

Document information

Publication

Journal of International Arbitration

Topics

Investment Arbitration

Key words

Investment arbitration
Evidence of corruption
Standard of evidence
Means of evidence
Power to raise corruption matters sua sponte

Bibliographic reference

Olivier Caprasse and Maxime Tecqmenne, 'The Evidence of Corruption in Investment Arbitration', in Maxi Scherer (ed), *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2022, Volume 39 Issue 4) pp. 519 - 548

The Evidence of Corruption in Investment Arbitration

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A great deal has been written over the years about the evidence of corruption in international arbitration. In that context, this article offers a timely analysis of some of the most contentious rules and principles applicable in relation to the evidence of corruption allegations in investment arbitration. On the basis of an assessment of forty investment awards dealing with corruption, it is demonstrated that it matters relatively little which standard of evidence is applied by arbitral tribunals. The arbitral practice also reveals that, in recent years, arbitrators have come to rely more heavily on their discretion over evidentiary matters in order to contribute to the fight against corruption. This trend has materialized not only in relation to the arbitrators' growing reliance on their investigative powers, but also their acceptance of more flexible means of evidence for the purpose of demonstrating the reality of corrupt practices.

1 INTRODUCTION

It is a truism to say that corruption is – at least legally speaking (1) – almost universally condemned. Over the past few decades, there has indeed been a growing international consensus regarding the fight against corruption. (2) The prohibition against corruption features in various anti-corruption international treaties and conventions such as the United Nations Convention Against Corruption (UNCAC), the Organization for Economic Co-operation and Development (OECD) Convention on Bribery of Foreign Public Officials in International Business Transactions, and the Council of Europe Conventions on corruption. (3) There is no denying that these international and national initiatives have turned the spotlight onto the fight against transnational corruption in international law and policy. That prohibition is also recognized – albeit to varying degrees (4) – in the vast majority of states. Countries such as the United States, France, England and Germany, to name but a few, have enacted laws and regulations with the aim of criminalizing corruption. As a consequence, there appears to be growing recognition that the prohibition of corruption belongs to transnational public policy. (5)

P 520

In that context, it is rather unsurprising to observe that the number of allegations of corruption in investment arbitration has increased markedly over the past few years. No less than thirty awards involving allegations of corruption have been rendered since 2010. Such allegations may arise at different stages of the arbitral proceedings. They may be invoked by the host state to deny the competence of the tribunal – as a bar either to jurisdiction or to the admissibility of the claim. (6) The use of this objection raises thorny questions relating to the manner in which arbitral tribunals should deal with claims involving corruption. Much has already been said and written, in particular, on whether an arbitral tribunal may decide to deny access to international arbitration to an investor whose investment is tainted by corruption even in the absence of an explicit 'legality requirement' in the relevant Bilateral Investment Treaty (BIT). (7) In addition, these allegations may also be invoked by the investor itself at the merits stage to allege a violation by the host state of its international obligations under the relevant BIT. (8)

P 521

When a claim involving corruption is brought forward, arbitrators – and indeed parties alike – may have a hard time demonstrating that corruption has indeed occurred. In practice, the true nature of corruption is often concealed behind seemingly legal transactions, and the parties will make sure to leave no 'incriminating evidence of their activities'. (9) As a consequence, it may be difficult to find straightforward evidence to demonstrate corrupt practices. (10) Even if such evidence exists, arbitral tribunals may not always be able to obtain such evidence given that they enjoy rather limited investigative powers in comparison with domestic courts, especially in relation to their ability to compel the production of relevant evidence and subpoena witnesses. (11) The difficulty is further compounded by the relatively little amount of guidance offered by national laws, arbitral rules, as well as international conventions in relation to the rules and principles governing the evidence of corruption in international arbitration.

In that context, this article seeks to provide an overview of the arbitral jurisprudence on some of the most salient evidentiary matters with respect to claims involving corruption. For that purpose, an analysis of the arbitral jurisprudence dealing with corruption was conducted. From the outset, it must be stressed that this analysis does not deal with cases in which corruption was not examined at any real length. There have been instances where the arbitral tribunal dispensed with the issue of corruption, (12) and similarly, the parties themselves have sometimes dropped their claims of corruption in the course of proceedings. (13) Beyond those cases, this article relies on an analysis of forty awards to shed more light on the evidentiary principles governing corruption claims. On the basis of that analysis, this article seeks to address the question of whether arbitral tribunals are bound by a duty to raise and perhaps even investigate allegations

P 522

of corruption of their own volition (section 2), before analysing the rules and principles governing the standard and burden of evidence of corruption (section 3). The article then moves on to deal with the arbitral practice in relation to the assessment of the evidence of corruption (section 4).

2 ARBITRAL TRIBUNAL'S POWER TO RAISE CORRUPTION MATTERS ON ITS OWN MOTION

Arbitral tribunals may sometimes have manifest grounds for suspecting that a dispute – or the contract giving rise to that dispute – is tainted by an issue of public policy even though the parties themselves have not raised that issue in their submissions. It is generally accepted that the tribunal retains the power to investigate and take initiatives to obtain further evidence of fact or law, (14) especially with respect to issues that were dealt with by the parties. By contrast, it is a matter of great debate whether and to what extent the arbitral tribunal may – or perhaps even should – be allowed to expand the dispute by raising *sua sponte* such issues of public interest beyond the disputed questions submitted by the parties. Unfortunately, most investment treaties and arbitral rules do not provide any guidance on that matter, and it has accordingly generated considerable controversy in academic literature and arbitral jurisprudence.

At the heart of that debate there features a paradox – or dilemma – between two overarching principles of international arbitration. On the one hand, the principle of party autonomy militates in favour of a *laissez-faire* attitude on the part of arbitrators. On the other hand, it must be noted that the enforcement or ● recognition of an award may be refused if it is deemed to be contrary to the public policy of the country in which recognition or enforcement is sought. (15) Several arbitral awards have effectively been annulled or set aside on the ground that they were not in compliance with public policy. (16) Similar arguments have been advanced successfully before the French Court of Appeal in the context of requests to set aside arbitral awards for violation of the principles of international public policy, including matters involving fraud, money laundering or corruption. (17) It has been suggested, in that respect, that public policy considerations support a more proactive approach from the tribunal with respect to matters of public interest, (18) subject to compliance with the parties' due process guarantees and, in particular, their right to be heard and right of equal treatment. For that reason, some commentators have posited that arbitral tribunals are bound by a duty to address and perhaps even investigate salient issues of public interest provided that they belong to mandatory rules or transnational public policy – such as matters involving corruption, money laundering, and embezzlement. (19)

The same reasoning may admittedly not so readily apply in relation to arbitration proceedings carried out under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('the International Centre for Settlement of Investment Disputes or ICSID Convention'). One of the most peculiar features of the ICSID system is that public policy does not feature amongst the grounds for annulment described in Article 52 of that Convention. This means that the parties cannot challenge the award on that ground. As a consequence, it falls upon the arbitrators themselves to deal with any issues of public interest that may arise in the course of proceedings, or else such issues will not be addressed at all. In other words, there is no way for the parties to initiate subsequent proceedings to redress that defect. P 524 In those circumstances, the ● arbitral tribunal is (formally speaking) under no obligation to raise issues of public interest on its own motion. It is sometimes suggested, however, that the public dimension of investment arbitration 'militate[s] towards requiring arbitrators to make use of independent fact-finding powers' in those circumstances. (20) Even in the context of ICSID arbitration proceedings, the arbitral tribunal should thus strive to make use of its investigative powers – by requesting the production of specific evidence, or ordering the attendance of a third-party witness – in order to shed light on those public policy issues even if they were not addressed by the parties in their submissions.

If these are the terms of the debate as to the powers of arbitrators in investment arbitration in general, some commentators also consider that there is growing acceptance in relation to the arbitral tribunal's authority to address and even perhaps investigate allegations of corruption on its own initiative. (21) Although the practice of arbitral tribunals in that respect has traditionally been rather inconsistent, (22) recent arbitral awards seem to indicate that at least some arbitrators are willing to make use of their fact-finding powers to investigate potential suspicions of corruption arising during the arbitration. (23)

One of the most striking features of *Metal-Tech v. Uzbekistan* is that the tribunal decided to rely on its *ex officio* investigative powers described in Article 43 of the ICSID Convention in order to cast some light on suspicions of corruption that arose in the course of the arbitration. During the hearing on jurisdiction, the tribunal became aware of three important elements raising suspicions of corruption. In the first place, the claimant's CEO admitted that the consulting agreements concluded by Metal-Tech and three of its consultants were already running before the investment was made. Prior to that hearing, the evidence on record indicated that these agreements had only been concluded a few

years *after* the making of the investment. In the second place, it was also revealed that the consultants did not perform the services described in the consulting agreements. Instead, they were employed to perform ill-defined ‘lobbying activities’. More surprisingly still, it was also revealed that they had been paid in the strikingly large amount of approximately USD 4 million.

P 525 The tribunal observed that the payments made by Metal-Tech were disproportionate in comparison with the overall value of the transaction because they ‘exceeded its initial cash contribution ... and amounted to nearly 20% of the entire ● project costs’. (24) Viewed together, these elements raised reasonable suspicions about the true nature of these transactions. Although none of the parties had raised allegations of corruption, the tribunal therefore decided to delve further into the nature and purpose of the services provided by Metal-Tech’s consultants. For that purpose, it made use of its fact-finding powers and requested the claimant to produce further evidence demonstrating that actual and effective services had been performed ‘for legitimate purposes in return for those payments’. (25) In the light of Metal-Tech’s failure to adduce evidence to that effect, and despite repeated attempts by the tribunal to obtain such evidence, the tribunal subsequently inferred that ‘no services, or at least no legitimate services at the time of the establishment of the Claimant’s investment, were in fact performed’. (26)

The tribunal’s approach in *Metal-Tech* is consonant with a widespread view in academic literature that the tribunal should be able to raise – and perhaps even investigate (27) – issues involving corruption of its own volition. (28) It also falls in line with the approach adopted recently by the Singapore International Commercial Court in *Lao Holdings NV and Sanum Investments Ltd v. Government of the Lao People’s Democratic Republic*. (29) In its decision, the Court upheld two awards that had dismissed the claims put forward by the claimants on the basis of findings of corruption. The claimants subsequently filed an application to set aside these two awards on the ground that the tribunals exceeded the scope of the parties’ submission by admitting new elements of evidence. It is worth stressing that the parties initially settled the dispute and decided that the record in the arbitrations would remain frozen even if the claims were revived. In that perspective, the parties reached a settlement by which they agreed that no new claims, evidence, or reliefs would be accepted. After the arbitration proceedings were resumed, however, the arbitral tribunals accepted the respondent’s request to introduce decisive new elements to support its allegations of corruption.

In its decision, the Singapore Court concurred with the tribunals’ approach. It opined that the tribunal was bound by a ‘public duty’ to address corruption ‘not only where [it] has to deal with allegations of corruption in the dispute between the parties, but also where the evidence in the case indicates possible corruption’. For that reason, the Court concluded that arbitral tribunals ‘have a pro-active role and cannot simply ignore evidence of corruption’. This meant, in particular, that ● ‘no agreement between the parties can prevent the tribunal from reviewing and, where appropriate, admit[ting]’ new elements of evidence demonstrating corrupt practices. (30) It is suggested here that this approach is indeed warranted considering the risk of annulment or non-enforceability affecting an award rendered in violation of the prohibition of corruption. It must nevertheless be stressed that the tribunal’s initiative should only be undertaken if *prima facie* evidence or red flags arise leading it to suspect that the transaction might be affected by corrupt practices, (31) as otherwise the award may be challenged on the ground that the tribunal has exceeded its mandate. (32)

P 526 Ultimately, though, it falls upon each tribunal to assess the elements adduced by the parties on a case-by-case basis, and to decide whether to carry out further investigation. In the subsequent case of *Infinito Gold v. Costa Rica*, (33) for instance, it may be suggested that the arbitral tribunal’s somewhat more cautious approach to the use of its investigative powers was justified by reference to its assessment of the cogency of the evidence pertaining to corruption. In that case, the claimant, Industrias Infinito, had obtained an exploitation concession for the extraction, processing, and sale of minerals from the Las Crucitas gold deposit, an area located in Costa Rica. That concession was later annulled by the Constitutional Court on the grounds that it violated the right to a healthy and ecologically balanced environment. That judgment was subsequently repealed by then-President Óscar Arias. The later decided to grant an exploitation concession to the claimant by converting the previously annulled concession into a valid one.

In the subsequent arbitration proceedings launched by the claimant, the Costa Rican government alleged that the former President’s decision was affected by corruption. It was submitted, in particular, that he had received a donation from the claimant’s shareholder for the purpose of securing the award of the concession. In support of that allegation, the host state relied on an ongoing investigation against former President Óscar Arias and other state officials in relation to the award of the concession. In the course of proceedings, the respondent withdrew its claim following the decision by a Costa Rican criminal court to discontinue the investigations on the grounds that the charges proffered against the former President were time-barred. ●

P 527 In spite of the respondent’s withdrawal of its claim, the tribunal decided to address these corruption allegations *ex officio*. According to the tribunal, ‘corruption allegations ... raise an issue of international public policy’ and, as such, they must be

addressed by the tribunal even if the parties decided not to rely upon them in their own pleadings. (34) At first glance, the arbitral tribunal's pronouncements may therefore be seen as confirming the trend ushered in by *Metal-Tech*. Ultimately, though, the tribunal's approach was rather more cautious in comparison with that in *Metal-Tech*. More specifically, the tribunal refrained from requesting further evidence on the allegations. Instead, it merely relied on the evidence adduced by the parties at that stage. The tribunal subsequently concluded that the evidence produced by the parties was insufficient to demonstrate corruption. In support of that conclusion, the tribunal stressed, in the first place, that the investigation had been discontinued and that there was 'no indication that the charges against President Arias [could] proceed'. (35) On the face of it, that argument is not entirely convincing. Although there is no denying that these investigations were discontinued, it appears that that decision was made only on the basis of procedural grounds. In other words, the decision was adopted without prejudice to the merits of that investigation. The tribunal nevertheless added, in the second place, that there was no evidence to support the conclusion that the former President had received a donation from one of the claimant's shareholders. In reaching this conclusion, the tribunal was satisfied that it had 'discharged its *ex officio* duty in matters of international public policy'. (36)

In the light of *Infinito Gold v. Costa Rica*, it can be suggested that the existence of a duty to raise *ex officio* allegations of corruption is commonly accepted in arbitral practice. At the same time, however, that duty does not necessarily encompass a duty to investigate such allegations. That decision in that case may indeed be seen as an indication that arbitral tribunals will only consider making use of their investigative powers provided that there is specific *prima facie* evidence raising suspicions of corruption. In that perspective, the tribunal's somewhat cautious approach may have been justified by the rather scarce evidence provided by the parties in relation to the allegation of corruption. It is rather surprising, however, that the tribunal did not engage further with these issues, especially considering the fact that an official investigation was launched against the former President in relation to allegations of corruption pertaining to the claimant's investment. In line with the tribunal's approach in *Metal-Tech*, it may be suggested that such investigations constitute precisely the type of evidence required to give rise to a reasonable ● suspicion that an investment is tainted by corruption. In choosing to investigate, arbitrators should also take into consideration the inherent difficulty to demonstrate corruption with certainty. (37) If the tribunal decides to conduct further investigation of its own motion, it must further be stressed that it must comply with the parties' right to be heard. This means, in particular, that the parties should be informed of the tribunal's concerns and offered the time and opportunity to share their views on the matter. (38)

3 BURDEN AND STANDARD OF PROOF OF CORRUPTION IN INVESTMENT ARBITRATION

When it is called upon to decide on the parties' claims, the arbitral tribunal must identify the rules applicable to evidentiary matters such as the burden and standard of proof. The rules applicable to those matters may indeed influence the outcome of allegations of corruption. The rules on the allocation of the burden of proof aim to determine the party who bears the burden of adducing evidence in support of its allegations. (39) That party will accordingly lose if the relevant assertion remains unproven. As to the rules on the prevailing standard of proof, they define the level or degree of confidence required to conclude that the fact of corruption is demonstrated. (40) As such, these rules determine whether the evidence adduced by each party is sufficient to support a finding of corruption. The identification of the laws and regulations applicable to the burden and standard of proof may therefore have a bearing on the outcome of allegations of corruption.

Whilst there is no denying that most national and international provisions on the burden of proof contain similar – if not identical – solutions, the same conclusion does not prevail in relation to the standard of proof. Diverging approaches towards the standard of proof exist depending on the applicable national laws and regulations. It is perhaps fair to acknowledge at this stage that, in contrast to common law systems, most civil law systems do not necessarily articulate the very concept of 'standard of evidence' in a clear and explicit fashion. (41) This is especially the case in civil and commercial matters. (42) That does not mean, however, that this concept is simply non-existent in those legal orders. Just because the terminology 'standard of ● evidence' is not employed in an explicit manner, this does not necessarily mean that the idea underlying this concept is simply absent in those countries. As aptly pointed out by Patrick Kinsch, determining the appropriate standard or 'degree' of evidence is also a matter of concern in continental legal systems. (43) In any event, we shall see that even though the approaches adopted in common and civil law jurisdictions seem to diverge considerably, they may not necessarily lead to diverging outcomes. One of the most recurring questions in that respect is whether the rules on the burden and the standard of proof should be determined in accordance with the substantive or procedural legal rules governing the investment arbitration. (44)

Against that background, this section is structured as follows. After dealing with the

question of which law governs the standard and burden of proof (3.1), it delves into an assessment of the burden and standard of proof applied in practice by arbitral tribunals when they deal with allegations of corruption. It is demonstrated, in particular, that the rule *actori incumbit probatio* is universally recognized and applied by arbitral tribunals (3.2), whereas the requisite standard of evidence gives rise to considerable debates in legal scholarship and arbitral practice (3.3).

3.1 Law applicable to the burden and standard of proof

The question of which law applies to the burden and standard of proof has generated considerable controversy in arbitral jurisprudence and legal scholarship. It is worth mentioning from the outset that there are, broadly speaking, two approaches to the identification of the rules applicable to the arbitration. The first approach, which may aptly be qualified as the ‘conflict of law approach’, dictates that arbitrators should apply the relevant conflict of law provisions to determine the rules applicable to the arbitration. In turn, the relevant conflict of law provision must be identified with due regard to the applicable investment treaty or, in the absence of specific provisions in the treaty, national legal provisions. While the country of the seat traditionally serves as a reference in that context, that does not hold true in relation to ICSID arbitration proceedings which are internationalized and, hence, do not have a seat. When it comes, P 530 in particular, to the substantive rules governing the merits of the dispute, Article 42(1) ● of the ICSID Convention specifies that they must be identified by reference to the law of the host state, as well as rules of international law. Besides the traditional conflict of law approach, a second approach, dubbed the ‘*voie directe* approach’, is also commonly applied by arbitrators. That approach is explicitly endorsed by some arbitration rules. (45) Based on that approach, it falls upon the arbitral tribunal to determine directly the rules applicable to the arbitration without any reference to the conflict of law provisions originating from a specific legal order.

Against that background, most commentators seem to consider that the rules on burden and standard of proof belong to the substantive rules governing the merits. (46) In practice, it would nevertheless seem that arbitral tribunals have differed on the question of whether these matters belong to the procedural or substantive rules governing the arbitration. The uncertainty resulting from those diverging approaches is further compounded by the fact that some tribunals may even sometimes establish a distinction between the rules on the burden of proof and those pertaining to the standard of proof. That approach was most notably adopted by the tribunal in *Jan Oostergetel*. According to the tribunal, ‘[w]hile the general principle *actori incumbit probatio* pertains to the procedure ... the rules establishing presumptions or shifting the burden of proof under certain circumstances ... are generally deemed to be part of the *lex causae*’. (47) This statement offers an illustration of the approach according to which the burden of proof must be determined by reference to the procedural rules governing the arbitration, while the standard of proof must be identified in accordance with the law chosen by the parties to govern the merits of the dispute.

It must also be pointed out that most arbitral tribunals have remained somewhat oblivious to the issue of identifying the relevant laws and regulations applicable to these evidentiary matters. One of the reasons justifying that approach may simply arise from the fact that in some cases the parties themselves did not specifically address that matter, but preferred instead to rely upon authoritative sources such as, for instance, P 531 previous arbitral awards or academic legal writings. (48) ● In addition, as far as the burden of proof is concerned, that approach may be warranted considering the broad consensus existing across national jurisdictions about the principle *actori incumbit probatio*. (49) Beyond this, that approach may also be explained by reference to the relatively small amount of guidance proffered by national laws, arbitration rules and international customary law with respect to these evidentiary matters. (50) In the majority of cases, the applicable substantive law – which is usually the relevant BIT (51) – does not commonly include detailed guidance on evidentiary matters. In the same vein, most arbitration rules, customary international law and applicable procedural laws do not offer much guidance on such matters. In particular, they remain silent on the applicable burden and standard of proof. The only prevailing rule of evidence is the free appreciation of evidence by the tribunal. (52) The principle of free evaluation of evidence entails that arbitral tribunals are free to determine the weight to be attached to a particular item of evidence, and remain sovereign when it comes to the assessment of the admissibility of such pieces of evidence. (53) It must nevertheless be stressed that this principle does not offer ‘any positive standard of proof’. (54) As a consequence, the arbitral tribunal is not bound by specific rules of evidence when it comes to the identification of the burden and standard of proof applicable in each case under consideration. It would therefore seem that the prevailing burden and standard of proof may be determined irrespective of the laws and regulations governing the arbitration.

That approach is illustrated by the reasoning exhibited in *Gavrilovic v. Croatia*. In that case, the arbitral tribunal considered that it was not bound by any specific rule or evidence and could determine the burden of proof irrespective of the solutions provided in different jurisdictions. The tribunal initially observed that ‘the ICSID Convention, the P 532 ICSID Arbitration Rules and the BIT do not provide ● guidance for determining which party bears the burden of proof’. For that reason, the tribunal subsequently went on to

state that:

in the absence of mandatory rules as to how a tribunal should judge the probative value of evidence put before it, therefore, the tribunal considers it appropriate to apply the general approach taken in international dispute settlement which is not characterized by formal rules of evidence. (55)

It subsequently relied upon an analysis of the arbitral jurisprudence on that matter to identify the principle *actori incumbit probatio* as being applicable in the proceedings.

3.2 Burden of proof

The Latin maxim *actori incumbit probatio* is almost universally recognized as being applicable in investment arbitration and, more generally, in international arbitration. (56) Considering arbitral tribunals' wide acceptance of that principle, it is rather surprising to observe that it has not been enshrined explicitly in most sets of arbitration rules. That principle features most notably in the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, (57) as well as the Iran-United States Claims Tribunal Rules of Procedure. (58) It is also recognized and applied in most, if not all, legal systems. (59) It follows that the *actori incumbit probatio* rule may be deemed to constitute a general principle of law pursuant to Article 38(c) of the Statute of the International Court of Justice. (60) Some commentators even believe that it belongs to the *lex mercatoria*. (61) Based on that principle, each party must adduce evidence to support its own assertions of facts. ●

P 533

That principle has repeatedly been reaffirmed in relation to allegations of corruption. It follows that the party who alleges the presence of corruption must produce evidence to demonstrate that it has indeed occurred. (62) The question frequently arises as to whether the burden of proof may be shifted in circumstances – such as those involving fraud, money laundering or corruption – where a party alleging a fact may have to grapple with serious difficulties in demonstrating that it has occurred. It would appear that arbitral tribunals have generally been reluctant to accept to shift the burden of proof in such circumstances. (63) It seems, in particular, that no investment tribunal has ever agreed to shift that burden of proof thus far.

3.3 Standard of proof

3.3[a] General Considerations on the Standard of Proof in Investment Arbitration

Whilst the principle *actori incumbit probatio* is uniformly applied by arbitral tribunals, there appear to be varying approaches in relation to the standard of proof applicable in investment arbitration. It is often suggested that the most commonly applied standard of proof is the common law standard of 'balance of probabilities' or 'preponderance of evidence'. (64) At the same time, though, this standard is not applied uniformly by arbitral tribunals. (65) As we shall see, some tribunals have also determined a heightened standard of proof in circumstances where serious allegations involving wrongdoing such as fraud, money laundering or corruption are made. (66) Arbitral tribunals have also regularly refrained altogether from articulating the appropriate standard. (67) These varying approaches towards the applicable ● standard of proof may be partly related to the broad discretion enjoyed by arbitral tribunals in relation to evidentiary matters. As we have seen, most institutional rules of arbitration remain silent on the standard of proof to be applied by arbitral tribunals. Quite unsurprisingly, arbitrators therefore retain the power to set the appropriate standard in the light of the circumstances of each case, (68) subject to compliance with due process requirements. (69)

P 534

In practice, the arbitrators' choice of standard of proof may sometimes be influenced by the varying standards of proof emanating from specific legal orders. (70) Most arbitral tribunals do not explicitly refer to a specific legal order when it comes to defining the prevailing standard of proof, preferring instead to rely upon earlier investment arbitration awards in order to support their own findings on the applicable standard. (71) They may also take into account the jurisprudence from international courts and tribunals for that purpose. For instance, the arbitral tribunal in *Sanayi v. Pakistan* relied upon a jurisprudential precedent emanating from the International Court of Justice to support its findings on the relevant standard of proof. (72)

But the influence drawn from specific legal orders may be more explicit. It is not unusual for arbitral tribunals to expound – albeit sometimes very briefly – on the evidentiary principles applicable in different legal orders to ground their decision as to the standard of proof applicable in a given case. (73) The rules on evidentiary matters may differ to a certain extent depending on the applicable national laws and regulations. More specifically, the rules on standard of proof may vary considerably between civil law and common law traditions. In the same vein, there may also be differing rules on standard of proof within a specific national legal order depending on the nature and consequence of a claim. In this respect, we shall see that a difficulty arises from the nature of illegal activities such as ● corruption. As the latter constitutes a criminal offence, some arbitrators insist that it should be subject to a heightened level of proof even in the context of international arbitration. At the same time, however, that position is contested by other arbitral tribunals on the ground that the arbitration procedure does not purport

P 535

to determine the criminal law implications, but rather the civil consequences resulting from the alleged corrupt activities.

In common law countries such as England and the United States, the applicable standard of proof depends on the nature of the claim. (74) The standard applicable in relation to civil claims is the 'preponderance of evidence'. That standard is otherwise known in the United States as the 'balance of probabilities'. It follows that a fact will be considered as established if the probability that it has indeed occurred exceeds 50%. (75) In contrast, the level of proof required to establish that a fact has occurred in the event that a claim involves important individual rights and interests must reach the greater threshold of 'clear and convincing evidence'. That standard entails that the judge or arbitrator must be satisfied that the allegation is 'significantly more likely to be true than not true'. (76) The applicable standard is even higher in relation to criminal claims. In those circumstances, the judge must be convinced that the alleged event has occurred 'beyond a reasonable doubt'. (77)

As we have seen, most civil law jurisdictions stand in stark contrast with comparison to common law systems because they do not offer much guidance on the standard of evidence. The standard applicable with respect to all claims – including both civil and criminal claims – is the 'inner conviction' test. The precise meaning of that test nevertheless remains somewhat elusive. Unfortunately, it does not 'indicate the degree or quantum of evidence' required to consider a fact as proven. (78) As already mentioned, that does not necessarily mean, however, that the concept of 'standard of proof' is not recognized to some extent by civil law systems. In civil law countries such as France, Belgium and Switzerland, the requisite standard of evidence is often described as 'certainty'. (79) More specifically, the degree of certainty required in relation to criminal law matters reaches the level of proof 'beyond any reasonable doubt' or 'unsurmountable doubt'. (80) In contrast, ● the allegation will be considered as demonstrated in civil cases if the probability that it has indeed occurred reaches the threshold of 'certainty' or, at the very least, 'reasonable certainty'. (81)

At a first glance, the difference in terminology would suggest that the civil law standard of 'certainty' is different from the common law standard of 'balance of probabilities'. Unlike the common law standard of evidence, which is characterized by an objective, if not mathematical, approach, the civil law approach towards the standard of evidence relies more heavily on the subjective dimension of the evaluation of the evidence presented by the parties. (82) At the same time, however, it is widely assumed that the application of the relevant standard does not necessarily lead to a different outcome. (83) What matters most, at the end of the day, is that arbitrators and judges should 'evaluate the evidence produced and be convinced that the evidence is more likely than not'. (84)

3.3[b] Standard of Proof of Corruption in Investment Arbitration

It can be inferred from an analysis of the arbitral jurisprudence on allegations of corruption that arbitral tribunals have differed in their approaches towards the standard of proof required to demonstrate the fact of corruption. Most arbitral tribunals fail entirely to consider the appropriate standard of proof. Amongst the forty awards analysed in the context of this article, twenty-two do not feature a decision on the applicable standard of proof in relation to these allegations. The tribunal in *Niko Resources v. Bapex* even went as far as to consider that the question of the appropriate standard of proof did not provide much assistance to the tribunal in the assessment of the evidence of corruption. (85) In the same vein, Emmanuel Gaillard observed that discussion of the adequate standard of proof is to 'a large extent academic' since arbitral tribunals enjoy great leeway when it comes to the appreciation of evidence. (86) ●

Arbitral tribunals' apparent lack of engagement with the standard of proof mainly occurs in relation to one specific situation. In particular, it seems that arbitral tribunals usually refrain from setting a specific standard of evidence in circumstances where the evidence is clearly lacking because the party alleging corruption has failed to substantiate its allegations. One of the most common features of these awards is that the party alleging corruption relied on mere insinuations or general allegations of corruption, but failed to provide specific and relevant evidence of the alleged corrupt practices. (87) In *Bridgestone v. Panama*, (88) for instance, the claimants submitted that the Supreme Court judgment adopted in a case involving them was affected by corrupt practices. In support of that contention, they mentioned several elements allegedly supporting a finding of corruption. Amongst those featured several non-governmental organizations' reports demonstrating the widespread nature of corruption in the judiciary of Panama, as well as complaints of corruption filed against the judges involved in the drafting of their judgment. These elements were relied upon by the claimants in order to support the argument that the errors in substance deriving from the judgment could only be explained by reference to corruption. The tribunal nevertheless considered that these elements constituted mere insinuations of corruption that did not relate specifically to the claim of corruption brought forward by the claimant. They were therefore deemed to be insufficient to conclude that corruption had indeed occurred.

The tribunal in *ECE Projektmanagement v. Czech Republic* (89) was also confronted with similar arguments involving general allegations of corruption. In the case under consideration, the claimant alleged that the respondent state had breached the fair and

P 538 equitable treatment (FET) standard owing to serious irregularities pertaining to the process leading up to the award of building permits for the construction of shopping centres – which the claimant subsequently abandoned. In that context, the claimant alleged that one of its main competitors paid bribes to ● the state authorities with a view to delay the award of its own permit. In that relation, the claimant relied upon general evidence deriving from NGOs' reports demonstrating the systemic nature of corruption in the Czech Republic. It was submitted that these elements, in combination with serious irregularities affecting the building permit process, supported the conclusion that the process had been affected by corrupt practices. The tribunal was not convinced. Although it was willing to 'connect the dots' offered by the claimant, the tribunal found that there was no evidence of any specific act of corruption. It insisted, in particular, on the need to remain:

vigilant against blanket condemnatory allegations which can have the appearance of an attempt to 'poison the well' in the hope of making up for a lack of direct proof. Reference to other instances of alleged corruption may prove that corruption exists in the state, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. (90)

When it has been addressed explicitly by international arbitral tribunals, the question of the appropriate standard of proof in relation to allegations of corruption has given rise to controversy. From the outset, it must be stressed that most arbitral tribunals have paid little to no attention to the preliminary step of identifying the law applicable to the issue of the standard of proof. (91) It would seem, in particular, that arbitral case law only features scarce reference to the solutions applied in different national jurisdictions. (92) In *Croatia v. Mol*, for instance, the tribunal duly considered the respondent's argument that the standard of evidence should be the standard of 'reasonable certainty' in accordance with the substantive law applicable to the dispute (i.e., Croatian law). Ultimately, though, the tribunal grounded its decision on the basis of two arbitral precedents dealing with corruption. (93) In the same vein, most arbitral tribunals flesh out the relevant standard of proof by reference to previous arbitral awards, (94) while several tribunals did not even provide support for their findings based on any authoritative legal reference. (95) That ● approach seems to indicate that arbitral tribunals usually consider that they are not bound by specific rules of evidence when it comes to the identification of the relevant standard of evidence.

P 539 The analysis conducted in the context of this article also reveals that there is no universally accepted standard of proof with respect to such allegations. It is sometimes suggested that claims involving serious wrongdoings such as fraud, bribery, or more generally any impropriety pertaining to international public policy should be dealt with in accordance with a high standard of proof. (96) In those circumstances, the chosen standard may vary across a spectrum of possibilities ranging from 'proof beyond doubt' (97) to the 'irrefutable evidence' standard (98); although, in most instances, it is the standard of 'clear and convincing evidence' that prevails. (99) Oft-repeated in support of that approach is the argument that the gravity of such allegations warrants a different approach from that applied under the rules and principles governing the evidence for other claims. (100) Whether a claim of corruption is successful or not may indeed have a significant bearing on the outcome of the arbitration proceedings, especially given that a finding of corruption may constitute a bar to the competence of the tribunal. Further support for this approach may also be drawn from an analysis of the evidentiary rules applicable in some national jurisdictions. It has been stated above that the standard of proof applicable in some jurisdictions may depend on the nature of the claim. In common law jurisdictions, for instance, the prevailing standard of proof is that of 'proof beyond reasonable doubt' in respect of criminal law claims. Given that corruption is considered a criminal offence in most legal systems, it is sometimes suggested that the standard applicable to allegations of corruption should be raised even in the context of international arbitration. ●

P 540 That approach has gained some traction in legal scholarship and, more importantly, in arbitral practice. According to the tribunal in *Karkey v. Pakistan*, there is a 'large consensus among international tribunals regarding the need for a high standard of proof of corruption'. (101) Upon closer analysis of the arbitral jurisprudence dealing with corruption, it is nevertheless suggested here that the tribunal's pronouncement was a significant exaggeration. There is no denying that the majority of tribunals consider that the applicable standard of proof should be greater – or 'heightened' – in relation to allegations of corruption. More specifically, the analysis reveals that ten out of the eighteen awards dealing explicitly with the issue of standard of evidence have articulated a higher standard compared to the traditional standard of 'balance of probabilities'. (102) However, a significant chunk of the arbitral jurisprudence – eight awards – considered that the standard of proof applicable to civil matters should be applied in relation to claims of corruption. In recent years, it would seem that arbitral tribunals have increasingly referred to the civil standards of 'balance of probabilities', (103) 'preponderance of evidence' (104) or 'reasonable certainty'. (105) As we shall see, this development goes hand in hand with a discernible trend in arbitral jurisprudence towards acceptance of more flexible forms of evidence to demonstrate illegal practices.

(106)

By contrast to the heightened approach, this approach focuses instead on the inherent difficulty of proving corruption. Allegations of corruption are notoriously difficult to demonstrate with absolute certainty for various reasons. That difficulty may arise from the absence of direct evidence of the corrupt practice, especially given the fact that the true nature of corruption is often concealed behind ● seemingly legal transactions. But it may also result from the rather limited investigative powers enjoyed by arbitrators. Quite unfortunately, arbitral tribunals lack the power to 'seize documents, compel the attendance of a party's witness or force relevant third parties to participate in proceedings'. (107) Without the possible involvement of national judges in the collection of evidence explicitly provided for by some national laws and arbitral rules, (108) they may therefore be ill-equipped to gather the requisite amount of evidence.

The partial award rendered in *Chevron Corp. v. Ecuador* is worth mentioning here. An interesting feature of that decision is that the allegedly bribed individual did not attend the hearing and accordingly could not defend himself against the allegations made by the claimants. In the course of proceedings, the tribunal repeatedly expressed its wish to hear that individual's testimony. Following several unsuccessful attempts by the respondent state to invite the individual to participate in the hearing, the tribunal itself decided to issue a procedural order by which it invited the witness to attend the hearing. Unfortunately, the initiative taken by the tribunal was also unsuccessful. In that respect, that case provides an illustration of arbitral tribunals' lack of investigative powers in relation to suspicions of corruption. Whilst the tribunal sought to secure the presence of the main witness at the hearing, the fact remains that – as the tribunal duly noted – 'it was [that witness'] right to choose not to' testify. (109)

Considering the difficulty of demonstrating corruption, some commentators opine that arbitrators should exercise the procedural flexibility which they derive from their mandate in order to provide the parties with a reasonable opportunity to adduce evidence that it has indeed occurred. (110) More specifically, the arbitral tribunal should not necessarily opt for a higher standard of evidence, but instead for the more flexible 'balance of probabilities' standard even in instances involving corruption. (111) Some commentators have expressed doubts as to whether it is relevant to establish a heightened standard of proof by reference to considerations emanating from domestic criminal laws and regulations. (112) In contrast to domestic criminal courts, international arbitrators are not called upon to impose criminal sanctions. Rather, they are entrusted with the task of determining the civil consequences resulting from allegations of corruption in relation to the dispute submitted to investment arbitration proceedings. ●

4 ARBITRAL APPROACH TO THE ASSESSMENT OF EVIDENCE OF CORRUPTION IN INVESTMENT ARBITRATION

The implications resulting from the choice of a specific standard of evidence are difficult to appreciate in practice. It has been suggested that the choice of a heightened standard of proof 'has had a direct impact on case law' given that 'every tribunal in which a higher standard was employed has ... resulted in tribunals being unable to positively rule that corruption did indeed occur'. (113) That statement may still hold true today. There may indeed be cases in which the standard of proof has a direct impact on the outcome of the arbitration proceedings. (114) In particular, it is worth mentioning here the awards rendered in *Sanum Investments v. Laos* and *Lao Holdings v. Laos*. (115) In those cases, the outcome of the claim of corruption raised by the host state was directly determined by the applicable standard of proof. Although the tribunal concluded that the allegations of corruption were deemed as established on the basis of the 'balance of probabilities' standard, it nevertheless concluded that these allegations did not meet the requisite standard of 'clear and convincing evidence' in the light of the government's failure to identify any bribe taker. The tribunal stressed, in particular, that 'the government's failure to track down bribe-takers or to provide a convincing explanation of its efforts (even if on occasion unsuccessful) to do so, weighs against the government's case'. (116) In spite of that conclusion, the tribunal subsequently considered that 'its conclusion that corruption of government officials was established to the "lower standard of probabilities" [was] relevant to the issue of the claimants' good faith'. (117) At the merits stage, the tribunal rejected the investor's claims for expropriation. It also added that, in any event, these claims should be dismissed as the claimants 'exhibited manifest bad faith in various efforts not only to manipulate the Government to advance their gambling initiatives but [also] to manipulate the arbitration process itself'. (118) It remains somewhat unclear, however, whether the tribunal would have reached a similar conclusion if the material claims brought forward by the investor had prevailed. (119)

In the light of the tribunal's decision in *Sanum Investments*, it would appear that the tribunal's choice of standard of evidence may sometimes have a direct impact ● on the outcome of corruption allegations. At the same time, however, the present study reveals that even when arbitral tribunals have opted for the lesser standard of 'balance of probabilities' or 'preponderance evidence', it has rarely led to a positive finding of corruption. The analysis conducted in the context of this article reveals that, in the vast majority of cases, claims of corruption have been unsuccessful. In contrast, it indicates that only four awards have led to positive findings of corruption. (120) Perhaps somewhat

surprisingly, three of these four awards did not include any finding as to the standard of evidence to be applied in relation to these allegations. It is also worth stressing in that respect that in *Metal-Tech v. Uzbekistan*, the tribunal's findings with respect to the appropriate standard of proof did not have a significant bearing on the outcome of the case. In that case, the evidence on record was particularly incriminating and included, in particular, a witness statement proffered by the claimant's CEO admitting that substantial payments had been made to several intermediaries for no legitimate reason. In the light of this evidence, the tribunal insisted that:

[w]hile the debate about standards of proof and presumptions is an interesting one ... the present factual matrix does not require the tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the claimant and the tribunal itself sought further evidence of the nature and purpose of such payments. (121)

The foregoing considerations suggest that it matters relatively little which standard of proof applies in relation to allegations of corruption. What matters most, at the end of the day, is the tribunal's approach to the assessment of the evidence. This explains why much of the debate in recent years has focused on the means of evidence available to the parties in order to demonstrate the fact of corruption. Because corrupt practices are inherently difficult to demonstrate, it seems more widely accepted that they may be established through indirect or circumstantial evidence (*'faïceau d'indices'*). That approach has been used increasingly by arbitral tribunals. It has also been accepted by national courts dealing with requests to set aside international arbitral awards. (122) ●

Following that approach, a party can discharge its evidentiary burden by demonstrating 'a sufficient number of indicators of corruption, or the so-called "red flags"'. (123) Taken on its own, each red flag would not suffice to conclude that corruption has occurred. Viewed together, however, these red flags may be sufficient to establish the fact of corruption. (124) It therefore falls to arbitral tribunals to 'connect the dots' of the individual items of evidence adduced by the parties to determine whether corruption has indeed occurred. This approach was described in *Methanex* as follows:

Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that all the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened. Accordingly, the Tribunal will consider the various 'dots' which Methanex has adduced – one-by-one and then together with certain key events (essentially additional, noteworthy dots) which Methanex does not adduce – in order to reach a conclusion about the factual assertions which Methanex has made. (125)

Several initiatives were developed by academia, governmental bodies and even non-governmental organizations to establish non-exhaustive lists containing the most commonly used red flags. (126) One of these initiatives is the 'Toolkit for Arbitrators' drafted by the Basel Institute on Governance. (127) This red flag list is inspired to a certain extent by arbitral cases dealing with claims of corruption and money laundering. It is primarily concerned with situations involving the hiring of intermediaries or consultants to conduct and facilitate business in a foreign country. More specifically, arbitral tribunals are encouraged to exert further scrutiny into potential corrupt practices if one or more of the following red flags emerge in the course of proceedings:

(i) the intermediary does not have its seat/is not located in the country where its/ his/ her services are performed; (ii) the commission paid to the intermediary is not in proportion to the work done and/or the expenses claimed by the intermediary are not related to any actual expenses incurred; (ii) there is no tangible work product by the intermediary and the intermediary is unable to produce documentation for the services performed and the services are not specified in any detail; (iii) the qualifications of the intermediary to ● perform the work for which it/ he/ she is hired are doubtful; (iv) the extent of time of the agent's intervention is very short; (v) the intermediary demands payment to offshore accounts and/or via third parties or unusual payment arrangements that raise local law issues; (vi) percentage-based remuneration; (vii) inaccurate or incomplete financial statements; (viii) the intermediary demands payment of a commission or a significant portion before the contract is concluded; (ix) the intermediary has no transparent structure, an unclear financial organisation and hardly any staff (if the intermediary is a company); (x) the intermediary gets involved shortly before the successful conclusion of a contract and/ or after unsuccessful negotiations by the company; (xi) the intermediary is not bound by a code of conduct; (xii) refusal to provide specific documents such as bank records or payments to a third party; (xiii) the intermediary asserts that it/ he/ she alone can secure the contract, knowing the right people; (xiv) the intermediary has personal

connections to decision-makers of the foreign state; (xv) lack of usual documentation proving a normal commercial relationship (e.g. technical studies and research, negotiations, drafts of contracts, letters and emails); (xvi) the choice of the intermediary cannot be explained; no indicators that the intermediary was bound to be as efficient as competitors, proving that the choice was not business oriented; (xvii) the contract is poorly drafted, or lacks specific indications.

The Toolkit also describes several other indicators of corruption which are not related to the hiring and use of intermediaries. Those include 'the prevalence of corruptive behaviour in the country as revealed by certain international organisations or NGOs like Transparency International's Corruption Perceptions Index'. The parties may rely on NGOs' reports in order to demonstrate the widespread nature of corruption in the host state. It must be noted, however, that such reports must necessarily be accompanied by cogent evidence relating specifically to the allegations of corruption raised by either party to the arbitration proceedings. Arbitral tribunals have consistently refused to entertain allegations of corruption that were supported by mere insinuations deriving from general information (such as NGOs' reports) about the state of corruption in the host state. The existence of such red flags or indicators of corruption warrants a careful and thorough analysis of the evidence adduced by the parties, but the fact remains that these 'dots' must provide specific evidence of the acts of corruption in the case under consideration.

Another indicator of corruption may also arise from the conduct of criminal investigations 'prior to the arbitration proceedings, or in the meantime, by domestic authorities'. Most commentators usually establish a distinction depending on whether criminal investigations were initiated by domestic criminal authorities or not. On the one hand, the initiation and carrying out of an official investigation into the alleged criminal activities begs the question of the evidentiary weight to be attributed to the outcome of such investigation. It is generally accepted that arbitral tribunals are not necessarily bound by the decisions adopted by domestic criminal authorities. (128) As the tribunal in *Glencore v. Colombia* pointed out, the findings reached in the context of a domestic criminal investigation may not so readily apply in relation to arbitral proceedings because those proceedings 'operate in different legal spheres' and are 'subject to diverging standards of proof'. (129) The fact remains, however, that such decisions are relevant to the tribunal's assessment of evidence of corruption, especially considering the fact that domestic authorities 'have a much higher capacity of investigation' in comparison with arbitral tribunals. (130) This means that the outcome of domestic criminal proceedings must be duly considered in the context of arbitration proceedings.

It is important to stress that the relevant decision must nevertheless offer evidence relating specifically to the claim raised in the arbitration. A case in point in that respect is *Tethyan Copper v. Pakistan*. (131) In that case, the respondent state alleged that the conclusion of the joint venture agreement giving rise to the dispute was affected by corruption. In support of that allegation, it pointed out that the agreement was concluded within an expedited timeframe following the entry into office of a new chairman for their public co-contractor. The respondent found it rather surprising, in particular, that the agreement was concluded in a very limited timeframe after the new chairman took office despite the fact that the negotiations had stalled prior to that event. It was further submitted that the chairman involved in that process had previously been convicted of corrupt practices by a domestic court. The tribunal nevertheless ruled out the relevance of that judgment on the ground that it was unrelated to the claimants' investment. (132) Ultimately, it therefore falls upon arbitrators to decide whether the outcome of domestic proceedings offers relevant and specific evidence of the alleged illegal activities. In that context, the arbitral tribunal should also be mindful to determine whether the domestic criminal proceedings were conducted in compliance with due process requirements. (133)

On the other hand, the arbitral case law also reveals that the absence of criminal investigation may affect the outcome of a claim of corruption. The arbitral award handed down in *Sanum Investments v. Laos* provides a perfect illustration of the implications resulting from the lack of criminal investigation in relation to claims of corruption. The tribunal considered that the host state's failure to bring any prosecution or even investigation against any of the individuals allegedly involved in corrupt practices was 'relevant to the credibility of the government's allegations'. (134) The tribunal stressed, in particular, that 'the government's failure to track down bribe-takers or to provide a convincing explanation of its efforts (even if on occasion unsuccessful) to do so, weighs against the government's case'. (135) In the light of the government's failure to investigate these issues, the respondent's allegations were deemed as proven on the basis of the standard of 'balance of probabilities', but were not established in accordance with the higher standard of 'clear and convincing evidence'. Several other arbitral tribunals have also relied on the host state authorities' failure to prosecute or investigate the alleged criminal activities to dismiss such allegations. (136)

The absence of criminal investigation or prosecution may equally be taken into account by national courts when they are called upon to ascertain whether an award is compatible with international public policy. (137) That approach is hardly surprising

considering the fact that governmental authorities are 'best placed to investigate and collect proof of corruption'. (138) The inaction of national authorities may therefore have significant implications in relation to the outcome of an allegation of corruption insofar as it may deprive the tribunal of relevant evidence pertaining to the alleged criminal activities. In *Getma International v. Guinea*, for instance, the tribunal observed that the bribed officials were not prosecuted or sanctioned for their alleged involvement in the corruption scheme uncovered by the host state. It also added that they were still holding positions within the state administration. The tribunal subsequently inferred from those elements that the state did not attach sufficient importance to the alleged corrupt practices and, perhaps more importantly, that its inaction deprived that state from the possibility to demonstrate corruption in accordance with the requisite standard of 'clear and convincing evidence'. (139) At the same time, however, it has been observed that most tribunals do not take the host state's prosecution – or lack thereof – into account when they are called upon to decide on allegations of corruption. (140) For that reason, it is often suggested that the host state authorities' failure to investigate ● the alleged criminal activities does not as such constitute a ground for barring the underlying claim of corruption brought forward in arbitration proceedings. (141)

P 548

5 CONCLUDING REMARKS

Over the past few years, a great deal has been written about the manner in which allegations of corruption are – or perhaps ought to be – treated by the international arbitration community at large. While there appears to be growing acceptance that the prohibition of corruption has ascended to the level of transnational public policy, arbitrators and parties alike continue to grapple with considerable hurdles in the fight against corruption. Perhaps the most complex issue encountered by the arbitral community relates to the evidence of corrupt activities. There is no denying that allegations of corruption are generally difficult to demonstrate with absolute certainty. That difficulty is further compounded in relation to international arbitration proceedings because arbitrators enjoy rather limited investigative powers in comparison with domestic courts and tribunals.

Against that background, this article has sought to offer a timely analysis of the arbitral jurisprudence relating to the rules and principles governing the evidence of corruption in investment arbitration. The present analysis, conducted on the basis of forty awards dealing with corruption in investment arbitration, indicates that in most instances it matters relatively little which standard of proof applies in relation to allegations of corruption. What matters most, at the end of the day, is the tribunal's approach to the assessment of evidence. It should come as no surprise, then, that in recent years arbitral tribunals seem to have relied on their discretion in evidentiary matters to accept more flexible sources of evidence. In the same vein, this article indicates that arbitral tribunals are increasingly willing to address suspicions of corruption of their own motion and, perhaps more importantly, make use of their fact-finding prerogatives in a more systematic manner to alleviate the difficulty of demonstrating corruption. ●

P 548

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- 13) See e.g., *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Annulment and Revision Proceedings; *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 Aug. 2006); *F-W Oil Interests Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 Mar. 2006).
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- 45) See e.g., ICC Arbitration Rules, Art. 19: 'The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration'.
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