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STAMPA

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CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION: IN DEFENCE OF THE «ZERO TOLERANCE» APPROACH (*)

Abstract

The present article analyses the issue of corruption in investment arbitration and endorses the so-called «zero tolerance» approach, according to which arbitrators shall, without hesitation, declare that all claims arising from corruption do not have legal standing. The author analyses all the legal reasons why such an approach is preferable and — *inter alia* — focalizes on the necessity to safeguard the credibility of international investment arbitration as a reliable and neutral method for solving investment disputes. The paper argues that, should arbitrators apply an «eyes shut» approach when dealing with corruption issues, this could only raise the level of criticism against investor-State dispute settlement.

1. *Introduction.*

In the last three decades, there has been a huge growth in the number

(*) *This article represents a largely reviewed and expanded version of the speech which the author gave at the «below 40» section of the Annual Conference of the Capitulo Italiano of the Clube Espanol de Arbitraje (jointly organized with Arbit and the International Chamber of Commerce Young Arbitrators Forum) held in Naples, at "Maschio Angioino" Castle, on 6 October 2017, in the Panel entitled «Suspicion of Corruption in International Arbitration: Eyes Shut Approach vs. Zero Tolerance».*

of foreign investments throughout the world (1). This has, of course, generated an increasing specialization of the international law on foreign investment and a refinement of the standards of treatment granted to investors (2). On the other hand, however, especially in countries with a high level of corruption, this circumstance has also been accompanied by a growth in the phenomenon concerning the payment of bribes to public officials (and/or people related to them) (3). In this regard, it is to be noted that — contrary to what happened in commercial arbitration between private parties (4) — investment arbitrators have only relatively recently started to deal with this problem (5). While there is already a substantial

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(1) See, *inter alia*, A. Giardina, *L'arbitrato internazionale in materia di investimenti: impetuosi sviluppi e qualche problema*, in N. Boschiero and R. Luzzatto (eds.), *I rapporti economici internazionali e l'evoluzione del loro regime giuridico*, Naples, 2007, p. 319 ff.

(2) See, *inter alia*, W. M. Reisman, *The Empire Strikes Back: The Struggle to Reshape ISDS*, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943514*, p. 1 ff.; F. M. Palombino, *Fair and Equitable Treatment and the Fabric of General Principles*, Heidelberg, 2017, p. 1 ff.

(3) For the purpose of this article, we will refer to corruption as defined by Art. 1.1 of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed on 17 December 1997 and in force since 15 February 1999 (the Convention today has 43 signatory States), according to which corruption consists in «intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business». When referring to the misuse of public power by heads of State, ministers and top officials for private, pecuniary profit, some authors discuss of «grand corruption». See S. Kulkarni, *Enforcing Anti-Corruption Measures Through International Investment Arbitration*, *Transnational Dispute Management*, 2013 (3), p. 1 ff. Corruption in international arbitration and the increasing numbers concerning this phenomenon are analysed in-depth by M. Hwang and K. Lim, *Corruption in Arbitration - Law and Reality*, *Asian International Arbitration Journal*, 2012, p. 1 ff.

(4) For a general overview of the subject and an in-depth analysis of its multiple facets see A. Crivellaro, *The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption*, *Transnational Dispute Management*, 2013, (3), p. 1 ff.; Id., *Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence*, in this *Rivista*, 2003, p. 27 ff. In brief, commercial arbitrators have started to deal with corruption issues when the concept of arbitrability has evolved so as to include also preliminary issues which are functional to the resolution of the main dispute. Therefore, while initially they used to refuse to hear corruption issues, they now usually rule on these matters. This approach is based, firstly, on the separability doctrine, and, secondly, on the idea that while «arbitrators are not, as such, the guardians of international morality, [they] are charged with the mandate of putting an end to a legal or contractual dispute, which requires them to establish the facts and apply the law thereupon» (A. Crivellaro, *The Courses of Action*, *cit.*, p. 13). For a case in which jurisdiction on corruption issues was refused (on the basis of the alleged inarbitrability of the dispute) see ICC Award No. 1110 of 1963 available at https://www.trans-lex.org/201110/_/icc-award-no-1110-of-1963-by-gunnar-lagergren-yca-1996-at-47-et-seq-/. For an analysis of the evolution of the concept of arbitrability concerning corruption issues see D. Hiber and V. Pavic, *Arbitration and Crime*, *Journal of International Arbitration*, 2008, p. 461 ff.; C. A. S. Nasarre, *International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator*, *Transnational Dispute Management*, 2013, p. 1 ff.; L. Laudisa, *Arbitrabilità della controversia internazionale*, *Rivista dell'arbitrato*, 2007, p. 219 ff.

(5) See, inter alia, *Inceysa Vallisoletana S. L. v. Republic of El Salvador*, ICSID Case

amount of literature concerning this subject (6), the legal approach to be applied by investment arbitrators in dealing with corruption cases is still surrounded by abstruseness.

The starting point of all discussions on the topic is that there is unanimity among scholars on the necessity to fight corruption, considered to be «more odious than theft» (7), as «one of the most heinous crimes of global proportion» (8) and something which «crushes the potential benefits of free market forces» (9), as well as «raising serious moral and political concerns, undermining good governance and economic development, and distort[ing] international competitive condition» (10).

No. ARB/03/26, Award of 2 August 2006; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award of 16 August 2007; *World Duty Free Co. Ltd. V. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007. A missed opportunity, in this regard, is the case *Lucchetti Enterprises, S.A. (Chile) and Lucchetti Peru, S.A. (Peru) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award of 7 February 2005, where in presence of videos evidencing the payment of a bribe to public officials, the arbitral tribunal avoided to deal with the issue of corruption in light of the lack of *ratione temporis* jurisdiction because the facts at issue predated the relevant BIT. For previous general analysis of the issue of corruption see M. J. Bonell and O. Meyer, *The Effects of Corruption in International Commercial Contracts, http://www.iacl2014congress.com/fileadmin/user_upload/k_iacl2014congress/General_reports/Bonell__Meyer_-_The_Effects_of_Corruption_in_International_Commercial_Contracts.pdf*, 2014, p. 1 ff.; U. Draetta, *The OECD convention on bribery of foreign public officials and the bribes paid by foreign subsidiaries*, in this *Rivista*, 2003, p. 1 ff.; Id., *La nuova convenzione OECD e la lotta alla corruzione nelle operazioni commerciali internazionali*, in this *Rivista*, 1998, p. 969 ff.; Id., *Spunti per un'azione comunitaria contro la corruzione nel commercio internazionale*, in this *Rivista*, 1995, p. 333 ff.; L. Borlini and P. Magrini, *La lotta alla corruzione internazionale dall'ambito OCSE alla dimensione ONU*, in this *Rivista*, 2007, p. 15 ff.

(6) See, inter alia, G. Sacerdoti, *Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice*, *ICSID Review - FILJ*, 2009, p. 565 ff.; A. Carlevaris, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of Arbitral Tribunals, Journal of World Investment & Trade*, 2008, p. 35 ff.; C. Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World, ICSID Review - FILJ*, 2010, p. 47 ff.; M. R. Mauro, *Il ruolo dell'arbitrato internazionale quale strumento di prevenzione della corruzione, con particolare riferimento al sistema ICSID*, in A. Del Vecchio and P. Severino (eds.), *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale*, Padua, 2014, p. 406 ff.; I. T. Odumosu, *International Investment Arbitration and Corruption Claims: An Analysis of World Duty Free v. Kenya*, *The Law and Development Review*, 2011, p. 87 ff.; C. B. Lamm, B. K. Greenwald and K. M. Young, *From* World Duty Free *to* Metal-Tech: *A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, *ICSID Review - FILJ*, 2014, p. 328 ff.; J. Tirado, M. Page and D. Meagher, *Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship*, *ICSID Review - FILJ*, 2014, p. 493 ff.; S. Nadeau-Séguin, *Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices*, *Transnational Dispute management*, 2013 (3), p. 1 ff. Several other works are mentioned throughout this paper.

(7) S. Nappert, *Nailing Corruption: Thoughts for a Gardener. A Comment on World Duty Free Company Ltd. V. the Republic of Kenya*, *Transnational Dispute Management*, 2013, p. 1 ff.

(8) *World Duty Free*, *supra* n. 5, para. 173.

(9) J. Pope, *Corruption in Africa: The Role for Transparency International*, *Commonwealth Law Bulletin*, 1994, p. 1470.

(10) T. Sinlapapiromsuk, *The Legal Consequences of Investors Corruption in Investor-*

However, with regard to the ways in which corruption should concretely be tackled, two approaches have emerged. According to the first of them, the so-called «zero tolerance approach», all claims arising from corruption have no legal standing and shall be entirely rejected (11). Such an approach is, first of all, based on the existence of a widespread consensus against corruption and on the assumption according to which «*ex iniuria jus non oritur*» (so-called clean hands doctrine), viz. who has committed an offence cannot ask for justice in relation to such an offence (12). Secondly, but not less importantly, this approach recognizes that arbitrators carry out a public function and cannot allow investment arbitration to become a shelter for corrupt practices (13).

The second possible approach to deal with corruption issues in investment arbitration, called the «eyes shut» approach, provides for a more permissive attitude. Starting from the idea that arbitrators should «reconcile both [their] loyalty towards the parties and [their] adherence to the international legal order» (14), scholars endorsing this approach think that if arbitral tribunals deprive the investors' claim of its legal standing once corruption is ascertained, States could avoid fulfilling their investment obligations by proving that there has been corruption, notwithstanding the circumstance that a State official took part in the corrupt scheme and the fact that the State has anyway got certain advantages by the investment. It would therefore be unfair to let only the investors pay the costs of corruption (15).

In this author's opinion, as will be demonstrated in this article, there are many legal reasons which make the «zero tolerance» approach more suitable for investment arbitration. However, the choice of the method to deal with corruption issues cannot overlook the current policy framework surrounding investment arbitration. Indeed, as is well-known, there are significant criticisms against this form of dispute settlement, which is considered by some authors as unable to deal with disputes involving essential public interests (16). It is arguable that, should arbitrators become

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State Arbitration: How Should the System Proceed?, *Transnational Dispute Management*, 2013, p. 1 ff.

(11) A. Crivellaro, *The Courses of Action*, *supra* n. 4, p. 21.

(12) R. Moloo, *A Comment on the Clean Hands Doctrine in International Law*, *Transnational Dispute Management*, 2011, p. 1 ff.

(13) It is significant, in this regard, to mention the decision *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, para 389, where it has been expressly said that a rigid approach is based on the necessity to promote the rule of law in investment arbitration.

(14) L. Y. Fortier, *Arbitrators, corruption and the poetic experience: 'When power corrupts, poetry cleanses'*, *Arbitration International*, 2015, p. 369.

(15) H. Raeschke-Kessler and D. Gottwald, *Corruption in Foreign Investment - Contracts and Dispute Settlement between Investors, States and Agents*, *Journal of World Investment & Trade*, 2008, p. 16.

(16) See, inter alia, G. Van Harten, *Investment Treaty Arbitration and Public Law*,

more permissive when they deal with issues of corruption, they could attract even more severe criticisms.

In the present article we will, first of all, introduce the «zero tolerance» approach (Section 2) and the «eyes shut» approach (Section 3) in order to understand their rationale and how they propose to solve corruption issues in investment arbitration. We will subsequently explain (Section 4) what are the reasons why we are inclined to accept the first of the proposed approaches and what are the limits for the applicability of the proposed way of dealing with corruption (Section 5). Section 6 will be devoted to some concluding remarks.

2. *The «Zero Tolerance» Approach.*

The method to deal with corruption issues which has found prominent application in investment arbitration is the so-called «zero tolerance approach» (17). As already said, this approach establishes that there is no legal standing for claims relating to investments which arose from corruption. In the words of Antonio Crivellaro, «[t]he old adagios *ex iniura jus non oritur* and *fraus omnia corrumpit* are self-explanatory: no legally enforceable right may arise from an illicit cause, or from a contract made for an illicit purpose. The inevitable result of an illegality finding is the rejection of all claims based on the invalid contract, which have no legal standing» (18).

The proposers of the «zero tolerance» approach support the idea according to which arbitrators should: (i) raise corruption issues *ex officio* during their process (19); (ii) report the existence of this criminal offence to relevant public authorities (20); and (iii) apply the generally accepted «balance of probabilities» standard of proof and also accept circumstantial evidence in order to ascertain the existence of corruption (21).

Oxford, 2007, p. 1 ff.; see also, for an analysis of the criticisms and a reply to them, A. Henke, *La crisi del sistema ISDS e il progetto di una nuova corte internazionale permanente, ovvero della fine dell'arbitrato in materia di investimenti*, in this *Rivista*, 2017, p. 133 ff. A very interest analysis of the reasons behind this scepticism towards investment arbitration has been recently made by S. I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931137, 2017, p. 1 ff.

(17) A. Crivellaro, *The Courses of Action*, *supra* n. 4, p. 13.

(18) Id., p. 21. Similarly, see A. Menaker, *The Determinative Impact of Fraud and Corruption in Investment Arbitration*, *ICSID Review - FILJ*, 2010, p. 67 ff.; A. de Lotbiniére McDougall, *International Arbitration and Money Laundering*, *American University International Law Review*, 2005, p. 1026.

(19) See M. Hwang and K. Lim, supra n. 3, pp. 19-22. See also V. Pavic, *Bribery and International Commercial Arbitration - The Role of Mandatory Rules and Public Policy*, *Victoria University Wellington Law Review*, 2012, p. 670-671.

(20) See C. A. S. Nasarre, supra n. 4, p. 10; a similar position is sustained by J. Tirado, M. Page and D. Meagher, *supra* n. 6,pp. 512-513.

(21) A. Crivellaro, *The Courses of Action*, *supra* n. 4, p. 15; C. B. Lamm, B. K.

In investment arbitration, the «zero tolerance» approach has found application in two different sets of circumstances (22).

The first of them concerns the cases in which the applicable BIT contains a clause setting forth that investments, in order to be so qualified, shall be made in accordance with the host State law (23). This means that, in presence of this kind of provisions, foreign investments originating from the payment of a bribe cannot be qualified as investments covered by the BIT protection. This circumstance, in turn, involves that — considering that almost all domestic systems of law now contain provisions against corruption (also in light of the numerous international law instruments which impose to States a duty to enact laws forbidding this offence) (24) — arbitral tribunals will have to decline jurisdiction in the cases where there has been the payment of a bribe (25). There is substantial and consistent case-law pointing in this direction (26). It is significant to mention, in this regard, the *Metal-Tech v. Uzbekistan* award (27). In this case, after having noted that Art. 1(1) of the Israel-Uzbekistan BIT defines as investments «only investment implemented in compliance with local law», and pursuant to having ascertained that Metal-Tech had made several corrupt payments to establish its investment, the Tribunal stated that those payments were made against Uzbek law, whose «condemnation of corruption» was «in conformity with international law and the laws of the vast majority of States» (28). As a consequence, Uzbekistan's consent to ICSID arbitration being conditioned to the existence of an investment (Art. 8 of the BIT), the Tribunal found that it did not have jurisdiction on the dispute. In this regard, the Tribunal pointed out that it was «sensitive to the ongoing debate that findings on corruption often come down heavily on claimants,

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Greenwald and K. M. Young, *supra* n. 6, p. 338; C. B. Lamm, H. T. Pham and R. Moloo, *Fraud and Corruption in International Arbitration*, in M. A. Fernández-Ballestros and D. Arias, *Liber Amicorum Bernardo Cremades*, Madrid, 2010, p. 703; S. Wilske and T. J. Fox, *Corruption in international Arbitration and Problems with Standard of Proof*, in S. Kröll, L. A. Mistelis, et al. (eds.), *Liber Amicorum Eric Bergsten*, London, 2011, p. 504; M. Hwang and K. Lim, *supra* n. 3, pp. 27-37;

(22) See, inter alia, R. H. Kreindler, *Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge With New Answers*, in L. Levy and Y. Derains, *Liber Amicorum en l'honneur de Serge Lazareff*, Paris, 2011, p. 383 ff.

(23) A. Carlevaris, supra n. 6, p. 35 ff.

(24) Please refer to footnote 62 below.

(25) E. Savarese, *La nozione di giurisdizione nel sistema ICSID*, Naples, 2012, p. 71.

(26) See, inter alia, the *Inceysa Vallisoletana* and *Fraport* cases mentioned *supra* at n. 5. See also *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009. On the subject see A. Carlevaris, *supra* n. 6; U. Kriebaum, *Illegal Investments*, in C. Klausegger, P. Klein, et al. (eds), *Austrian Arbitration Yearbook*, 2010, p. 307 ff.; C. B. Lamm, B. K. Greenwald and K. M. Young, *supra* n. 6, p. 342; A. C. Smutny and P. Polášek, *Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration*, in J. Werner and A. H. Ali (eds.), *A Liber Amicorum: Thomas Wälde*, London, 2009, p. 277 ff.

(27) *Supra* n. 13.

(28) Paras. 288-290.

while possibly exonerating defendants that may have themselves been involved in the corrupt acts» with the consequence of giving «an unfair advantage to the defendant party». However, arbitrators clarified that «the idea (...) is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act» ([29]).

The second scenario in which the «zero tolerance» approach has emerged is the one in which the relevant BIT does not contain an «in accordance with host State law» clause. In these cases, arbitrators shall assume jurisdiction on the dispute but, nonetheless, they could decide to declare the claim inadmissible. This means that, for reasons related to the interest of justice, the Tribunal refuses to exercise its validly conferred jurisdiction on a dispute ([30]). As a consequence, should they find that the dispute at stake arose from a corrupt scheme, they can refuse to hear such a dispute on which, *in abstracto*, they had jurisdiction. This because both the interest of justice and the promotion of the rule of law require that investment arbitration does not become a free forum for corrupt activities ([31]).

This approach is emblematically represented by the *World Duty Free v. Kenya* award ([32]). In this case, the Claimant obtained the license to carry out its investment in Kenya after having paid a 2 million dollars bribe to the Kenyan President Daniel arap Moi. The payment of a sum to the Kenyan President was confessed and analytically described by the Claimant CEO during the arbitration proceedings ([33]). However, the parties disagreed as to the legal qualification of that payment. According to Kenya, it was a forbidden bribe. Contrariwise, the Claimant stated that it was made pursuant to a Kenyan custom called *harambee* in accordance to which personal donations are made by private to public parties in order to pursue a public benefit. The Tribunal, which was chaired by the former President

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([29]) Para. 389.

([30]) See (also for several authorities concerning the distinction between jurisdiction and admissibility) G. Zarra, *Parallel Proceedings in Investment Arbitration*, Turin - The Hague, 2017, pp. 103-109.

([31]) This happened in several cases in which the claim was considered to be an abuse of the investment arbitration process. See E. Gaillard, *Abuse of Process in International Arbitration, ICSID Review - FILJ*, 2017, p. 17 ff.; H. Ascensio, *Abuse of Process in International Investment Arbitration, Chinese Journal of International Law*, 2014, p. 763 ff.; E. De Brabandere, *'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims, Journal of International Dispute Settlement*, 2012, p. 609 ff.; J. Gaffney, *'Abuse of Process' in Investment Treaty Arbitration, Journal of World Investment & Trade*, 2010, p. 515 ff.; G. Zarra, *supra* n. 30, p. 128 ff.

([32]) *Supra* n. 5. For a comment see L. Crema, *Il caso WDF: corruzione e ordine pubblico transnazionale innanzi alla giurisdizione ICSID, Rivista di diritto internazionale privato e processuale*, 2008, p. 111 ff.

([33]) Para. 130 ff.

of the International Court of Justice Gilbert Guillaume, said that — regardless of the existence of a local custom — «bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal» (34). As a consequence, after having recognized that the «payment was received corruptly by the Kenyan head of State; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself» and that «[i]f it were otherwise, the payment would not be a bribe» (35), arbitrators declared the claim inadmissible.

It clearly emerges from the above that all Tribunals which applied the «zero tolerance» approach have done so keeping in mind that their role was not only to solve the dispute among the litigating parties, but also to promote the rule of law and, impliedly, safeguard the credibility of arbitration as a reliable means of dispute settlement (36).

3. *The «Eyes Shut» Approach.*

Recent scholarship has pointed out that the «zero tolerance approach» inadvertently incentivizes corruption by allowing respondent States to immunize themselves against arbitral judgments by preparing in advance a corruption defence. The issue should be, hence, treated more flexibly (so-called «eyes shut» approach). Indeed, a State would be able to avoid liability under the investment treaty simply by proving that corruption has taken place and this generates an asymmetry between the two parties in prejudice of the claimant (37). This would allegedly run against the purpose

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(34) Para. 157.

(35) Para. 169. See also para. 178, where it is said that «the Tribunal does not identify the Kenyan President with Kenya».

(36) See, for further analysis concerning this point, para. 4(e) below.

(37) M. Reeder, *Estop That! Defeating a Corrupt State's Corruption Defense to ICSID BIT Arbitration*, *The American Review of International Arbitration*, 2016 p. 311 ff. See also H. Raeschke-Kessler and D. Gottwald, supra n. 15, p. 16; R. Bhojwani, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, *Columbia Law Review*, 2012, p. 102 ff.; E. R. Bienvenu, *International Arbitral Tribunals and Corruption: Not So Duty Free*, *University of Pennsylvania Journal of International Law* (online edition), 2017; J. W. Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, *Virginia Journal of International Law*, 2012, p. 723 ff.; R. Z. Torres-Fowler, *Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration*, *Virginia Journal of International Law*, 2012, p. 996 ff.; A. Brady Spalding, *Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement*, *University of California, Davis*, 2015, p. 443 ff.; M. A. Losco, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, *Duke Law Journal*, 2013, p. 1201 ff.; D. Litwin, *On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption*, *Transnational Dispute Management*, 2013 (3), p. 1 ff.

of investment treaties, which — in these Authors' opinion — is primarily to promote and protect investments (38).

According to these authors, if an official of the host State has taken a bribe, the State itself is responsible for that conduct pursuant to Art. 7 of the International Law Commission's *Draft Articles on State Responsibility* of 2001, which are largely considered as representing customary international law in matters of responsibility of States (39). Article 7 provides that «[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*» (emphasis added) (so-called *ultra vires* conduct of State officials). Furthermore, footnote 150 of the Commentary to Art. 7 of the Draft Articles (40) stipulates that «[o]ne form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction». Subsequently, it would be obvious that also the Respondent State has «unclean hands» in cases of corruption and therefore it would be estopped from barring the Claimants pleadings through the corruption defence (41). As a consequence, a model of contributory fault has been proposed, according to which arbitral tribunals could recognize to corrupt claimants «an allowance in money for the work done, corresponding to the value of the infrastructure project (i.e. a restitutionary remedy)» as well as sharing the costs of the arbitration between the two parties (42).

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(38) A. Kulick and C. Wendler, *A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption, Legal Issues of Economic Integration*, 2010, p. 82.

(39) On the customary status of ILC articles see K. Hober, *State Responsibility and Attribution*, in P. Muchlinski et al. (eds.), *The Oxford Handbook of International Investment Law*, Oxford, 2008, p.553; M. Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State Owned Entity*, *Berkeley Journal of International Law*, 2010, pp. 145-146. See also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, para. 69 ("While those Draft Articles are not binding, they are widely regarded as a codification of customary international law.").

(40) Available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

(41) S. Kulkarni, *supra* n. 3, p. 24. M. Reeder, supra n. 37, p. 317 ff. The possibility to attribute the corrupt conduct to the State is also authoritatively sustained by A. Peters, *Corruption as a violation of international human rights*, *MPIL Research Paper Series No 2016-18*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805099, 2016, p. 24 ff.

(42) G. Rojas Elgueta, *The Legal Consequences of Corruption in International Arbitration: Towards a More Flexible Approach?*, www.kluwerarbitrationblog.com, 2016 (who mainly based his opinion on the Unidroit Principles of International Commercial Contracts); S. Kulkarni, *supra* n. 3, p. 25 ff.; R. Sabia and C. Trecroci, *Ascesa e declino dell'»Investor-State Arbitration», fra contrasto alla corruzione internazionale, regolazione dei mercati e Free Trade Agreements internazionali*, *Rivista dell'arbitrato*, 2016, pp. 173-174. In this regard, as reported by *IAReporter*, an innovative (and quite unusual) solution has been applied by a Tribunal in a confidential case (*Spentex v. Uzbekistan*, ICSID Case No. ARB/13/26, Award of 27 December 2016, B. Stern dissenting) where it was asked to the Respondent State - if it wanted to avoid to bear the costs of the arbitration proceedings - to donate an amount

According to some Authors, corruption issues deserve «clear and convincing evidence», i.e. a higher standard of proof closer to the «beyond any reasonable doubt» applied in criminal trials (43), and arbitrators should be more flexible in reporting the issue to public authorities (44) due to the fact that they owe their loyalty not only to the international legal order but also to the parties (45). In any case, Tribunals should never decline jurisdiction in the presence of allegations of corruption and should always deal with the issue at the merit stage, because this is the phase of the proceedings where arbitrators have a full opportunity to verify *in concreto* whether a case of corruption has taken place (46).

The «eyes shut approach» has found application in certain cases (many of which regarding disputes between private parties) in which the standard of proof has been particularly raised, so as to render it almost impossible for the respondent parties to prove the existence of corruption (47).

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perceived pursuant to corrupt activities (involving both the parties) to a UN anti-corruption initiative related to the United Nations Development Program. The funds have been directed to a four-year project to improve rule of law and anti-corruption initiatives in Uzbekistan, including in relation to the country's implementation of the UN Anti-Corruption Convention. The present author, however, shares the perplexities showed by the Dissenting Arbitrator, Brigitte Stern, according to whom the conditioning of the cost order on the respondent's fulfilment of the recommendation essentially equates the recommendation to an order, which falls outside of the tribunal's competence. Moreover, in Stern's opinion, a situation where respondents are ordered to bear the costs of claimants in cases involving corruption could have negative effects on the entire system, as claimants engaged in corruption would then be able to free-ride in their pursuit of damages without the risk of shouldering additional costs of the procedure. See https://www.iareporter.com/articles/in-an-innovative-award-arbitrators-pressure-uzbekistan-under-threat-of-adverse-cost-order-to-donate-to-un-anti-corruption-initiative-also-propose-future-treaty-drafting-changes-that-woul/.

(43) See M. S. Rieder and A. Schoenemann, *Suspicion of Corruption in Arbitration: A German Perspective*, *Transnational Dispute Management*, 2013 (3), p. 1 ff. and in particular p. 13.

(44) See K. S. Gans and D. M. Bigge, *The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic Authorities*, *Transnational Dispute Management*, 2013 (3), p. 1 ff. and in particular p. 20, where it is said that «[t]his article was not intended to definitively answer the question of whether an arbitrator can or should report allegations of corruption that arise in the context of an arbitration. *Whether and when it should be deployed depends heavily on the circumstances of the case*» (emphasis added).

(45) L. Y. Fortier, *supra* n. 14, p. 376, where he says that the arbitrator «is keenly aware of his duties to the parties, to the entities that have entrusted him with their dispute; but he also aspires to certain ideals of international justice and morality. There is no choice to be made between two moralities, at least not if the arbitrator, like the doctor, wishes to excel in his practice. He must compose with and adopt both of these commitments». It seems, therefore, that Fortier encourages a more flexible attitude towards corruption. However, the same Author at 379 seems to change his mind by referring to the arbitrators' need to protect due process, fairness and impartiality as the only requirements for ensuring the respect of the opposite duties pressing them.

(46) A. Kulick and C. Wendler, *supra* n. 38, p. 76 ff.

(47) The reason why arbitrators are free to raise the burden of proof in corruption cases lies in the fact that according to all the existing arbitration procedural rules, tribunals enjoy great discretion in setting forth the thresholds for ascertaining matters of fact. See, e.g., Art. 43-45 of the ICSID Convention and Art. 34 of the ICSID Arbitration Rules.

In the ICC Case No. 5622 ([48]) the Tribunal required evidence «beyond doubt». Similarly, in the well-known *Himpurna* case, arbitrators admitted that «there is a presumption in favour of the validity of contracts; that this presumption is healthy; that it is strengthened when contracts have provided the basis upon which many persons have acted over time, and that a finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof» ([49]). In this regard, somebody correctly pointed out that the effect of this Tribunal's approach was that arbitrators «by raising the standard of proof, did in reality not treat problems of evidence. [They] tried to evade the consequences of *ipso iure* invalidity of the main contract» ([50]).

In the context of investment arbitration, in *Siag v. Egypt*, the Tribunal required «clear and convincing evidence» and explained that such a standard is higher than the usually applied balance of probabilities but lower than the criminal law standard of «beyond any reasonable doubt» ([51]).

A similar approach has been applied in *EDF v. Romania* ([52]) where the Tribunal, on the one hand, recognized that corruption is notoriously difficult to prove since, usually, there is little or no physical evidence, but, on the other hand, stated that the seriousness of the accusation of corruption demands clear and convincing evidence. Also in this case, the result of this stringent approach was that corruption was not proved ([53]).

4. *A Defence of the «Zero Tolerance» Approach.*

This Section is aimed at demonstrating that the allegations of those who sustain the «eyes shut» approach are legally untenable and, should such a method be applied by arbitral tribunals, it would finally only have the undesired effect of undermining the credibility of investment arbitra-

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([48]) So-called *Hilmarton* case, available at *Yearbook of Commercial Arbitration*, 1994, p. 105 ff. (also published in *Revue de l'Arbitrage*, 1992, p. 773 ff.).

([49]) *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara*, Uncitral Ad Hoc-Award of 4 May 1999, *Yearbook of Commercial Arbitration*, 2000, p. 13 ff. The Tribunal continued by saying: «The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality (...) The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption. But such accusation must be proven. (...) Rumours or innuendo will not do».

([50]) H. Raeschke-Kessler and D. Gottwald, *supra* n. 15, p. 24.

([51]) *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009, paras. 325-326.

([52]) ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 221. It is to be noted that in this case the corruption issue was raised by the Claimant in order to demonstrate that, pursuant to a request for a bribe by State officials to which it did not comply, Edf's investment has been subject to unfair and inequitable treatment.

([53]) For a critic to this decision see M. Hwang and K. Lim, *supra* n. 3, pp. 23-24.

tion as a neutral venue for solving investment disputes. We will therefore analyse individually the reasons leading us to sustain the «zero tolerance» approach.

follows: a) The Necessity to Issue an Enforceable Award.

The first reason why arbitrators shall necessarily deal with corruption issues and refuse to close their eyes in the cases where there is evidence (even if not beyond any reasonable doubt) of this offence lies in the fact that it is the arbitrators' duty to issue an award which is enforceable (54).

In non-ICSID cases, indeed, the enforcement of the award is regulated by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which — at article V(2)(b) — provides that awards contrary to public policy may not be enforced; this provision obviously involves cases of awards arising from corruption and, more generally, from illegality. While, as far as this author knows, there have never been investment cases in which a party asked for the refusal of the enforcement of an arbitral award on the basis of illegality, a significant example comes from the commercial arbitration world. In the well-known *Soleimany v. Soleimany* (55) case the Court refused to enforce an award rendered by a Jewish Rabbinical Court (the «Beth Din») based on Jewish law which upheld a contract between a father and a son involving the smuggling of Persian carpets out of Iran. The contract involved the bribery of diplomats, who used their diplomatic bags to take the carpets out of Iran. The Beth Din acknowledged the illegality of the contract under Iranian law but said that this did not have effect on the applicable Jewish law. When enforcement was sought before English courts, it was, unsurprisingly, refused due to the contrariety of the award to public policy (56).

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(54) We can significantly refer, in this regard, to Art. 42 of the newly enacted 2017 ICC Arbitration Rules, according to which «[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law». See in this regard G. Sacerdoti, *supra* n. 6, p. 576.

(55) London Court of Appeal, 4 March 1998, *Abner Soleimany v. Sion Soleimany*, [1998] EWCA Civ 285.

(56) Surprisingly enough, in a later case arising from similar circumstances (i.e. smuggling of weapons involving the payment of bribes) an English Court reached an opposite conclusion. See High Court, *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd.*, [1998] 3 WLR 770 at p. 798-800, where Colman J sustained that «[o]n the one hand there is the public policy of sustaining the finality of awards in international arbitration and on the other hand the public policy of discouraging corrupt trading (...) In my judgment, it is relevant to this balancing exercise to take into account the fact that there is mounting international concern about the prevalence of corrupt trading practices (...) However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking. On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international

This example clearly explains that, should an investment tribunal uphold a claim which arises from corruption, the enforcement of the resulting award is likely to be refused. The application of the «eyes shut» approach can, therefore, have only a detrimental effect for the sake of the enforcement of arbitration awards in accordance with the New York Convention.

As to ICSID Cases, it is well-known that Art. 54 of the ICSID Convention sets forth that «[a]n award of a Tribunal is binding on all parties to the proceeding and each party must comply with it pursuant to its terms. *If a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts*». While this rule is clear in stating that an ICSID award shall be recognized by national judges as if it was a domestic *res judicata*, some Authors have recently proposed that, if a claim for the enforcement of an ICSID award is started by the winning investor before national courts, it could be possible for such the respondent State to file an opposition to the enforcement claim on the basis of the remedies provided by the applicable national law (57). While the practical applicability of this opinion has been already criticized by the present author (58), it is a fact that — should a domestic court allow the filing of the domestic remedies against enforcement — such remedies could be used as a shield in order to deny the enforceability of an award arising from corruption. Also in the ICSID framework, therefore, arbitrators should be very careful in applying the «eyes shut» approach if they want to ensure the enforceability of awards.

follows b) Transnational Public Policy Against Corruption.

Transnational public policy is a legal category which finds its origins in

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commercial corruption». This decision, for the reasons set out in this paper, is highly regrettable. In any case, it seems that it has been the effect of a sort of protectionism put into place by English judges: the *Soleimany* case was the first one in which the public policy defence has been successful before an English court and, probably, in *Westacre* the judge wanted to avoid that the pro-arbitration reputation of London as a prominent seat of international arbitrations be undermined. Even more surprising and regrettable is the recent High Court decision in *National Iranian Oil Company v Crescent Petroleum Company International, Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm), where Burton J held that public policy considerations did not, in this case, preclude enforcement of a contract procured or 'tainted' by bribery or corruption and that there is no English public policy requiring an English court to set aside a contract procured by illegality. Moreover, there would be no English public policy rule requiring a court to refuse to enforce a contract which has been preceded, and is unaffected, by a botched attempt to bribe, or one of the parties to the contract has allegedly been tainted by the preceding conduct. For the reasons set out in this paper, this approach (which is, as it appears obvious, supported by a very limited number of decisions and scholars) is to be refused.

(57) R. Sabia and C. Trecroci, *supra* n. 42, p. 182 ff.

(58) See G. Zarra, *supra* n. 30, pp. 180-181.

French and Swiss scholarship (59) and whose content should reflect the existing global consensus on fundamental economic, legal, moral, political, and social values. «It is a collection of universal standards, shared norms, and general principles that are widely accepted by the international community» (60). When a contract or an arbitral award are contrary to a principle which is part of transnational public policy, the legal effects of such a contract or award should be denied. Unsurprisingly, whoever endorses the «zero tolerance» approach in matters of corruption has also argued that economic transactions arising out of corruption are contrary to transnational public policy and arbitrators should refuse to exercise their judicial powers on these matters.

The *World Duty Free* ruling is, in this regard, emblematic. Indeed, the Tribunal carried out a meaningful analysis of the concept here at stake and expressly recognized that the prohibition of corruption is a rule of transnational public policy. In the Tribunal's words «[a]rbitral tribunals have (...) often based their decisions on universal values in using various formulations such as 'good morals', 'bonos mores', 'ethics of international trade' or 'transnational public policy'. (...) But it has been rightly stressed that Tribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards» (61). Therefore, after having analysed the widespread diffusion of the prohibition of corruption in national laws, international treaties and international arbitral case law (62), arbitrators have concluded

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(59) See, e.g., P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in P. Sanders (ed.) Comparative Arbitration Practice and Public Policy in Arbitration, London - The Hague, 1998, p. 258 ff.; H. Rolin, *Vers un ordre public réellement international*, in *Hommage d'une génération de juristes au Président Basdevant*, Paris, 1960, p. 441 ff.; M. Forteau, *L'ordre public «transnational» or «réellement international»*, *Journal du Droit International*, 2011, p. 3 ff.

(60) C. B. Lamm, H. T. Pham and R. Moloo, supra n. 21, p. 707.

(61) *World Duty Free*, *supra* n. 5 para. 141.

(62) *Id.*, paras. 142-156. The Tribunal referred, inter alia, to the Inter-American Convention against Corruption of 29 March 1996; the OECD Convention on combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997; the Council of Europe Criminal Law Convention on Corruption of 27 January 1999; the African Union Convention on Preventing and Combating Corruption of 11 July 2003; the United Nations Declaration against Corruption and Bribery in International Commercial Transactions of 16 December 1996; the United Nations Convention against Corruption od 31 October 2003. The Tribunal also referred to English and Kenyan law, as well as to rulings by domestic courts, such as the Paris Court of Appeal, 30 September 1993, *European Gas Turbines v. Westman* where it was said that a contract involving bribery is contrary to French public policy as well as to the ethics of international business as conceived by the largest part of the international community. The Tribunal finally referred to several ICC arbitrations, namely: ICC Case n. 1110; ICC Case n. 6401; ICC Case No. 3916; ICC Case No. 5622; ICC Case No. 7047; ICC Case No. 7664; ICC Case No. 8891. As to the fight to corruption in Africa, see also C. N. Nana, *West Africa: The Actions of the OHADA Arbitral Tribunal in the Face of Corruption*, *Transnational Dispute Management*, 2013 (3), p. 1 ff.

that «[i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld» (63).

It is to be noted that the same concept of transnational public policy has been strongly criticized because it allegedly is a merely doctrinal concept, difficult to capture and, to the extent that its content mirrors the domestic concepts of public policy, useless (64). This article is not the place in which to carry out an analysis of the existence and the content of this extremely complex concept, as well as of its applicability in investment arbitration. However, as recently pointed out by Prof. Giorgio Sacerdoti, it is possible to say that the almost unanimous consensus among domestic systems of law regarding the prohibition of corruption in economic transactions (and the abovementioned related principle «*ex iniuria jus non oritur*») has generated a rule of general international law (that also finds confirmation in international treaties and international case law), which, in the opinion of that author, assumes the form of a general principle of law common to domestic legal systems as per Art. 38(1)(c) of the ICJ Statute (65) (autonomously applicable in investment arbitration) (66). The ar-

(63) Para. 157.

(64) M. Pryles, *Reflections on Transnational Public Policy Reflections on Transnational Public Policy*, *Journal of International Arbitration*, 2007, pp. 1-8. See also W. M. Reisman, *Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration*, in A. J. van den Berg, *International Arbitration 2006: Back to Basics?*, London - The Hague, pp. 7-8. Other references are provided by L. Crema, *supra* n. 32, p. 123 ff.

(65) G. Sacerdoti, supra n. 6, p. 578. The same approach has been sustained by H. Lauterpacht, *Recognition in International Law*, Cambridge, 1947, pp. 420-421, according to whom: «This construction of non recognition is based on the view that acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer. That view applies to international law one of the 'general principles of law recognized by civilized nations'. The principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer». Finally, this opinion may find an implied confirmation in the opinion of B. Conforti, *Diritto Internazionale*, X Edition, 2015, p. 51, where this Author recognizes that universally principles aimed at safeguarding social justice may be recognized in international law through the instrument set forth in Art. 38(1)(c) of the ICJ Statute. As to these principles, see, inter alia, R. Magnani, *Nuove prospettive sui principi generali nel sistema delle fonti nel diritto internazionale*, Rome, 1997, p. 1 ff.

(66) It is sufficient here to recall that Art. 42 of the ICSID Convention provides for the application of the law chosen by the parties *and* such rules of international law as may be applicable. On the topic see, inter alia, A. Giardina, *La legge regolatrice dei contratti di investimento nel sistema ICSID*, Rivista di diritto internazionale privato e processuale, 1982, p. 677 ff.; E. Gaillard and Y. Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, *ICSID Review - FILJ*, 2003, p. 375 ff. In addition to the above, it is to be considered that the vast majority of BITs provide for the applicability of general international law to disputes arising from the treaty.

gumentation used by the *World Duty Free* Award is a confirmation of this opinion: in order to deny giving effects to international transactions arising from corruption, arbitrators have carried out a meaningful analysis of the effects of corruption on economic transactions in several national systems of law and — then — having ascertained the existence of an almost unanimous consensus on the principle here discussed, have decided to declare inadmissible the underlying claim.

It is therefore arguable that, while for the sake of the present discussion (which regards corruption in investment arbitration only) the recourse to the concept of transnational public policy is to be considered superfluous, the existence of a bribe at the basis of an economic transaction renders it impossible for arbitrators to issue an award regulating such a transaction (67).

follows c) The Non-Attributability of the Conduct to the State.

As said above, proposers of the «eyes shut» approach say that the conduct of a State official who accepts a bribe is, in any case, attributable to the State. This opinion is mainly based on a broad interpretation of Art. 7 of the ILC Articles on State Responsibility (providing for an extension of State responsibility in the cases where a State official acting in his capacity exceeds its authority), as well as — more in detail — on a footnote contained in the Commentary to such Articles (which mentions bribery as one of the possible reasons at the basis of *ultra vires* responsibility) (68).

Such a view, even if based on a very authoritative source on the subject of State responsibility, presents certain drawbacks. In fact, it is not surprising that, as far as the present author is concerned, it does not find support in existing case law and State practice.

As a matter of mere fairness, the fact that a State (i.e., indirectly, a population) should pay for a bribe covertly accepted by a State official for his private interests is, indeed, highly disturbing (69). Indeed, as recognized

(67) The situation is obviously different in the commercial arbitration context. See, in this regard, V. Pavic, *supra* n. 19, p. 661 ff.

(68) Please refer to Section 3 and related footnotes. It is to be noted that the issue is not even dealt with by the most authoritative doctrinal sources on the subject. See, *inter alia*, L. Condorelli, *The Rules of Attribution: General Considerations*, in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 221 ff.; D. Momtaz, *State Organs and Entities Empowered to Exercise Elements of Governmental Authority*, in J. Crawford, A. Pellet and S. Olleson, *id.*, p. 237 ff.; R. Kolb, *The International Law of State Responsibility*, Cheltenham, 2017, p. 70 ff.; J. Crawford, *First Report on State Responsibility at the Intenational Law Commission*, 1998, paras. 235-240; S. Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts* (edited by the British Institute of International and Comparative Law), London, 2007, pp. 76-81. With specific regard to investment arbitration see K. Hober, *State Responsibility and Investment Arbitration*, *Journal of International Arbitration*, 2008, p. 545 ff.

(69) Similarly see T. Sinlapapiromsuk, *supra* n. 10, p. 26.

by the *World Duty Free* Award, if the payment of a bribe is not covert, it is not a bribe (70)! It comes as a logical consequence, therefore, as the Tribunal chaired by Gilbert Guillaume demonstrates, that the State cannot pay for something it did not even imagine existing (71).

However, some *legal* reasons are nonetheless needed in order to sustain the present thesis. As a general argument, as noted by Robert Kolb, the issue of *ultra vires* responsibility shall be solved taking into account, on the one hand, the apparent authority under which State officials act and, on the other, the legitimate expectations that the official's act may generate in its counterparty. In the same Kolb's words, «[t]he matter is at the bottom one of equity» (72). Starting from these considerations, and keeping in mind the concrete circumstances in which corruption may take place, it is arguable that — firstly — there is no apparent authority on the side of a State official who accepts a bribe: it is self-evident that this individual is acting for his private interests and not for the public interest that he should represent. Secondly, as a consequence, it is also arguable that the counterparty who pays a bribe has no legitimate expectations from the State, because it should know perfectly that the payment of a bribe to an individual does not involve any commitment of the State (73).

In addition, as it has been correctly pointed out, the fact that whoever pays a bribe is perfectly aware of the unlawful circumstances in which corruption takes place allows us to give a merely private value to the illicit payment: «if the public official accepts a bribe, the State of that corrupted official is *arguably* not responsible towards the party that paid the bribe because such corruption amounted to purely private conduct and was known to be so by the investor, and thus cannot be attributed to the host State» (emphasis in original) (74). Indeed, in this case the counterparty is perfectly aware of the fact that the public official is clearly acting in excess of his authority and freely accepted to participate in the corrupt act, which — therefore — has only private effects between the two bargaining parties. Such a conclusion is reinforced by the circumstance that if a State passes laws against corruption, signs treaties prohibiting this offence and implements a compliance system in order to fight it, it is evident that its officials

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(70) Para. 169.
(71) Para. 177.
(72) R. Kolb, *supra* n. 68, p. 86.
(73) The individual responsibility of those who accept a bribe has been strongly sustained by N. Kofele-Kale, *International Law of Responsibility for Economic Crimes*, London - The Hague - Boston, 1995, p. 280 ff.
(74) A. Llamzon, S*tate Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration*, *Transnational Dispute Management*, 2013 (3), pp. 76-77.

who accept a bribe are acting without authority (75) and that — therefore — the conduct is not attributable to the State (76).

follows d) The Unnecessity to Raise the Burden of Proof in Cases of Corruption.

As already emerges from Section 3 above, whenever arbitral tribunals have raised the standard of proof required for giving evidence of corruption, the party alleging the existence of such an offence was unable to prove it.

This is the reason why several prominent authorities in the field of international arbitration have taken the position that it is unnecessary to apply to corruption issues a standard of proof which is different from the usual balance of probabilities test (77). Indeed, «in determining an appropriate standard of proof, arbitration tribunals should take account not only of the seriousness or likelihood of the allegation, *but also the intrinsic difficulty of proving it*» (emphasis added) (78) and, in this regard, «[a]rbitrators must accept that it is almost impossible or unrealistic to collect direct evidence» (79) concerning corruption.

It is, hence, a matter of fact that Tribunals should take into account also the so-called circumstantial evidence (based on indicia), which — in the case it is converging and consistent — may also be at the basis of a ruling on corruption (80).

The *Metal-Tech* Tribunal noted, in this regard, that scholarly works provide us with several lists of «red flags» indicating the presence of corruption, which essentially have the same content (81). The reference applies, e. g., to the relationship existing between an intermediary and the relevant decision makers, to the timing of the intermediary's actions in the road towards the signing of an investment contract and/or to the urgency and the amount of the fees paid to an intermediary (82).

Should arbitrators refuse to take into account «red flags» they would

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(75) This consideration is due to S. Dudas and N. Tsolakidis, *Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment Treaty Arbitration?*, *Transnational Dispute Management*, 2013 (3), p. 19.

(76) See, more generally on this subject, M. Spinedi, *State Responsibility v. Individual Reponsibility for International Crimes:* Tertium Non Datur?, *European Journal of International Law*, 2002, p. 898.

(77) It is sufficient here to mention A. Crivellaro, *The Courses of Action*, *supra* n. 4, p. 15 ff.; C. Partasides, *supra* n. 6, p. 57; M. Hwang and K. Lim, *supra* n. 3, p.22 ff.

(78) C. Partasides, *supra* n. 6, p. 57.

(79) A. Crivellaro, *The Courses of Action*, *supra* n. 4, p. 15.

(80) *Ibid.* The possibility of relying on circumstantial evidence is recognized also by B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, p. 322 ff.

(81) *Metal-Tech*, *supra* n. 13, para. 293.

(82) C. B. Lamm, B. K. Greenwald and K. M. Young, *supra* n. 6, pp. 338-339.

only render the evidence of corruption impossible, with the risk of rendering arbitration a free venue for adjudicating corrupted disputes (83).

follows e) The Necessity to Safeguard the Credibility of Investment Arbitration (as a neutral form of dispute settlement).

The final, but not less important, reason why arbitrators should not apply the «eyes shut» approach in presence of issues of corruption lies in the already mentioned necessity to safeguard the credibility of investment arbitration as a credible and neutral method for the settlement of investment disputes.

Some authors have argued that one of the reasons why arbitrators should provide for restitutory remedies in cases of corruption is the fact that international investment law should be mainly aimed at the promotion and protection of investments (84). This statement is completely misplaced. It is commonly said that one of the main advantages of arbitration is that it is a *neutral* forum for solving international commercial disputes, which entails the trust of *both* parties (85). The goal of BITs and investment arbitration, indeed, is to promote economic development (86). This — in turn — requires that foreign enterprises are reassured in making their investments by the fact that, in the case where a dispute arises, such a dispute will be heard by a non-biased judge (as the court of the host State might be perceived to be). On the other hand, this does not mean that investment tribunals shall protect investors even in presence of evidence that they acted illegally.

In fact, the main criticisms which currently affect investment arbitration are precisely related to the perceived pro-investor bias of arbitral tribunals. The fact that, while the greatest part of the international arbitration community is moving in order to demonstrate that such criticisms are misplaced (87) some Authors still advocate in favour of the necessity to allow some remedies for a party who took part in a corrupt scheme, is really puzzling.

Indeed, in the presence of national and international rules prohibiting

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(83) A. Crivellaro, *The Courses of Action*, *supra* n. 4, p. 17.

(84) A. Kulick and C. Wendler, *supra* n. 38, p. 82.

(85) See, emblematically, P. Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, in C. Reymond and E. Bucher (eds.), *Recueil de travaux suisses sur l'arbitrage international*, Zurich, 1984, p. 23 ff.; similarly see, N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, Sixth Edition, Oxford, 2015, p. 28 ff.

(86) A. J. Menaker, *supra* n. 18, p. 69. See also *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award of 3 March 2006, para. 212.

(87) See, *inter alia*, A. Henke, *supra* n. 16, p. 133 ff.; P. Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests*, *ICSID Review - FILJ*, 2017, p. 38 ff.

corruption and setting forth the application of the clean hands doctrine, there is no legally tenable reason to opt for a conclusion different from the approach endorsed, inter alia, by the *World Duty Free* and *Metal-Tech* Tribunals ([88]). «The inevitable result of an illegality finding is the rejection of all claims (...) which have no legal standing» ([89]).

Indeed, as recognized in *Metal-Tech*, the interest of justice and the promotion of the rule of law require that a «zero tolerance» approach is applied when dealing with issues of corruption.

5. *The limit of the proposed approach.*

As we have seen, the inadmissibility of all claims arising from a corrupt scheme is closely related to the circumstance that the State is not considered responsible for the corruption of its officials. This is possible as far as it is proved that there is an agreement between the payer and the receiver of a bribe, which evidences the fact that the official is acting beyond its powers and, as a consequence, the extraneity of the State with respect to the illegal conduct.

The situation may, however, change in the cases where it is proved that the State was aware of the existence of corruption prior to the commencing of the arbitration and it did nothing in order to prosecute the people who took part in the illegality. In this case, the State might be considered as having *interiorized* the corrupt scheme and, therefore, would be estopped from raising the corruption defence in investment arbitration.

This observation is not new. In the words of Aloysius Llamzon, «[i]n any case, when a host State invokes corruption as a defense against investor claims, both the principles of acquiescence (under the law on State responsibility) and the duty to prosecute corruption (under national and international corruption law) should oblige the State to demonstrate that it has actively investigated and prosecuted those public officials who received bribes» ([90]).

Indeed, 'acquiescence' — from the Latin quiescere (to be still) — denotes consent ([91]). The principle, which is grounded in the civil law

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([88]) In the words of B. M. Cremades, *Corruption and Investment Arbitration*, in G. Aksen et al. (eds.), *Liber Amicorum Robert Briner*, Paris, 2005, p. 214, «[t]he corruption of the investor cannot affect the validity of the treaty, and therefore the substantive right remains intact. The effect of corruption of an investor's treaty right must therefore be procedural. The corrupt investor will be estopped from claiming the benefit of the substantive rights in the BIT».

([89]) A. Crivellaro, *The Courses of Action*, *supra* n. 4, p. 21.

([90]) A. P. Llamzon, *supra* n. 74, p. 76.

([91]) N. S. Marques Antunes, *Acquiescence*, *Max Planck Encyclopedia of Public International Law* (online edition), 2006; see also C. J. Tams, *Waiver, Acquiescence and Extinctive Prescription*, https://ssrn.com/abstract=1414188, 2009, p. 1, according to whom, «[w]aiver, acquiescence and extinctive prescription are legal concepts entailing the same effect - they

doctrine of good faith and the equity concept of estoppel, is expressed by the Latin adage «qui tacet consentire videtur si loqui debuisset ac potuisset»; in matters of corruption, this means that if a State knows about the existence of a bribe and does nothing to punish the parties of the illegal scheme at domestic law level, it tacitly accepts the conduct of his corrupt official and therefore acquiesce to the illicit conduct of the investor (92). Only at this point, the State having lost the possibility to demand for a declaration of inadmissibility of the claim (93), a tribunal will be entitled to recognize restitutory remedies and share the responsibility among the two parties.

Investment case law confirms this opinion. In *Wena v. Egypt* (94) the Respondent State alleged that the Claimant had «improperly influenced» a State official (Mr. Kandil) who entered into a contract «to give advice and assistance to the company as to opportunities available to the company for developing its hotel business in Egypt». The Claimant, however, gave evidence of the circumstance that — regardless of the fact that the timing of the signing of that contract and the amounts paid might have been considered as indicia of corruption — the Egyptian government was perfectly aware of the existence of such an agreement and never even started an investigation in that regard. For this reason, the Tribunal at para. 116 stated that «given the fact that the Egyptian government was made aware of this agreement by Minister Sultan but decided (for whatever reasons) not to prosecute Mr. Kandil, the Tribunal is reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with Mr. Kandil was illegal under Egyptian law».

Similarly, in *Kardassopoulos v. Georgia* (95), the Respondent State tried to deny the Tribunal's jurisdiction arguing that the investment con-

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lead to the loss of a right or claim. In the context of State responsibility, they entail the loss of the right to invoke responsibility, i.e. they extinguish any existing claim for cessation, reparation or guarantees and assurances of non-repetition».

(92) This is a direct consequence of the provision of Art. 45 of the ILC Articles on State Responsibility. This rule says that: «The responsibility of a State may not be invoked if: (a) the injured State has validly waived the claim; (b) *the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim*» (emphasis added). As to the applicability of the ILC Draft Articles on State responsibility in matters of investment arbitration see, inter alia, K. Hober, *supra* n. 68.

(93) In this regard, it is important to point out that in cases of acquiescence a State loses a right that it initially had. See C. J. Tams, *supra* n. 91, p. 2. It is important to point out, as the same Tams made, that «acquiescence *affect[s] the substance of a claim.* Once the conditions for any of them are met, the claimant State's right to demand cessation, reparation or guarantees and assurances of non-repetition ceases to exist. [A]cquiescence therefore needs to be distinguished from concepts which leave the substance of a claim unaffected, but, procedurally, prevent its enforcement in a particular forum or with a particular content, for example res judicata» (emphasis added).

(94) *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, paras. 111-116.

(95) *Kardassopoulos*, *supra* n. 5, paras. 182-184.

tract signed by the Claimant was contrary to domestic law, because the state entity who signed it lack the authority to grant the rights the agreement conferred. The Tribunal, however, noted that Georgia was aware of the situation prior to the commencement of the arbitration and did nothing. The Respondent's jurisdictional objection was therefore refused.

This approach could, therefore, be summarized in a statement made in *Fraport v. Philippines*, where the Tribunal stated that «[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law» (96).

6. *Conclusions.*

This paper analysed the issue of corruption in investment arbitration and argued in favour of the so-called «zero tolerance» approach, in accordance to which the claims of an investor who has taken part in corruption have no legal standing before an arbitral tribunal (and should, therefore, be refused, in accordance with the concrete circumstances, either as a matter of jurisdiction or as one of admissibility).

As we have tried to demonstrate in this article, there are many legal reasons which make the «zero tolerance» approach more suitable for investment arbitration. Such reasons are related to the existence of a general principle common to domestic legal systems which can be expressed through the maxim «*ex iniuria jus non oritur*», to the unnecessity to raise the burden of proof in cases of corruption, as well as to the arbitrators' obligation to issue an enforceable award.

However, the main reason why the «zero tolerance» approach should be applied is related to the current policy framework surrounding investment arbitration. In a historical period in which investor-State dispute settlement is subject to severe criticisms for (allegedly) being too favourable to foreign investors, a less strict approach to corruption could foment the perception that such a method of dispute settlement is a free venue for adjudicating matters arising from illegality. It is arguable that this is exactly what investment arbitration now would not need.

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(96) *Fraport*, *supra* n. 5, para. 346.