in the host State, a legal system where the rule of law is strong and investors

[5] https://undocs.org/en/A/CN.9/WG.III/WP.244.

are held accountable for their misconduct before domestic courts.

'Going international' is not always the solution!"

Speaker 3 – Dr. Martim Della Valle, Marchini, Botelho, Caselta, Della Valle Advogados

Seminar/Topic 3: Evidence of Corruption in International Arbitration

Wooseok Shin introduced the third sub-topic, **Evidence of Corruption in International Arbitration**, and the third panelist: **Dr. Martim Della Valle**.[6]

Dr. Martim Della Valle opened the discussion with his post in three structures, which are (i) applicable standard of evidence for corruption allegations; (ii) test to evidence corruption; and (iii) corruption red flags:

"*(i) What is the applicable standard of evidence for corruption allegations?*

The International Centre for Settlement of Investment Disputes (ICSID) Convention establishes (art. 52 (1)) that a departure from a fundamental rule of procedure can be the cause of annulment of an award. Therefore, a bad decision on the allocation and standard of proof has the potential of being a ground for non-recognition or annulment an award (albeit in practice this ground is hardly ever accepted).

On the other hand, different standards of proof exist internationally. Common law resorts to at least two types of standards, varying according to the degree of evidence required for a certain case. First, "preponderance of evidence" – which sets out that a proposition will be held if it appears to be truer rather than false ("more likely than not"). This is typically the standard for civil and commercial cases. Second, "beyond reasonable doubt", which normally requires a robust set of evidence. In general, this is the standard for criminal trials. Civil law jurisdictions usually set out a different standard, based on the "sufficient inner conviction of the judges" to rule the case (l'intime conviction du juge). This means that the judge must be reasonably convinced about the facts in question, in a judgment of logical probability. In practice international arbitrators have considerable latitude to weigh the evidence.

Corruption is defined as a criminal offense in most jurisdictions. When assessing corruption allegations, should the arbitrators apply the standard of proof applicable to criminal prosecution? Of course there are different views, but I (rather strongly) submit that arbitral tribunals should avoid adopting stricter criminal law standards to decide commercial/civil matters as they are not criminal law enforcers. In other words,

[6] **Dr. Martim Della Valle** is a lawyer and arbitrator based in Brazil. Martim is a lecturer and a member of the International Academic Advisory Board of the International Anti-Corruption Academy (international organization based in Vienna, Austria). Martim has been the Chief Compliance Officer of a large multinational and a former board member of Transparency International Belgium. Martim holds a PhD in International Law from the University of São Paulo (with highest honors) and has published two books on international arbitration: Arbitragem e Equidade (São Paulo, Atlas, 2012) and International Arbitration Ex Aequo et Bono (Huntington, Juris, 2016). Martim has also published several of articles on International Arbitration, Compliance and Anti-Corruption matters. Martim regularly sits as independent audit and compliance committee member of large corporations.

arbitral tribunals do not enforce criminal sanctions (such as imprisonment and criminal fines). They draw commercial/civil consequences from conducts that may also be defined under criminal law (e.g., the unenforceability of a contract procured by extortion/corruption). Even when criminal law is the only source to define certain conduct as illegal an arbitral tribunal applying such definition is not acting as a criminal law enforcer.

(ii) A Test for Evidence Corruption?

Due to its very nature, corruption is extremely difficult to prove. Even though corruption is not an infrequent issue, there is usually a lack of direct evidence and straightforward admissions of guilt. On the other hand, corruption allegations cannot be ignored. In a recent article, I submit that a combination of evidence and negative inferences can be an effective way to tackle the inherent difficulties of proving corruption allegations. It works in a two-step framework: first shifting the burden of proof from one party to the other, when and if certain prima facie indicia are presented. If such a party does not disprove these allegations, then, secondly, the tribunal should adopt the standard of proof to establish if corruption or fraud took place.

In the first step, after corruption allegations have been brought against a party, the tribunal should determine if enough indicia of corruption have been shown. Such red flags may vary between industry sectors and from the type of contract, but common signs include, for instance, if a consultant employed by the party has close personal, familial or professional ties with a key government official or his other relatives; if there were requests for payments in cash or cash equivalents; if there was a refusal to provide reasonable information or contradiction with previously provided information; or if there were abnormally high commissions. If the tribunal is satisfied with the number and strength of the red flags that were provided prima facie by the alleging party, it should then explicitly shift the burden of proof to the other party and request that it provide counterevidence – be it documentation, witness testimony, etc. – disproving the allegations.

The prima facie standard will also not be the ultimate standard of proof by which the tribunal would evaluate the allegations. This is the second step: once the tribunal concludes that the accused party has not managed to sufficiently dispel the allegations of corruption, it should then apply an – at least relatively – lower standard in its review of the corruption claim (such as the preponderance of evidence standard).

To make this model systematic: the existence of at least one red flag of corruption is sufficient for the tribunal to start a more in-depth review. I believe it is the duty of the arbitrator to prevent such a serious matter from going unexamined. If during the proceeding more evidence of the practice may emerge, it shall be incumbent upon the arbitrator to resort to adverse inferences. The party who is not able to produce direct evidence of the legality of the transaction and does not present convincing reasons for such, will be subject to adverse inferences by the arbitrator, always when they are reasonable and proportional to the evidence and to the fact intended to be proved. It is reasonable to consider, at this point, that two uncontested red flags would already be sufficient to make inferences about corruption. The relevance and importance of the red flags must always be assessed in light of the (non-corrupt) commercial practices used in the sector involved (e.g., the level of commissions and the work product of

consultants vary according to the specific industry practices).

This approach has already been somewhat suggested in Metal-Tech v. Uzbekistan. Metal-Tech had entered into a molybdenum processing joint venture with two Uzbekistani government-owned companies, under the Israel-Uzbekistan Bilateral Investment Treaty. Later, the two government entities-initiated proceedings against Metal-Tech, claiming the distribution of dividends of their shares. Metal-Tech was ordered to do so but refused to comply, the two companies later filed bankruptcy proceedings against Metal-Tech and then submitted a request for arbitration. Uzbekistan's main defence was that the investment contract had been obtained through corruption, by engaging three so-called consultants – who included the prime minister's brother and a former government official – in bribery and lobbying. The tribunal found that the investment had indeed been established illegally and declined jurisdiction following its interpretation of the rules of the investment treaty. To reach this conclusion, the tribunal used six findings that qualified as red flags for corruption in the consultancy contracts. These were 'the amount of payments, the fact that there was no proof of service, the lack of qualifications of the consultants, the sham consulting contracts, the lack of transparency of the payee and the connections of the consultants with public officials in charge of Metal-Tech's investment'. The tribunal allowed Metal-Tech to prove the legitimacy of the consultancy services, but it was unable to do so. Though Metal-Tech did not seem to be withholding evidence, the tribunal concluded that it had not been able to substantiate the services because none were rendered. By applying this 'red flag analysis', the tribunal concluded that there was sufficient – even if circumstantial – evidence of wrongdoing.

The use of adverse inferences, as mentioned, cannot be unrestricted, and should be covered by criteria of reasonableness and proportionality. The Basel Institute on Governance, which developed an important and simplified practical guide for the detection and treatment of allegations of corruption and money laundering in international arbitration, suggests the following criteria for a diligent use of adverse inferences: (1) The party seeking the use of adverse inferences must produce robust evidence of the existence of corruption and must have produced in advance all available evidence to corroborate the evidence sought, or the tribunal must have identified sufficient evidence of corruption; (2) The party from whom evidence is sought must have access to the evidence and be able to produce it; (3) The party against whom the production of evidence is sought fails to give a convincing reason for not producing the evidence; and (4) The inference to be drawn from such conduct must be reasonable, consistent with the facts, and have a logical relationship to the nature of the evidence that has not been produced. This leaves the question as to which indirect evidence should be considered indicative of corruption and which may result in the use of adverse inferences by the court.

(iii) What Constitutes a Corruption Red Flags?

Red flags can be defined as "any fact that suggests commercial, financial, legal and ethical irregularities" or "circumstances that may indicate a party's propensity to make an illegal payment to officials and employees". While many indications are not themselves violations of anti-corruption laws, they indicate that additional care must be applied when analyzing the facts. If only one red flag is present or if it is taken alone, an arbitrator can potentially commit 'false positives'. However, when viewed

together, and within context, a large number of unclear red flags may indicate a high likelihood of wrongdoing.

The most common red flags listed by the compliance literature are:

(1) A reference check indicates that the advisor/consultant has a poor background or reputation;

(2) The contract involves a country that has a history of corruption cases and scores high in corruption rankings;

(3) The payer for the prime contract is a state or public company;

(4) The advisor/consultant is suggested by a public entity to mediate the procurement of services;

(5) The object of the consulting/advisory contract is not tangible;

(6) The main contract involves a sector with a history of corruption, such as defense, mining, health or public works construction;

(7) The advisor/consultant rejects anti-corruption commitments, as well as any liability for acts of this nature;

(8) The effective beneficiaries of the firms providing advice/consultancy are unknown or are individuals close to the managers or employees with decision making power over the main contract;

(9) The adviser/consultant does not have an actual office or does not have an office at the place designated for the performance of the obligations in the contract, with an opaque corporate structure and domicile;

(10) The adviser/consultant has only nominal directors, generally resides in tax haven territories or are lawyers;

(11) Due diligence investigations identify that the adviser/consultant owns a shell company or has a non-transparent corporate structure;

(12) The adviser/consultant does not have sufficient staff capable of performing contract obligations;

(13) The adviser/consultant requires that its identity, employees and directors are not disclosed;

(14) The contract value is high in absolute terms and in relation to the scope of the contract;

(15) The agent's remuneration is calculated as a percentage of the main contract value and the amount paid is disproportionately high compared to the work done by the agent;

(16) There is a little time-lapse between signing the contract with the intermediary and the date of obtaining the main contract;

(17) The contract must be paid into a bank account outside the agent's domicile;

(18) Amounts are due only after the main contract has been closed or has its initial payments made. Advisory/consultancy fees are fully contingent on success;

(19) There are no relevant records associated with the execution of the advisory/consulting contract; and

(20) Lack of transparency in information, with rudimentary accounting."

Andreas Mazuera asked the four questions, which were responded to by **Dr. Martim Della Valle** in turn, respectively:

1. *Do you have any thoughts on how tribunals should weigh investigating corruption allegations seriously against not punishing the party facing corruption allegations unduly or unnecessarily? Should the award avoid labelling certain acts as "corruption" and instead use other wording?*

   Dr. Martim Della Valle: "*I guess the short answer is that arbitrators are required to follow the facts brought to them. If serious corruption allegations are raised, of course they have a duty to look into the issue.*

   It is my view that arbitrators do not act as criminal law enforcers. They typically (or mostly) decide on contractual effects of certain acts that may also be defined as corruption under criminal law. Just for context, there are many conducts that fall under the "corruption" umbrella but are defined as different criminal offenses depending on the jurisdiction (e.g., bribery, trading in influence, abuse of function, embezzlement, illicit enrichment). Besides, even some elements of the classic bribery definition may vary according to the jurisdiction (e.g., what constitutes an advantage to a public official – money or any benefit -; requirements for simultaneity/concurrence between the benefit and the act or omission by the public official).

   On the other hand, especially when dealing with causes of annulment of contracts, the arbitrators typically deal with categories that are not the same of criminal law (e.g., error, deceit, fraud – dol, erreur, violence, lésion – which may, of course have corrupt acts as the ultimate cause). Therefore, there are instances where resorting to the "label" corruption is not necessary.

   I believe the arbitrators are not required to follow the strict characterizations of corruption given by criminal law but rather assess the facts and their consequences for the dispute, which may come from other fields of law.

   Please note that I am not suggesting that corruption should be overlooked. If the facts lead the arbitrators towards a conclusion that acts tainted by corruption happened and this is relevant for the dispute, they should not shy away from such conclusion, even if not resorting to the definition of corruption under criminal law.

2. *Since host-States are usually best placed to investigate and prosecute crimes in their territory, should the fact that the State has failed to raise corruption allegations before the arbitration proceedings even started being weighed against it?*

   Dr. Martim Della Valle: "*It is certainly an element to be considered by the arbitrators when weighing the evidence regarding corruption allegations. It is of course very useful to assess how the parties have behaved both in relation to the agreement and in the arbitration proceedings. Prosecuting a corruption case (or reporting it to the regulators/enforcement officers) is certainly an element to evidence how seriously a party has taken the corruption evidence/indicia it claims to exist. However, such behavior should be taken in perspective. There are legitimate reasons for a party to avoid criminal prosecution (e.g., prosecution may be time-barred). On the other hand, there can be politically driven prosecution (jurisdictions where prosecutors are not independent and will enforce whatever the government of the day dictates). Therefore, in as much as previous behavior towards the alleged corruption is important, one should take it with a grain of salt. On the one hand, not always corruption prosecution means the host-State has found sufficient evidence ; on the other, the lack of prosecution may derive from legitimate reasons.*"

3. *Taking into account the public interests involved in ISDS cases, do you believe investment arbitration tribunals (unlike commercial arbitration tribunals) should have more "inquisitorial" powers to investigate corruption allegations further?*

   Dr. Martim Della Valle: "*It is tempting to say yes, but I believe the duty to inquire about corruption in the face of sufficient evidence/indicia arises from the fact that corruption is a matter of public policy (even "truly international public policy" for those who accept the concept) and the arbitrators' duty to render an enforceable award.*"

4. *Regarding your two-step framework, how does the arbitral tribunal allocate the burden of proof? For instance, it might not be uncommon that an investor lacks documentation due to a sudden seizure of assets by the State, or access to witnesses willing to testify against officials in their home State. In these scenarios, the investor would be placed in a dire situation to "disprove the corruption allegations" in the second step. Should the burden of proof be allocated exclusively to the host-State?*

   Dr. Martim Della Valle: "*In the proposed framework, one uncontested red flag is sufficient to start a more in-depth review. This should allow the party concerned to produce direct evidence or convincing reasons for the legality of the transaction. If it is not able to do so, then an adverse inference may apply. Of course, the "uncontested" is to be assessed according to the evidence available to the party (including custody of documents). If documents have been seized by the party claiming corruption, it is incumbent on such party to produce the evidence in its custody. Otherwise, there would be a serious due process issue. In your example, the host-State should produce the evidence.*

   On a personal note (and I have acted in dozens of corruption investigations around the world in different capacities), in practice it is not that difficult to dispel corruption allegations. There are many indirect ways to "disprove" the allegations. If we use the classic example of consultants who may be the vehicle for bribes, it is possible to

evidence that payments have been made to legitimate bank accounts, the payee and the vendor are the same entity, the fees are hourly-based (as opposed to success fees or a percentage of the contract), the consultant renders such services on a regular basis and has a public record of such work, the fees are in line with market practices. Showing some of those facts may be sufficient to dispel the allegations, even if part of the documents is held by the host State. When facing indicia of a legitimate transaction, the tribunal of course should not make any negative inference."

Speaker 4 – Dr. Emmanuel Igbokwe, Rechtswissenschaftliches Institut Universitat Zurich

Seminar/Topic 4: Inquisitorial Approach of the Tribunal on Corruption Issues

Wooseok Shin introduced the fourth panelist, **Dr. Emmanuel Igbokwe** [7] who spoke concurrently on the fourth sub-topic, **Inquisitorial Approach of the Tribunal on Corruption Issues**.

Dr. Emmanuel Igbokwe expressed his thanks for the kind introduction and opened the discussion with his post:

"*The issue of corruption has become an important topic in the context Investor-State Dispute Settlement ("ISDS").*

Arbitration, as the preferred dispute settlement mechanism in this area, is currently under scrutiny and has come in for severe criticism, including in connection with the question of how arbitral tribunals deal with corruption. In most cases, the issue arises where a state claims that a contract or an investment was tainted by corruption.

Concretely, it is often alleged that a foreign investor made payments, mostly through intermediaries, to decision-makers and government officials in developing countries to influence the outcome of government tenders or to enable the foreign investor to enter into a contract with the government.

In the ISDS context, a host state faced with arbitration calls into question the legality of the investment on grounds of corruption.

In the so-called "corruption defence" context, arbitrators often struggle to establish evidence of corruption. Given this difficulty, arbitrators appear to have historically

[7] **Dr Emmanuel O. Igbokwe** specialises mainly in international business law, international commercial law and dispute resolution (arbitration and litigation). Following several years of experience at Switzerland's top-tier commercial law firms, he is currently Legal Counsel (Corporate & Industry) at a renowned Swiss multinational corporation, where he is responsible for all legal and corporate matters, including dispute resolution (arbitration and litigation). Emmanuel graduated from the University of Bern, Switzerland with a Master of Law, specialising in *International and European Law*. He holds an LL.M. in International Dispute Settlement from the University of Geneva and the Graduate Institute of International and Development Studies, Geneva. Emmanuel also studied law at the University of Cambridge, England and at The Hague Academy of International Law, The Netherlands. He holds a PhD (Dr. iur., *summa cum laude*) from the University of Zurich, Faculty of Law. Amongst several other publications, he is also the author of the award-winning (DIS Sponsorship Award 2023/2024) book "*Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not to Probe"*, Wolters Kluwer International (2023).

avoided dealing with corruption, leading to a perception that international arbitration provides a safe harbour for parties who engage in corruption.

Determining whether corruption may have been involved in the underlying contract often hinges on the facts and the applicable standard of proof, level of evidence necessary to establish guilt. As secrecy, duplicity, and complexity are inherent parts of corruption, it is intrinsically difficult for arbitral tribunals to be able to flesh out clear evidence.

Given this difficulty, anecdotal evidence suggests that arbitral tribunals in ISDS have historically avoided, if not outrightly ignored, the issue oof corruption.

This has also contributed to the recent backlash against ISDS.

The reason for the apparent passive attitude is that it is often claimed that arbitrators do not have an obligation to address issues the parties themselves have not raised.

However, it appears that most people in the arbitration community have now realised that this cannot be a satisfactory situation, especially given that it is now widely acknowledged that arbitrators, especially in the context of ISDS, perform judicial and public functions. It also seems obvious that their decisions often have far-reaching implications for the citizens of the states.

Although my book titled Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not to Probe (Kluwer 2023) focuses on International Commercial Arbitration, its findings on the duties and responsibilities of arbitral tribunals in ISDS to raise and address corruption sua sponte in the face of red flags, are, in my opinion, also applicable in the context of ISDS.

As we have seen over the years following the famous Metal Tech v. Uzbekistan case (ICSID Case No. ARB/10/3), it seems that the idea that tribunal are obliged to raise and address corruption on their own motion has been gaining support.

Nevertheless, it would be a stretch to argue that this has become a majority view. There are still many arbitrators that consider it an aberration to deal with issues the parties themselves have not put before the arbitrators.

In view of the criticisms ISDS continues to face, it seems to me that it is important to continue reminding arbitration practitioners, especially arbitrators, of the importance of ensuring that arbitration does not provide a safe harbour through which parties can conceal and facilitate corrupt deals.

As Alexis Mourre aptly put it, "if arbitration was to become a safe harbour for illegality or a tool for fraud, it would not only be rejected by states but also cease to be useful to the business community and, hence, to be the normal way of resolving international business disputes"."

Ricardo Marroquin expressed appreciation for the insights provided and raised several questions regarding the issue. He inquired whether existing arbitration rules grant tribunals sufficient authority to independently address concerns about corruption or to adopt an

inquisitorial approach to evidence. He also questioned whether arbitral institutions should amend their rules to explicitly empower or encourage tribunals to take such steps, or whether the real challenge lies in a lack of willingness rather than a lack of authority. Finally, he asked whether there are any risks associated with arbitral tribunals overstepping or misusing these inquisitorial powers.

Dr. Emmanuel Igbokwe addressed his questions from two different perspectives, which are International Commercial Arbitration and Investment Arbitration.

> "*I. International Commercial Arbitration (ICA):*
>
> *On the question of Authority:*
>
> *In principle, the burden of persuasion and proof rests with the party making a factualallegations (actori incumbit probatio). However, certain special circumstances require those charged with the administering of justice to adopt a more active approach to fact-finding. In my view, corruption is an example of such special circumstances.*
>
> *It seems to me that leading institutional arbitration rules provide arbitral tribunals with the authority to adopt the inquisitorial approach where necessary. For example, Article 25(1) ICC Rules states that the arbitral tribunal "shall proceed within as short a time as possible to establish the facts of the case by all appropriate means". Other institutional arbitration rules (e.g., Article 22.1 LCIA Rules; Article 28 DIS Rules) also contain similar provisions. Although the scope of the authority conferred by, and the duty imposed on, arbitrators by these provisions remains controversial, I share the view that such provisions provide arbitral tribunals with the authority to follow the inquisitorial approach where necessary. Indeed, it seems that the arbitration laws of some of the major arbitration jurisdictions, such as Section 34(2)(g) of the 1996 English Arbitration Act, explicitly permits arbitrators – unless the parties agree otherwise, which they hardly do – to adopt the inquisitorial approach where necessary.*
>
> *Therefore, it seems to me that, in the context of ICA, the question as to whether the existing arbitration rules provide arbitral tribunals with sufficient authority to adopt the inquisitorial approach in cases where reds flags of corruption appear can be answered in the affirmative (I address this point extensively under Chapter 3 of my book Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not To Probe). As a result, I do not think that it is necessary for arbitration institutions to amend their rules.*
>
> *Instead, it seems to me that what is needed are proactive arbitrators who will not be intimidated and hence cower in fear when faced with any threats – real or perceived – that they may be challenged for being impartial or that their award could be set aside if they adopt an inquisitorial approach when it comes to corruption.*
>
> *On the question of overstepping or misusing these inquisitorial powers:*
>
> *It is part of human nature that where there is authority, there is potential for that authority to be misused. Arbitration is not exempt from this possibility.*
>
> *However, to the extent that your third question relates to the possibility of the arbitral*

tribunal exceeding its mandate (i.e., acting ultra petita partium) and hence risking the award being set aside at the seat of arbitration, I am of the view that adopting an inquisitorial approach in appropriate circumstances does not necessarily result in the tribunal deciding ultra petita partium. In my view, if a tribunal, having suspected that the underlying contract may be illegal, inquires sua sponte into the legality of the parties' contract, this would not lead to the tribunal awarding a party more than what it sought in the arbitration. Instead, such an approach should be construed as the tribunal performing its duty in a diligent manner by striving to establish the legality of the contract and whether the parties may rely upon such a contract for claims, counterclaims or defences which have been submitted to the tribunal.

In my opinion, ascertaining the legality of the contract falls squarely within the tribunal's mandate. For a detailed analysis of the common objections to the inquisitorial approach, you may want to see Chapter 7 of my book Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not to Probe.

II. Investment Arbitration:

The points addressed previously are, in my view, also largely applicable in Investment Arbitration. As stated above, the issue of corruption is such a circumstance that requires an exception from the rule of actori incumbit probatio.

It also seems to me that the public dimensions of investment treaty arbitration require the tribunal to adopt an active role in the face of red flags of corruption. Indeed, it is arguable that not looking beyond the parties' submissions would not be sufficient for arbitral tribunals to fulfil their public order functions.

In most cases, arbitral tribunals in Investment Arbitration would also dispose of the necessary authority for an inquisitorial approach to fact-finding under such special circumstances. For instance, Article 43 ICSID Convention states, unless the parties agreed otherwise, the tribunal may, if it deems it necessary at any stage of the proceedings "(a) call upon the parties to produce documents or other evidence, and "(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate". This provision seems to provide sufficient basis for tribunals in Investment Arbitration to adopt the inquisitorial approach where necessary.

Even in cases where the authority or competence of the tribunal is not explicitly provided for, it is arguable that the tribunal may draw on inherent powers of international courts or tribunals that are necessary to fulfil their task in administering justice to actively raise and address corruption if red flags appear. "

Christian Campbell raised a question regarding the potential misuse of arbitration as a tool for facilitating corruption. Referring to the idea of preventing arbitration from becoming a "*safe harbour*" for corrupt practices, he asked whether there have been any known investment arbitration cases of this nature (**first remark**). He also noted that, more commonly in investment arbitration, corruption involves incidental (though possibly significant) bribes related to the authorization or operation of an otherwise legitimate investment. In cases where the entire arbitration is a corrupt device, he suggested it may be appropriate for tribunals to act on their own initiative (*propriu motu*) to ensure the integrity of the proceedings. However, in cases involving incidental corruption, arbitrators may lack the authority to investigate if neither

party raises the issue. He also questioned whether such investigations might encroach upon the jurisdiction of the host State and raised concerns about the cost implications if tribunals unilaterally pursue corruption inquiries that yield no results (**second remark**). He concluded by suggesting this might be another instance where "going international" is not always the most effective solution, referencing **Dr. Jarrett**'s earlier remark.

Dr. Emmanuel Igbokwe addressed two remarks from **Christian Campbell** in turn:

> "*To your first remark, I admit that the sentence "ensuring that arbitration does not provide a safe harbour through which parties can conceal and facilitate corrupt deals" is open to interpretation. However, the message I was trying to communicate was that tribunals should ensure that resorting to arbitration as the dispute settlement mechanism does not result in parties that have engaged in corruption being able to reap the benefits of their illegal behaviour because the arbitral tribunal adopted the eyes-wide-shut approach even in the face of glaring red flags.*
>
> *To your point about sham arbitrations, although this is admittedly more likely to occur in the context of International Commercial Arbitration, one cannot rule out a situation where an Investment Arbitration is based on sham investment. Indeed, although not an Investment Arbitration case per se, in the now famous case The Federal Republic of Nigeria vs. Process & Industrial Developments Ltd. Nigeria characterised the underlying agreement as "sham".*
>
> *One can also question the idea that an investment can be characterised as "genuine" if the investor procured the investment illegally through the payment of bribes.*
>
> *In any event, it seems to me that even in the context of Investment Arbitration, it should be irrelevant whether the arbitration itself is a sham or whether "incidental corruption" was involved in the procurement of the investment. In both cases, the position that arbitral tribunal should act sua sponte in the face of red flags stands. The objective should be ensuring that those who engage in and seek to reap the fruit of their illegal acts through arbitration do not find shelter under the umbrella international of justice.*
>
> *As I indicated in my response to Ricardo's questions earlier, to the extent that there are justifiable reasons to do so, arbitral tribunals in both Investment and International Commercial Arbitration do have the authority and, arguably, the duty to raise and address corruption sua sponte.*
>
> *Regarding your point about the tribunal intruding on the jurisdiction of the host State, I think that this is a legitimate concern.*
>
> *However, one must keep in mind that arbitral tribunals are not criminal courts. States unquestionably retain their criminal law jurisdiction to prosecute, and if found guilty, punish those involved in the crime of corruption. On the other hand, arbitral tribunals would be "investigating" such matters to draw the necessary civil law consequences. Therefore, while these investigations may overlap and sometimes create issues (e.g., whether to suspend the arbitration proceedings and await the outcome of a criminal investigation), it seems to me that the central problem is not whether tribunals would, by raising and addressing the matter from a civil law perspective, necessarily be*

intruding on the jurisdiction of States. But this is certainly an interesting topic.

Finally, on the question of the costs of a tribunal-initiated investigation, I must say that I do not have the answer to this question. Nevertheless, it would seem to me that, if one shares the view that sua sponte investigating corruption where red flags appear falls under the mandate of the tribunal in its quest to perform its duties of delivering justice diligently, it can be argued that this is part of what the parties bargained for when they agreed to resolve their dispute through arbitration."

Speaker 5 – Prof. Kamalia Mehitiyeva, University Paris-Est Créteil

Seminar/Topic 5: Parallel illegality proceedings and proportionality in assessing illegality and corruption

Wooseok Shin introduced the fifth panelist: **Prof. Kamalia Mehitiyeva**,[8] who opened the discussion with the following remarks:

"*My areas of focus include evidence (standard of proof, burden, law applicable to evidence, admissibility, legality, assessment of proportionality) and parallel proceedings. When it comes to criminal law, namely to corruption, the two areas intertwine. As a matter of example, regarding parallel proceedings, one of the recurrent topics is two separate arbitrations (a commercial arbitration and an ICSID arbitration, for instance) dealing with facts some of which are interrelated. Does the finding of one tribunal on illegality of the contract affect the position of the other arbitral tribunal which is yet to render its award? These topics are complex both separately and even more so when they cross, for example when it comes to assessing the value of one award in another arbitration, as well as of the way another arbitral tribunal has considered evidence produced in the proceedings before it.*"

Aayushi Singh posed two questions addressing the relationship between parallel proceedings and the evaluation of evidence, as well as the role of proportionality in assessing illegality and corruption. First, regarding the interplay between parallel proceedings and evidence evaluation, she referred to the impact that a finding on illegality in a domestic court proceeding can have on an arbitral tribunal that has yet to render its award. She asked how, in practice, tribunals treat the admissibility and weight of evidence originating from separate arbitration, especially when the burden or standard of proof may differ between the proceedings. Second, on the issue of proportionality in assessing illegality and corruption, she inquired how tribunals have balanced the seriousness of corruption allegations with the principle of proportionality in evaluating evidence. She further asked whether there are any notable cases in which a tribunal's application of proportionality significantly influenced the outcome, even in the presence of corruption claims.

[8] **Kamalia Mehtiyeva** is a Professor of Law at the University of Paris-Est Créteil (France). Her teaching and research fields focus on international arbitration law, civil procedure, mutual legal assistance in both civil and criminal matters, international sanctions, evidence law in transnational cases and parallel proceedings, as well as international enforcement. She is admitted to the Paris bar. Prior to becoming a professor of law, she practiced in the Public International Law and Arbitration Group of Shearman & Sterling in Paris (2007-2014) and in a firm that she co-founded, Barbier Mehtiyeva Law. Kamalia also regularly acts as arbitrator. Professor Mehtiyeva is also a member of the ICC Court of International Arbitration.

Prof. Kamalia Mehitiyeva kindly provided the responses to her two questions as follows:

"To start with parallel proceedings, the first correlation to examine is the intertwine between arbitration and criminal case. Arbitral tribunals have the discretion to temporarily stay the arbitral proceedings but are in no way bound to do so. Tribunals also decide autonomously whether and to what extent to rely on or defer to findings from parallel criminal investigations.

A second possible intertwine is the parallel or subsequent arbitrations. This interplay necessarily raises the question of assessing the same evidence or evaluating the same facts which may lead to two different scenarios: when a tribunal is asked to admit to the record and to assess evidence from the record of another arbitration, and when the tribunal is asked to admit another award and rely on the findings of that tribunal as it has already established illegality resulting from corruption.

Regarding the admissibility and weight of evidence from the record of another case, this matter is governed by the rules applicable to the admissibility of evidence. The question directly related to interplay is rather whether an arbitration award may constitute in itself evidence of illegality because that tribunal has found so. The admissibility of that award depends on different parameters, namely confidentiality of the arbitration proceedings. If accepted to the record, the award rendered in a related arbitration may have a persuasive authority vis-à-vis common issues but in no way does it bind another tribunal.

In investment arbitration, tribunals have not taken a uniform approach regarding the standard of proof applied to corruption allegations, sometimes not basing themselves on any standard of proof, relying instead on a reasonable degree of certainty of the corruption, by recurring to the red flag methodology. Tribunals do not consider themselves bound by findings of other tribunals. This means that allegations of corruption may be brought forward before an arbitral tribunal even if another tribunal has rejected their seriousness. Equally, a tribunal may perform a complete review of the corruption allegations, in law and in fact, without being bound by the findings of other arbitrators. The latter may however constitute a persuasive element in the debate.

As to proportionality in assessing illegality and corruption, corruption allegations are most often dealt with during the merits phase of arbitration, although some tribunals have assessed their procedural consequences, such as the ground for lack of jurisdiction or lack of admissibility of the investor's claims, depending on the specificities of the dispute. For an investment to be protected under investment treaties, it must comply with the host state law. In the case of an initially corrupt investment (as opposed to further corrupt acts), tribunals have approached the lack of competence as a sanction, which must be proportionate to the violation committed. This has been namely the approach in Vladislav Kim and others v. Republic of Uzbekistan, ICSID, Decision on Jurisdiction, Case No. ARB/13/6, 8 March 2017 where the Tribunal stated that "the interpretative task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable Investment framework with the harsh consequence of denying the application of the BIT in total when the Investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only

when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State". The Tribunal thus rejected the usual "all-or-nothing" approach and considered that the denial of the treaty protection "is a proportional response only" when "noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State".

Speaker 6 – Dr. Kathrin Betz, betz law

Seminar/Topic 6: Proving Corruption in International Arbitration

Wooseok Shin introduced the last panelist, **Dr. Kathrin Betz**[9] who will address the issue of Proving Corruption in International Arbitration.

Dr. Kathrin Betz initiated the discussion with her post by noting the general practice of dealing with corruption in the fields of international investment arbitration:

"*International investment arbitration plays an important role when it comes to settle international investment disputes. These disputes often involve large contracts and sums. Allegations or suspicions of illegality affecting the underlying dispute in investment arbitration pose a number of challenges to arbitrators.*

As a starting point, arbitrators need to become aware that "something is wrong": it may be that one party raises allegations of illegality, e.g. corruption, in an investment arbitration proceeding. However, it is also possible that none of the parties alleges criminal conduct, but that the arbitrators themselves suspect that such conduct may have had an impact on the underlying dispute. So-called "red flags" can alert arbitrators to potential illegality.

Arbitrators will consider what type of illegality is at stake. Is it corruption in the form of (foreign) bribery, trading in influence, private bribery? Or fraud? Or money laundering? Etc. Identifying the applicable criminal law is an important step at this point because it allows arbitrators to apply the elements of the criminal offence to the concrete case before them.

Arbitrators will need to decide whether they consider allegations of criminal conduct proven or not. While the majority view is that the party raising the allegation needs to prove it, tribunals can ask both parties for more evidence if there are plausible indicators of illegality. Regarding the standard of proof, different options are available to the arbitrators. There is no need for direct evidence to prove criminal conduct in

[9] **Kathrin Betz** is an attorney at law in Basel, Switzerland, specialising in criminal law. As a defence lawyer and as a representative of victims, she covers all areas of Swiss criminal law, including economic crime, administrative criminal law and mutual legal assistance. She is co-founder of the Competence Centre Arbitration and Crime (arbcrime.org) and author of Proving Bribery, Fraud and Money Laundering in International Arbitration, On Applicable Criminal Law and Evidence published by Cambridge University Press in 2017. She graduated from the University of Basel in 2016 (Doctor of Laws) and from the University of Zurich in 2007 (Master of Arts). She continues to research and publish in the areas of transnational criminal law, economic crime, arbitration and crime, and responsible supply chains.

arbitration proceedings, circumstantial evidence is sufficient.

A difficult question is what the legal consequences will be of proven criminal conduct in investment arbitration. Arbitral tribunals are not criminal courts that impose penal sanctions; rather, tribunals decide on the (civil) law consequences of proven illegality. It may be that the tribunal has no jurisdiction, that the claims are inadmissible, or rejected on the merits stage. This depends on the applicable law. It will also make a difference whether e.g. bribes were paid to procure an investment, or whether corruption occurred at a later stage, during performance of the investment.

As the tribunal said in World Duty Free v. Kenya (ICSID Case No. ARB/00/7) in 2006, "bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy." Conduct that is contrary to transnational public policy cannot be ignored by arbitral tribunals. "

Aayushi Singh raised three questions, which are addressed by **Dr. Kathrin Betz** respectively:

1. *Given the challenges of proving corruption in ISDS, how do you see the role of circumstantial evidence evolving in investment arbitration? Are there any recent trends or tribunal approaches that you find particularly noteworthy?*

   Dr. Kathrin Betz: "*I think there is a clear trend that investment arbitration tribunals accept circumstantial evidence to prove corruption. Cases in which corruption allegations have been considered proven based solely on circumstantial evidence are very rare though. There may be a mix of direct and circumstantial evidence. I find the approaches taken by the tribunals in Metal-Tech v. Uzbekistan and BSGR v. Guinea particularly noteworthy.*"

2. *How do you think arbitral tribunals can better navigate the intersection of arbitration and criminal law, especially in cases where state authorities are simultaneously investigating the same allegations of corruption or money laundering?*

   Dr. Kathrin Betz: "*In investor-state arbitration, parallel criminal investigations may be carried out by the authorities of the host state, or by one or several third states that are not involved in the dispute. In particular if the authorities of the host state are involved, it will be important that the tribunal ensures fairness of the arbitral proceedings. For example, if the host state relies on files from the criminal investigation to make its case, access to these files must be granted to the investor as well. If the authorities of third states are involved, depending on the applicable domestic criminal procedure, tribunals or parties may be able to gain access to the criminal investigation files. Tribunals may consider staying the proceedings in order to await the outcome of the criminal investigations. However, this can take a long time.*"

3. *You mentioned that transnational public policy does not permit tribunals to ignore bribery. In your experience, how do courts in different jurisdictions approach the enforcement of arbitral awards where allegations of corruption have been raised but not definitively proven?*

> **Dr. Kathrin Betz**: "*The approaches of domestic courts when it comes to reviewing awards at the enforcement stage are quite different. The New York Convention says in Article V(2)(b) that recognition or enforcement of a foreign arbitral award may be refused if that would be contrary to the public policy of the respective country.*"

Umang Bhat Nair raised two questions concerning the authority of arbitrators to investigate corruption allegations on their own initiative and the treatment of such findings by courts, as well as the discretion arbitrators have in evaluating the relevance of bribery to a claim. First, **Umang** questioned whether findings resulting from such investigations would receive the same level of judicial deference during post-award review stages, or whether courts might be more inclined to intervene. Second, referring to the *P&ID v. Nigeria* case, where the London Commercial Court "*appropriately presumed*" a causal link between a bribe and the granting of a contract without requiring direct evidence of causation, Umang asked whether arbitrators have the discretion to determine that a bribe—regardless of whether it occurred—is irrelevant to the claims raised, and to dismiss corruption allegations accordingly.

In response to **Umang Bhat Nair**'s questions, **Dr. Kathrin Betz** expressed the view that arbitral tribunals have a duty to investigate corruption not only when such allegations are raised by the parties, but also on *sua sponte,* if there is a suspicion of corruption. She emphasized that this responsibility stems from the arbitrators' obligation to render an enforceable award, referring to Article V(2)(b) of the New York Convention. In her view, a thorough investigation—regardless of the outcome—enhances the likelihood that the award will withstand scrutiny at the enforcement stage.

Addressing the second question, **Dr. Betz** stated that bribery must be proven by establishing its essential elements. This includes the involvement of a public official who is offered, promised, or receives an undue advantagein order to motivate the official to act or omit to act in the exercise of its official duties, possibly in breach of duties, or in the use of discretion. She underscored the importance of a quid pro quo relationship, such as when a bribe is paid to secure an investment, creating a causal link that can affect claims arising from the investment relationship.

Following the replies from **Dr. Betz**, **Earvin Delgado** first asked about the common "red flags" that arbitrators typically consider when assessing potential illegality in investment arbitration cases. In addition, expanding on Umang Bhat Nair's question about arbitrators investigating corruption *ex officio*, he also inquired how tribunals can avoid overstepping their mandate when addressing illegality on their own initiative and what safeguards should be implemented to ensure that arbitrators' findings on corruption do not provoke undue judicial interference during post-award proceedings.

Dr. Kathrin Betz addressed the questions posed by **Earvin** as follows:

> "*Many thanks for your questions. Regarding "red flags" for illegality: they will be different depending on the type of illegality one is looking at. For different crimes and offences, there are different "red flags".*
>
> *In his message of 27 February 2025, Martim has very thoroughly listed common red flags for corruption. In our "Toolkit for Arbitrators" that you may know,[10] next to a*

[10] https://arbcrime.org/a-toolkit-for-arbitrators.

list of red flags for corruption similar to Martim's, we also have a non-exhaustive list of red flags for money laundering:

Regarding sham arbitration proceedings (an arbitration is conducted in order to launder money), red flags include: a very one-sided dispute; a non-participating respondent; a respondent who participates but basically acknowledges liability or agrees to a settlement prematurely; a lack of documentation for the background of the dispute; and a lack of business activity of the involved companies.

Regarding a real dispute involving funds that are the proceeds of crime, red flags include: unidentified beneficial owners behind accounts or private investment companies, trusts etc. (shell corporations, possibly off-shore, ownership possibly concealed through bearer shares); the involvement of politically exposed persons (PEPs); persons or funds involved that originate from countries with a well-known risk for crime and corruption; unusual transactions, e.g. large cash payments; unknown origin of the funds at stake without plausible explanation how those funds were earned legally.

On the second question regarding the overstepping of an arbitrator's mandate, the main fear, as I understand, is ultra petita: arbitrators cannot go beyond what the parties claim. According to Art. V(1)(c) New York Convention, recognition and enforcement of an arbitral award may be refused if the award decides on matters beyond the scope of what the parties submitted to arbitration.

In my PhD thesis, I argued that the ultra petita rule is not designed for and does not apply to situations in which arbitrators investigate criminal conduct sua sponte, even if this is against the will of the parties. Rather, ultra petita refers to the claims of the parties in a civil law dispute and means that a court (or tribunal) awards something more or different than the party has requested, or less than the opposing party has acknowledged.

If a tribunal decides to investigate suspected criminal conduct sua sponte, this is an issue of public policy not at the disposal of the parties. Again, arbitral awards are meant to be enforceable.

Furthermore, I argued that the maxim of iura novit curia (and arbiter) demands that arbitrators know the law and apply the relevant provisions, including criminal law provisions, even if the parties do not invoke them.

In an extreme scenario, if an arbitral tribunal ignored clear evidence of criminal conduct, depending on the circumstances, the question whether the tribunal was aiding and abetting in crime would need to be asked."

Jorge Escalona also contributed to the discussion by raising a series of important questions regarding recurring factual and legal challenges that arise when allegations of corruption emerge in investor-State relationships. He highlighted key issues such as the burden of proof, attribution of responsibility, and the complexity of evidentiary requirements, particularly when bribery allegations involve third-party intermediaries who are not parties to arbitration. Drawing from his personal experience, he emphasized the difficulty in proving corruption when there is little to no direct physical or documentary evidence. He further questioned

whether it is feasible to obtain testimony from public officials or politicians implicated in bribery without exposing them to criminal liability in their home States. Additionally, he questioned whether a tribunal could adopt a more proactive role by acting upon prima facie indications of corruption, potentially ordering the production of specific evidence or even initiating its own investigation.

To this, the following explanation was offered by **Dr. Kathrin Betz**:

> "*In the context of corruption allegations in ISDS proceedings, on the factual side, it can be difficult to identify and trace bribe payments. They will often be concealed by use of - as you mention - intermediaries, offshore structures etc. Another difficulty is to find out what act or omission was expected from the public official in return for the bribe. On the legal side, the applicable standard of proof is a recurring issue, as well as the "red flag" methodology, i.e. the question how to prove bribery with the help of red flags.*
>
> *I think proving bribery without any documentary evidence is very difficult, but such documentary evidence can be indirect evidence. The difficulty with witness testimonies in arbitration proceedings is that such testimonies, even if the arbitration is confidential, may find their way into a prosecutor's file. In a criminal proceeding, the accused person has defence rights, but this is not the case in arbitration proceedings. At least in theory, the testimony would have to be taken anew to be admissible in the domestic criminal proceeding, respecting the defence rights of the accused person, but whether all countries worldwide will adhere to this standard is uncertain. Officials who take bribes risk criminal prosecution in many countries, and therefore, they may prefer not to testify at all in an arbitration proceeding if they have been involved in bribery. One option could be to grant witnesses the privilege against self-incrimination in the arbitration proceedings in such situations.*
>
> *If there is prima facie evidence for corruption, the tribunal can ask both parties for more evidence to substantiate their factual assertions. It will depend on the facts of the case how specific such a request for more evidence will be. Arbitrators have no coercive powers; however, they have the possibility to draw adverse inferences (cf. Articles 9(6) and (7) of the 2020 IBA Rules on Evidence). I again refer to our "Toolkit for Arbitrators"[11] where we say that arbitrators should consider applying adverse inferences diligently if the following conditions are fulfilled:*
>
> 1. *the party that seeks the adverse inference must produce compelling indicators of corruption and must itself have produced all available evidence to corroborate the inference sought, or the tribunal itself has identified sufficient indicia of corruption;*
> 2. *the party of whom evidence has been requested must have access to such evidence;*
> 3. *the party of whom evidence has been requested failed to give any convincing reason for not producing such evidence; and*
> 4. *the inference must be reasonable, consistent with the facts and logically related to the likely nature of the withheld evidence.*"

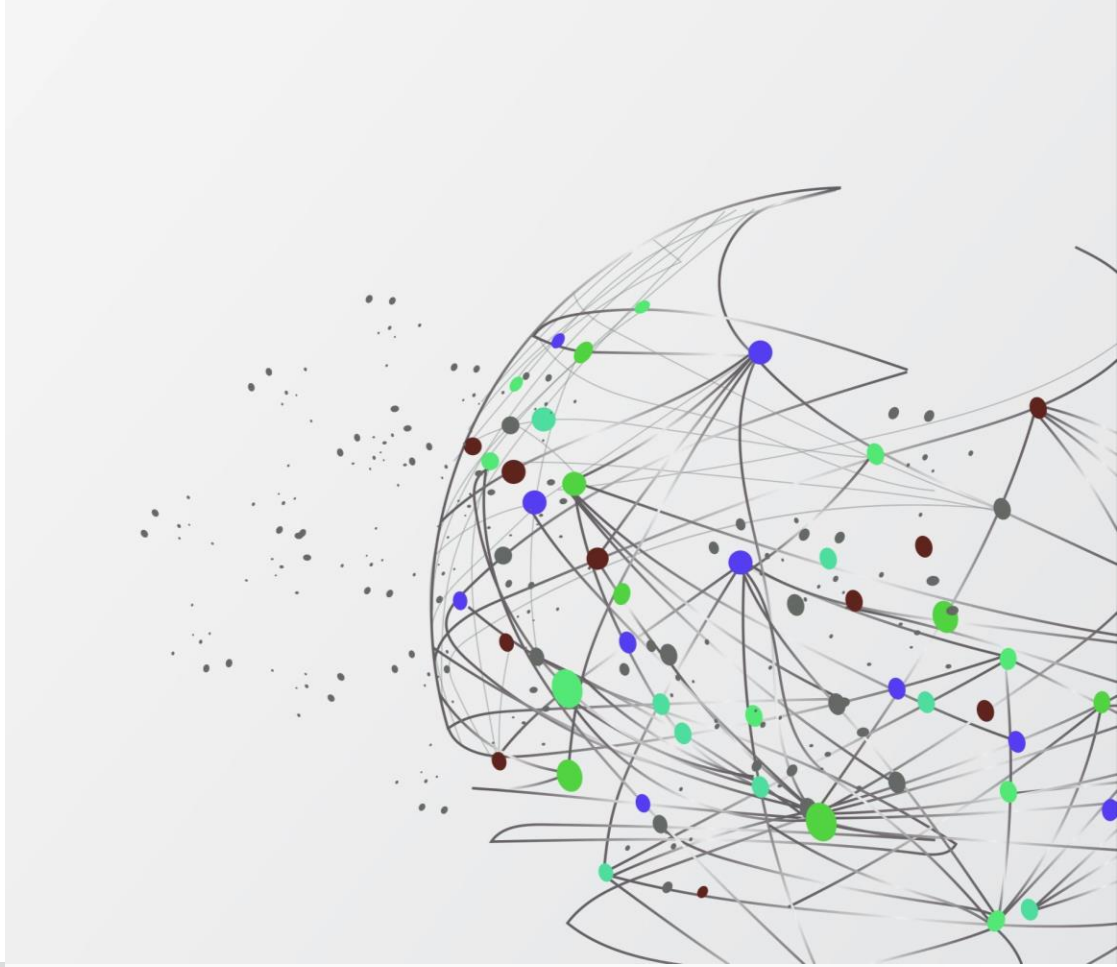
[11] https://arbcrime.org/a-toolkit-for-arbitrators.

Lastly, **Christian Campbell** raised a question regarding the applicability of drawing adverse inferences under the ICSID Arbitration Rules. Referring to **Dr. Kathrin Betz**'s mention of adverse inferences under Articles 9(6) and 9(7) of the 2020 IBA Rules on the Taking of Evidence, he asked whether such inferences are still permissible under the ICSID Arbitration Rules in the context of the discussions on corruption and illegality. In response, **Dr. Kathrin Betz** noted that the 2022 ICSID Arbitration Rules do not explicitly address the use of adverse inferences, but they also do not prohibit them. She concluded that tribunals may still draw adverse inferences under the new rules, provided they do so in accordance with Rules 36 and 37 of the 2022 ICSID Arbitration Rules.

After the conclusion of all discussions, **Wooseok Shin** officially closed the Symposium by thanking the speakers for sharing both their time and expertise.

Annex I - "Illegality and Corruption in ISDS" Dr. Yueming Yan, Chinese University of Hong Kong

Illegality and Corruption in ISDS



Dr. Yueming Yan

Chinese University of Hong Kong

yuemingyan@cuhk.edu.hk

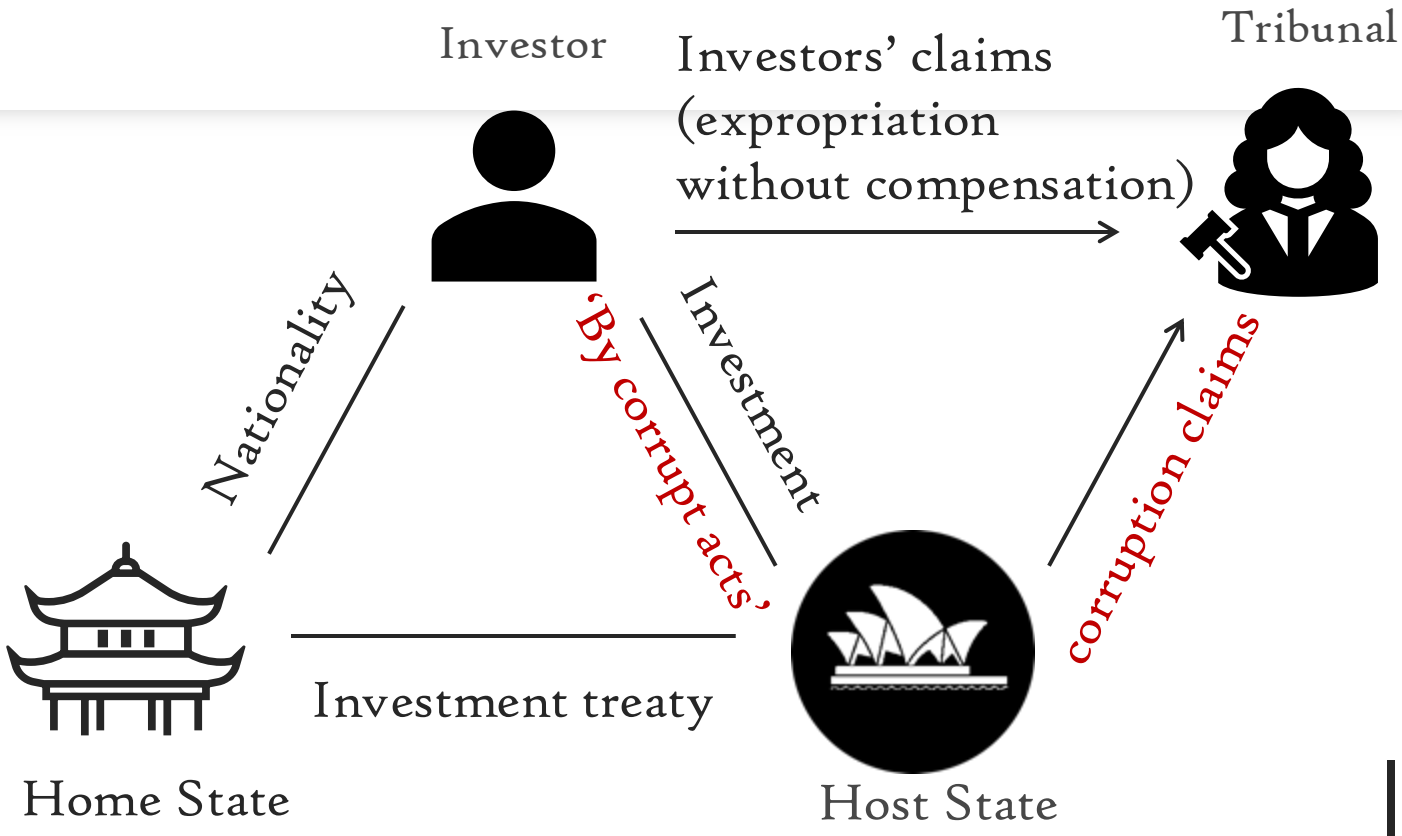
I. Background: Typical scenario of corruption claims

Corrupt act:

Between investor and public official of the host state to obtain investment

Corruption allegations:

All claims by investors must be dismissed due to corruption



II. Jurisprudence: Binary Approach

Corruption-Proved cases:

1. *World Duty Free v. Kenya (2006)*
2. *Metal-Tech v. Uzbekistan (2013)*
3. *Spentex v. Uzbekistan (2016)*
4. *Littop v. Uzbekistan (2021)*
5. *Penwell Business v. Kyrgyz Republic (2021)*
6. *BSG Resources v. Kyrgyzstan (2022)*

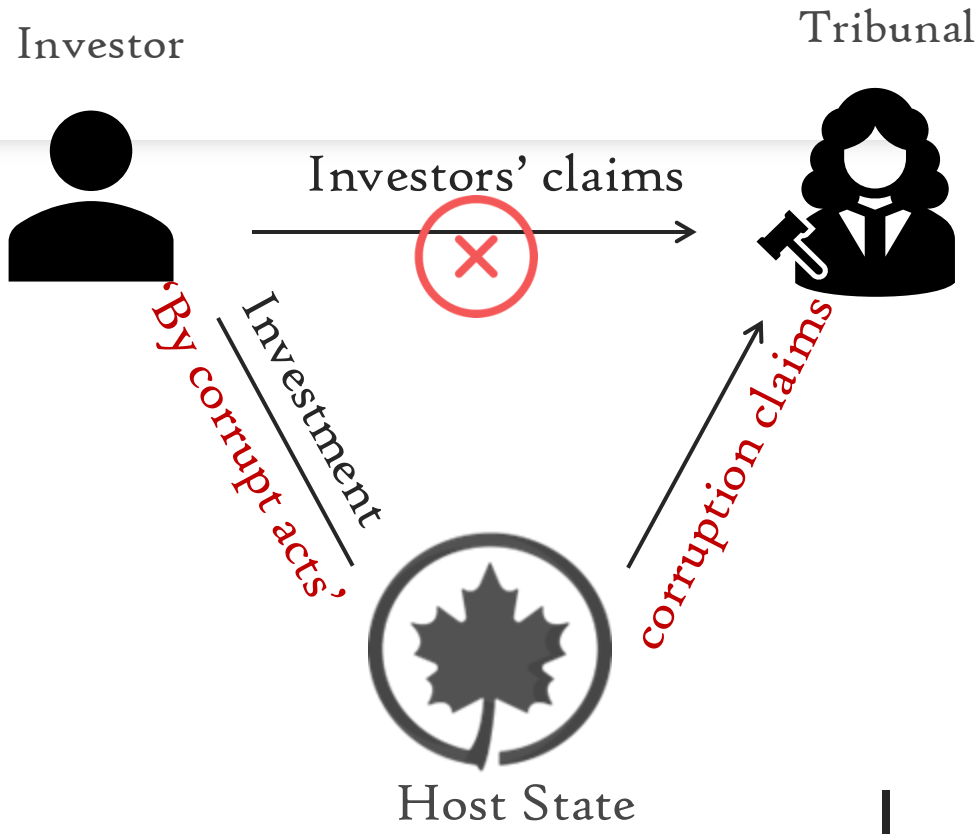
- **Binary approach: "all or nothing"**
  - **If corruption is substantiated, investor's claims dismissed**

II. Binary approach: legal bases

1. The 'clean hands' doctrine (Spentex v. Uzbekistan)
- 'He who comes to equity for relief must come with clean hands'
- Investor, unclean hands
- Inadmissible

2. The legality requirement (Metal-Tech v. Uzbekistan)
- 'in accordance with host state's law' clause
- Domestic law prohibiting corruption
- Illegal investment
- No jurisdiction

3. Transnational public policy (World Duty Free v. Kenya)
- Existence of transnational public policy against corruption
- Contract obtained by corrupt acts can be invalidated
- Claims dismissed



III. The 'clean hands' doctrine

-Party A claims Party B's action X_b breaches law

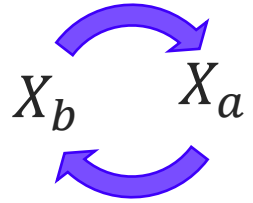
-Party B claims Party A has unclean hands because of its misconduct X_a

- *Where does this doctrine come from?*
- *Is there any requirement on X_a?*
- *What is the relationship between X_a and X_b?*

III. The 'clean hands' doctrine

Principle of equity: PCIJ Case: Diversion of Water from the Meuse

Reciprocal obligation: Assume an identical or a reciprocal obligation

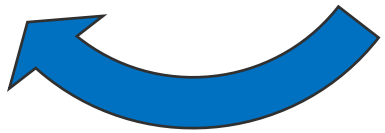


$$X_b \approx X_a$$

Netherlands - 1863 Treaty - Belgium

Belgian Lock (violation of the 1863 Treaty)

Netherlands Lock (violation of the 1863 Treaty)



PCIJ Case: Diversion of Water from the Meuse

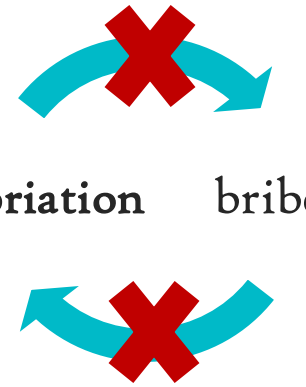
Judge Hudson:

"Taking precisely similar action, similar in fact and similar in law"

III. The 'clean hands' doctrine

Party A Party B

Investor – treaty – host state



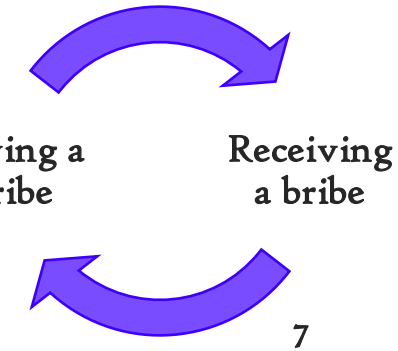
Expropriation bribery

$$X_{b=expropriation} \not\approx X_{a=bribery}$$

Investor's treaty claims should *not* be dismissed by host state's 'clean hands' doctrine submission

Party A Party B

Host state – anti-corruption law – investor



$$X_{b=giving\ bribes} \approx X_{a=receiving\ bribes}$$

Host state's clean hands doctrine submission should be dismissed by its own unclean hands

For more details, please see "Yueming Yan, Corruption and the (Un)Clean Hands Doctrine in Investor-State Arbitration: Definitional and Reciprocity Challenges, *ICSID Review - Foreign Investment Law Journal*, Volume 39, Issue 1, Winter 2024, Pages 61–73, https://doi.org/10.1093/icsidreview/siae006 ."

Thanks for your attention!

Dr. Yueming Yan

Chinese University of Hong Kong

yuemingyan@cuhk.edu.hk