



## UNDERSTANDING THE DIFFERENT APPROACHES OF INTERNATIONAL ARBITRATION GRAPPLED WITH CORRUPTION ISSUES

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### ABSTRACT

Corruption has been a challenge in most countries in the world and also internationally. Many cases of international contracts are procured or allegedly procured by corruption. International legal instruments nowadays try to combat this issue and the application further needs to be followed to the international arbitration for dispute resolution. The problem of corruption is more systematic, hard, and needs extra time to be sure. The next problem that has to be discussed in this article is the dispute resolution field in arbitration about the agreement or contracts allegedly procured by corruption. The implication of alleged corruption has broadly changed the arbitration proceeding and its capacity to adjudicate this issue. This article examines judicial-normative explains what approaches have been used and the development of facing the corruption issues in international arbitration and the effects on the proceeding finding the difference between investment to commercial arbitration from case to case.

**Keywords:** commercial arbitration; investment arbitration; corruption.

### I. INTRODUCTION

Corruption has become an international issue and the world has to deal with the cancer of corruption. The context of corruption could refer to a transaction between an individual or entity and any individual holding a public service role within any government branch. This transaction entails a direct or indirect exchange or an offer to exchange any form of benefit in exchange for an action or inaction by the public servant, or the exploitation of a public position for personal advantage.<sup>1</sup> There are many challenges to be faced by the Arbitral Tribunal from the finding of corruption leads to the enforcement issue.

Bribery is defined by United Nations Convention Against Corruption (“UNCAC”) as the act of providing an undue advantage, either directly or indirectly, to a public official, with the intention of influencing the official's actions or inactions in the performance of their official duties, either for themselves or on behalf of another person or entity.<sup>2</sup>

The definition by UNCAC is not a concrete definition of corruption, but the rationale behind every definition to define corruption in this world is addressed enough. Corruption has become a commonly raised issue in international arbitration, as the non-arbitrability doctrine regarding corruption matters has gradually diminished over the past few decades. Nowadays, arbitration is recognized as a viable means to address corruption-related disputes in almost all legal systems.<sup>3</sup> In the commercial

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<sup>1</sup> Shang Jin Wei, *Corruption in Economic Development, Beneficial Grease, Minor Annoyance, or Major Obstacle?* “The World Bank Development Research Group Public Economics”, February 1999

<sup>2</sup> United Nations Convention against Corruption (31 October 2003), Art. 16

<sup>3</sup> Gary B. Born, *International Commercial Arbitration*, Third Edition, Kluwer International, 2009.

aspect, corruption shows the reality during dealing in international commercial transactions.<sup>4</sup> Anti-corruption clause founded in The United Nations Convention has become the only legally binding universal instrument<sup>5</sup> that parties in international contracts are usually bound by. However, not only in the United Nations, corruption has become the international agenda, and this performance is combating corruption and providing anti-bribery and anti-money laundering regulations in other institutions like the EU<sup>6</sup>, Inter-American<sup>7</sup>, African Union<sup>8</sup>, and OECD.<sup>9</sup> The discussion of the dispute contains corruption claim is the risk of a contractual agreement would render void and unenforceable, moreover, the Arbitral Tribunal lacks jurisdiction in both aspects of investment and commercial.<sup>10</sup>

Corruption involves domestic and international institutions, and cooperation between countries is needed to eradicate corruption. When a dispute occurs and issues of corruption arise, disputes in arbitration can be slow and detrimental to the parties because proving corruption is very difficult. Investment arbitration is not designed to interfere with a national or transnational criminal law regime<sup>11</sup> and is broad to commercial arbitration.<sup>12</sup> For international arbitrators, allegations of corruption are not only a legal or theoretical liability, but also a matter of practice and necessity.<sup>13</sup> The first below discuss is to address the classification of hearing of the alleged corruption, the second discussion is talking about the standard of evidence and proof and the last is about the duty, power, and limit of international arbitration to address such issues.

## II. RESEARCH METHODS

In examining the above problems to achieve research objectives and methods. The writing used is the juridical-normative method. The juridical-normative method according to the method of research is a legal research method that research based on library materials or secondary materials and analyzes the reciprocal relationship between legal facts and social facts where the law is seen as independent variables and social facts are seen as dependent variables. The juridical-normative research here attaches questions concerning the approach of corruption underlying the contract in international arbitration for investment and commercial. This article focuses on international arbitration from Arbitral Tribunals' approaches to the issue of corruption in investment and commercial aspects. Concisely, the main focus lies in the interplay between regulatory measures and the proceedings of commercial and investment arbitration tribunals as references.

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<sup>4</sup> Pontian N. Okoli, "Corruption in international commercial arbitration—Domino effect in the energy industry, developing countries, and impact of English public policy", *Journal of World Energy Law and Business*, 2022, 15, 136–150

<sup>5</sup> United Nations Convention against Corruption, 31 October 2003.

<sup>6</sup> Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 3 June 1997.

<sup>7</sup> Inter-American Convention Against Corruption, 29 March 1996

<sup>8</sup> African Union Convention on Preventing and Combating Corruption, 11 July 2003.

<sup>9</sup> Organization for Economic Cooperation and Development "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997."

<sup>10</sup> Lucinda A. Law, *Symposium on New Directions in Anticorruption Law Dealing with Allegations of Corruption in International Arbitration*, Cambridge University Press, 2019, p. 341.

<sup>11</sup> Joe Tirado, Matthew Page, Daniel Meager, "Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship", *ICSID Review*, Vol. 29, No. 2, 2014, p. 493.

<sup>12</sup> Deeksha Malik & Geetanjali Kamat, "Corruption in International Commercial Arbitration: Arbitrability, Admissibility, & Adjudication", *The Arbitration Brief*, 2018, pp. 4-5.

<sup>13</sup> Tran Bao Cao, "Proving Corruption Allegation in International Arbitration." *Faculty of Law Victoria University of Wellington*, 2017, p. 18.

### III. DISCUSSION AND RESULT

#### A. Corruption - a Matter of Jurisdiction or Substantive Law?

Various views are determining the standard of proving corruption in international arbitration. Some argue that the more appropriate way to address the procedural rules but others suggest that the substantive law chosen should also govern the same.<sup>14</sup> There is a division in the doctrine regarding the determination of whether the standard of proof is determined by the procedural law or the substantive law.<sup>15</sup> The challenge with corruption lies in the difficulty of providing substantial evidence to meet a rigorous standard of proof, particularly as the circumstances can be suspicious and subject to change under certain conditions. As the discussion below might be summarized as follows (I) jurisdictional stage approach, (II) substantive law stage approach.

##### I. Jurisdictional Stage Approach

The jurisdictional stage approach here refers to the approach to the issue of corruption by jurisdiction hearing. In this stage, the party raised the allegations of corruption that need to be proven and this can become a shield to challenge that the Arbitral Tribunal does not have jurisdiction. Applying the doctrine of *kompetenz-kompetenz*, the Arbitral Tribunal has its own discretion to adjudicate or not the case. The jurisdictional stage will impact the rest of the proceeding and also the substantive law hearing. In this stage also the party who wants to avoid the contract usually gave a massive defense regarding how the Arbitral Tribunal is not efficient to adjudicate corruption issue and need to be done by the domestic court. The defense will go along with the international principle that initiates delay of the proceeding until the corruption is proven or even the rejection of jurisdiction due to its estoppel principle.<sup>16</sup>

The condition of consent in investment disputes is usually demonstrated under the BIT, a different situation from a commercial dispute that sometimes has a different agreement outside the main contract. As laid down by the International Court of Justice (“ICJ”), consent in the international tribunal has been a mandatory requirement.<sup>17</sup> In the *Salini v. Morocco* case, there was a requirement of legality stated in the applicable treaty. This requirement aimed to ensure that the Bilateral Treaty does not provide protection to investments that are illegal and should not be safeguarded. The consideration of this presumption took place during the initial phase of determining jurisdiction in the case.<sup>18</sup> Another jurisdictional stage approach could be found in the case *Inceysa v. El Salvador* when the Arbitral Tribunal satisfied due to the investor's illicit actions, the foreign investment became ineligible for protection under international investment law, rendering the existence of any jurisdiction infeasible from the outset.<sup>19</sup>

In commercial arbitration, the example of delivering the jurisdictional stage for the alleged corruption is an early arbitral award by a well-known Swedish arbitrator, G Lagergren in ICC Case No 1110 of 1963 declined jurisdiction over a claim for commissions owed to an agent who had been

<sup>14</sup>Deeksha Malik & Geetanjali Kamat, *Ibid*, p. 15

<sup>15</sup>Florian Haugeneder and Christoph Liebscher, *Ibid*, p. 545.

<sup>16</sup>Stéphane de Navacelle and Juliette Musso, *Jurisdiction and Powers of International arbitral tribunals when dealing with allegations of corruption*, <https://navacelle.law/jurisdiction-and-powers-of-international-arbitral-tribunals-when-dealing-with-allegations-of-corruption/> (accessed 13 June 2023)

<sup>17</sup>Adilbek Tussupov, “*Corruption and Fraud in Investment Arbitration Procedural and Substantive Challenges*”, Springer, Volume 22, 2022, pp. 28-29

<sup>18</sup>Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001”, para. 46. See also, Tokios Tokelés v. Ukraine, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004.

<sup>19</sup>Adilbek Tussupov, *Ibid*, p. 29

retained to bribe Latin American government officials.<sup>20</sup> The reliance of Lagergen was placed on "general principles denying arbitrators the power to entertain disputes of this nature," rather than being based on a specific national law. The rationale behind this was that a general principle of law, acknowledged by civilized nations, exists that considers contracts that significantly violate bonos mores or international public policy as invalid or, at the very least, unenforceable. Such contracts are not to be endorsed by courts or arbitrators.<sup>21</sup> Thus, it is now commonly undisputed that the Arbitral Tribunal can adjudicate corruption in a commercial aspect.

## II. Substantive Law Stage Approach

The core of the dispute lies in the substantive law or merits of the issue, which forms the basis for the value claim. By addressing corruption within the merits of the case, arbitrators can explore a wider range of potential remedies based on proportionality, such as restitution. This allows for a more comprehensive consideration of the issue, rather than limiting the discussion to the jurisdictional stage.<sup>22</sup> The alleged party commonly contests that the alleged corruption should be brought to the merits stage to bear the damages. There are proponents who contend that the standard of proof should always be governed by the substantive law established by the Arbitral Tribunal or chosen by the parties.<sup>23</sup> This is also suggested that under certain circumstances, the burden of proof could be reversed, meaning that the party making the allegations is required to provide relevant evidence, even if it is not conclusive. In such cases, if the tribunal finds the evidence presented by the alleging party to be reasonable or compelling, it may request the other party to provide counter-evidence to refute the allegations.<sup>24</sup> Another issue pertains to the determination of the applicable law by the commercial arbitrator. This can encompass several possibilities, including the law of the contract selected by the parties, the law of the seat of arbitration, the law of the jurisdiction where the contract is to be executed, and relevant international treaties.

It is common now that Arbitral Tribunals can use the doctrine of *kompetenz-kompetenz* to be linked into the doctrine called "separability doctrine" When the substantive contractual agreement is tainted by corruption it can not affect the arbitration clause or agreement.<sup>25</sup>

The merits stage approach has its applicability in the *Westinghouse* case where the applicable law is the law in the States of Pennsylvania and New Jersey, and the Philippines.<sup>26</sup> The three laws lead to "clear and convincing" evidence concerning corruption cases.<sup>27</sup>

Asserting the case of *TSA Spectrum de Argentina S.A v. the Argentine Republic* ("TSA") as an example is one of the ways to approach the corruption issue in the investment arbitration in the merits stage where Argentina vigorously contested the jurisdiction of the tribunal, raised allegations of corruption, and argued against the legality of the investor's actions.<sup>28</sup> Even if the jurisdictional issue first was denied, previously, *TSA* submitted "that the legality of an investment is a question for the merits" and nevertheless expressed "if there had been no other jurisdictional obstacle in the present

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<sup>20</sup>Gary B. Born, *Ibid*, para. §6.04

<sup>21</sup>*Ibid*.

<sup>22</sup>Florian Haugeneder and Christoph Liebscher, *Ibid*, p. 545

<sup>23</sup>*Ibid*.

<sup>24</sup>ICC Case No. 6497, Award (1994), paras. 3—4,

<sup>25</sup>Iman Mirzazadeh, "The approach of Arbitrators When They Confronted with Cases Involving Allegation or Suspicion of Corruption" (2020), p. 12.

<sup>26</sup>Florian Haugeneder and Christoph Liebscher, *Ibid*, p. 552.

<sup>27</sup>*Ibid*.

<sup>28</sup>*TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008", para. 173

case, the tribunal would have decided to join the fourth jurisdictional objection to the merits of the case” as an appropriate way for the alleged corruption.<sup>29</sup>

In the case of *Malicorp Limited v. the Arab Republic of Egypt* (“**Malicorp**”), the Arbitral Tribunal conducted a comprehensive evaluation of the legality requirement and its procedural aspects. The tribunal acknowledged the fundamental principle that safeguarding good faith is integral to both international law and investment law.<sup>30</sup> The decision of the Malicorp tribunal is supported by the principle of autonomy of the arbitration agreement. The tribunal emphasizes the need to determine whether the grounds for the decision stem from an act that goes against good faith. This determination necessitates a thorough examination, which is challenging to separate due to the close interconnection of the facts involved.<sup>31</sup>

Despite the prevailing practice followed by numerous Arbitral Tribunals, it is possible to argue that in specific instances, the examination of the factual context surrounding the acquisition of foreign investments should and must be conducted during the merits phase of the dispute.<sup>32</sup>

Significantly, investment tribunals are not the first bodies to grapple with the issue of determining a proper stage when to address preliminary objections that raise jurisdictional concerns. In *Prince Von Pless, Germany v. Poland* case, back in 1933, the Permanent Court of International Justice encountered this very dilemma and expressed as the court found that at the jurisdictional stage of the proceedings, a decision cannot be made regarding the preliminary nature of the objections or their validity. Such a decision would involve factual and legal questions in which the Parties hold differing views and are closely linked to the merits of the case. It is not appropriate for the Court to adjudicate on these matters at this stage. If the Court were to rule on these objections now, there would be a risk of passing judgment on issues that pertain to the merits of the case or pre-judging potential solutions. However, the Court has the authority to order the joining of preliminary objections with the merits when it is necessary for the proper administration of justice.”<sup>33</sup>

Furthermore, regardless of the challenging nature of proving illicit misconduct by the party making the allegations, there are arguments advocating for the examination of alleged illegality during the substantive law stage based on considerations of procedural fairness. It has been suggested that in complex investment relationships, misconduct may be reciprocal, as expressed in the document.<sup>34</sup> This viewpoint was demonstrated in the dissenting opinion of the *Fraport v. Philippines* case. It argued that when the legality of the claimant's actions is considered a matter of jurisdiction, while the legality of the respondent host state's actions is considered a matter of merits, it gives the respondent host state a considerable advantage. In simpler terms, it means that the tribunal would need to examine a minor mistake in the investor's actions first and might never address or delay addressing a major mistake in the host state's actions. It creates an imbalance of power between the parties, similar to a situation where a small fault is thoroughly examined while a significant fault is overlooked or never addressed.<sup>35</sup>

Professor Schreuer asserts that the exercise of *ex aequo et bono* by an Arbitral Tribunal requires the consent of the parties, as acting without such consent may exceed the tribunal's powers to unenforceable award.<sup>36</sup> Some authors have expressed the view that accepting jurisdiction while reserving the right to refuse it at a later stage creates a legal fiction that is equivalent to the exercise of

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<sup>29</sup> Adilbek Tussupov, *ibid.*, p. 30

<sup>30</sup> *Malicorp Limited v. the Arab Republic of Egypt*, ICSID Case No ARB/08/18, Award, 7 February 2011, para. 116.

<sup>31</sup> Adilbek Tussupov, *ibid.*, p. 31

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 32

<sup>34</sup> *Ibid.*, p. 34

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

the tribunal's power *ex aequo et bono*. However, according to Schreuer, the exercise of *ex aequo et bono* by an Arbitral Tribunal requires the consent of the parties, and without such consent, the tribunal risks acting beyond its powers, and the award will be unenforceable.<sup>37</sup> Nevertheless, in the context of this discussion, this situation can only be imagined when one party alleges illegality while the other party denies it. It would be challenging to envision a scenario where the losing party, who denied any wrongdoing and consequently caused the deferral of the examination of illegality to the merits stage, would blame the arbitrators for exceeding their powers, as it would be a result of their own continued misconduct. In common law jurisdictions, this could be seen as unfair and thus undeserving of legal or equitable protection.

In the context of investment disputes that arise from international investment contracts rather than investment treaties, the circumstances can indeed vary. It is within this distinction that the tribunal in the *Niko Resources v. Bangladesh* (“**Niko Resources**”) case established that a violation of the principle of “good faith” does not necessarily lead to an automatic denial of jurisdiction. The tribunal reasoned that when jurisdiction is established based on contractual agreements, as in this case, the arbitration clause is not merely a conditional offer but a binding agreement that obliges both parties to submit their disputes to ICSID arbitration. Consequently, the alleged or proven lack of good faith in the investment should be considered as part of the merits of the dispute, rather than serving as a justification for denying jurisdiction.<sup>38</sup> The Arbitral Tribunal concluded Jurisdiction in the *Niko Resources* case does not rely on an investment treaty but on two agreements. The arbitration clause within these agreements is not a conditional offer that may or may not be accepted; rather, it represents a binding agreement between both parties to submit their disputes to ICSID arbitration. The determination of whether the investment was made in good faith or not, and the consequential implications, must be resolved according to the agreed-upon procedure. In a contractual dispute like the one at hand, the alleged or proven lack of good faith in the investment does not warrant the denial of jurisdiction but should be regarded as an aspect of the merits of the dispute.<sup>39</sup>

## **B. Evidence, Proof, the Standard of Proof of Corruption**

An allegation of corruption will be required to be proven. Even if there is an argument laid the near impossibility to “prove” corruption.<sup>40</sup> Proving in State-Investor Disputes bears immense gravity as it is likely to have an effect on the reputation of states and in a commercial context more to render the contract null and void and the claim will be dismissed.<sup>41</sup> In cases involving contracts or investments tainted by corruption, the burden of proof should encompass the specific type of corruption alleged and the connection between that corruption and the awarding of the contract or concession, or the establishment of the investment. Unlike in cases of pure corruption, where demonstrating the illicit purpose of the contract alone is enough, this additional linkage requirement becomes essential.<sup>42</sup>

Therefore, In the case of *World Duty Free Ltd. v. Kenya*, the Arbitral Tribunal refused to enforce the contract and declare it null and void based on corruption making the claim of expropriation dismissed as it is obvious and will be the exception.<sup>43</sup>

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Niko Resources Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No. ARB/10/18, Decision on Jurisdiction, paras. 470–471.

<sup>39</sup> *Ibid.*

<sup>40</sup> Karen Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and the Conduct of Arbitration Relating Thereto* ICCA Congress Series No. 11 (Kluwer, 2003) at p. 295.

<sup>41</sup> *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.

<sup>42</sup> Lucinda A. Law, *Ibid.* p. 343.

<sup>43</sup> Florian Haugeneder and Christoph Liebscher, *Ibid.*, 545.

Before addressing and producing evidence, the alleged party likely tends to contest the jurisdiction over the Arbitral Tribunal. In commercial arbitration, there is a separate arbitration agreement consisting of the parties' consent to enter arbitration. Based on that, there is one doctrine called the *separability doctrine* or "*the principle of autonomy of the arbitration agreement*". Shortly, this *separability doctrine* is usually applied in commercial arbitration where parties practically conclude two agreements: an agreement to arbitrate and an agreement for commercial transactions.<sup>44</sup>

Difficult questions of sufficiency of evidence and standards of proof almost inevitably arise, as corrupt behavior is often well hidden by its perpetrators. There are *mens rea* or criminal intent requirements has to be satisfied. Under UN Convention, bribery must be "committed intentionally".<sup>45</sup> When it turns to international arbitration, the burden and standard to prove corruption issues have been the most contentious problems in arbitral practice.<sup>46</sup> The shift in the burden of proof in certain circumstances is widely not supported in international arbitration in the sense of the principle in law that the burden of proof is absolute and never shifts.<sup>47</sup> It is discussed in detail in ICC Case No 7047 that a contract asserted and arised from claimants claims, then the respondent refuse claimant;s right due to the allegation that the contract is null and void procured by bribery, it will be the respondent rights to present anything link into the evidence within the time limits.<sup>48</sup> In conclusion the burden of proof is upon the respondent.

Historically, the burden of proof requires that the burden of proof lies upon him who affirms, not upon him who denies, and such a mechanism compels the alleged party only counterclaims any alleged fact based on the claim made<sup>49</sup> or simply the burden of proof is that those who assert something must prove that which is asserted Furthermore, the same party would bear the risk if the allegation cannot be substantiated and the claim is dismissed<sup>50</sup>

When it comes to proving corruption in international arbitration, there exist limited rules that establish the burden and standard of proof. One such rule is found in the UNCITRAL Arbitration rules, which stipulate that each party is responsible for demonstrating the facts on which its claim or defense is based.<sup>51</sup>

According to Foreign Corrupt Practice Act, ignorance is not a defense, as laid down "impose liability not only on those with actual knowledge of wrongdoing but also on those who purposefully avoid actual knowledge."<sup>52</sup> In most cases, the allegation of corruption hard to be proven.<sup>53</sup> Arbitral Tribunals have different approaches in many cases. There are two different approaches for proving the alleged corruption based on common law jurisdiction as it requires "preponderance evidence" and a higher standard of "clear and convincing" evidence for the allegations of corruption and fraud.<sup>54</sup> The origin standard seems to be that the jury system provided to distinct "balance of probabilities" and standard in civil cases to "proof beyond reasonable and doubt".<sup>55</sup>

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<sup>44</sup> Adilbek Tussupov, *ibid*, p. 31

<sup>45</sup> UN Convention, Article 16.

<sup>46</sup> Brody K. Greenwald and Jennifer A. Ivers, "*Addressing Corruption Allegations in International Arbitration*", Koninklijke Brill NV (2019), p. 15.

<sup>47</sup> Tran Bao Cao, *Ibid*, p. 22

<sup>48</sup> Westacre v Jugoinport (Award) ICC 7047 (1994) Yearbook Commercial Arbitration XXI, (1996)"79, para. 54.

<sup>49</sup> Tran Bao Cao, *ibid*, p. 23

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid*.

<sup>52</sup> Brody K. Greenwald and Jennifer A. Ivers, *Ibid*. p. 14

<sup>53</sup> Florian Haugeneder and Christoph Liebscher, *Ibid* p. 32

<sup>54</sup> *Ibid*, pp. 539 - 564

<sup>55</sup> *Ibid*, para. 546

In the example, As per the findings of the Arbitral Tribunal in the *Westington case*, bribery is considered a form of fraud in civil cases both in the United States and the Philippines, it is important to have presented “clear and convincing” evidence rather than just a mere preponderance that will make it mere speculation and baseless.<sup>56</sup>

Despite the presence of evidence indicating that *Westinghouse* had the intention to bribe President Marcos through payments made to a local agent, the Arbitral Tribunal concluded that the Respondents did not meet their burden of proof. This was because they failed to provide evidence of direct payments to Marcos or establish the existence of an agreement between President Marcos and Westinghouse.<sup>57</sup> The Arbitral Tribunal concluded that the (main) contracts were valid and rejected any allegation of bribery.<sup>58</sup>

The lack of adequate evidence also underlying the allegations in the case of *Westman v. European Gas Turbines*, where the Arbitral Tribunal determined that a valid contract was in place between the parties and stated that the terms of the contract did not explicitly require the Claimant to exert influence over the owner in order to secure the pre-qualification of the Respondent.<sup>59</sup>

Furthermore, by examining the case of *EDF v. Romania (“EDF”)*, we will know the illustration of the difficulties to prove corruption in international arbitration. The tribunal set a high threshold by requiring “clear and convincing” evidence to prove the alleged corruption. The tribunal demonstrates the difficulties to show evidence of corruption.<sup>60</sup> The case shows up the alleged bribery in a private area that opens up a question from Constantine Partasides to what extent we fairly know and undoubtedly proof of a conversation in a car park and a living room.<sup>61</sup> This reason is emphasizing the idea of tackling corruption and how bribery worked well in some places with storing alibi to the defense.

The investor had limited evidence to support their claim of corruption by the respondent. They could only rely on the statements of their own employees who claimed to have received requests for bribes. However, the respondent's witnesses denied these allegations, and the investor did not raise any objections or protest when the supposed solicitation of bribes took place. Additionally, the Romanian Anti-Corruption Authority made a decision that cleared the respondent of any wrongdoing.<sup>62</sup>

Some commentators argue that the tribunal in *EDF* set a heightening threshold and imposed a higher burden of proof.<sup>63</sup> Constantine Partasides has advocated for Arbitral Tribunals to maintain a balanced approach, avoiding both a lenient relaxation of the standard of proof and an excessively burdensome requirement for parties to meet their burden of proof.<sup>64</sup> Moreover, *EDF* is not the only case that heightens the standard, in the *Westinghouse case*, the Tribunal demanded “clear and compelling evidence” of corruption amounting to “more than a mere preponderance”.<sup>65</sup> The *Hilmarton case* also demanded proof “beyond doubt” of corruption.<sup>66</sup>

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<sup>56</sup>Mohammed Abdel Rouf, How Should International Arbitrators Tackle Corruption Issues? ICSID Review-Foreign Investment Law Journal (2009), p. 124 (citing 7 ICC Case No. 6286, Partial Award (Aug. 28, 1991), para. 22, III Collection of ICC Arb. Awards 1991–1995, at 264 (1997)).

<sup>57</sup>*Ibid.*

<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.*

<sup>60</sup>Joe Tirado, Matthew Page, Daniel Meager, *Ibid.*, p. 495.

<sup>61</sup>Michael Hwang and Kevin Lim, *Corruption in Arbitration, Law, and Reality*, p. 17

<sup>62</sup>*Ibid.*

<sup>63</sup>Joe Tirado, Matthew Page, Daniel Meager, *Ibid.*, p. 495.

<sup>64</sup>Kyriaki Karadelis, “Corruption and the Standard of Proof”, *Global Arbitration Review* (July 26, 2010).

<sup>65</sup>*Westinghouse Int’l Projects Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v. Nat’l Power Corp. and The Republic of the Philippines*, ICC Case No. 6401, Preliminary Award (19 December 1991), paras. 33–35.

<sup>66</sup>*Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A.*, ICC Case No. 5622 (1988), p. 23.

It is understood the tribunal in the *Hilmarton* case analyzed the allegations of corruption and the traffic influence from:<sup>67</sup>

- (I) In light of substantive law of the contract (*lex causae*) chosen by parties (Swiss law).
- (II) Under the law of the place of performance of the contract (*lex loci solutiones*) (Algerian law).

Addresses also in the case of *Dadras v. Iran*, the principle of “clear and convincing evidence” has been proposed in adjudicating the corruption issue, where the Arbitral Tribunal opined that the applicability of this principle finds support in both American and English law, according to which cases of fraudulent behavior mandate a higher standard of proof.<sup>68</sup>

There are so many discussions regarding the standard of proof of tightening or even lowering the evidence. The standard of proof in a case is typically determined by the law chosen by the parties and is correctly applied in accordance with the substantive law. However, in the absence of specific criteria, the application of a higher standard of proof can sometimes be based on the notion that the more extraordinary an allegation is, the greater the required burden of proof becomes.<sup>69</sup>

In many circumstances of the case, there are some “red flags” on the basis of the facts they presented pointed towards the existence of corruption. The World Bank utilizes red flags of corruption to identify potential risks associated with tainted activities when assessing applicants for financed contracts.<sup>70</sup> This “red flags” method is also usually known as ‘circumstantial evidence’, ‘more likely than not’, ‘reasonable certainty’, ‘connecting the dots’.<sup>71</sup> This method is a method for the Arbitral Tribunal as Indicators of corruption that offer arbitrators a set of factors that any reasonable adjudicator would consider when evaluating facts related to a corruption issue. These indicators serve as a guide for arbitrators to assess the presence or likelihood of corruption based on their sound judgment and common sense.<sup>72</sup>

In the case of *Metal Tech v. the Republic of Uzbekistan*.<sup>73</sup> A significant “red flag” identified was the involvement of officials in obtaining the 1989 agreement, as well as the connection between one of the consultants and the Prime Minister of Uzbekistan. In response to this, the tribunal made a decision to issue an *ex officio* procedural order to Metal-Tech. The purpose of this order was to require Metal-Tech to submit evidence and documents, including original consultancy contracts, a comprehensive list of payments made to each consultant, detailed information regarding the amount of each payment, identification of the payee and payer, and any supporting documentation that could address or clear the red flags.<sup>74</sup> The facts that raised concerns include certain indicators, commonly referred to as “red flags.” These indicators include the questionable qualifications of the consultants involved, excessively high payments referred to as “remuneration,” and close connections with influential government officials, such as the President and the Prime Minister of Uzbekistan.<sup>75</sup>

In commercial arbitration award practice the discussion regarding the standard of proving corruption are less uniform.<sup>76</sup> The awards consistently suggest that allegations of corruption and

<sup>67</sup> Institute for International Arbitration, “ITA IN REVIEW, Vol. 4, Issue 2”, 2022, p. 12

<sup>68</sup> Deeksha Malik & Geetanjali Kamat, *Ibid*, p. 16.

<sup>69</sup> Florian Haugeneder and Christoph Liebscher, *Ibid*, p. 555.

<sup>70</sup> Irman Mirzazadeh, *Ibid*, p. 24 (citing “Charles Kenny and Maria Musatova, “Red Flags of Corruption” in World Bank Projects: An Analysis of Infrastructure Contracts”, International Handbook on the Economics of Corruption, Volume Two, 2011. p. 3).”

<sup>71</sup> Metal-Tech Ltd v. The Republic of Uzbekistan, ICSID Case No. ARB/10/03, Award (October 4, 2013), paras, 243, 293.

<sup>72</sup> *Ibid*, para. 293.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid*.

<sup>75</sup> Irman Mirzazadeh, *Ibid*, p. 25 (citing Lamm, Greenwald and Young (n 103). P.62).

<sup>76</sup> Deeksha Malik & Geetanjali Kamat, *Ibid*, p. 18.

<sup>77</sup> Florian Haugeneder and Christoph Liebscher, *Ibid*, 552.

illegality necessitate a tight burden of proof, such as clear evidence or substantial indications. Nevertheless, the arbitrators' rationale demonstrates that these statements are not always decisive. This is because either the purported higher standards are also met in the cases, or a corruption claim fails to meet any standard of proof.<sup>77</sup>

In example, case of *Himpuma v. PLN*,<sup>78</sup> in an ad hoc arbitration conducted under the UNCITRAL Rules, the arbitrators employed elevated criteria when evaluating claims of corruption and the resulting nullification of a contract. The arbitrators concluded that a determination of illegality or other forms of invalidity should not be reached casually, but instead necessitates compelling and unequivocal evidence to support such a finding. The Arbitral Tribunal based this determination on a policy argument.<sup>79</sup>

*“However tempting it may be in the context of a particular case for a public-sector respondent to seek relief from liability by invoking illegality, the fact is that such a posture puts into question the reliability of undertakings [...]. [O]ver-readiness by international arbitrators to accept illegality defenses may harm an international mechanism that benefits numerous countries that rely on access to international funding, technology, and trade”.*

### C. Arbitral Tribunal's Power, Duties, and Limit

When the allegation of corruption underlying the agreement appears, the Tribunal should challenge various procedural and substantive issues.<sup>80</sup> Addressing the power of the Arbitral Tribunal has the link to based doctrine Kompetenz-Kompetenz to which arbitrators have jurisdiction to determine the scope of their own jurisdiction. Inevitably, the Arbitral Tribunal decision is an inherent attribute of international tribunals.<sup>81</sup> Thus, we have to discuss below (I) the Arbitral Tribunal's power and duty to address the corruption issue, (II) the duty to uphold the anti-corruption norms, and (III) the limit of addressing corruption issues in international arbitration.

#### I. The Arbitral Tribunal's Power and Duty to Address the Corruption Issue

The Arbitral Tribunal is obliged to address the corruption issue to investigate all the existence and consequences of the proceeding and the case. Addressing the corruption issue is the Arbitral Tribunal's duty to the parties and the public.<sup>82</sup> However, there is a differentiation between the arbitral's morality of duty and morality of aspiration.<sup>83</sup> The tribunal has the duty to make the best effort to render an enforceable award.<sup>84</sup>

As pointed out by Gary Born:<sup>85</sup>

*“insofar as arbitrators are requested to make a binding arbitral award through an adjudicative process, either awarding monetary sums or declaratory relief, it is a vital precondition.”*  
[emphasized added]

Furthermore, Gary Born addressed that the fulfillment of the precondition is needed to be done in light of to decide whether a contractual agreement is not valid, unlawful, or contrary to public

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, (citing *Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Indonesia)*, Award, 4 May 19).

<sup>79</sup> *Ibid.*

<sup>80</sup> Joe Tirado, Matthew Page, Daniel Meager, *Ibid.*, 494.

<sup>81</sup> Mohammed Abdel Rouf, *Ibid.*, p. 120.

<sup>82</sup> Tran Bao Cao, *Ibid.*, pp. 13-17

<sup>83</sup> The Honourable L. Yves Fortier, QC, “*Arbitrators, corruption, and the poetic experience: ‘When power corrupts, poetry cleanses,’*” *Arbitration International*, 2015, p. 376

<sup>84</sup> ICC Arbitration Rules, Article 41.

<sup>85</sup> Gary B. Born, *Ibid.*, p. 2183

policy.<sup>86</sup> The Arbitral Tribunal is incapable to decide an obligation to parties other than considering the effect of public policy, and the Arbitral Tribunal is also mandated to resolve public policy and other objections of mandatory legal.<sup>87</sup> The Arbitral Tribunals are responsible to address the issue raised by any party during the proceedings, including the alleged corruption. According to the jurisprudence of ICJ whichever party alleges a fact has the burden of proving it, a principle derived from the Latin *maxim onus probandi incumbit actori*.<sup>88</sup>

In the *F-W Oil Interests v. Trinidad Tobago* case (“**F-W Oil Interests**”), the tribunal appeared to express frustration with the parties' poorly substantiated corruption allegations and was relieved to be able to base its ruling on alternative grounds.<sup>89</sup> The claimant eventually withdrew its bribery allegations during pointed questioning from the tribunal, as it lacked substantial evidence to support such significant and wide-ranging claims. Similarly, the respondent did not pursue its own vague accusations. With the withdrawal of the bribery allegations, the tribunal was able to proceed with its ruling on other grounds, ultimately dismissing the claimant's claims. The tribunal acknowledged the seriousness of the allegations but took a questionable narrow perspective on its own powers. It expressed concern about how to address these allegations and counter-allegations in its findings, considering the inherent challenges of investment arbitrations compared to proceedings in a court of law, such as the absence of sworn evidence and the inability to compel witnesses.

Consent is an inherent requirement to conduct international arbitration. Parties' consent plays a decisive role in the tribunal to exhaust the jurisdiction. However, if there is no alleged corruption raised by any party, but the evidence on the record leads the tribunal strongly to suspect that corruption activities may have been afoot, the question might arise whether the tribunal has the right and obligation to investigate *sua sponte* or voluntarily.<sup>90</sup> Investigating *sua sponte* may require the tribunal to raise corruption as a legal issue or seek additional factual evidence, or both. It is ambiguous to assume the tribunal over its own accord an inquisitorial role to establish its existence and rule upon its consequences.<sup>91</sup> While the award is rendered to the possible risk of being set aside<sup>92</sup> or unenforceable<sup>93</sup> If arbitrators venture beyond the scope of the claims made by the parties and delve into the investigation of corruption and making rulings on its consequences, they would be exceeding their authority and encroaching into ultra petita territory. This refers to situations where such issues were not raised or brought forward by the parties involved.<sup>94</sup>

The ICC Arbitration Rules, the UNCITRAL Arbitration Rules, and the Swiss Rules of International Arbitration as most leading arbitration rules are silent on the matter.<sup>95</sup> However, there is one notable arbitration rule that provides the Arbitral Tribunal to enquire explicitly on the issue of law

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Pulp Mills (Argentina v. Uruguay), Judgment, ICJ Reports 2010, para. 162.

<sup>89</sup> F-W Oil Interests v. Trinidad and Tobago, Award, ICSID Case No. ARB/01/14, 3 March 2006, paras. 190-192.

<sup>90</sup> Michael Hwang and Kevin Lim, “Corruption in Arbitration, Law, and Reality”, pp. 8-9.

<sup>91</sup> *Ibid.*, p. 9.

<sup>92</sup> Article 34(2)(a)(iii) UNCITRAL Model Law states: “34[...] (2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: [...] (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;”

<sup>93</sup> Article 36(1)(a)(iii) UNCITRAL Model Law and Article V(1)(c) New York Convention provide for refusal of enforcement of an award on the same basis as setting aside of an award under Article 34(2)(a)(iii) UNCITRAL Model Law (*ibid.*).

<sup>94</sup> Michael Hwang and Kevin Lim, *Ibid.*, p. 9.

<sup>95</sup> Domitille Baizeau and Tessa Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte', in Andrea Menaker (ed), International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19 (© Kluwer Law International; Kluwer Law International 2017), p. 5.

after the parties give a reasonable reply and respond concurring with the context of the London Court of International Arbitration (LCIA) Arbitration Rules.<sup>96</sup> The court found that the power to conduct necessary or expedient inquiries, including the identification of relevant issues and the determination of applicable laws and rules, may be vested in the Arbitral Tribunal. This includes the discretion to initiate such inquiries and gather relevant facts pertaining to the Arbitration Agreement, the arbitration process, and the merits of the parties' dispute.<sup>97</sup>

The concept of *sua sponte* is derived from the civil law principle "iura novit curia," which means "the court knows the law." This principle allows the court to apply the law even if the parties involved haven't explicitly raised it in their arguments (while still adhering to the requirements of due process). In simpler terms, it empowers the court to independently apply the relevant laws and rules, regardless of how the parties have presented or pleaded them.<sup>98</sup> In common law jurisdictions, the recognition of such principles is not widespread, and there is a significant debate regarding their application in international arbitration or common law legal systems generally do not accept these principles, and there is an ongoing discussion about whether they should be applied in international arbitration cases.<sup>99</sup> It is widely acknowledged that the International Arbitral Tribunal has the authority to independently address and raise legal issues concerning public policy and contract legality. However, this should be done while ensuring due process requirements are met. This means that the tribunal must inform the parties about any additional legal issues it intends to consider and provide them with an opportunity to respond, known as the tribunal has the power to examine and discuss matters related to public policy and the validity of the contract, but it must also ensure that both parties are properly informed and given a chance to present their arguments.<sup>100</sup>

The illustration of *sua sponte* application of mandatory public policy by the Arbitral Tribunal can be found in European Union Antitrust Law where in the case *Eco-Swiss v. Benetton* ("Swiss"). In the Swiss case, the court ruled that if a contract explicitly forbids the use of competition law, it would be considered invalid automatically. This is because competition law is a mandatory provision that must be applied regardless of what the parties agreed upon in their contract. Additionally, if an arbitral tribunal fails to address Article 81 of the EC Treaty, it could result in the cancellation of the arbitration decision. This might happen if a country's local procedural rules require a national court to grant a request to cancel an arbitration decision when it is found that the decision violates the country's public policy regulations.<sup>101</sup> Concurring with what is stated under the EC Treaty, *the United States – Morocco Free Trade Agreement* under article 18.5(1) stipulates the parties' commitment to "eliminate bribery and corruption in international trade and investment." Thus, the same ratio for the Arbitral Tribunal applying such a reason to observe the public policy can be made based on the treaty upheld.<sup>102</sup> Thus, the issue of *sua sponte* corruption examines the specific type of corruption alleged arbitration" and this becomes a notable voiced issue.<sup>103</sup>

While in the *Westacre* case, the tribunal adopted the stance that the Arbitral Tribunal is not obligated to conduct an investigation if the defendant does not include certain facts in their presentation. The tribunal emphasized that the direction of the investigation is solely determined by the parties'

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<sup>96</sup>LCIA Arbitration Rules, Art. 22.1(iii) (emphasis added).

<sup>97</sup>LCIA, *Ibid*.

<sup>98</sup>Domitille Baizeau and Tessa Hayes, *Ibid*, p. 5.

<sup>99</sup>*Ibid*.

<sup>100</sup>*Ibid*.

<sup>101</sup>*Ibid*, p. 6.

<sup>102</sup>Odumosu, Ibronke T. (2011) "International Investment Arbitration and Corruption Claims: An Analysis of World Duty Free v. Kenya," *The Law and Development Review*: Vol. 4: No. 3, Article 5, p. 91.

<sup>103</sup>Domitille Baizeau and Tessa Hayes, *Ibid*, p. 7.

presentations of facts.<sup>104</sup> In this particular case, the tribunal perceived its role primarily as an adjudicator rather than a prosecutor. It assumed a passive stance and refrained from conducting an investigation when neither party was willing to submit the necessary evidence.<sup>105</sup> Moreover, the tribunal is required to be convinced that there exists clear evidence of bribery. Merely having a "suspicion" expressed by any member of the tribunal is considered entirely inadequate to establish the presence of corruption.<sup>106</sup>

## II. Duty to Uphold the Anti-Corruption Norms

There is considerable contention regarding whether arbitrators have a duty to investigate allegations of corruption and/or disclose any findings of corruption to the appropriate authorities.<sup>107</sup> An arbitrator, in contrast to a judge in a national court, is selected based on the request of the parties involved in a contractual dispute. Consequently, the role of an arbitrator can be perceived differently compared to that of a judge. In other words, the question arises: "Is the arbitrator primarily serving the interests of the parties or the pursuit of truth?"<sup>108</sup> The duty to uphold the anti-corruption is more presenting the morality of the Arbitral Tribunal to set the anti-corruption to the dispute. Anti-corruption norms bring the sustainability of goals. As there is the difference discussed above regarding the morality of duty in international arbitration which focuses on the basic rule imposing the law punishment as a result, here we focus on the morality to aspiration. As explained by Professor Lon Fuller the morality of aspiration consists of the morality of excellence, of the fullest realization of human powers.<sup>109</sup> Fuller stated that such failure leads to a failure to achieve excellence rather than failure to sanction or punish.<sup>110</sup> There is more reason for the arbitral's jurisdiction by upholding the anti-corruption norms to determine the validity of the claims and simply to ensure the arbitral process does not sanction corrupt acts.<sup>111</sup>

In the case of F-W Oil Interests, the tribunal emphasized that its role is not to morally evaluate the conduct of either party involved, but rather to solely determine the validity of the claims presented and their legal implications.<sup>112</sup> Although initially, it may appear as a rejection of the idea that tribunals have a role in international anti-corruption endeavors, it must be made clear that this ICSID Tribunal, is obligated to treat allegations of State corruption with the utmost seriousness, provided there is proper evidence to support them.

Corruption allegations have far-reaching implications that go beyond their impact on the individuals involved. They have been shown to have serious and detrimental effects on economic development, especially in developing nations. The primary goal of Bilateral Investment Treaties and the establishment of the World Bank is to promote economic growth. Consequently, if corruption allegations are made and convincingly substantiated, they would heavily influence how the Tribunal views the case. This would be particularly significant when evaluating the State's actions or omissions regarding the treatment of foreign investment, as outlined in the BIT.<sup>113</sup>

Following some anti-corruption norms already codified as discussed above.<sup>114</sup> The application for upholding the anti-corruption norms can be found in the case of *Spentex v. The Republic of Uzbekistan* the tribunal<sup>115</sup>, due to its finding of corruption, dismissed the claim on jurisdictional

<sup>104</sup>A. Timothy Martin "International Arbitration and Corruption: An Evolving Standard", 2003, p. 5.

<sup>105</sup>*Ibid.*

<sup>106</sup>Mohammed Abdel Rouf, *Ibid*, p. 125.

<sup>107</sup>Joe Tirado, Matthew Page, Daniel Meager, *Ibid*, p. 498.

<sup>108</sup>A. Timothy Martin, *Ibid*, (citing P. Sieghart, "Viewpoint" (1982) 48 *Arbitration* 133 at p. 135).

<sup>109</sup>The Honourable L. Yves Fortier, QC, *Ibid*, p. 376.

<sup>110</sup>*Ibid.*

<sup>111</sup>Domitille Baizeau and Tessa Hayes, *Ibid*, p. 7.

<sup>112</sup>Joe Tirado, Matthew Page, Daniel Meager, *Ibid*, p. 499 (citing F-W Oil Interests v. Trinidad and Tobago, Award, CSID Case No. ARB/01/14, 3 March 2006, para. 211).

<sup>113</sup>F-W Oil Interests v. Trinidad and Tobago, *Ibid*, para. 212.

<sup>114</sup>See *Supra* at Introduction.

<sup>115</sup>Lucinda A. Law, *Ibid*, p. 345 (citing *Spentex v. the Republic of Uzbekistan*, ICSID Case No. ARB/13/26, para. 981).

grounds. However, it issued an order stating that the state must contribute to an anticorruption non-governmental organization (NGO) or face a negative costs ruling. This unconventional approach, which was not contested by the parties involved, seems to indicate that the tribunal was uneasy about the implications of its finding and sought to address the issue through alternative means.

With the increasing prevalence of compliance programs, Arbitral Tribunals have the authority to examine the preventive measures taken by a company that is pertinent to the specific case under consideration. Additionally, they may make determinations regarding the adequacy of a company's efforts to address corruption risks. Likewise, by adopting a proportionality approach, Arbitral Tribunals may assess the extent of a state's preventive measures to fulfill its treaty obligations, both in a general sense and in relation to the specific case at hand. Based on these findings, the tribunals may then determine issues of state responsibility or attribution.<sup>116</sup>

#### IV. CONCLUSIONS

In conclusion, corruption issues internationally still develop and the circumstances to tackle the issue in international arbitration are evolving whether it will be counted as jurist or merits. There is no yet clear distinguish the stage for corruption issue that practically merits the appropriate stage to discuss the burden of proof. The measures taken by tribunals have shown their development when grappling with the issue of corruption.

The standard of proving corruption not yet finding its concrete definitions. The tribunals examined different standards from low to tight. Proofing corruption has been influenced by common law and civil law systems where both common law and civil have different approaches for finding corruption. These turned into problems to understand international arbitration itself and many suggestions of international arbitration for having such concrete standards. Accordingly, the burden of proofing corruption also needs further discussion. The counterclaim is not enough for the alleged party for proving the allegations. This issue is still debatable due to the time limit and the basis of the alternative dispute itself in arbitration.

Corruption issue has an impact on the proceeding in international arbitration. This issue broad from the anti-corruption norms that are not enough just to prove the generic norms but instead need to be specified so the corruption can be combated. It should be a bare minimum for everyone especially the Arbitral Tribunals to be more aware of the legal and factual issue. Thus, combating corruption issues evolve in many different ways from the Arbitral Tribunals and needs to be in a specified discussion regarding the standard of proof and deal with enforcement award to be executed.

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