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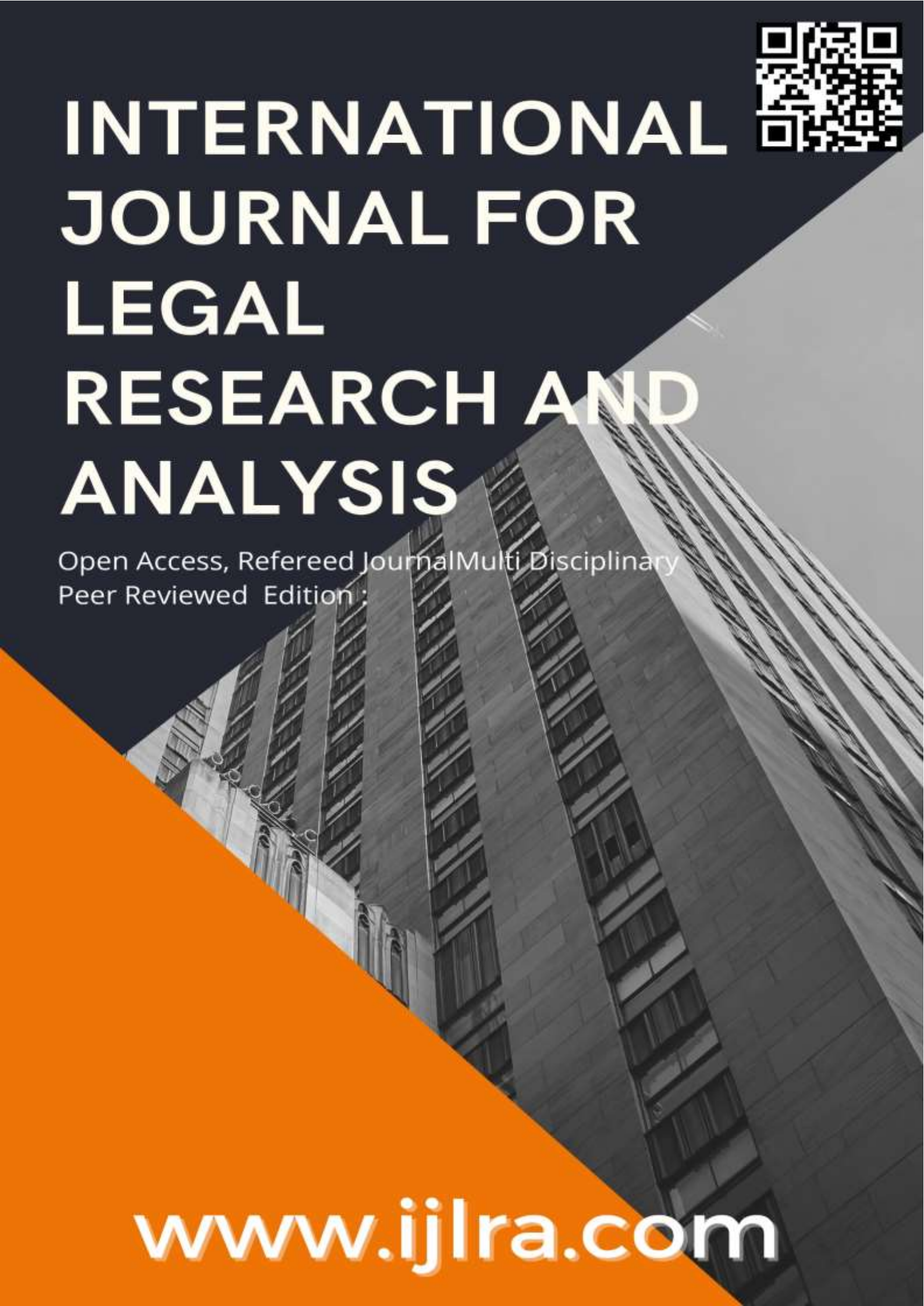

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NOTION OF CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION

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B.B.A., LL.B. (HONS.)

CERTIFICATE

This is to certify that the research work entitled "Notion of Corruption in Investment Arbitration" is the work done by Sukhpreet Kaur Bedi under my guidance and supervision for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons.) degree at Amity Law School, Amity University Noida, Uttar Pradesh.

Signature & Name of Supervisor: Mr. Himanshu Singh
Designation: Assistant Professor
Date:

DECLARATION

I declare that the dissertation entitled "Notion of Corruption in Investment Arbitration" is the outcome of my own work conducted under the supervision of Prof. Himanshu Singh , at Amity Law School, Amity University Noida, Uttar Pradesh.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student: Sukhpreet Kaur Bedi
Date:

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ABBREVIATIONS

ACC	:	Bangladesh Anti-Corruption Commission
BIT	:	Bilateral Investment Treaty
DOJ	:	U.S. Department of Justice
DRC	:	Democratic Republic of Congo
ECT	:	Energy Charter Treaty
EGOTH	:	Egyptian General Organization for Tourism and Hotels
EHC	:	Egyptian Hotels Company
FCPA	:	Foreign Corrupt Practices Act, 1977
FDI	:	foreign direct investment
ICC	:	International Chamber of Commerce
ICSID	:	International Centre for Settlement of Investment Disputes
ILC Articles	:	International Law Commission's Articles on State Responsibility
ISA	:	investor-state arbitration
LCIA	:	London Court of International Arbitration
MIGA	:	Multilateral Investment Guarantee Agency
NAFTA	:	North American Free Trade Agreement
NGOs	:	Non-Governmental Organizations
OECD	:	Organization for Economic Co-Operation and Development
PCA	:	Permanent Court of Arbitration
PPA	:	Power Purchase Agreement
SEC	:	U.S. Securities and Exchange Commission
UNCITRAL	:	United Nations Commission on International Trade Law
VCLT	:	Vienna Convention on the Law of Treaties

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I am indebted to my family. My parents and brother have always supported and prayed for success in everything I have undertaken. My deepest gratitude is reserved for my girlfriend, without

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whose support this dissertation would simply not exist.

SYNOPSIS

STATEMENT OF PROBLEM

Bribing host state's public officials by foreign investor to reap benefits out of the investment made can be termed as Transnational Corruption. Transnational corruption revolves around Foreign Investment made by Multinational Companies who make hand shake deal with the most elite individuals of host countries political class. Transnational corruption is a malady and growing phenomena that is present in investment and trading channels.

Transnational Corruption provides a twofold solution to business risks. Firstly it assures investor from political risks and changes in government policy and second being uncertainties arising out of business cycle. United States enacted the Foreign Corrupt Practices Act, 1977 for combating transnational corruption. After the enactment of legislation in U.S., the world saw various other Bilateral and Multilateral Agreements to curb corruption for e.g. UN Convention against Corruption, 2003. Investor-state dispute have been regulated through investment arbitration law, the same law should also be applied to transnational corruption. In the case of World Duty Free Company v. Kenya, the ICSID tribunal held that offering made by the company to former president of Kenya, Arap Moi, to obtain a contract was void in law, taking the ground that bribery was contrary to public policy. In another case of Inceysa Vallisoletana v. El Salvador, an ICSID

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tribunal dropped jurisdiction on the grounds of misrepresentation while acquiring contract. Thus considerable issues have been raised when it comes to transnational corruption in Investment Arbitration.

LITERATURE REVIEW

A lot of literature has been referred during the research for synopsis. Few of them are as follows:

1. International Investment Law: Reconciling Policy and Principle by Surya P Subedi. (Hart publishing: Oxford and Portland, Oregon, 2012)

   The author in his books has taken up current issues in investment law where he has dedicated an Article on Anti-Corruption Law and Investment Disputes. In this Article he argues that International Conventions on Corruption should be made applicable to Investment Arbitration disputes. While coming to this conclusion he takes into account some decisions of ICSID tribunal. He also argues that when an act tainted with corruption, the approach of tribunal have been negative towards the investors and have even denied reliefs.

2. The Oxford Handbook of International Investment Law by Peter T Muchlinski, Federico Ortino, Christoph Schreuer (Oxford University Press: Oxford, 2014)

   The author has dedicated one entire chapter to corruption and its effect on investment contract. The author also discusses international public policy aspect in Investment arbitration. The author discusses various situations and their treatments when they are tainted with corruption for e.g. for main contracts, flexible treatment should be given.

3. Corruption in International Investment Arbitration by Aloysius P Llamzon. (Oxford University Press, Oxford, 2014)

   This book deals with the study of corruption in investment Arbitration. The author mainly focuses on the growing movement of corruption activities and advocates to criminalize corrupt activities. He also suggests a general framework for investment arbitration decision making when issues of corruption rise.

4. The viability of Corruption Defenses in Investment Arbitration when the state does not prosecute by Brody Greenwald, EJIL Talk, Accessed on 31st October, 1:48PM, (http://www.ejiltalk.org/the-viability-of-corruption-defenses-in-investment-arbitration-when-the-state-does-not-prosecute/)

   The author in this article discusses the idea of raising the plea of corruption before international arbitration tribunal when not dealt by the domestic courts. He concludes by stating that states be allowed to raise jurisdictional and admissibility plea based on corruption even where the domestic

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courts have not dealt with the same.

5. The Legal Consequences of Corruption in International Arbitration: Towards a more flexible approach? by Giacomo Rojas Elgueta, Kluwar Arbitration Blog, Accessed on 29th November 2016, 12:13 PM. **(http://kluwerarbitrationblog.com/2016/01/20/the-legal-consequences-of-corruption-in-international-arbitration-towards-a-more-flexible-approach/)**

   The author in this article supports the argument that when investment contract is tainted with corruption, the contractor should be granted allowance in money equivalent to the amount of work done. The arbitration tribunal should take a flexible approach while granting reliefs to the investors. The tribunals can also resort to non-contractual remedies such as restitution remedies and proprietary remedies.

6. Corruption in International Arbitration: Evidence and Remedies by Victoria Shannon, American Society of International Law, Accessed on 2nd November 2016, 12:05PM (https://www.asil.org/blogs/12th-annual-ita-asil-conference-corruption-international-arbitration-evidence-and-remedies)

   In this the author argues on shifting the Burden of Proof and standard of proof required in case of corruption specifically when it comes to Investment Arbitration. The author also discusses the tribunal's binary approach in dismissing claims when affected by corruption. The author also cites Article 51 of ICSID Convention where the parties may revise the award within 3 years if new evidence is obtained. Hence tribunal can revise award if evidence of corruption is discovered.

7. Corruption in International Arbitration by Inan Uluc, Penn State Law elibrary, Accessed on 1st November 2016, 4:50 PM, (http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1000&context=sjd)

   The author suggests that the arbitration court may view corruption issues and identify the fortune of its peculiar jurisdiction on two major doctrine that is doctrine of separability and doctrine of competence-competence. The tribunal than can consider the evidentiary value and also take arguments on burden of proof. If the tribunal finds that the contract is tainted by corruption than it can declare it null and void due to its contravention of law and public policy but in this matter the tribunal may adopt investor friendly approach and may grant relief to investor.

IDENTIFICATION OF ISSUES

The following are the issues that can be raised after looking at the statement of problem

1. Whether Attribution of Corruption choke up states urgings in any way before the Arbitration Tribunal under Articles on Responsibility of State?

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2. What are the legal implications of Corruption on international investment contract and arbitrators approach towards those contracts in declaring them void ab initio?
3. Should omnipresence of corruption in foreign investment affect the approach of investment arbitrators when faced with the issue in any way?

SCOPE OF RESEARCH

To study the phenomenon of corruption in Investment Arbitration and to curb the growth of corruption in Investment and trading channels. To provide a broad framework to be followed when cases of corruption in Investment Arbitration crop up.

RESEARCH METHODOLOGY

The research methodology adopted would be doctrinal and secondary sources. In this dissertation the author will rely upon cases, articles by famous authors, concurring judgments, law reviews etc. on corruption in Investment Arbitration to substantiate hypothesis and probable outcome.

HYPOTHESIS

Arbitrators should take BIT's, MIT's and other customary international law as binding and then decided the fate of arbitration even when investment is tainted by transnational corruption.

PROBABLE OUTCOME

Arbitrators have that room to interpret statutory tenets to the benefit of both the parties. In this subject the arbitrator has to give verdict as per law. The Arbitrator will determine jurisdiction after addressing the issues of corruption. Arbitrators have been sluggish in identifying corruption as in case of World Duty Free v Kenya and Metal-Tech v. Uzbekistan where the arbitrators have deliberated upon the corruption aspect and have taken down the same in determining the outcome of the case. But these cases do not discuss on the evidentiary standards and burden of proof used in Investment Arbitration. It is also putative that activities of corruption can be clearly attributed to state. But when corruption is consummated such that public action or inaction purchased by bribes has occurred than in that case host states are not liable. The arbitrators are of the view that when a contract is tainted by corruption it has to be declared null and void due to its contravention with law and public policy. There is continuous increase in corruption and thus the arbitrators will have to be innovative while simultaneously adopting an analogous approach while deciding corruption issues in Investment Arbitration.

SCHEME OF CHAPTERS

1. Investment and Corruption

   1.1 Defining corruption and its Ubiquities

   1.2 Corruption as tradition in Foreign Investment

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1. INVESTMENT AND CORRUPTION

Corruption has always revolved around human organization and it can be seen from the history of corruption. There have been revolutions in world history which were motivated largely to remove or reform corrupt institutions. One such example of the same is that during the sixteenth century in Europe the Protestant Reformation was started as a response to the corruption that was done by the temporal Catholic Church and additionally it used to clash with the religious doctrine. One might also come to a conclusion that corruption, was taken as a reason for every revolutionary activity in the history starting from the change in monarchy to republicanism; or from colonialism to self-rule; or as seen most recently in the Arab spring, from autocratic kleptocracies to burgeoning democracies.

Corruption is endless and in modern days there has been continues increase of investment all around the world which has resulted in near borderless movement of goods and capital seeking or asking for huge profits has also called for more corruption than asked where the foreign individual or enterprise tries to bribe the host state where they try to bribe the public officer or any political leader is termed as transnational corruption which is taking hold of trade, commerce and having disruptive effects. “Perhaps the most invidious aspect of transnational corruption relates to foreign direct investment, fertile ground for corruption as multinational firms build large-scale, long-term relationships with host States in extractive industries, infrastructure, and

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manufacturing."[1] From bribes to get speedy customs clearance of capital equipment to the big corruption that asks the government to make multi-billion dollar white elephant[2], transnational corruption is a disease that is spreading all across the world that hampers all trading and investment channel.

"When we see statistics that are provided by the World Bank we can see that the World Bank estimates that within the world's 30 trillion dollar economy, more than one trillion dollars (or a full 3 per cent of the world's economy) are paid in bribes each year."[3] The World Bank also analyzed that when we take into consideration foreign investment we find that it is severe as 10% of the total cost of performing profession internationally, and corrupt activities add upto 25 per cent of the total cost of procurement contracts in developing countries. "Some have estimated that moving business from a country with a low level of corruption to a State with medium or high levels of corruption is found to be equivalent to a 20 per cent tax on foreign business."[4] There is a very small margin between profitability and loss in a going concern and that is at around 20 per cent. In order to be not affected by this corruption aspect the investor will either build the bribe into the price, or compromise on the quality aspects of the project or the good that has to be delivered.

Foreign investment is weighted on inconsistency. The States that demand for investment are those states or come from those part of the world that are politically unstable, too poor or too underdeveloped. It is always seen that investors heavily rely on the stability of state which indeed comes from rule of law, it is seen that those countries of the world which are involved in autocracy and repression are the poorest of nations and thus are never selected by foreign investor for any form of investment. But for some developing states, foreign investment is still there and that too in billions, and yet for many of these developing States, foreign investment does flow, and in billions, taken by inexorable truths of capital and not by altruism: where in present time the money invested will always look for return; but it is also true that higher the risk, higher the return and that the less explored, less developed, less sophisticated markets will yield far greater returns than in more efficient market economies. But risk is sometimes rewarded and investors asking for a return while simultaneously minimizing risk will be always go for stable ad hoc investment

[1] Daniel Kaufmann, Rethinking Governance: Empirical Lessons Challenge Orthodoxy 8–9 (2003) (World Bank Discussion draft); James Anderson et al., Service Delivery, Poverty Reduction and Corruption—Common Threads from Diagnostic Surveys 11–13 (Background Paper for the 2004 World Bank Development Report) (27 June 2003).
[2] SUSAN ROSE-ACKERMAN, THE CHALLENGE OF POOR GOVERNANCE AND CORRUPTION IN GLOBAL CRISIS, 23 (Bjorn Lombord (ed.), 2004).
[3] HUGUETTE LABELLE, ANTI-CORRUPTION: CHALLENGES AND TRENDS IN THE UNITED NATIONS GLOBAL COMPACT: ACHIEVEMENTS, TRENDS AND CHALLENGES 101-11 (2010); SPEECH OF U.S. ATTORNEY GENERAL ERIC HOLDER TO THE OECD, (May 31, 2010) <http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html>.
[4] *Id.* at 12.

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environment for itself but they have always dodged all the risks and have maximized return by indulging in acts of corruption.

A foreign investment can be made successful and profitable with less risk if the investor goes for corruption. When a bribe is given to a public official it can be seen that there are many advantages of the same some being that the it allows the investor to obtain insurance of risk and an assurance of maximum return, also it immunizes the investment from geopolitical activities which may include change in government, change in government policy etc., it even takes care of uncertainties that are there in any business cycle by purchasing a public official who can ensure safe investment and it is done in such a way that no one ever comes to know about anything and by an unsuspecting populace.

The investor always thinks that he might lose everything in foreign land where he knows little about the law of that land and thus he checks before making investment in that country. In order to make his investment a safe investment he takes help of public official and partnering with local elites so that various risks can be avoided.

However it is very difficult for an investor to get support from the government and other public officials even where country has poor governance and law and order situations. Investors thus in order to bring stability and reliability to business indulge in the act of corruption. They sometimes do it go get small outcome from corruption such as to be able to participate in the economic activity of that State and sometimes they do it for something big such as for capturing profits etc. The investor knows what is legal and what is illegal but still he goes for it anyway, either overtly or tacitly.

It would be wrong to judge the investor from corruptions point of view. For some people corruption is more of a moral question rather than a legal or economic one and should be looked to fit foreign investment needs. Taking this as only corruption in such an environment is abhorrence as for a foreign investor who takes the risk of making investment on any other land than is home is more than just risk and calls for huge effort where everything goes against the flow. "It is no accident that one often hears of the 'fight' against corruption, of 'combating' corruption, even of the 'war' on corruption, as it is considered an existential threat to society, especially in Africa."[5] "Equal importance must be placed on both the 'supply' side of the corruption equation (i.e. the willingness of multinational firms engaged in transnational investment to make such payments as a facilitation of global commerce), and the 'demand' side,

[5] Olanrewaju Fagbohun and Gbadebo Olagunju, *'International Law and the Crisis of Corruption: Africa in Focus'*, J. Afr. & Int'l L., June 15, 2009, 1(2); Abyei Arbitration (Government of Sudan v. Sudan People's Liberation Movement/Army), Permanent Court of Arbitration, Award, 22 July 2009.

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where bloated bureaucracies and kleptocratic regimes within host States dominate the national economy and engage in covert or outright rent-seeking."[6] Those who view that there is a clear difference between foreign investors wanting to make investment and the good but tempting public officer of poor country than they are wrong because the government supports none and so it is better that both the investors and the officials take care of each other accordingly.

1.1 DEFINING CORRUPTION AND ITS UBIQUITIES

Corruption is something that has moral foundations and is understood by someone as a wrong. "Etymologically, the word 'corruption' can be traced back to the Latin corrumpere, meaning 'to break'."[7] "The Oxford English Dictionary defines 'corrupt' as 'perverted from uprightness and fidelity in the discharge of duty' and 'to induce to act dishonestly or unfaithfully, to make venal'."[8] "The key factor distinguishing corruption from mere preference is the fact of inducement by one to another in order to show favour, rather than the showing of favour itself."[9] Corruption has far ends and has vast scope. It can be referred when a payment is accepted by a government official to do or not to do certain activities as that would benefit the one making the payments. When the act of corruption is done there is clear abuse of power and authority which the public officer owes to the public. When it comes to international investment law or foreign investment law it has been seen as when a relationship between a capital provider and the public official who holds public trust but accepts payments made by the investor in exchange for a favourable order are the basic components of corruption when it comes to foreign investment law. There is no as such universally accepted definition of the word corruption. "The leading NGO on this area, Transparency International, operationally defines corruption as the 'abuse of entrusted power for private gain'."[10] It is important to note that, the OECD Anti-Bribery Convention,[11] does not define corruption but only focuses on "'bribery of a foreign public official', which the treaty defines in the following terms: '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

[6] VITO TANZI AND HAMID DAVOODI, 'CORRUPTION, PUBLIC INVESTMENT AND GROWTH', IN GOVERNANCE, CORRUPTION, AND ECONOMIC PERFORMANCE 280–99 (2nd ed. 2002),.
[7] COLIN NICHOLLS ET AL., CORRUPTION AND THE MISUSE OF PUBLIC OFFICE 1.01 (1st ed. 2006).
[8] *Id.* at paras.1.01–1.02; Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, 24 May 1990, 1980 I.C.J. 29.
[9] DAVID KRAFT, ENGLISH PRIVATE LAW AND CORRUPTION: SUMMARY AND SUGGESTIONS ON THE DEVELOPMENT OF EUROPEAN PRIVATE LAW IN THE CIVIL CONSEQUENCES OF CORRUPTION 207-08 (2009).
[10] Elizabeth McNichol, *The Law of Transparency in International law* (Sept 3, 2013) <http://www.transparency.org/whoweare/organisation/faqs_on_ corruption/2/>.
[11] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Negotiating Conference, Nov. 21, 1997, in force Feb 15, 1999.

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relation to the performance of official duties, in order to obtain or retain business or other improper advantage....'."[12] But a plain reading of this definition suggests that there is still ambiguity as various terms such as 'improper' or 'undue' advantages and 'abuse' of power are used often, but do not have a clear and precise definition. Corruption when taken from another perspective it can be seen that there are no illegal activities, the public officer conducts are well within the threshold of his powers and duties but are finally motivated by illegal considerations received from a private party.

"The United Nations Office on Drugs and Crime has resisted attempts to lay out a precise definition, maintaining that there is 'no single, comprehensive, universally accepted definition of corruption', and that 'attempts to develop such a definition invariably encounter legal, criminological and, in many countries, political problems'."[13] "Instead, the U.N. prefers to identify its particular forms, including corruption, bribery, embezzlement, theft and fraud, extortion, abuse of discretion, favoritism, nepotism and clientelism, conduct creating or exploiting conflicting interests, and improper political contributions."[14] "Similarly, jurists and legal scholars prefer to discuss particular manifestations of corruption that lend themselves to ready legal analysis, such as 'illicit commissions."[15] Out of all the above mentioned forms of corruption, bribery and extortion are amongst the most important as they are the most performed acts by public officials as well as they have been long into discussion over the same.

Bribery has been considered as most common and recongnised mode of corruption. When any doubts are raised between a private business and public official, bribery is the most commonly used term and even equal to corruption. But Bribery is les specialis as it refers to payments made to public official to get benefit against many more less direct methods that make public official to do the same work and not even the shelter of law.

"Another essential concept concerning bribery is that the tender and acceptance of a private reward for a defection from duty involves not only a violation of law, but also the conscious and premeditated corruption of the processors of the law."[16] Bribing or acts of corruption has one of the major drawback which is that when such acts are out in public, the people lose faith in the system and it becomes troublesome than the particular act of corruption itself. People start believing that public officials who was left with the duty to control the public order and economy

[12] *Id.* at Art. 1(1).
[13] UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE GLOBAL PROGRAMME AGAINST CORRUPTION: UN ANTI-CORRUPTION TOOLKIT (3rd ed. 2004).
[14] *Id.* at 12.
[15] Jose Rosell and Harvey Prager, *Illicit Commissions and International Arbitration: The Question of Proof*, 15 Arb. Int'l, 329 (1999).
[16] W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 2 (1979). ["FOLDED LIES"]

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could not do the same as they were no longer there for the public and instead they were left with one thing which was to get private gain or benefit at the expense of public responsibility. This makes people loose trust on the legal system itself.

Corruption is another form of fraud committed on the general public,[17] but when compared with other forms of corruption it is one that involves the free and willing participation of the parties to the act.

'Extortion' or 'blackmail' is another type of corruption. It can be clearly distinguished from another when you see that the payer has in exchange of something against a situation where the payer pays in order to stay protected. "Additionally extortion is a situation in which the capacity of the official to withhold a service or benefit otherwise required by law exceeds the capacity of the private party to sustain the loss of that service or benefit."[18] The difference is very specific when the payment is made voluntary then it is bribery and when the payment is dictated by necessity then it is extortion. "It is not unknown for government officials to engage in outright extortion; but for the most part, a combination of greed, incentive, and threat usually occur in practice, making differentiation difficult."[19]

Low-level extortion are often done where money is given to low ranking government officials to perform their functions accordingly and thus are considered as more annoying leading to use of common citizens. "It is a response to 'extortion' considered largely acceptable (the U.S. Foreign Corrupt Practices Act actually exempts this form of corruption from the application of that law)[20] because the degree of deviance from the law the payment seeks to obtain is small at best the official is usually paid just to 'do their job'."

When it comes to foreign investment corruption the investor is the one who initiates the proposal and then asks the public officer to do certain act or omission and for that induces the public official to receive a bribe after the drudgery is done. There is another way where the public officer can through various coercive means force the investor to pay money in order to make the investor pay by not acting or not performing his work in detrimental to exercise of the power conferred to him by the state. Blackmail and extortion are the things which are prima facie avoided by the public authority when the law and order in the state are at their best. So in order

[17] ANDREW NEWCOMBE AND LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 282 (2ed. 2009); GABRIEL BOTTINI, 'LEGALITY OF INVESTMENTS UNDER ICSID JURISPRUDENCE' IN THE BACKLASH AGAINST INVESTMENT ARBITRATION 297 (2010).

[18] FOLDED LIES, *supra* note 16, at 38.

[19] SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 12 (1999), citing Ian Ayres, *'Judicial Corruption: Extortion and Bribery'*, 74 Denver U. L. Rev. 1231, 1236–7 (1997).

[20] GEORGE MOODY-STUART, GRAND CORRUPTION: HOW BUSINESS BRIBES DAMAGE DEVELOPING COUNTRIES 93 (16th ed. 1997).

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to make corruption work it is suggested that when the investor and the public authority come freely agree and indulge in the crime of corruption.

Corruption always demands for legal part when it comes to corruption as highest effect corruption can have is not application of law. A plain meaning of corruption as far we have understood can be that an act where there the public officer abstains to apply laws that would benefit the investor rather than the public of that nation.

Corruption is so connected to the public sentiment that its existence itself makes damage to the government and is one of the biggest issue that the state is facing. But it is also seen that private sector corruption is also growing but at present we are only going to deal with public sector because when it comes to investment arbitration it can be seen that it is only limited to a conflict between host state and investor where the investment is made by the investor. "While obviously related, the condemnation of private commercial bribery has not been as prominent,[21] given uncertainties about policy goals[22] and legal foundations[23], among others."

Corruption can be identified by clarifying the legal scenario and acts which are considered as corruption. What if the act of benevolent giving of money to a public official to achieve private gain be considered as corruption even when the domestic law does not consider it illegal. Cases where someone contributes for a political leaders campaign or else when a government employee is appointed by the same industry for which he was conducting investigation on violation of any law or any report was filed against the industry.

When an allegation of corruption is made one might easily relate it to bribery. In United States it is very common to donate funds and they have minimized their differences between the public officials and private sector. They enter in lobbying and campaign finance which other would see as acts of corruption.

When you talk about India you find that people use more of their personal connection to get their work done and even it has not fall under the threshold of corruption. People have the habit of giving and taking and it exists in every society but are then they are used to influence the decision of an authority or public official for other than essential benefits. It is not just monetary but also non-monetary payment that helps the investor or any individual to secure some help from a public duty as a bribe but then there are other views to the contrary as well. An example of the same is lobbying in United States, in some states it is accepted while in others it is not thus it is bound to happen that there will be conflicting views.

[21] GÜNTER HEINE, PRIVATE COMMERCIAL BRIBERY 12-13 (International Chamber of Commerce 2003) (1998).
[22] *Id.* at 3.
[23] *Id*. at 4.

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Lobbying in general sense is taken as the process by which the people provide relevant information to legislators regarding a particular area or subject matter on which the legislation will be made. But it has been observed that such has not begun to see the abuse that has started to corrupt the legislators in United States. Social unobtrusiveness is the reason for continuous increase of toleration of lobbying practices, which has questioned the idea of equality and representative government. "Nonetheless, 'they are probably integral to the United States political system'."[24] "Permitted 'lobbying' by former elected officials having personal relationships with (and thus access to) those still in power, a practice accepted in the U.S., might be considered intolerable 'influence-peddling' by other societies, including other developed countries."[25]

Lobbying does not on its own call for unlawful corruption, the discussions and exchange of information or promises done are all part of the lobbying industry. "As stated by the infamous lobbyist Jack Abramoff after having been imprisoned on corruption charges, 'at some level, unfortunately, corruption has seeped its way into even honest dealings there, where you have the exchange of gratuities, you have the exchange of contributions and money, and it's not viewed as it should be, as bribery; it's viewed as a polite way that business is done'."[26] Lobbyist are hired for their contacts with top post officials and who therefore know those persons and are used to process necessary to hurdle. "To address these issues, Mr Abramoff's suggested reform is to completely disallow representation of any kind, even a glass of water, because gratuity of any kind can lead to bribery."[27]

Another party that play big role is campaign contributors. Companies want favourable legislations or contract as they have financial interest and secure their own objectives. So one of the ways that they adopt is they support the camp of any public official and then they believe that in return he would support them to achieve the objectives. "Some would consider this ability to use money to persuade public officials for such purposes an inherent part of freedom of expression; the United States Supreme Court is of this view, for example."[28] But some states do not accept the above argument and reject private contributions outright, thinking that public funds would be a better way to run those campaigns as the same would not mean having a gun on your head where any third party may ask for a favor in return.

[24] FOLDED LIES, *supra* note 16, at 58.
[25] SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 12 (1999)
[26] David Sirota, *Interview of Jack Abramoff: A Reformed Jack Abramoff?*, (Dec 27, 2011), http://www.salon.com/2011/12/27/a_reformed_jack_abramoff; 9. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970.
[27] *Id.* at 12
[28] Citizens United v. Federal Election Commission, 558 U.S. 8 (2010).

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"Interestingly, when considering the legality of such contributions, the foreign-ness of the giver is considered a relevant factor payments made to a foreign public official (for example, to that official's 're-election campaign') will be viewed in some countries as improper meddling with domestic affairs and as possible bribery; indeed, in many countries, campaign contributions by foreigners are considered unlawful regardless of the intention."[29] "Similar foreign payments made in Washington, D.C. may sometimes be considered lawful, albeit distasteful."[30] Thus under different legal system the same act has been dealt differently and so there is always the possibility that the same act can be legal in one state and illegal in another.

"International investment arbitration has considered the same question in the case of Methanex v. United States."[31] In that case it was alleged that the California Lieutenant Governor Gray Davis, who was fighting for governor of that state, received contributions by a competitor of foreign investor Methanex against which he was asked to enact a decree that would ban the gasoline additive MBTE (Methanol, which Methanex produced, was an ingredient of MBTE). But the tribunal emphasized that campaign contributions were legal and the same was not prohibited under US legal system so a case of corruption did not sustain. "Nonetheless, the tribunal expressed a willingness to look into 'whether the evidence adduced can event support, by way of inference, Methanex's view' that a dinner between Methanex's competitor ADM and Lt. Gov. Davis held in Illinois (the seat of ADM's offices), which in and of itself was a typical way to gain 'access' to a candidate, was sufficient evidence 'to justify inferring that the exchange at the dinner was unlawful'."[32] The Court reviewed the matter and came to a conclusion that there was no interference of corruption, they even considered the fact that in such democracy such as the United States such private individuals and interest groups intervention could be justified and they have every right to participate:

> *Legislation in democratic systems involves, by its nature, participation by a wide spectrum of private individuals and interest groups in addition to the members of the legislature and the executive, insofar as its endorsement is also necessary for a bill to become law. While there may be circumstances in which facts would support an inference that one 'invisible hand' was lurking behind and controlling a seemingly democratic process which had been elaborately (p. 31) contrived to conceal its machinations, it is clear beyond peradventure that the facts in the*

[29] Batas Pambansa Blg. 881, Sec. 96 (1985, as amended).
[30] Rick Hoofman, *"Foreign" Campaign Contributions and the First Amendment*', 110 HARV. L. REV. 1886-1903 (1986).
[31] Methanex v. United States, NAFTA/UNCITRAL Arbitration Rules, Final Award on Jurisdiction and Merits, 3 August 2005. ["Methanex"]
[32] *Id.* at 78.

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record do not warrant such an inference here.[33]

The tribunal clearly clarified the fact that there was no corruption but it added that even though some acts which are legal under national law may be scrutinized at international forum for possible corruption. Thus the case suggested a possibility of different and more stringent idea or application of law by international tribunal in lieu of more permissive national laws. The tribunal also clarified a situation where if even taking into fact that even if campaign contributions are per se legal, if that contribution was made in exchange for something than that would have fall within the ambit of corruption such as where if campaign contribution would be made in exchange or demand of government action than that would have been considered as illegal. Thus it only depends on the intention of the contributor and which is the most vital part in determining corruption. Although intention is difficult to prove before an arbitral tribunal. "However, intent is of course difficult to prove. The idea that companies bidding for government contracts or receiving subsidies be banned from giving any money whatsoever politically thus merits serious consideration."[34]

Lobbying and campaign contribution calls for influencing, although they both might work differently but are the ways for influencing decision making is influenced by the often inchoate offer of private reward at some undetermined time. Investor considers it as a strategy of doing or conducting business and they do not consider it as corruption by most fastidious of companies. "As noted by Professor Reisman, 'our system of law tolerates and facilitates through the device of the licit business expense the practice of transacting business not by exclusive reference to the quality of the product or service but by reference to essentially unrelated personal favors'."[35]

"From the standpoint of community expectations, what separates the more-tolerated use of personal connections from less-tolerated bribery? First, it seems to matter what type of public official is being approached. Few, for example, would agree that interested parties can discuss their pending cases outside the courtroom."[36] By bringing the public officer on his side the investor makes a lot out of him, legislations, which require hearing people and addressing their concern where the closer gets to the officials and has the opportunity to work with him and, the less tolerated material persuasion is. Secondly transparency is most important. In United States the campaign contributors name must be disclosed by the candidate who is fighting as the office seems to contribute to its acceptance. Against this if hidden work or contribution is carried out

[33] *Id.* at para. 46.
[34] David Sirota, *Interview of Jack Abramoff: A Reformed Jack Abramoff?*, (Dec 27, 2011), http://www.salon.com/2011/12/27/a_reformed_jack_abramoff/.
[35] *Id.* at 52.
[36] Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002).

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than that will stink for corruption irrespective and no one will take into consideration the argument on free expression. This can be avoided in a situation when there is no quid pro quo that is when the contribution is done irrespective or against which no favour is demanded than in that case the same will be accepted and no finger will be raised.

Thus from the societies point of view not every use of favour or influence is used in order to influence public decision making. The legal acceptance of such activities may be ascertained by how the community reacts and allows or calls out for corruption.

1.2 CORRUPTION AS TRADITION IN FOREIGN INVESTMENT

It is difficult to understand why the investor wants to be in bed with public official for doing corruption despite the fact that they make a relationship where the host states public official that that leaves the investor susceptible to continuous extortion and ill-treatment, and is thus it sometimes falls on the investor itself of which he can never get rid of. The answer may lie in understanding the investor at the point of time when the investment is made. The only reason that makes investor to go for corruption is to rational effort of the investor to minimize the risk or else the level of uncertainty that is attached to the investment at the time of making investment and that turns out to be the main reason for transnational corruption.

According to Customary International Law it has been seen or settled that the state has the right or power to change the environment in which companies operate within its territory. This was a direct outcome of the move in the 1970's where the resource rich states, "who had been saddled by what they believed were colonial-legacy contracts with Western corporations, to annul such agreements and espouse the concept of a State's 'permanent sovereignty over natural resources', a principle that was eventually embraced even by Western States."[37] World political actors have made tough efforts to nationalize resources through the state owned companies "having monopolies in extractive industries and public utilities; thus, this clearly is a time when 'law in the sense of a contract for the exploitation of a resource which will remain fixed and inviolable for the life of the resource, is on the wane...'."[38]

When there is continuous growing competition and even when there is a global environment of contractual uncertainty, corporate actors have been under considerable pressure as they are given responsibility "to maintain corporate actors are under to maintain the economic viability of present and future projects, and 'the persistence of experienced operators' in those industries is

[37] W.A. Berkeley, *'The Changing Political Environment for Investment Agreements'*, 75 Arb., 248 (2009).
[38] *Id.* at 248.

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necessary to produce reasonable returns."[39] Thus in order to achieve above goals while compensating for the uncertainties, corruption is the best method and a tool which can be employed to ensure certainty when it comes to political uncertainty and economic uncertainty.

When we talk about corruption then comes the idea of arbitrariness or arbitrary exercise of power we also talk about the rule of law which is considered by contemporary historians and economists alike as one that contributes to the economic, social and political development of a nations.[40] Investor always asks for a level playing field when he makes an investment in the host state as well as transparent rules that can be applied without discrimination which indeed in investment arbitration is called fair and equal treatment. Additionally they are the rights in an Bilateral investment treaty found under the heading of arbitrary and non-discriminatory treatment, a protection of fair and equal treatment and protection against expropriation without adequate compensation by the host state against the investor.

The investor also demands for consistency and predictability when he makes investment in host state by which he also means that the environment should be stable to do a business, especially when he is making such huge investment which involves a commitment to continue for long years within the territory of Host State which is even exposed to political changes in the host state, say, one-off sales of goods or equipment, no matter how expensive. "So important is the need for certainty in an investment climate that an entire instrumentality of the World Bank, the Multilateral Investment Guarantee Agency (MIGA), is devoted to promoting foreign investment 'by providing political risk insurance to investors and lenders caused by noncommercial risks'."[41]

Thus from the above situation it can be seen that it demands more and thus the investor thinks that it is more easy to go for corruption than to handle all those situations. This will even save the investor from political risks using more active methods, one of which is through corruption. The investor even sometimes goes to the public official and directly bribes him and insulate themselves against actual or possible unfair treatment from host governments in the future and obtaining through bribe payments a guarantee of non-intervention from government officials. This sort of bribe is given so that the investor can simply run his business and that he can be treated in a fair manner and not to get some advantage above someone. In India it is called protection money which is offered so that the investor or businessman can conduct his business.

[39] *Id.* at 248.

[40] MICHAEL TREBILCOCK AND RON DANIELS, RULE OF LAW REFORM AND DEVELOPMENT: CHARTERING THE FRAGILE PATH OF PROGRESS 32 (2nd ed. 2008); Daniel Kaufmann et al., *Governance Indicators for 1996–2004*, WORLD BANK POLICY RESEARCH WORKING PAPER SERIES NO. 3630, (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=718081; NIALL FERGUSON, CIVILIZATION: THE WEST AND THE REST (1st ed. 2011)

[41] Multilateral Investment Guarantee Agency, *The Notion of Corruption in Arbitration*, (Nov. 12, 2011) http://www.miga.org/.

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The investor sometimes even accept and praise the fact that bribing public official of host state has been accepted in some countries, "compared to others where observers say many foreign investors 'complain of having to pay bribes and then don't quite get what they paid for'."[42]

There is another form of controversy that corruption has economic uncertainty regarding the same. When the investor thinks of investing in an unfamiliar environment or else in those environment which are underdeveloped economies, this has its own benefit and disadvantages such as that there is instant or rapid profit, but then it also has much more risk not all of which arises because of political reasons. There is no uncertainty when it comes to cost side of a foreign investment or even when it comes to expected profits from the enterprise. But we also see that there are commercial risks which are inherent when an business is started and thus this are never protected by the MIGA or from any other form of political risks which the business calls.

But foreign investors always wants some sort of consistency and certainty on returns and thus indulge in some sort of illegal activities such as corruption which can be used as a tool in maximizing returns. Many prominent business personalities believe that when we talk about foreign investment, corruption is indeed essential in order to further expand the business when the business was there in a developing country, "because corruption guaranteed that the return received by that foreign investor for his capital would be at a rate greater than what he would receive in less-risky investment climates, a rate enough to justify the additional risk of investing in a developing State."[43]

When we see corruption from the investor's point of view we find that it is a risk-mitigation in that case corruption comes out to be handy and useful when developing a typology of transnational corruption. Extortion by host states public officials can be clearly distinguished from an opportunistic bribery it can be seen that it just requires inquiry into the nature of the public official decision sought to be purchased by the investor. As earlier discusses it has been noted that corruption has been used as a risk mitigating instrument by which the investor mitigates the risk and minimizes the risk as he comes to a different market will engage in the act of corruption for two simple purposes firstly that there is an economic reason. Although bribery is given but then it will make a risky investment worth the risk by seeing that the profits do not get affected and they increase and even cover the safer markets. This can clearly be differentiated from a second reason which is to get "leave from what the investor deems to be unfair or oppressive regulation perpetrated by public officials; in other words, to protect the potential or

[42] *The world of India's anti-graft campaigner Anna Hazare*, BBC WEBSITE, (Aug 15, 2011), http://www.bbc.co.uk/news/world-south-asia-14525537.

[43] THEODORE H. MORAN, HARNESSING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPED AND DEVELOPING COUNTRIES 48 (6th ed. 2006).

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already existing investment from political risk."[44]

There are corruption related issues which can be analyzed from the risk that the investor take which is precisely what form of government action or inaction did the investor purchase to get his job done and even the form of protection from commercial risks, or from political risk? Political risk is more of extortion by public official while economic risk is more connected to or related to investor-led bribery. The pressure of doing corruption by making payments to get benefit an investment from political uncertainty stands some consistency with the political and noncommercial risks that investment treaties themselves were designed to protect foreign investors against, such as fair and equitable treatment, or freedom from arbitrary and discriminatory treatment. But these activities are illegal if consummated but also subject the investor to sanction.

There is another form of controversy that corruption has economic uncertainty regarding the same. When the investor thinks of investing in an unfamiliar environment or else in those environment which are underdeveloped economies, this has its own benefit and disadvantages such as that there is instant or rapid profit, but then it also has much more risk not all of which arises because of political reasons. There is no uncertainty when it comes to cost side of a foreign investment or even when it comes to expected profits from the enterprise. But we also see that there are commercial risks which are inherent when an business is started and thus this are never protected by the MIGA or from any other form of political risks which the business calls.

1.3 National and International Efforts to Combat Corruption

Transnational corruption has evolved over the centuries from endorsement, condonation to criminalusation. "Corruption was used as an instrument of policy in the eighteenth century by the British East India Company in its transnational commerce with both the Indian kingdoms and the Empire's colonial government,"[45] and the justification behind this has been a different story in itself and even sometimes it was justified wherein 1994, "the former British Secretary of State for Trade and Industry justified bribery under the guise of unwillingness to impose 'western values' upon the rest of the world."[46] The revisionist in 1960 suggested that a proper definition of corruption must be given which covers or is based in condemnation but should also be based on moral principles although they might not be accepted by all. "Revisionists emphasized the

[44] Quoted in Merle Miller, Plain Speaking: An Oral Biography of Harry S. Truman 70 (2nd ed. 1973); W. Michael Reisman, Folded Lies: Bribery, Crusades, and Reforms 69 (12th ed. 1979).
[45] Padideh Ala'i, *'The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption',* 33 Vand. J. Transnat'l L. 877 (2000).
[46] George Moody-Stuart, Grand Corruption: How Business Bribes Damage Developing Countries 93 (3rd ed. 1997).

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'unavoidable character of corruption at certain stages of development and the contributions of the practice to processes of modernization and development'."[47] "Oft-repeated is the surprising fact that up until the 1990s, Germany and France not only enabled their companies to extend 'courtesies' to foreign government officials without fear of criminal or civil liability; their tax laws actually allowed such payments as tax-deductible business expenses."[48]

International law never dealt with transnational corruption nor did universal aspirations bring a law for the same, the major change was brought when the United States brought the "Foreign Corrupt Practices Act in 1977"[49], just after the Watergate scandal's revelation where the United States firms had used foreign connections or indulged in acts of "corruption to launder illegal contributions to the Nixon campaign."[50] The then US President Carter assured that US Business that others states would eliminate the FCPA, other developed, capital-exporting States were intractable, refusing to adopt restrictions that would render them less 'competitive'. "Almost 20 years elapsed before the next significant step came with the enactment of the Organization of American States' Inter- American Convention against Corruption in 1996."[51] After this within less time there was the "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December 1997"[52], the "Council of Europe's Criminal Law Convention on Corruption"[53] and "Civil Law Convention on Corruption (both in 1999)"[54], the "African Union Convention on Preventing and Combating Corruption"[55], and culminated in the first international anti-corruption Convention, the "United Nations Convention Against Corruption in December 2003."[56]

The major reason for the flow of conventions in international law against corruption was the rare collective opinion or agreement among various institutions such as the World Bank, capital importing representative institutions such as the OECD, Non-Governmental Organizations (NGOs), and national governments alike. "This consensus, in turn, was prompted in no small measure by the agreement of academics and policy-makers as to how serious an impediment

[47] Gabriel Ben-Dor, *'Corruption, Institutionalization, and Political Development: The Revisionist Theses Revisited'*, 62 Comp. Pol. Stud. 63-65 (1974).
[48] Alejandro Posadas, *'Combating Corruption Under International Law'* 10 Duke J. Comp. & Int'l L. 345, 376 (2000); Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1991
[49] Foreign Corrupt Practices Act (FCPA), Pub. L. No. 95-213, 91 Stat. 1494.
[50] Kenneth W. Abbot and Duncan Snidal, *'Values and Interest: International Legalization in the Fight against Corruption',* 31 J. Legal Stud. 141, 161 (2002).
[51] Caracas, 29 March 1996, 35 I.L.M. 724.
[52] Paris, 17 December 1997, 37 I.L.M. 1.
[53] Strasbourg, 27 January 1999, E.T.S. 173.
[54] Strasbourg, 4 November 1999, E.T.S. 174.
[55] Maputo, 11 July 2003, 43 I.L.M. 1.
[56] G.A. Res. 58/4, U.N. GAOR 58th Sess., Agenda Item 108, U.N. Doc. A/RES/58/4 (2003).

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corruption is to the long-term development of States."[57]

When we see international law on corruption the only problem that exists currently is that it clearly lacks specificity. There are various issues including the issues on procedural as well as substantive law aspect and even if corruption is proven before the national courts or the international tribunal the question on consequence is still on, will the contract be declared void entirely, for eg should corruption be considered a matter that if proven deprives a tribunal of jurisdiction to hear the investor's clams, no matter how good the host State's treatment of that investor may have been?

There is a clear difference between situations such as where there is formal condemnations which is claimed by the government and effective regulation which is what we believe and this situation clearly raises questions on the reliability of international law. It was noticed that even before the international community recognized the need to pass convention the same was done as there existed of every state addressed bribery and graft; but these laws have clearly failed to control the behavior of transnational actors. The culture of host states, multinational corporations, and capital-exporting States have been accepting corruption to some or more degrees. "This forbearance has not necessarily been unvaryingly damaging to host States—although far from conclusive, there is some empirical evidence which suggests that corruption is not per se dissuasive to the attraction of foreign direct investment"[58] and indeed, Transparency but it is also pertinent to note that more we have globalisation and International investment or open markets for that purpose this all has led to increase in corruption, despite having national and international laws on corruption.

When a comparison is drawn between what has been said against corruption and the manner in which people take it within society[59] has led "Professor Reisman to identify the existence of 'two relevant normative systems: one that is supposed to apply', which continues to enjoy lip service among elites, and one that is actually applied. Neither should be confused with actual behaviour, which may be discrepant from both."[60]

"He terms the first the saga system, which 'clearly provides for every rule and prohibitions (the

[57] SUSAN ROSE-ACKERMAN, INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 16 (4th ed. 2006).
[58] David Wheeler and Ashoka Mody, *'International Investment Location Decisions: The Case of U.S. Firms'* 33 J. Int'l Econ., 57–76 (1992); Alberto Alesina and Beatrice Weder, *Do Corrupt Governments Receive Less Foreign Aid?*, Nat'l Bureau Econ. Research (Working Paper No. 7108, Cambridge, MA) (1999); C.C. Okeahalam and I. Bah, *'Perceived Corruption and Investment in Sub-Saharan Africa'* 67 South Afr. J. Econ. 386 (1998); Pierre-Guillaume Méon and Khalid Sekkat, *'Does the Quality of Institutions Limit the MENA's Integration in the World Economy?'* 27 *The World Economy* 1475–98 (2004); S.J. Wei, *'How Taxing is Corruption on International Investors'* 82 Rev. Econ. & Stat. 1–11 (2000).
[59] ROBERTO MANGABEIRA UNGER, POLITICS: THE CENTRAL TEXTS (2nd ed. 1997).
[60] W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 16 (3rd ed. 1979).

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"rights" and "wrongs" of behavior articulated without gradations or shadings)', and the second, an operative code that 'tells "operators" when, by whom, and how certain "wrong things" may be done'."[61] "Periodic attempts to criminalize and further expand the definition of corrupt conduct are often 'crusades' that possess little more than symbolic meaning, particularly in the interim."[62] It is important to understand the fact that irrespective of the fact that we are transparent, any acceptance of the difference between myth system and operational code it is vital to understand the investors mind set which even brings him to international arbitration and resolution of disputes of such nature.

"Squaring formal pieties with the reality on the ground is not a quest to unravel formal laws against corruption; nor is it an apology for corrupt practices. It is rather an attempt at recalibrating the decision calculus of international investment arbitration in order to make it a fairer, more realistic, and above all effective system capable of doing more than just lip service to the combating of transnational corruption."

[61] *Id.* at 1.
[62] *Id.* at 105.

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2. PROVING AND ATTRIBUTING CORRUPTION IN INVESTMENT ARBITRATION

When a question of transnational corruption is raised the arbitrators have wide consensus only have one view of the same that transnational corruption is unlawful, immoral and the parties who indulge in the same should be punished. The first question that arbitrators phase when they see an issue on transnational corruption is the issue of how to be tested or proven. "The most common modality in transnational investment bribery is perpetrated by parties who have power and resources, and collude precisely to avoid any trace of corrupt conduct."[63] The proper questions that can be raised are that what the proper evidentiary value is or standard that must be applied; who has the burden of proving corruption allegations and under what circumstances the burden will shift to the other party. This also raises query on the ability of the arbitral tribunal as they are the decision makers of the fact that how they should approach such issues of bribery or corruption. And if are the rules on evidence very much clear so that the arbitrators have to just apply the same and their task will be done.

There are very few cases such as World Duty Free, Azpetrol, and Metal-Tech where the investor had agreed or admitted to corruption activities. There might be such a situation in further where the investor agrees to indulge in the activity of corruption before the national prosecutors and courts in host state where the proceedings are carried out such as in Siemens and Niko, and will be growing, even the capital exporting countries are taking steps to carter transnational corruption effectively. "Those cases show to the potential impact national prosecutorial agencies have in affecting arbitral outcomes where corruption is at issue by aiding in the establishment of the underlying facts,"[64] a development that is to be encouraged, although not unqualifiedly.[65] Ultimately, it must be a rule that the international arbitral tribunals should make independent assessment of the facts irrespective of the fact that whether the national or domestic authorities have done the same or not.[66]

In cases where corruption might have some role to play in the way investment was made, it is an obligation on the arbitrators to identify as to how the corruption take place and even whether or not corruption did occur on the basis of direct, circumstantial, flawed, sporadic, and often self-

[63] KAREN MILLS, CORRUPTION AND OTHER ILLEGALITY IN THE FORMATION AND PERFORMANCE OF CONTRACTS AND IN THE CONDUCT OF ARBITRATIONS RELATING THERETO 295 (2nd ed. 2003).
[64] Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, BAPEX, and PETROBANGLA, ICSID Case Nos. ARB/10/11 amd ARB 10/18, Decision on Jurisdiction dated 19 August 2013, para. 425.
[65] *Id.* at para. 425
[66] Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID ARB/03/26, Award of 2 August 2006 at paras. 209–213; Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae.

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contradictory evidence and even with some assistance form national or domestic authorities. When there is an unbroken chain of events which prove morally that corruption did occur necessitates reliance on longstanding tools that are found with national and international courts and tribunals which concern the rule on evidence and burden of proof, presumptions, and inferences that lead to a proper 'connecting of the dots'.[67] The arbitrators instead of leaving at the party to think on evidence and standard or burden of proof in cases of corruption they should provide parties with some sort of guidance, preferably prior to the taking of evidence, with regards to the burden of proof and the standard of proof, so that the parties can adapt themselves to those requirements and standards'[68] thereby applying due process of law in arbitration.

International Anti-Corruption law and international investment law can be observed from the perspective of state responsibility under the articles on state responsibility as it supports all sphere of International law. It is necessary because the parties have to be made liable for corrupt act because they are the one who indulge in such activities where the government takes action and gets gain from the deal and for which the state can be made liable internationally for the corrupt acts of its public officials. It is difficult to improve international corruption as it not only includes questions relating to the scope of substantive law and the extent to which a state own acts may limit or negate its ability to employ corruption as a defense against investor claims.

The actions of the public officers making the state responsible for their acts is the foundation of International law and investment arbitration.[69] There has been clear ambiguity when it comes to attributing responsibility on state for the acts of its officers and indeed making the state liable for corruption under investment arbitration. "In World Duty Free v. Kenya the arbitral tribunal drew a conclusion that the corrupt acts of sitting head of the state cannot be attributed to host state itself. This finding was given in light of the fact that levying of adverse consequences for corruption solely to the investor; allowing Kenya to bear any responsibility would, in its view, effectively hold innocent Kenyan citizens responsible for the corruption of its political class."

In International law under the glimpse of state responsibility states are held responsible for internationally wrongful acts. A State is a juridical entity, after all, and its incorporeal being can only operate through the corporeal acts of the individuals and groups that represent it; these are

[67] Thunderbird Gaming Corp. v. Mexico, NAFTA Arbitration under the UNCITRAL Arbitration Rules, Award, 26 January 2006, Separate Opinion of Thomas Wälde at para. 3

[68] Jose Rosell and Harvey Prager, *'Illicit Commissions and International Arbitration: The Question of Proof',* 15 Arb. Int'l 329, 348 (1999); 22. Globex Trading Resource Corp. and Globex International Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award, 1 December 2010.

[69] IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 1 (18th ed. 1983); ROBERTO AGO, THIRD REPORT ON STATE RESPONSIBILITY 199-205 (12th ed. 1971).

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by necessity deemed the acts of the State itself.[70] In a way when any act done by an officer of a corporation holds the corporation liable under the principle of agency found in all national systems in a similar way states are made accountable for the breaks of international obligations performed by their representatives and even the state is not barred when the act is illegal, unsanctioned etc.

"When a Head of State or cabinet minister orders measures that are tantamount to the unlawful expropriation of an investment, for example, or a State's domestic courts render judgments that disrupt the financial viability of an investor's investment, the State itself is routinely held liable by arbitral tribunals, and it is no argument that the public official acted in excess of his powers or contrary to national law, or that courts are independent and cannot be controlled by the government and thus could not have been acting on behalf of that State."[71] Corruption is seen as a hindrance by investors in doing business;[72] even taking into consideration such facts there has never been a case in investment arbitration where public officials acts have been endorsed to the host state.

"In World Duty where the corrupt acts of an investor's corporate officers and intermediaries always generate severe consequences against the investor itself, in the case of public officials of the host State, participation in corruption almost never seems to engage the responsibility of the State. This is true notwithstanding the fact that all internationally wrongful acts committed by public officials (a fortiori Heads of State) are attributable to the State and thus potentially engage its international responsibility." This clearly raises the issue of policy and fairness. Sympathy will be found for the side of the investor as he is the one who has made huge investment but the same is not working accordingly and so has indulged in corruption. International Anti-Corruption treaty such as the 1997 OECD Anti-Bribery Convention[73] have been made to eradicate the supply side of corruption in foreign investment, seeing to it that the state suffers for the acts of its public

[70] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 183-84 (22nd ed. 1953), citing German Settlers in Poland, P.C.I.J. Advisory Opinion, B.6, p. 22 (1923) 10.03(p. xx); Moses Case (Mexico v. United States), 3 Int'l Arb. 3127 (1871) 10.03.

[71] Articles on State Responsibility for Internationally wrongful acts arts. 4 and 7, Nov. 12, 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Article 4(1) states: "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."
Article 7 states: "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

[72] Vikas Bajaj, *Corruption, Corporate Battles Scaring Away Foreign Investors?*, N.Y. TIMES, March 1, 2011.

[73] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997, in force since 15 February 1999, available at: <http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html>.

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officials.[74]

But there have been situations contrary to the same such as when government corruption was cited as the primary reason behind the Arab Spring uprisings that toppled entrenched dictatorship in Tunisia, Egypt etc in 2011. Public officials in developing countries are passive recipients of bribes falls far from reality. The Current waive which the arbitrators are sailing into is where the appropriating the sanctions for corruption to investors alone by allowing the state to plead corruption against the foreign investor as a complete defense against all or any investor claims.

"The investor has to bear the burden of corruption entirely, in both substantive and procedural ways as substantively, they declare the investment agreement void or unenforceable and not assigning any form of consequence to host States for the participation of its public officials in the corrupt act;[75] and procedurally, they deny jurisdiction to an arbitral tribunal through the legality clause found in many investment treaties,[76] or considering the claim unenforceable. Such a sanctioning regime carries the implicit conclusion that host States are not internationally responsible for corruption in which its public officials were complicit."

The potential moral hazard of having such a procedural 'trump' that would effectively clear the host State not only of corruption but of all putative violations of the investment treaty has not escaped the attention of arbitrators[77] and commentators.[78] In order to protect the rights of the investors the law on state responsibility could help counter this potential hazard. The ideal question would be whether responsibility can be attributed to state and what happens to the principles of waiver, estoppel etc.

2.1 PROVING CORRUPTION IN INVESTMENT ARBITRATION

When a matter relating to transnational corruption is brought before the tribunal the arbitrators are of wide consensus that it is as unlawful, immoral and the one that must be sanctioned. The

[74] FRANK VOGL, 'THE SUPPLY SIDE OF GLOBAL BRIBERY': FINANCE AND DEVELOPMENT 345 (2nd ed. 1998).
[75] *Id.* at 356.
[76] Germany-Philippines BIT: The requirement that investments not be made in contravention of national laws is firmly entrenched in bilateral investment treaties such as the Germany-Philippines BIT, which states: 'the term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State...' (art. 1(1)) 'Each contracting State shall...admit such investments in accordance with its Constitution, laws and regulations...' (art. 2(1)).
[77] Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007 ["Fraport"]; Decision on Annulment, 23 December 2010, Dissenting Opinion of Bernardo Cremades, paras. 37–38.
[78] Aloysius Llamzon, *'The Control of Corruption Through International Investment Arbitration: Potential and Limitations'* 102 ASIL Proc. 208, 210 (2008); Cameron Miles, *'Corruption, Jurisdiction and Admissibility in International Investment Claims'* J. Int'l Disp. Settlement 1, 24–5 (2012); R. Zachary Torres-Fowler, *Note, 'Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration'* 52 Va. J. Int'l L. 995, 1038 (2012).

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difficulty that arbitral tribunal face when it comes to corruption is that what are the rules that can be made applicable and hot they are to be tested or proved. But the arbitrators are well aware of the fact that they have to deal with transnational corruption which would be very difficult to break as the parties have power and resources and they would have applied their mind to erase all the evidences that even exist. "This raises hard questions about the proper evidentiary standard that must be applied; how parties are charged with burdens of proving corruption allegations; and under what circumstances, if any, such burdens of proof should shift."[79] This also raise question on the ability of the arbitral tribunal in deciding the matter and how they should evaluate the matter of bribery. Should they have a more proactive approach in trying to remove corruption or they should shift directly to the technical issues leaving behind all this questions unanswered also known as judicial economy which is used by WTO Panel and Appellate Body. The difficulty that arbitral tribunal face when it comes to corruption is that what are the rules that can be made applicable and hot they are to be tested or proved. But the arbitrators are well aware of the fact that they have to deal with transnational corruption which would be very difficult to break as the parties have power and resources and they would have applied their mind to erase all the evidences that even exist.

2.1.1 IDEA OF PROVING CORRUPTION

The issues that arbitrators face when deciding or resolving questions on corruption are analyzed by Bernardo Cremades where he stated that 'the arbitrators have the obligation to deal with the issues on bribery, money laundering, or fraud every time they have been raised by an investor or host state and should also govern the proceedings according to the choice of the parties and even to address the legal and factual questions and have it on record. Arbitrators have this as the only option available with the arbitrators to defend the enforceability of the arbitral award and the veracity of the arbitral institution.[80] While there has been some lacuna in the laws when the arbitral tribunal wants to decide the matter then they will have to go onto the precise scope and content of the law and their approach in dealing the national authorities change when dealing with the issues of corruption.[81] "There is no doubt that tribunals are obliged to the parties to

[79] Karen Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitrations Relating Thereto 295 (3rd ed. 2003).
[80] BERNARDO CREMADES AND D.J.A. CAIRNS, 'TRANS-NATIONAL PUBLIC POLICY IN INTERNATIONAL ARBITRAL DECISION-MAKING: THE CASES OF BRIBERY, MONEY-LAUNDERING AND FRAUD' IN ARBITRATION - MONEY LAUNDERING, CORRUPTION AND FRAUD 65, 85 (3rd ed. 2003).
[81] Bernardo Cremades and D.J.A. Cairns, *'Corruption, International Public Policy and the Duties of Arbitrators'*, 58 Dispute Resolution Journal 83 (2003); Michael Hwang and Kevin Lim, *'Corruption in Arbitration - Law and Reality'* 8 Asian Int'l Arb. J. 14–22, 48, (2012).

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address issues of corruption that are directly raised before them as part of their decision making duty, particularly when corruption can potentially affect the outcome of the case."[82]

However if the tribunals are faced with the issue of insinuations of corruption, or certain facts are there which directly point towards a suspicion of corruption, or tribunals suspect that the party is not presenting the entire fact or is hiding some of the facts and is not forthcoming with all evidence that can be used in proving corruption than in that case the question would be whether the tribunal have a duty to pursue the issue of corruption and investigate.

The tribunals have been burdened with some responsibility. "As discussed previously, investment arbitrators bear obligations not only to the immediate parties to a dispute, but to the public of the host State and indeed the international community as a whole"[83]; it has been held in a plethora of judgments that public international law, including the law on anti-corruption law and other customary international law form part of the law that must be applied in an investment arbitration matter. Thus the arbitral tribunals are burdened with the obligation of performing the actions in good faith and also requires that the tribunals should deal the issues of corruption with propio motu as soon as they realize that there are certain facts that support the idea that there has been act of corruption and as to whether corruption attended the investment at some stage. Even other than international investment law, the general law on arbiotration supports the fact that an arbitral tribunal has a duty to investigate every issue of corruption sua sponte, not least to ensure the enforceability of its Award.[84]

"The practice of tribunals has been inconsistent, with some tribunals preferring to allow the adversarial process to take its course without intervening directly absent compelling indications."[85] However, other cases exhibit more interrogational propensities. Metal-Tech v. Uzbekistan is a case on the similar aspect where the testimony of the claimant's principal witness led to a conclusion that there was clear relationship between the investor and its contracted consultants, "including the fact that the services provided were 'lobbyist activity' and not assistance with the operation, production, and delivery of the joint venture's products as originally stated, and that US$4 million was paid)."[86] From the above mentioned facts the tribunal exercised its authority under Article 43 of the ICSID Convention, and by making continuous

[82] Id. at 12.
[83] ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 8 (2nd ed. 2004); YVES DEZALAY AND BRYANT GARTH, DEALING IN VIRTUE 245–6 (6th ed. 1996).
[84] Michael Hwang and Kevin Lim, *'Corruption in Arbitration-Law and Reality',* 8 Asian Int'l Arb. J. 14–22 (2012).
[85] Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 9.06(p. xxi)
[86] Metal-Tech Ltd v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013, paras. 86, 274. ["Metal-Tech"]

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orders made the parties to provide additional information on the corruption aspect. "The tribunal subsequently called for additional testimony and evidence via another procedural order, and was able to obtain sufficient information to satisfy themselves of the existence of corruption in that case."[87]

The tribunal does not have unlimited power but there is always a limit to the tribunals power when it comes to investigation the corruption aspect which is when forcing discovery or testimony by compelling witnesses is difficult, and the same have been accepted by scholars and other case laws as well.[88] However, Metal-Tech makes evident that arbitral tribunal's effort to search the truth is not without tools that help or pursue their suspicions.

2.1.2 LAWS APPLICABLE IN PROVING CORRUPTION

The notion of who faces the encumbrance of proving corruption is straight and does not require any guessing work except the fact that there are some theoretical uncertainty as to the conflict of law rules that might apply.[89] The latin maxim onus probandi incumbit actori (or actori incumbit probation), which provides that the party ascertaining some fact has to prove on the facts that he relies.[90] When corruption is claimed by investor than the burden shifts on the host state; for investors seeking to prove corrupt practices or extortion is done by the host states public official than the investor will bear the burden of proof. The procedural rules applied by international courts and tribunals recognize this rule widely, and tribunals consistently confirm this in the case law.[91]

The question now that comes before us is that in what occurrences it would be suitable to swing the burden of proof or what it takes to shift the burden of proof from the party asserting corruption to the party acting in defence. Constantine Partasides has examined that 'a simple shifting of the burden of proof is difficult for the other party and even for any lawyer to accept.' There are a few instances where the burden of proof was directly shifted for corruption allegation in international arbitration[92] but none have been done in international investment arbitration.[93] "Burden shifting has been used when it comes to WTO adjudication, which allows for the burden of proof to be

[87] Metal-Tech, supra note 86, at paras. 247–256.
[88] F-W Oil Interests Inc. v. Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14, Award, 3 March 2006 at para. 211.
[89] GARY BORN, II INTERNATIONAL COMMERCIAL ARBITRATION 1858 (3rd ed. 2009).
[90] DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 127 (19th ed. 1975).
[91] UNCITRAL Arbitration Rules, Art. 27(1); Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) [1984] ICJ Rep. 392, 1986 I.C.J. 14, 268. 392, 437
[92] CONSTANTINE PARTASIDES, 'PROVING CORRUPTION IN INTERNATIONAL ARBITRATION: A BALANCED STANDARD FOR THE REAL WORLD' (47th ed. 2010).
[93] F-W Oil Interests Inc. v. Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14, Award, 3 March 2006 at para. 211.

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shifted once a prima facie violation has been established."[94] But the same practice of shifting the burden of proof on a prima facie violation has not been found in other international courts and tribunals.[95]

The question that has been raised is specific about the nature of corruption that validates a reallocation of the actori incumbit probation principle? "Scholars, particularly those focused on improving the effectiveness of arbitration in combating corruption, have argued the necessity of burden-shifting."[96] World Bank has been employing burden-shifting including in their corruption investigations and they went on accepting the fact that similar to arbitral tribunals they have no subpoena or contempt powers.[97] It has been seen earlier as well that because of the absence of any case where corruption was found to have existed except where the investors agreed to a fact that there was corruption that certainly ramparts the idea that the status quo is ineffective.

The nature of transnational corruption is so secretive and of highly complex nature that it requires an honest admission that unless there is strong evidence which is applied by the tribunal and if it matches with the cleverness of those who are engaged in corruption, it will be very difficult for the arbitrators to find corruption in arbitration matters.[98] Indeed if there is a domestic legislation which asks as to why the burden of proof on the party to explain why corruption should not be made out, but in case there are certain facts which have been established; these methods have started to take hold in the jurisprudence. In Metal- Tech the tribunal held that the international community establishment of lists of indicators of corruption which is also referred as 'red flag' principles and the same has also been deliberated and referred as the red flag principles drafted by a former Chief Justice of England and Wales, "including an advisor's lack of experience in the sector involved and any close personal relationship the advisor may have with the government that could improperly influence the latter's decision."[99]

These 'red flags' and similar indicia of corruption can be considered as some form of circumstantial evidence when once has been proved can lead to a shifting of the burden of proof,

[94] M. Hwang and K. Lim, *'Corruption in Arbitration—Law and Reality',* 8 Asian Int'l Arb. J. 14 (2012); A. Mourre, *'Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator',* 22(1) Arb. Int'l 95, 102 (2006); K. MILLS, 'CORRUPTION AND OTHER ILLEGALITY IN THE FORMATION AND PERFORMANCE OF CONTRACTS AND IN THE CONDUCT OF ARBITRATION RELATING THERETO' 288, 295 (3rd ed. 2003); C. LAMM ET AL., 'FRAUD AND CORRUPTION IN INTERNATIONAL ARBITRATION' IN LIBER AMICORUM: BERNARDO CREMADES 699, 701 (4th ed. 2010).
[95] *Id.* at 123.
[96] CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 93 (2007).
[97] Cecily Rose, *'Questioning the Role of International Arbitration in the Fight Against Corruption'*, 31 J. Int'l Arb. 183 (2014).
[98] World Bank, *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants*, (Oct. 15, 2006) http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB_Anti_Corruption_Guidelines_10_2006.pdf.
[99] Matthias Scherer, *'Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals'* 5(2) Int'l Arb. L. Rev. 29 (2002).

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indeed requires some rebuttal of allegations by evidence and if the same is not provided then the contrary to the same can be assumed and similar conclusions can be drawn. "Indeed, circumstantial evidence, particularly when direct evidence of corruption is unavailable, is widely, albeit cautiously, accepted as a tool to evaluate allegations of corruption by international tribunals."[100] In Methanex v. United States clearly draws a line where it provides that the chain of events must be complete to reach a conclusion based on the established fact which calls for applicability of circumstantial evidence in investment arbitration case law.[101]

There have been sometimes opposite situations where in the year 1939 sandifer referred that the most effective way to get evidence for international tribunal is to impose upon the parties that are negligent to get the evidence or produce the same before the tribunal against the party in the event of continuous refusal to bring the necessary documents to the tribunal.[102] Correspondingly, "the International Bar Association's Rules on the Taking of Evidence in International Arbitration provide that if a Party fails without satisfactory explanation to produce any Document... ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party".[103] The use of opposite inference is also considered as one of the ways of getting evidence and is also accepted as evidence before the arbitral tribunal. In Hamester v. Ghanathe tribunal held that it can only decide on the facts that are present before it and cannot decide matters based on inferences[104], but it has been observed that many investment arbitration decisions have been made on the basis of conclusions on the basis of inference, for which majorly there are two reasons first being that the party did not produce evidence when asked to do so by the tribunal that means on correct time and secondly because they were in possession of the evidence but the same was exonerative in nature and the same was not produced. The Metal Tech tribunal held that adverse inferences can be drawn from some instances to prove corruption where the arbitral tribunal can draw inference from the fact that if a party does not produce evidence when ordered to be produced than the tribunal can come to a conclusion to the contrary and pass order against that party and additionally at a number of occasions the tribunal have stated that they would draw inferences from the contrary on non-production of evidence.[105] Indeed in Metal-Tech has set this precedent for the future tribunals by providing that as the

[100] Woolf Committee Report, *Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems Plc*, 25–6 (2008).
[101] ICC Case No. 4145 (a fact can be proven by circumstantial evidence if its leads to 'very high probability'); ICC Case No. 8891 ('indices must be serious').
[102] Methanex, *supra* note 31.
[103] DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 127 (19th ed. 1975).
[104] IBA Rule 9(5)–(6).
[105] Niko, *supra* note 64, at para 424.

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utilization of procedural orders to seek further information, attached with the fact that reminders were given to the appropriate party that if the evidences are not produced than order can be passed against the party and testimony has been provided on a given corruption allegation may lead to adverse inferences, is not only sanctioned by international procedure[106], but can in the hands of a tribunal committed to unearthing the truth lead to strong findings of fact, no matter what standard of proof is advanced as relevant.[107]

At last it has been discussed that inferences and presumptions can aid in establishing that there are changes of direct or circumstantial evidence that can discharge a party's burden of proving its case or a defence asserted, but questions on burden of proof should not be confused with the establishment of sufficient proof. These are really important question in the area where the investor does something wrong it is not so much the burden of proof as the standard of proof where much of uncertainties remains.

2.1.3 ELEVATED STANDARD OF PROOF AND BURDEN OF PROOF IN ARBITRATION.

The Burden of proof is defined as to which party has the obligation to prove that he is not guilty. The Standard of proof has been defined as the threshold or the amount of evidence required to establish an individual fact or the entire contention in defending a party. This distinction was made clear by Rompetrol tribunal, "that the burden of proof is absolute, whereas the standard of proof is relative. [...] If, according to basic principle, it is for the one party, or for the other, to establish a particular factual assertion, that will remain the position throughout the forensic process, starting from when the assertion is first put forward and all the way through to the end."[108] Standard of proof has been always relative and the tribunal have always relied on relative standard of evidence in the sense that that although one party had the burden of proving it depends not just on its own evidence but on an overall assessment of the total evidence put forward by both the parties one for the proposition and one against the proposition.[109] The burden of proof is thus all about the fact that who has to substantiate a particular statement, while standard of proof refers to whether sufficient evidence has been provided to prove the assertion.

When we talk about national or domestic law the standard of proof varies between various system of law that is the common law system or the civil law system. "Broadly speaking, the general standard of proof for civil actions in common law is the 'balance of probabilities', while in civil

[106] Corfu Channel Case (UK v. Albania), Merits, Judgment of 9 April 1949, 1949 ICJ Rep. 4, 18
[107] ICSID Convention, Art. 43–45; ICSID Arbitration Rules, Rule 34.
[108] Rompetrol v. Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013 at para. 178
[109] *Id.* at 178.

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law systems it is typically the 'inner conviction' of the adjudicator."[110] International tribunals have often adopted the balance of probabilities approach for analyzing the facts and to draw a conclusion when they can be considered as deemed proven.[111]

When it comes to a serious allegation of wrongdoing in a civil proceeding the standard of prrof required is a heightened standard of proof;[112] that means that the same must be clear and convincing standard proof, derived from U.S. law, is often employed.[113] English cases have raised the fact that whether it is proper to connect the gravity of the misconduct with the standard of proof that should apply; in Re B (Children), the House of Lords held that "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."[114]

It has been seen that the tribunals have not limited themselves to heightened standard but have been considering the ordinary standard to prove allegations in an investment arbitration case law on investor wrongdoing[115], an image of different legal traditions that have been followed by the arbitral tribunals of varied backgrounds to issues of proof.

But when it comes to international commercial arbitration tribunals they have by and large relied on high standard of proof where in one of the rare publicly-known ICC arbitrations which dealt with corruption allegations concerning the cogency of the main contract and not merely a supporting agreement, Westinghouse v. National Power Corporation, Republic of the Philippines[116], the tribunal found the bribery as an integral part of fraud in civil cases, and thus the tribunal demanded 'clear and convincing evidence' under the laws of U.S. and Philippine law as the same were the domestic law applicable in that situation.[117] The tribunal held that "fraud in civil cases must be proved to exist by clear and convincing evidence amounting to more than mere preponderance, and cannot be justified by a mere speculation."[118] Other tribunals on international commercial arbitration decisions have adopted and asked for 'clear and convincing' standard of proof, or similarly high standards.[119]

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[110] Andreas Reiner, *'Burden and General Standards of Proof*', 10(3) Arb. Int'l 325, 335 (1994).
[111] NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 387 (10th ed. 2009); Miller v. Minister of Pensions [1947] 2 All ER 372 9.16 (Denning J).
[112] Andreas Reiner, *'Burden and General Standards of Proof*', 10(3) Arb. Int'l 325, 335 (1994).
[113] JOHN HENRY WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 446 (34th ed. 1935).
[114] In re B (Children) (FC), In re [2008] UKHL 35 9.16 at para. 13.
[115] Siag and Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009 at paras. 325–326. ["Siag"]
[116] GARY BORN, II INTERNATIONAL COMMERCIAL ARBITRATION 1858 (4th ed. 2009).
[117] Westinghouse Projects Company, et al. v. National Power Corporation, The Republic of the Philippines, Preliminary Award, 19 December 1991.
[118] *Id.* at 34.
[119] Himpurna California Energy Ltd. (Bermuda) v. P.T. (Persero) Perusahaan Listruk Negara (Indonesia), Final Award of 4 May 1999, (2000).

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We have earier discusses that the international arbitral forums are not bound by the national standard of proof which have largely adopted high standards of proof. In EDF v. Romania, for example, the tri[120]bunal did not ask for evidence instead proceeded by making statement that corruption is a 'disreputably problematic to assert' against the 'demand' for clear and convincing evidence:

> *"corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption."*[121]

This is not to say, but arbitrators in international investment arbitration do consider shaky evidence in order to find with the secret nature of transnational corruption. In Siag v. Egypt the arbitrators have considered the same, that the standard of proof the arbitrators adopt has a direct effect on the choice of law and whether a particular fact qualifies as corruption or not. In one of the divided cases, the corruption was complained of by Egypt of fraud, which required heavy proof or standard of clear and convincing evidence, which has to match the clear convincing evidence the standard that is met by United States for civil cases and the further than reasonable doubt standard in criminal cases under the American Law.[122]

The dissenting arbitrator, Professor Francisco Orrego Vicuña, believed that the standard of proof required did match and he came to a conclusion that there was corruption as the corruption was conducted in procuring Lebanese citizenship by the investor, which indeed is attached with the fact that the investor was in actuality an Egyptian citizen and thus not permitted ratione personae to bring a BIT claim against Egypt. Professor Orrego also clarified that his dissenting opinion began did not conclude that he was the only one who had identified corruption and others were overlooking the same.[123] "It was not the principals involved that were the source of difference; rather, it was a 'different assessment of the evidence and whether it is sufficient to establish such

[120] KAREN MILLS, CORRUPTION AND OTHER ILLEGALITY IN THE FORMATION AND PERFORMANCE OF CONTRACTS AND IN THE CONDUCT OF ARBITRATIONS RELATING THERETO 295 (4th ed. 2003).
[121] EDF (Services) Ltd v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009. ["EDF"]
[122] Bernardo Cremades and D.J.A. Cairns, 'Trans-National Public Policy in International Arbitral Decision-Making: the Cases of Bribery, Money-Laundering and Fraud', in Arbitration—Money Laundering, Corruption and Fraud (K. Karsten and A. Berkeley (eds.), ICC Publishing, 2003), 65, 85.
[123] Jose Rosell and Harvey Prager, 'Illicit Commissions and International Arbitration: The Question of Proof' (1999) 15 Arb. Int'l 329, 348.

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impropriety'."[124]

Professor Orrego also noted that the standard of proof which which the majority relied which was of clear and convincing evidence was not correct. He opined that when arbitral tribunals are deciding on a matter under international law than in that case they are free to choose the most relevant rules which they deem appropriate according the situation or in accordance with the law, are allowed to pick the most pertinent rules in accordance with the situation of the case and even they should consider the facts of the case and the evidences available before it.[125] "In this case, the facts could be best judged under a standard of proof allowing the tribunal 'discretion in inferring from a collection of concordant circumstantial evidence (faisceau d'indices) the facts at which the various indices are directed'."[126]

Professor Orrego's view that the arbitral tribunal has the discretion to apply the rules based on the circumstances and the facts of the case, nature of the facts involved and the same has been accepted by most of the recent investment arbitration tribunals dealing with transnational corruption and any other form of fraud and illegality. In Metal-Tech the tribunal had recently decided on the evidentiary value aspects which included the standard of proof which is required to be applied and are based on international investment law due to the Bilateral Investment Treaty being the lex cause and are therefore open questions, thus tribunals having some freedom in determining the standard necessary to determine a question on corruption.[127] The main reason behind the same is that international investment arbitration is mainly about the principle rather than procedural formalities and the rules used for evidence are neither rigid not technical. "This is so because international investment arbitration, and indeed the broader system of international dispute settlement, is characterized largely by principle rather than procedural formality, and the rules of evidence are neither rigid nor technical."[128]

The cases laws clearly provide the approach of the arbitral tribunals and also yield useful doctrine. The guidelines given by the Rompetrol tribunal on the tribunals approach in considering evidence has been highly valuable as the tribunal accepted the fact that there may be situations in which the tribunals have accepted circumstantial evidence and have decided on the fact that there will be situations in which the allegations are of such nature which are of wrongful conduct, and in

[124] Michael Hwang and Kevin Lim, 'Corruption in Arbitration—Law and Reality' (2012) 8 Asian Int'l Arb. J. 14–22.
[125] Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008
[126] Matthias Scherer, 'Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals' (2002) 5(2) Int'l Arb. L. Rev. 29
[127] Metal-Tech, *supra* note 86, at paras. 86, 274.
[128] F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14, Award dated 3 March 2006, para. 211

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light of these facts the adjudicator will be asked to decide on the pure probabilities or circumstantial inferences. But then these sort of allegations would be formative and in tribunals view challenge codification.' The Rompetrol tribunal then referred to Libananco v. Turkey:

> *"In relation to the Claimant's contention that there should be a heightened standard of proof for allegations of 'fraud or other serious wrongdoing,' the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that—the graver the charge, the more confidence there must be in the evidence relied on..., this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged."*

The tribunal will apply the normal standard which is the balance of probabilities standard to the facts of the case before it, the Rompetrol tribunal held that it will decide in each situation whether any act of corruption or any other serious allegation has been called for by a host states public official at any of the level which may be administrative or legislative level which has been proved on the basis of available evidence and the same approach requires a more nuanced approach to decide the matter.[129] Various commentators have concluded based on the decisions given in commercial arbitration matters that involve bribery and corruption charges that arbitrators rely on indirect evidence of corruption in those matters where credible accusations of corruption have been made.[130]

Thus the evidentiary standard on transnational corruption is that are being set by the arbitral tribunals are clearly moving away from the uniform and rigidity of high standard of proof, where the tribunals are not ready to be pinned down a priori either by particular standards or by formal rules on burden-shifting or presumptions. The prevalent doctrines are not in a position to get something out of the same compared to the specific finding on corruption despite of the fact that subjectivity of the evidence but the repeated invocations of the same has been Given the inability of the prevailing doctrine to generate positive findings of corruption despite its anecdotal frequency and repeated invocation, this is surely a positive development. It is important that the arbitrators be given some discretion and if the same is not given than corruption will never come

[129] Metal-Tech, *supra* note 86, at paras. 86, 274; 23. Grisbadarna Arbitration (Norway/Sweden), Permanent Court of Arbitration (1909).
[130] C. Lammet et al., 'Fraud and Corruption in International Arbitration' in M.A. Fernandez-Ballesteros and D. Arias, Liber Amicorum: Bernardo Cremades (Wolters Kluwer, 2010), 699, 703 (citing A. Crivellaro, 'Arbitration Case Law on Bribery: Issues of arbitrability, contract validity, merits and evidence' in K. Karsten and A. Berkeley (eds.), Arbitration: Money Laundering, Corruption and Fraud (ICC, 2003), 109).

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down and it would continue to reside in the margins of arbitral decision making, and thus will not deter the acts of corruption and all those cases will go in vain. "That unsatisfactory status quo where not a single investment arbitration case has resulted in a finding of corruption on the basis of contested evidence would expose international arbitration to further criticism for being a 'soft touch' on corruption."[131]

The question that comes to our mind is that why the parties have always feared in adopting such an approach where they exercise their discretion and adopt more flexible evidentiary processes that are equal to the ingenuity of those that conceal corruption[132] which itself is an open debate. It is good that the arbitrators go for high standard of proof as higher standards of proof have been used by tribunals because of the act of corruption have made it very difficult for them to do the same.[133] When a reference is made we find that arbitrators adopting high standard of evidence is always motivated as it has to be ensured that the consequences that are part of the decree which are that sometimes the contract are declared as null and void, the unenforceability of the contract, the lack of jurisdiction, all acting to prevent any valuation of host State offence would apply thriftily. And thus using such high standard of evidence will erase corruption from the minds of investor and help to achieve a clean business as well as and indeed, adopting a high standard of proof has the practical value of helping flush out the increasingly tactical or cynical use of corruption to derail the arbitral process.

It is not necessary that there should always be use of clear and conclusive proof as the standard is maintained only because it is the requirement of formal law and if having or carrying such a view it would be too reductive. Arbitrators have the discretion of choosing one standard over another in a situation where either of the standards are within the arbitrator's scope of choice. In so doing the evidentiary doctrines which even includes the standard of proof doctrine flows from the anti-corruption norms and even it can be regulated for the same. Arbitrators have the discretion to choose higher or lower standard of proof based at least in part on their indebtedness of the justices of the case and they believe that law can play great role in removing corruption from the society.

The principles that are laid down in Rompetrol and Metal-Tech can be applied to corruption is useful and should be accepted as a less formalistic sensibility approach adopted towards the evidentiary rules when it comes to corruption is more useful. Because corruption is a serious

[131] Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008
[132] Former Kenyan Attorney-General Amos Wako, quoted in Alison Ross, 'The Man Behind Kenyan Arbitration', Global Arbitration Review, 20 January 2012
[133] Oil Platforms (Islamic Republic of Iran v. United States of America) (2003) 42 I.L.M. 1334,1384–6 (Higgins J, Separate Opinion)

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charge and it affects the parties so the confidence of the tribunal in evidence must be high so that they can justify the award that has been passed. However this does not mean that the standard of proof itself should be high, the standard of proof must be adjusted according to the facts of the case and even the circumstantial evidence must be taken is not consideration, inferences, or presumptions and indicators of possible corruption should be used as well. Tribunals are given the freedom and burden of choice, which they should not abdicate by rote reference to an abstract 'heightened' standard of proof.

2.2 ATTRIBUTING CORRUPTION TO STATE

Bernardo Cremades highlighted corruption of public officials should be attributable to host States under general principles of State responsibility:

> *"In international law, a State is responsible for acts committed by its officials, of whatever status, in their official capacity, even when the officials exceed their authority, contravene instructions, or violate internal law. Accordingly, if a public official accepts a bribe to exercise his public duties in a certain manner, for example by smoothing the regulatory path for a foreign investment, then the acts of that official are attributed to the State itself in public international law."*[134]

Dr Cremades suggested that States are responsible for public official corruption as he provided that it is not possible to distinguish between the officials act and officials dishonesty for the purpose of attribution.[135] From the above two statement we can assume that there are uncertainties covering State responsibility for corruption. The question here is whether the acts of corruption be excluded and be only called private acts and thus not attributable to state.

"Corruption is a pathological behavior where one can readily identify illegalities that are more overtly disruptive of world public order such as genocide, crimes against humanity, unlawful use of force, piracy in other words, peremptory norms that have achieved the status of jus cogens of all of which are capable of engaging State responsibility in addition to individual criminal responsibility."[136] Corruption can be subjected to State Responsibility when corrupt

[134] Bernardo Cremades, 'Corruption in Investment Arbitration', in Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum Robert Briner (Gerald Aksen (ed.), ICC Publications, 2005), 203, 216, citing Crawford, The International Law Commission's Articles (n 15), 106–9; Ian Brownlie, State Responsibility, Part I (n 1), 145–52; Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment, I.C.J. Reports 1989.

[135] Bernardo Cremades, 'Corruption in Investment Arbitration', in Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum Robert Briner (Gerald Aksen (ed.), ICC Publications, 2005), 203, 216.

[136] Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 Eur. J. Int'l L. 649.

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solicitations/extortion comes from a public official against a foreign investor, would call for responsibility of the host State for two reasons first as a violation of international anticorruption norms and secondly as a violation of the fair and equitable treatment standard.

The Articles on State Responsibility provide for a detailed law on the elements, exception and various other effects that affect the responsibility of States for internationally wrongful acts. Sooner the draft was coming to an end it was less evolutionary developments of international law and more a codification of customary principles on State responsibility.[137] Investment Arbitration has seriously adopted the ILC Articles in deciding the cases when it came to attributing responsibility to state or applying it to questions of attribution of local government acts, judicial acts, acts of government-owned corporations or private individuals, often without engaging in an inquiry into the customary status of particular rules.[138]

"The elements of state responsibility are given under Article 2 of the ILC Articles when there is an act or omission which can be attributable under International law and constitutes a breach of an international obligation of the state."[139]

When it comes to attribution rules the same are very straightforward, we need to look at whether the act was done in official capacity which often vexes when applied to transnational corruption. When it comes to investment arbitration there will be a public official who would be asking for bribe or extorting money from the investor to get private gain. For an ordinary human being that action would not be an action done by a public officer but done in his private capacity as such acts are illegal and clearly personal with a clear motive to indulge in such act. "But if the nature of the transaction is such that the State should not be liable for the illegal acts of its officials that benefit the latter privately. It can be applied for the agents of foreign investors as well where they negotiate for the investor and their only role is to pay the bribe in order to see that their involvement is minimum."[140]

It is just that when the official acts within the colour of his authority or does some act which are official acts with apparent authority than that will clearly attract state responsibility.[141] "And while there is a realm of 'private' conduct that cannot be attributed to the State, if the organ is

[137] David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 Am. J. Int'l L. 857, 872–3

[138] Kaj Hober, 'State Responsibility and Investment Arbitration' (2008) 25 J. Int'l Arb. 545; Salini v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, 42 I.L.M. 609 (2003)

[139] ILC Commentary on Article 2

[140] Sweden: Jori Munukka, 'Civil Law Consequences of Corruption in Sweden', in The Civil Law Consequences of Corruption (Olaf Meyer (ed.), Nomos, 2009), 117, 129. For Germany: 'Olaf Meyer, Combating Corruption by Means of Private Law—The German Experience', in The Civil Law Consequences of Corruption (Olaf Meyer (ed.), Nomos, 2009), 145, 153.

[141] ILC Commentary on Article 4, para. 13, citing the Mallen case, United States/Mexico General Claims Commission, IV RIAA 173, 175 (1927).

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functioning as such but is acting ultra vires or is in breach of internal laws that render such conduct illegal, the fact that the public official continues to act in the name of the State is sufficient to engender responsibility."[142] It is indeed necessary to prove or make attribution under Article 7 as State will always claim that the actions of its organ do not bind the state for such acts and this responsibility cannot be attributed for unlawful acts. Thus Article 7 was introduced in order to see that state do not take refuge behind the idea that the organ has committed the unlawful act and not the state under the shelter of its official status or has noticeably surpassed its proficiency.

Article 7 has always benefited the state as they invoke anti-corruption laws and portrayed they can never be liable for corrupt practices. The law on State responsibility provides that "a State will be responsible even for ultra vires acts of its servants, that is to say, even when they acted beyond their powers."[143] In further it can be argued that if an organ of the state or public officer performed such an act which violated international law, the State would still be responsible for that wrongful conduct.[144] But when it came to World Duty free it can be seen that the corrupt act of the head of state was not considered bad as it was not a violation of international law but just a violation of domestic law, had the law on State responsibility been applied.[145]

"An example can be cited in this situation where in the Caire case Mexican officers sought and failed to extort money from a French national; the latter was murdered in the local barracks. The Commission found that the responsibility of Mexico had been engaged by virtue of the acts of the two officers even if they acted outside their competence and violated the orders of superiors, 'since they acted under cover of their status as officers and used means placed at their disposal on account of that status".[146] From the above example it can be seen that if in case where the public officers solicit or extort bribes from investors and are found guilty than responsibility can be easily attributed to the host state.

There will be no agreement between the investor and the official and thus there is no situation of equal culpability and clean hands but there is a clear and direct application of state responsibility. Corruption is a very wide term that includes many things and may happen at any time of investment which includes at the time of making the investment or at some point in the life of the

[142] *Id.* at Art. 7.
[143] *Id.* at Art. 7.
[144] Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford University Press, 1994), 150; Theodore Meron, 'International Responsibility of States for Unauthorized Acts of their Officials' (1957) 23 British Y.B. Int'l L. 85.
[145] World Duty Free Company Limited v. The Republic of Kenya, ICSID Case No. ARB/00/7, Award, 4 October 2006, para. 185
[146] ILC Commentary on Article 7, para. 5.

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investment, "can be proposed by an unprincipled investor or extorted by rapacious public officials of host States, and can involve agents and intermediaries on both sides that complicate the analysis of the degree of agency and independence by which these actors were operating. In reality, transnational corruption is often a messy and disconcerting combination of many of these elements wherein no side is blameless."[147]

When it comes to attribution it is seen that corruption appears to carve itself out of the application of the foundational principle that organs of a State engaged in unlawful acts necessarily engage the responsibility of that State for the acts of its public officials. As observed by Judge Higgins, "the very fact that the organ is an emanation of the State is sufficient, and makes it unnecessary to show any fault or malice on the part of 'the State'."[148] This doctrine is based on the fact that there is international obligation on the state.

It is important to consider the fact that attribution one of the two elements in proving state responsibility. Articles on state responsibility when it comes to attribution only proves whether the state had some involvement or not but the legality of such an act has to be still proved.[149] Because it will only prove that the state has indulged in such unlawful act of corruption but it is also important to prove that corruption resulted in a failure of an international duty. Attribution is sometimes totally dependent upon the substantive provisions on which the parties are relying, on the principle of lex specialis that would override the general principles found in articles on state responsibility. "Given the level of abstraction in which the Articles on State Responsibility were purposely drafted, no attempt was made to craft rules dealing with specific substantive areas of international law."[150] Thus it is always important to see that the act of host state shows a clear violation of a principle of international law.

It is important to question whether international law on anti-corruption precludes the responsibility of state and only holds individual public official liable for the unlawful act. There are situations where attribution would occur for wrongful acts of public officer, but the limitation in law will definitely protect the party from laws of attribution.

Corruption is definitely dealt by International law. Various conventions have been made to combat multinational or foreign corruption and foreign bribery practices, and domestic law of

[147] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 1(1), adopted by the Negotiating Conference on 21 November 1997, in force since 15 February 1999, available at: <http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html>

[148] Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford University Press, 1994), 152; Estate of Jean-Baptiste Caire (France) v. United Mexican States, 5 RIAA 516 (1929).

[149] ILC Commentary, Ch. II, para. 4

[150] ILC Commentary, reprinted in James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002), 2.

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states also stop the attempt of corruption but when you see Germany it allowed companies operating abroad to claim bribe payments as legitimate tax-deductible expenses. "It is true that one of the pillars of international anti-corruption norms, the OECD Anti-Bribery Convention, is focused exclusively on the criminalization of the offer or payment of a bribe to foreign public officials, virtually ignoring the other side of the corruption equation the acceptance of that bribe by the public official."[151] There has been much say about the nature of anti-corruption laws and the lack of effective international mechanisms combating corruption as has been seen that states do not take the charges of corruption seriously and do not work towards the reduction of the same.[152]

"In World Duty Free, for example, the tribunal noted 'that bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries".[153] One of the most effective international convention is the UN Convention against corruption, which was thought to be a comprehensive convention dealing with all the aspects of corruption and protected the international community. "The Convention requires States to criminalize both the 'promise, offering or giving, to a public official, directly or indirectly', and importantly, 'the solicitation and acceptance by a public official, directly or indirectly, of an undue advantage".[154] "The treaty then goes on to require the State Party to enact laws and other measures to prevent 'embezzlement, misappropriation or other diversion of property by a public official',[155] and the 'abuse of functions or position, that is, the performance or failure to perform an act...by a public official...for the purpose of obtaining an undue advantage...."[156] When compared with the OECD Anti-Bribery Convention and the UNCAC only attaches individual responsibility and not attach state responsibility to the same. "The law on State responsibility does not differentiate between 'civil' and 'criminal' responsibility; in that sense, it is an undifferentiated regime."[157]

"Whatever vagaries there may be in the content of international anti-corruption law, it is almost inconceivable that an arbitral tribunal would sanction the idea that international anticorruption

[151] Article 1(1) of the OECD Convention
[152] Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.
[153] World Duty Free, *supra* note 145, para. 142.
[154] U.N. Convention Against Corruption, Art. 15
[155] 'Article 17. Embezzlement, misappropriation or other diversion of property by a public official. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.'
[156] U.N. Convention against Corruption, Art. 19
[157] James Crawford, 'The System of International Responsibility', in The Law of International Responsibility (James Crawford et al. (eds.), Oxford University Press, 2010), 22.

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norms would not extend to a prohibition of public official corruption."[158] Corruption happens but the host state shows that they do not profess corruption but is always practiced. It is done by the one who have been casted the duty to protect the law and they are always of the view that with international corruption there are few changes of being caught and if caught the host state will protect the public official because if they don't than that might even bring state responsibility because nothing can be done without the implied authorisation of the head running the government although that is a presumption but indeed is reality.

Even when the awards are passed by appropriate court or tribunal it is seen that the same are then subjected to by a review by the domestic court and it is not possible that a court sanctioning anything less than a blanket proscription of public official corruption as a matter of public policy. It is important to see whether the international norms on corruption do themselves attribute the crime to the state or they limit it to the wrong doer and not ascribe the responsibility to the state. It can be seen that Article 7 of ILC clearly does the work and has been considered as primary source of law that attracts state responsibility for transnational corruption and also affects the content of international anticorruption law, including the part where the same has to be attributed to state that creates the 'lex specialis' rule on attribution that operates as an exception to the general rule.[159] Attribution should be done with a substantive law and only meaning when given is that meant to be regulated by 'substantive' international law areas such as corruption.

There have been very few instances where responsibility had been attributed to state for the acts of corruption done by public official of host state, asking the state to pay compensation for those who have suffered damage.[160] There are situations when the ILC articles cannot be applied taking into consideration their generality against special anti-corruption convention. "However, as yet, there seems to be no articulation of any special rule of attribution in cases of anti-corruption law at best, the principle hinted at in a handful of cases such as SPP v. Egypt and World Duty Free; but the authorities relied upon in those cases are not of public international law provenance."[161]

2.2.1 RESPONSIBILITY OF STATE IN INVESTMENT ARBITRATION

Foreign owned property was always subjected to Public International Law. But in the recent years

[158] W. Michael Reisman, Folded Lies: Bribery, Crusades, and Reforms (Free Press, 1979), 96.
[159] Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations', in The Law of International Responsibility (James Crawford et al. (eds.), Oxford University Press, 2010), 221, 225
[160] Wolfgang Rau, 'The Council of Europe's Civil Law Convention on Corruption', in The Civil Law Consequences of Corruption 21, 26 (Olaf Meyer (ed.), Nomos, 2009); Hilmar Raeschke-Kessler, 'Corrupt Practices in Foreign Investment Context: Contractual and Procedural Aspects' in Arbitrating Foreign Investment Disputes (Norbert Horn (ed.), Kluwer, 2004), 477, 485.
[161] Id. at 478.

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with the continuous growth of UNCTIRAL and ICSID rules has called for parties to submit their claims under investment arbitration, including the area of state responsibility for foreign investment. Developments are not limited to substantive principles of international investment law. They ascertain the duties owed by host States to foreign investors investing within their territory, investment tribunals delimit the regulatory space in host state and thus affect the regulatory environment within that State.

The law on international responsibility is, "general conditions under international law for the State to be considered responsible for wrongful acts or omissions, and the legal consequences which flow therefrom."[162] International Law Commission had recognized the need for a specific law addressing the responsibility of states for internationally wrongful acts for violations of International Law and accordingly efforts were made in the latter half of twentieth century, resulting in an adoption in 2001 of the Articles on responsibility of States for Internationally wrongful Acts. "ILC Articles look to the law on State responsibility, portraying principles that are to apply to all manner of internationally wrongful acts. The ILC Articles were drafted but never adopted or even opened to signature; but the same has been applied by international courts and tribunals in full, treating them as a functional equivalent of the customary international law."[163]

The Articles on State responsibility is applicable in case of investment arbitration, as one party is a corporate entity or individual given the right to sue the host State directly for alleged breaches of investment protections found in BITs and other international instruments.[164] It is true that entire articles cannot be applied onto the investor-state arbitration plane.

"The law on State responsibility was not made to address the matters on investment arbitration, and classical international law concerning State responsibility but the same was developed largely through international awards and decisions relating wrong done by state to foreigners or by the physical taking of property of a foreigner by that State, rather than wrongs done through

[162] ILC Commentary, reprinted in James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002), 74; International Law Commission, Report of the ILC, II ILC Yearbook 231 (Roberto Ago, Rapporteur, 1963).

[163] David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 Am. J. Int'l L. 857, 872–3

[164] Vaughan Lowe, 'Injuries to Corporations', in The Law of International Responsibility (James Crawford et al. (eds.), Oxford University Press, 2010), 1005, 1015; Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ('Claims Settlement Declaration'). 20 I.L.M. 223 (1981); R. Doak Bishop, James Crawford, and W. Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary (Kluwer, 2005), 759–86; Vaughan Lowe, 'Injuries to Corporations', in The Law of International Responsibility (James Crawford et al. (eds.), Oxford University Press, 2010), 1005, 1015; Ahmadou Sadio Diallo (Guinea v. DR Congo), 2010 ICJ, Judgment of 24 May 2007, p. 88ff.

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commercial means."[165] Investment Arbitration is such a system when it comes to State responsibility where the secondary obligations generated by the implementation of state responsibility in investor-state arbitration but it can sometimes take a special juridical character vis a vis secondary obligations applied generally to inter-state plane.[166] Although there are jurisdictional differences but it is important to understand that inter-state arbitration where the sovereignty prerogatives of one state perceived incursions into the sovereignty of another State are often engaged, interference with sovereignty does not (or should not) form the essence of disputes settled in investment arbitration.[167] "The interpretation and application of investment treaties present further nuance to this observation, however, and further blur the categorization of investment arbitration as a 'sub-system' of the law on State responsibility."[168] But it is pertinent to note that there are some situations where the treaty itself bars the use of general law such as the ICSID Convention where the procedural mechanisms for invoking state responsibility provides the lex specialis that makes part 2 and 3 of the ILC articles mostly inapplicable, which carries important consequences.[169] Thus it is always important to go through the appropriate rules to know whether the same allow the use of Articles on State responsibility.

Individual responsibility for the international crime of corruption is sometimes defined as fraudulent enrichment or is also defined as indigenous spoliation.[170] The jurisdiction of investment arbitration clearly only extends to the civil aspects of corruption but the act of corruption falls within the ambit of international criminal jurisdiction and thus requires to bring 'economic crimes' within the ambit of investment arbitration. Civil Punishment can never fill the gaps of criminal punishment which can be given to private individuals and public officials for the acts of their corruption under national act of host state. International investment arbitration through principles of State responsibility, assist in speedy criminal prosecution of corrupt public officials by imposing punishment on state for the failure of a State to take corruption seriously. It can stop the state from invoking corruption as a defence against investor claims unless serious

[165] Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford University Press, 1994), 152.
[166] Zachary Douglas, The Hybrid Foundations of Investment Treaty Arbitration (2003) 74 British Y.B. Int'l L. 151, 184–93.
[167] Zachary Douglas, 'Specific Regimes of Responsibility: Investment Treaty Arbitration', in The Law of International Responsibility (James Crawford et al. (eds.), Oxford University Press, 2010), 815, 819, citing Willem Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations', in The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (R. McDonald and D Johnston (eds.), Martinus Nijhoff, 1983), 593
[168] Michele Potestà, Case Note, 'Republic of Italy v.
Republic of Cuba' (2012) 106 Am. J. Int'l L. 341. The pleadings and expert opinions of the Ecuador v. U.S. case are available on the PCA's website: <http://www.pca-cpa.org/showpage.asp?pag_id=1455>
[169] Zachary Douglas, The International Law of Investment Claims (Cambridge University Press, 2009), 96–8.
[170] Ndiva Kofele-Kale, The International Law of Responsibility for Economic Crimes (Ashgate, 2006), 9–12

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steps are taken to prosecute such officials.

There have been a few cases which have highlighted on the aspects of state responsibility for corruption. Cases such as World Duty Free v. Kenya; SPP v. Egypt; Fraport v. Phillipines and EDF v. Romania. These cases focus on the broad terms of international anti-corruption law in international investment law. "But in the cases of World Duty Free, SPP, and Fraport, corruption is invoked as a defence by host States against the investment protection assertions of foreign claimants."[171]

Among the above mentioned cases, EDF v. Romania's contribution is significant when it comes to anti-corruption norms in investment arbitration. The case makes a clear classification between the high evidentiary standard utilized and of unintended benefit to future parties seeking to obscure corrupt acts. "The investor argued that bribe solicitations by the Prime Minister of Romania, when rebuffed, resulted in retaliatory acts by Romanian State-owned enterprises that were attributable to the State itself."[172] "The tribunal stated in clear terms that the corrupt solicitation of a bribe (extortion)"[173] by "a State agency"[174] would be a 'defilement of the fair and equitable treatment responsibility owed to the investor pursuant to the BIT as well as a desecration of international public policy'.[175] The tribunal also agreed with the claimant's submission that when the host State's choice was exercised on the idea of corruption, a "fundamental breach of transparency and legitimate expectations' occurs."[176] The essential difference that has to be marked is that this case was clearly decided from the point of view there was extortion of money and the principles on state responsibility were applied but when it comes to freely exchange of money than the same becomes a different matter and the investors culpability becomes a different issue.

World Duty Free demonstrate various issues taken as defence by the opposite parties which includes the finding that corruption "did indeed occur at the inception of the investment would potentially result in either (i) the invalidation of the underlying investment agreement and the unenforceability of claims arising from that agreement (as in World Duty Free), or (ii) a finding

[171] EDF, *supra* note 121*; F-W Oil Interests, Inc. v. Trinidad and Tobago (2006);* Methanex, *supra* note 31*; Rumeli Teleko, v. Kazakhstan (2008);* EDF, supra note 121*; RSM v. Grenada (2010)*
[172] EDF, *supra* note 121, at para. 102
[173] W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 39 (29th ed. 1979); "'Extortion' (sometimes also called 'blackmail') is another important type of corruption. One can distinguish extortion from bribery by looking into whether the payer receives 'better than fair treatment' or must pay to be treated fairly. Put another way, 'extortion' is a situation in which the capacity of the official to withhold a service or benefit otherwise required by law exceeds the capacity of the private party to sustain the loss of that service or benefit. 'The term extortion may be reserved for those situations in which the capacity of the official to withhold a service or benefit otherwise required by law exceeds the capacity of the private party to sustain the loss of that service or benefit."
[174] EDF, *supra* note 121, para. 187ff.
[175] *Id.* at 221.
[176] *Id.* at 222.

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that the tribunal has no jurisdiction over the dispute in its entirety (the investment not being protected by many investment treaties for not being an 'investment' made in accordance with the host State's laws)."[177] World duty free recognizes corruption as defence when invoked by the host State, even when against illegal actions of host State conduct irrespective whether they are related to corruption or not. However, in EDF v. Romania, we have noticed that when corruption is raised by investors, then the issue is argued from the investor's perspective taking into consideration the idea of fair and equitable treatment claims. Thus it can be seen that this is no less than a surprise when corruption is claimed by the investor than in that case we see that investment arbitration turns out to be fair system that does not entirely favour the host state.

But you can find that corruption will be raised much like in the case of Fraport v. Philippines, where the issue is raised, argued but never truly decided.

When it comes to State responsibility, we see from the decided cases that less than a handful of the decided investment arbitration cases have dealt with the question of State responsibility. "The Tribunal in the SPP v. Egypt award held that principles of State responsibility apply in investment arbitration to attract the liability of host States for the ultra vires acts of their public officials; but there was at best only an implied conclusion that corruption would not be similarly attributable to the host State if public officials are recipients of a bribe."

However, the tribunal never stated that state will not be internationally liable for the acts of their highest officials. Additionally in EDF v. Romania the tribunal held that State responsibility would be attributed if the investor engages as the international responsibility of a host State for bribery solicitations, i.e. extortion by public officials.[178] In Fraport v. Philippines the tribunal added that estoppel would apply when at the time of making investment the investor had engaged into the acts of corruption and the host state had tacitly accepted or at least acquiescence of that illegality than in that case the state cannot thake corruption as a defence on the basis of the principle of estoppel.

The case of World Duty Free is the case where the tribunal held that state responsibility was not the major concern of the case but corruption played an important role and was considered as a

[177] TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award dated 19 December 2008; SPP v. Egypt see Southern Pacific Properties v. Arab Republic of Egypt, Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, 8 December
2000, Lucchetti v. Peru see Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic
of Peru, EL SALVADOR, *supra* note 66; Tanesco v IPTL see Tanzania Electric Supply Co. v. Independent Power Tanzania Ltd and Thunderbird v. Mexico, Methanex, *supra* note 31 and Tobago, *An Emerging Defence for Host States?',* 52 Virginia J. Int'l L. 723 (2012).

[178] SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM (12th ed. 1999) citing Ian Ayres, *'Judicial Corruption: Extortion and Bribery'*, 74 Denver U. L. Rev. 1231, 1236–7 (1997); Loewen Group Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003

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substantive area of law that can potentially disallow redress for investor claims in their entirety.[179] The application of the same can be found in the tribunals order tribunal declared the contract voidable and unenforceable and also held that the same claim was inadmissible.[180]

The question raised after the judgment was that why the tribunal not applied public international; law for invoking state responsibility. In light of Article 42(1) of the ICSID Convention, the arbitrators have to limit itself to the consent of the parties to limit themselves to English and Kenyan law which is to limit itself to the contractual choice of the parties. "This even questions the fact that the contractual choice of law would forestall the direct application of public international law in this case, one can still inquire as to why no renvoi to customary international law was even considered by the tribunal through the application of the contractual choice of law",[181] considering that under English law (and presumably Kenyan law as well)[182], customary international law is 'part of the law of the land' and can be applied directly (albeit with some conditions).[183] "Indeed, international *ordre public* used unsparingly in the case in relation to anti-corruption norms was utilized precisely by introducing it as part of the corpus of English and Kenyan national law."[184]

When it comes to state responsibility the first thing that comes is attribution which was never in focus and it is seen that public international law was never explicitly discussed or cited in a case. In World Duty free the tribunal took all the pain to prove that there existed corruption and was considered rare. Proving corruption before attributing was a key point, in order to show state responsibility it is important to prove that there was corruption which is the occurrence of an internationally wrongful act, providing an opportunity for the issue to be fully fleshed out. It is important to note that the expertise the arbitrators hold, it could have been easily anticipated that a clear decision of state responsibility should have been expected which would endure precedent on the attribution of corruption upon host States for the acts of their public officials.[185]

But the award acknowledges the fact that corrupt acts of Head of state which is not less than the corrupt acts of investor is attributable to the host state itself not in the same sense as given under

[179] Fraport, *supra* note 77 (dissent of Dr Cremades); African Holding Co. of America Inc. and Société Africaine de construction au Congo SARL v. République Démocratique du Congo, ICSID Case No. ARB/05/21, Award, 2008; Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008 and Siag, *supra* note 115 (dissent of Prof. Orrego).
[180] Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd [1988] 1 Q.B. 428 10.26.
[181] W. Michael Reisman, *'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold',* 15 ICSID Rev.-Foreign Inv. L.J. 362 (2000).
[182] *Id* at para. 159
[183] Trendtex Trading Corporation Ltd v. Central Bank of Nigeria [1977] 1 All E.R. 881, 889–90; JENNINGS AND WATTS, OPPENHEIM'S INTERNATIONAL LAW 56–7 (9th edn. 1992); R (Al-Saddoon) v. Secretary of State for Defence [2009] EWCA Civ 7; [2010] Q.B. 486.
[184] Trendtex Trading Corporation Ltd v. Central Bank of Nigeria [1977] 1 All E.R. 881, 889–90.
[185] JENNINGS AND WATTS, OPPENHEIM'S INTERNATIONAL LAW 56–7 (9th edn. 1992).

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the Articles on State Responsibility.[186] The Tribunal went on discussing the issue of attribution in light of waiver, acquiesced and right to invoke corruption. The Tribunal limited itself to English or Kenyan law for ascribing information to the state of a public officer affianced as its agent in bribery'.[187] It could have been attributed in case the officer had made his admissions in his admissions in his witness statement in December 2002, over 13 years after the bribe was paid in March 1989.[188]

It is immaterial whether the state responsibility analysis would change the result but it is pertinent to note that in "World Duty Free tribunal saw the question of Kenya's knowledge of its former Head of State's corruption as primarily a question of actual knowledge, if the principles of attribution under the law of State responsibility did apply in this situation and the Head of State's conduct is considered attributable, such knowledge may if the requisites for attribution are met be ascribed to Kenya by operation of international law. The succeeding parts of this chapter focus on this issue within the framework of the Articles on State Responsibility."[189]

World Duty free was always related to state responsibility. In this case the consent to arbitrate was derived from the contract between the investor and the host State. Having a contract instead of an investment treaty as the basis for jurisdiction has important choice-of-law implications. As earlier stated the decision in this case was based on English law, followed by the fact that national law was contractually the applicable law. Because as we know when jurisdiction is derived from international treaty or law it opens the gate for application of International law, as the substantive investment protections which an investor will rely rather than on a contract. "The proper interpretation and application of that investment treaty to a particular dispute including the 'legality clause' provisions frequently invoked by host States as a defence against the tribunal's jurisdiction when issues of corruption are raised—will also require international law to be factored in. Under the Vienna Convention on the Law of Treaties, interpretation requires that 'any relevant rules of international law applicable in the relations between the parties' need to be taken into account."[190]

Thus for the above mentioned facts it can be seen that world duty free cannot be relied at least in the area of State responsibility as it was not decided on the basis of a treaty but on the basis of a contract and even it did not employ public international law. Even the substantive decision on the same matter has been derived from the domestic law. "In ICSID and UNCITRAL cases which

[186] WDF, *supra* note 41, at para. 178; Grynberg (Rachel S.) et al. and RSM Production Corp. v. Grenada, ICSID Case No. ARB/10/6, Award, 10 December 2010 6.274, 10.20.
[187] *Id.* at para. 185.
[188] *Id.* at para. 167.
[189] *Id.* at 61.
[190] Vienna Convention on the Law of Treaties, Art. 31(3)(c).

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arise out of dispute settlement provisions in bilateral and multilateral investment treaties, and as Professor Crawford emphasizes, contractual liability for breaches based on national law must be distinguished from State responsibility for breaches of international law one does not entail the other."[191]

The cases which have been discussed suggest that if corruption was done in the form of or through solicitation/extortion by the public official or when an offer made by the investor then that was not accepted, in that case the state was made responsible for the acts of the public official. However, if a bribe was freely accepted and paid then in that case investors would not be allowed any arbitral recourse, as it was done quid pro quo and the same would be attributed to the investor where he would not be given any relief in case of substantive law as well as procedural law and the host state can be made free or else the same act of public officer cannot be attributed to state but it requires a constitutive elements of State responsibility.

3. CONTRACT'S AFFECTED BY CORRUPTION

Corruption takes place and it is an accepted fact that it is difficult to stop. All these instances of corruption done by public official can be further divided into two principal firstly that the parties who do arbitration or litigation involve two parties that is the investor and the host state or a state-owned and governed entity. Secondly the investor has appointed an agent or the investor has been conducting his business through an agent and has been indulged in an arbitration or litigation matter.

Investors themselves fear to indulge in illegal activities and so they engage agents, contractors,

[191] JAMES CRAWFORD, 'THE SYSTEM OF INTERNATIONAL RESPONSIBILITY', IN THE LAW OF INTERNATIONAL RESPONSIBILITY 17-20 (2nd ed. 2010).

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intermediaries to act for them. They clearly stay out of such illegal work and leave such dirty work on agents. Even the agent or consultant is a local guy who has an established work in the host country so even in case if something goes wrong than the agent belonging to host state, the investor can clearly avoid the liability. He has this benefit of his locality and culture that he can simply help in indulging in corrupt practices.

"From a systematic point of view, most cases where corruption has been an issue in arbitration fit into one of the following two types."[192] As discusses earlier in the two category the first category includes the parties are the investor and host state or any other entity recognized as state by the domestic law. They enter into various agreement such as BOOT, joint venture, PPP etc. But then during the term of the agreement or after the agreement comes to an end there is a dispute relating to the provisions of the agreement. Where the investor feels that the host state is not complying by the terms of the agreement forcing the investor to initiate investment arbitration before a tribunal. Such situation arise because there is new government in power and in order to throw some dirt towards the work of the previous government they go through the history and come to a conclusion that the contract with the investor was not concluded fairly but was based on acts of corruption of previous government members.

Therefore the host state itself thinks whether to fulfill the terms of the contract or not? There have been plethora of cases that fall within this category and to be precise, 11 cases fall into this category. There are other types of cases as well where there is this investor and agent or intermediary who enters into an agency agreement. This agreement is made where the agent is required to get the benefit for the investor in form of procurement or infrastructure contract etc. In return or after fulfilling the contract the agent gets his share. "The commission is determined as a percentage of the main contract's volume: percentages may vary widely between 1.5 per cent and 33.33 per cent."[193] But here comes he twist when after the contract has been assigned to investor, the investor refuses to pay the amount due to him or any amount liable to be paid under the agency agreement. The agent is left with no option but to initiate arbitration before any arbitral forum which can be ICSID, LCIA etc. But the investor there argues that the agreement was invalid as it was void ab initio as the purpose itself was illegal. Here the agent has a gun over him and thus he pulls all the strings where he admits that the real objective of the agreement was to bribe the foreign officials in the host state, where the amount was due to be paid to the state

[192] Lucchetti (Empresas) v Peru, ICSID Case No Arb/03/4, award of 7 February 2005, 19 ICSID Rev-FILJ 359 (2004); 20. Gabchikovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7.

[193] ICC No. 6497, Final Award of 1994, 24a YB Comm Arb 71, Facts and para 17 (1999); Malaysian Historical Salvors v. Malaysia Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

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officials.

Here the arbitral tribunal can come to a conclusion that the main contract is not affected although tainted by corruption and remains valid and enforceable. But the arbitral tribunal has the power to modify the terms of the contract.

3.1 CONTRACTS WHEN DECLARED VOID AB INITIO AND UNENFORCEABLE

The main reason behind the corruption dispute is often for the host state to avoid its obligations under the contract. It has been noticed in many cases that the host state attempt to prove the contracts void[194] and unenforceable[195] by proving the corruption. There are three reasons for a contract to become void:

(1) If there are provisions under domestic law which declare a contract acquired by way of corruption as void.[196] Such a contract which is acquired by way of corruption can be considered *void ab initio*. The principle behind the action interpreted by the courts is that such contracts are immoral and illegal. The courts do not have authority or power to declare such a contract which is acquired through corruption as valid contract. This is "nemo auditur suam turpitudinem allegans". Such contracts are considered by the government of the host state to be lacking in consideration, fraudulent, without any authority and illegal[197], it has been made very clear that a contract acquired by paying bribes has no enforceability[198]. In the recent case of *World Duty Free v Republic of Kenya*[199] which was brought before ICSID, it was held that under English Laws and laws of Kenya which is the host state in the present case, any contract obtained by way of corruption is not a valid contract. [200] However, in some cases a different trend is followed where laws of a third state is used to check the validity of a contract which is said to be obtained by way of corruption. This choice of law done by the parties before concluding the contract bars the applicability of domestic laws of the host state. Therefore, the contract was held to be valid by the Federal Court of Switzerland. According to the court

[194] Federation of Pakistan through WAPDA (Secretary Water and Power) in the HUBCO case, Supreme Court of Pakistan, 20 June 2000, Arb Int'l 439, 439 (2000) (hereinafter HUBCO v WAPDA); PLN in the Himpurna case, Final Award of 4 May 1999, 25 YB Comm Arb 11, para 113 (2000) (hereinafter Himpurna v PLN); Wena Hotels v Egypt, ICSID Case No. Arb/98/4, Award of 25 May 1999, 41 ILM 881 (2002); Award of 8 December 2000; Decision of Ad Hoc Committee 28 January 2002, 41 ILM 896 (2002).

[195] The Islamic Republic of Iran in American Bell International v Iran, Award in Case No. 48 (255-48-3) of 19 September 1986, 12 YB Comm Arb 292, 292 (1987) (hereinafter American Bell v Iran); The Islamic Republic of Iran in Oil Fields of Texas v Iran (National Iranian Oil Company), Award in Case 43 (258-43-1) of 8 October 1986, 12 YB Comm Arb 287, 298 (1987) (hereinafter Oil Fields of Texas v Iran).

[196] *Id.* at 12

[197] HUBCO v WAPDA, *supra* note 194, at 439.

[198] American Bell v Iran, *supra* note 194, at 292.

[199] Id. at 293.

[200] World Duty Free, *supra* note 145, para. 40.

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the contract was perfectly valid as it did not break any anti-corruption laws of Switzerland. [201]

(2) The decision whether a contract is valid or not does not depend on the laws of the host state. Rather it is dependent on the international anti-corruption policy[202]. It is duty of the arbitrators to comply with the international policy (cf Art 5 § 2 b New York Convention). Recently anticorruption formed a part of international as well as transnational public policy. [203]However, there is no uniformity in legal consequences of corruption in deciding validity of contracts. On contrary, the parties to the Civil Law Convention on Corruption of the Council of Europe agreed that parties can approach local courts which would decide the question of validity of the contract.[204] Therefore, it can be said that the rule of of ipso iure and ab initio nullity is not shared by legal and moral values of contemporary states. These rules are aslo not contained by the international public policy.

(3) Corruption causes a defect of consent to the respondent state. Any consent given to a contract derived by corruption can be said to be have been agreed by free consent. This is also provided in Art. 50 of the VCLT. It provided that in case the consent of the state is derived by way of bribery to any authority then such a consent cannot be a valid or free consent.[205] This is similarly provided under Clause 2 of Art. 8 of Civil Law Convention of the Council of Europe. It says that the state 'whose consent has been undermined by an act of corruption'. However, these provisions are not enough to prove ipso iure invalidity of the contract but, its avoidance on request of the party suffering from the defect.

It has already been established that object to bribe official is an illegal one and the contract with such an object id also illegal and void.[206] In a lot of recent cases governed under Swiss law, contract was held invalid under Article 20 OR. German law provides nullity due illegality in § 134 BGB. Article 8 (1) of the Civil Law Convention on Corruption obliges the signing states to provide for regulations of nullity.[207]

[201] *Id.* at 43.
[202] American Bell v Iran, *supra* note 39 at 292.
[203] Hilmar Raeschke-Kessler, *'Some Aspects of International Public Policy in International Commercial Arbitration'*, (Aug 20, 2004); P Lalive and PM Patocchi, *'Transnational (or Truly International) Public Policy and International Arbitration'*, in ICCA Congress Series No. 3, 258 (New York, 1986),.
[204] Council of Europe Civil Law Convention on Corruption, Art 8(2).
[205] Vienna Convention on the Law of Treaties, Art 50.
[206] ICC No. 1110, Award of 1963, 10 Arb Int'l (1994) at para 16 (hereinafter ICC No. 1110); ICC 2730 Award of 1982 Coll, ICC Arbitral Awards 490, 494 (1974–85); ICC No. 3916, Award of 1982, 111 JDI 930, 933 (1984); ICC No. 3913, Award of 1981, quoted in YD, Observations, Coll ICC Arbitral Awards 497 (1974–85); State Agency A v Respondent X, Tribunal Fédéral, 30 December 1994, 21 YB Comm Arb 172, para 20 (1996); ICC No. 7047 Final Award of 1994 in 21 YB Comm Arb 79, para 54 (1996)
[207] Civil Law Convention on Corruption, Art 8(1).

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According to the laws applicable the tribunal may decide whether one[208] or both[209] the parties have intention to act illegally.

A contract can be held to be invalid on the basic of morality even if they are invalid according to the national laws. This was upheld by the German Federal Supreme Court even before foreign bribery was declared a criminal offence.[210]

The arbitral tribunal was of the view that Hilmarton award clearly recognized which was aimed at an agency agreement which was dedicated to 'influence peddling' and the same was considered as invalid and unlawful because it was considered as immoral under the Switzerland law.[211] It was taken as a principle that it cannot ratify the award as it had ratified various international anti-corruption conventions where in their objectives they had agreed to combat corruption and various other forms of the same.[212]

There are chances that contracts may be declared wrongful in part only, if the other part which must be a major part be legal and the minor part be illegal. It has been suggested that an agency agreement may require the consultant to perform is his obligation in a rightful manner and it nothing happens than as last resort he may use bribery. If the same is followed than the agency agreement may have a minimum of bribery included in it and thus make the agreement legal. "It must then be determined whether the objectives of the contract can be separated into a legal and an illegal part.

If this is not possible, the whole agreement must be considered invalid."[213] It has been observed that when at the time of his or her service at the time or when acting on behalf of the principal if the consultant did not act in any illegal or illicit means than in that case he or she will be given the fees but when found that he or she used bribe to get the work done than in that case he or she does not get the fees and even the contract is declared void.

3.2 CONTRACTS WHEN VALID AND ENFORCEABLE

It has been observed that unless to the contrary if the applicable national law does not make corruption null and void in that case corruption does not make the main contract invalid or unenforceable. There have been situations to the contrary which support the fact that the main contract should not be declared void which includes when there are high-ranking officials of the

[208] Case No 6248 of 1990, 19 YB Comm Arb 124 (1994) (hereinafter ICC No. 6248).
[209] European Gas Turbines v. Westman, Court of Appeal of Paris, 30 September 1993 6.22.
[210] *Id.* at 6.34.
[211] ICC No. 5622, Final Award of 1988, 19 YB Comm Arb 105, para 34 (1994).
[212] Pierre Mayer and Audley Sheppard, *'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards'*, 19 Arb Int'l 249, 261 (2003).
[213] ICC No. 1110, Award of 1963, 10 Arb Int'l (1994) at para 16

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host state involved, for e.g. the members of the cabinet, secretaries, deputies or even the head of the state which may include the Prime Minister or the President of the state.

"International law contains the fundamental principle of state responsibility[214], referring to 'the accountability of states for violation of international law, and the requirement that states make reparation for such violations'."[215] While dividing corruption into two which includes hard corruption and soft corruption, when international conventions are signed they provide that hard corruption is just violation of International law. Accountability in this situation is defined as the states have to bear the consequences of corruption and are responsible for the acts of their public officials. "This is obvious if the highest-ranking hierarchy, such as heads of state or the prime minister, is involved in the corrupt acts. It is not different if the state is represented by corrupt lower-ranking officials, like heads or deputy heads of departments."[216]

"State responsibility includes contractual responsibility, which means that the state must in general meet its obligations as a contractual party in spite of the corrupt activities of its officials."[217] It is important and mandatory for a state to comply by the terms of the contract although it might be tainted with corruption because of the fact that if the same is allowed than in that situation state might not be held responsible for its violation of International law and that would have been the best method to avoid international law obligation. There are various situations when one talks about such arguments. Surpassingly if corruption has the potential to make the contract render null and void automatically than in that situation state would never abide by their obligations and would escape the performance of the contract by merely accepting bribe or by merely presenting an incident of bribery, which in the present world be not too difficult to achieve.

In such a situation when the government has lost control over the situation than they might simply try to fulfill their contractual obligations such as if there is a liquidness problem such as or because of the price of the relevant goods under the main contract has changed than in such situation state have the easiest option to do the same by asking the public officials to indulge in the act of corruption. In that case what next happens is that the host state would not perform his part of the contract for which the investor might approach an investment arbitration tribunal where he would argue on corruption and the tribunal would declare the contract invalid.

If this were true than the whole intention of protecting the right of the investor goes on vein as

[214] *UN provisions on State responsibility,* http://www.un.org/inc/text/state_responsibility/responsibilityfra.htm.
[215] PAUL E COMEAUX AND N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK xix (19th edn. 1997).
[216] Draft Articles on State Responsibility, ILC 2001, Arts 4–11.
[217] Marc Blessing, *'State Arbitrations: Predictably Unpredictable Solutions?'*, 22 J Int'l Arb 435 (2005).

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this would naturally call for irrational and unjustified termination of contract and indeed result in violation of the rights of the investor. Anti-corruption law does not protect the parties but protects citizens those who have been forced to pay for corruption through higher prices and taxes.

3.3 ALTERATION OF CONTRACT

"If the main contract remains valid and enforceable, this does not mean that corruption has no effect on it. It is obvious and essential that an arbitral tribunal divides the legal consequences of corruption reasonably between the parties. The party that initiates an arbitration may seek settlement of a dispute about its contractual duties and performance in the past but it may also look for a decision related to its future rights and duties. This is particularly so in the context of investment arbitration. In this context, the term 'modification' will be used for the changing of rights or obligations related to the past. If contractual provisions need to be changed or amended, with effect for the future, this will be referred to as adaptation of the contract."[218]

3.4 PUBLIC POLICY

"One of the reasons why arbitral tribunals have been restrictive in invalidating main contracts may be that invalidity leads to very unpleasant results in restitution. Should the host state really have to give back the whole investment, the nuclear power plant, the petrochemical project or the cotton factory? This does not correspond to the will of the parties, nor to their mutual economic interests."[219]

4. CORRUPTION AND INVESTMENT ARBITRATION IN INDIA

Corruption has been most prevalent in India. India has become one of the biggest hub for international investment but has also called for many other illegal activities such as corruption, extortion etc. The same have been seen from various instances such as the one present in 2G Scam and Devas-Antrix Case. Recently in the year 2016 a case was filed by Astro South Asia Entertainment against India where the company had invested in Sun Direct which is a Indian satellite company. The claims have been made against India for an alleged unfair and biased criminal investigation by the government relating to the suspected bribery made by the claimants to Indian governmental officials. We will look into the two most important cases and decide the corruption aspect in that cases.

[218] CF NORBERT HORN, 'THE CONCEPTS OF ADAPTATION AND RENEGOTIATION IN THE LAW OF TRANSNATIONAL COMMERCIAL CONTRACTS', 7 (25th ed. 1985).
[219] *Id*. at 12.

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4.1 2G SCAM CASE

The 2G scam was an alleged 1.76 lakh crore scam which was convulsing in the Indian telecom market. The Supreme Court held that the allocation of 2G spectrum in 2008 was totally arbitrary, capricious and contrary to public interest[220] and violative of the doctrine of equity as there were special favours that were given to the telecom companies. Additionally 122 licenses granted to 8 telecom companies were quashed.[221] But it was seen that companies to whom the licenses were given were foreign investors who had set up joint ventures with various Indian Telecom Companies.[222]

Khaitan Holdings who owned 27% stake in Loop Telecom, whose 2G licenses were cancelled by the Supreme Court of India. Mauritius based Khaitan Holdings (Mauritius) Ltd holds 26.95% stake in loop telecom, had filed international arbitration against the Indian Government.

The main claim before the tribunal under international law was that Indian government failed to provide necessary preconditions for claiming expropriation through this judgment. The Supreme Court of Indian did consider the foreign investors that had invested in obtaining the spectrum and the same were revoked. Khaitan Holdings who owned 27% stake in Loop Telecom, whose 2G licenses were cancelled by the Supreme Court of India. Mauritius based Khaitan Holdings (Mauritius) Ltd holds 26.95% stake in loop telecom, had filed international arbitration against the Indian Government.

The case was filed before international arbitration because the investors were claiming compensation for the loss arising on the ground of expropriation by the order of Supreme Court of India. The parties have agreed to go for UNCITRAL Model law. There is a bilateral investment treaty with Mauritius under Article 12 of BIT provides for arbitration. It has been seen that the objective of such arbitration is to protect the interest of the investors and to see that the state pays for the wrong done to the investor. There have been plethora of judgments which include Metaclad v. Mexico, Goetz v. Burundi etc were considered to be effective. The claimant also went on arguing for legitimate expectation as the contract was made for specific time period.

It has been seen that the stands in favor of the claimants when a prima facie glance is given. When we look at the ECHR and ICSID tribunals they have an entire saying to this situation. There has always been this debate regarding the fact that when a clear line can be drawn when question on the actions of host state because of its public official are raised and on the other side the public

[220] Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1, para 77.
[221] *Id.* at para 81.
[222] Knowledge Wharton Today, Revoked Indian Telecom Licenses Spur Legal Action, March 1, 2012, available at http://knowledgetoday.wharton.upesnn.edu/2012/03/revoked-indian-telecom-licenses-spur-legal-action/

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interest of host states population when it specifically comes to question on corruption which was clearly addressed in the case of World Duty Free v. Kenya. The Indian government provided a deal where they agreed to adjust the same money against the auction and there was this another failure which includes the same deal as the same was another ground for challenge.

In order to bring in investor and call itself as an investor friendly state, India has entered into more than 74BIT's with negotiations underway for another 22. The main conspirator was the former telecom minister A Raja against whom the cases are still pending as he had favoured various telecom firms in the allocation of licenses. It is very important that if the charges of corruption are proved than it would be a two way game when it comes to arbitration at the international forum. The matter is governed by the UNCITRAL rules on Arbitration.

Although taking the above discussion we come to a conclusion that there was corruption and the award is passed in favor of the investor in that case the award can be challenged in the grounds of public policy. Article V(2)(b) of the New York Convention and Article 36 of the UNCITRAL Model Law provide public policy as a ground on which domestic courts can reject the award to be enforced. They provide that "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:... The recognition or enforcement of the award would be contrary to the public policy of that country."[223]

When we look at Article 34(2)(b)(ii) of the UNCITRAL Model Law it provides that setting aside of an award on the ground of public policy as "An arbitral award may be set aside by the court specified in article 6 only if:… the court finds that: … the award is in conflict with the public policy of this State. Majority of states have been following the UNCITRAL Model law on the same."[224]

"It has always been considered that the grounds for setting aside an award in case of an international arbitration matter have always been provided or read with in correspondence with New York Convention grounds for refusal of enforcement."[225] "It is therefore unnecessary to draw any distinction between the concept of public policy under the setting aside and enforcement regimes, as the extent of the court's scrutiny of international arbitration awards is the same regardless where the award is made."[226]

A court is bound to not enforce the award or to even quash the same if the party efficaciously proves that the grounds mentioned under the New York Convention and UNCITRAL Model Law

[223] New York Convention, Art. V(2)(b); UNCITRAL Model Law, Art. 36.
[224] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2183 (3rd ed. 2009).
[225] *Id.* at pp. 2552; 2556-2560; 2827-2863.
[226] The Singapore Court of Appeal recently affirmed this principle in AJU v AJT [2011] SGCA 41 at [37]-[38].

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are satisfied in that case the same can be set aside. But it is pertinent to note that even the arguments on public policy is presented it does not make the tribunal bound or the tribunal may clearly and unambiguously refuse to enforce the award. The tribunal has to identify the questions on public policy which do not allow the award to be enforced.

It is seen that when discretion is exercised it has been found that there is always a dilemma between taking the award passed by arbitral tribunal as final award on one hand and on the other we have the forums concern for the enforcement of award on the ground of public policy concerns. When we talk about the finality of arbitral award we find that it serves multiple function that is that it prevents the other courts to further check the validity of the award, allows to gain trust in the international arbitrations system as well as "encourages predictability in the resolution of disputes through international arbitration; and preserves the principle of comity of nations."[227] It is important to note that public policy covers a majour chunk of state interests which are far more away than the policy goals underlying preservation of award finality. "For present purposes, the most relevant manifestation of public policy in direct tension with award finality is the prohibition against agreements considered contrary to good morals or public order, such as contracts for corruption and bribery."[228] National courts have the obligation to enforce by accepting the arbitral award and upholding the validity of the award, agreements which may be inacceptable to the forum's central moral values, and which challenge fair competition as well as veracity in public administration.

When a court decided not to enforce the award or set aside the award than in that situation there are various question that are raised which includes the two major question on the basis of the fact that the award allegedly upholds a contract and does not declare it to be void , two issues arise: (i) whether the award that has been passed incorporates the right fact and has been decided on the basis of correct law and (ii) whether the award, which has been passed by the tribunal which itself is based on the fact that it has been obtained on public policy grounds. Both the two issues have been discussed in the succeeding paragraph.

If a tribunal is of the opinion that there is no certain piece of evidence which proves corruption or the same is not enough or that the applicable does not show that either party has engaged in corrupt activities. Another option which is left with the tribunal is that it may pass an award without considering the possibility that corruption had taken place since neither of the parties had pled corruption. The most common thing that exists between all those awards is that it does not

[227] Mitsubushi Motors Corp. v Soler Chrysler-Plymouth Inc 373 U.S. 614 (1985); Re an arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte. Ltd [1996] 1 SLR 34

[228] The International Law Association International Arbitration Committee's Interim Report on ―Public Policy as a Bar to Enforcement of International Arbitral Awards (2000).

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show any finding on illegality or corruption. When the award is not passed in the favor of a party than in that case the party tries to set aside or resist enforcement on the basis that the did not take the evidence into proper consideration which was put before the tribunal, and the same was identified after the arbitral tribunal decided the matter, or that the tribunal wrongly identified or applied the law governing issues of corruption.

The 2G scam was an eye opener of the activities which were conducted under the state head in India. This case might also ask India to pay millions of dollars as compensation after the alleged wrong was done to the investors. It might also raise some questions on India's approach towards bilateral investment treaty and they should see their results on the costly awards that are being passed.

4.2 DEVAS-ANTRIX CASE

Basically the Antri-Devas deal was signed in the year 2005 which was an agreement granting S-band Spectrum, the same were basically for satellite based communication but the same were not used. Telecommunications firm Devas Multimedia which is based in Bangalore had the idea to provide for a hybrid satellite system that would provide the domestic population with wireless broadband services and use of other audiovisual services.

The deal would provide antrix and devas with their respective use where the deal provided that Antrix which is an extended arm of ISRO would build and launch two ISRO satellites and then it would lease the two S-Band spectrum to Devas from which it can provide the broadband services and other audiovisual services. All these years from the year 2005 to 2010, Devas had worked on the project and had tested various terrestrial network that would reprocess ISRO's satellite frequencies.

But it was in the year 2010-11 where the CAG audit report showed clear indiscretions in the Devas-Antrix deal which included noncompliance of laws, financial mismanagement and granting of extra favour to the other party. At that time itself which was in the year 2012 when the Supreme Court of India decided on the 2G Spectrum allocation case and the same was highlighted here as the note to the Department of Space's was inquired into the same matter and the Department of Space clearly failed to mention that the construction of the new satellites was purely for devas customer and no other individual and this it clearly required an auction of the same which was not done. The contract itself was one sided and favored devas. It burdened DoS with everything in cases of failure as well as success of the program. It was seen that this could have been a high profit earning project for the government but the same was gifted at prices equal to water.

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There were a lot of committees which were formed to inquire the matter which included initially the CAG Audit report and other repots given which includes the Suresh report, the Balachandran report, the Chaturvedi report, the Chandrasekhar report and the Sinha report which could not at that time find any connection between the heads of both the companies. However the reports clearly identified that there were conflict of interests as various employees of devas company used to be scientist at ISRO. But devas went on saying that there were not conflict.

The Audit conducted by the CAG he marked a loss of Rs. 2 lakh crores in the Antrix-Devas deal by associating satellite spectrum and terrestrial/telecom spectrum. The report of CAG was out and the UPA government and Department of Space was left with only one option that was to scrap the deal and quickly put an end to the deal. The manner and the method that was adopted was very important as the same is the major reason why international arbitration courts consider that devas should be well compensated by the Indian government.

In the year 2011 antrix sent a letter to devas cancelling the contract by stating that the conditions in the contract cannot be fulfilled as the necessary frequency for the orbit slot coordination to launch the satellite could not be obtained. Even the Cabinet Committee on Security meeting provided the same reason for the termination of the agreement which was that orbit slot cannot be given as there are various other purposes for which the same are needed.

Corruption was never an issue not the conflict of interest but the government highly relied on the force majeure event to shut the project where the agreement itself allowed for a force majeure clause which provided that in the event that the government requires the orbit space for the need of national purpose and if it decided to exercise sovereign capacity than in that case it can call for force majeure and the same will not be leased to devas.

The questions that were put forward by the parties all revolved around the fact about the force majeure clause and the manner in which the contract came to an end. It was observed that mostly because the same was not satisfactorily done and even the International Chamber of Commerce was not even convinced by the same and ordered a compensation of $672 million to Devas, which came out as the first arbitral decision.

The major drawback was that antrix never paid attention to the ingoing proceeding where they had the opportunity to nominate members for the three member ICC tribunal but they never considered this and were busy in initiating a process in India before the Supreme Court of India against devas which indeed failed and it was even seen that the panelist deciding the matter had bias against the parties. In the run-up to the arbitration process, Antrix worsened matters by not taking its duties seriously. It is said by well renounced authors that it was the biggest mistake done by Antrix when they had the opportunity to pick their own members but they failed.

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Antrix presented arguments before the International Chambers of Commerce where it raised the argument that the contract cancellation was an act of a force majeure as the place in the orbit was not available and thus the government requested that the state be absolved of the responsibility and thus not be asked to pay compensation to devas.

It next came to the question of last resort principle where the International Chamber of Commerce arbitrators raised the question to the chairman of ISRO K. Radhakrishnan as to whether the act of termination or annulment of contract the act of last resort and nothing else could have been done. The idea behind putting forward this question was that if this was an act of last resort than the same would have saved antrix from paying compensation to devas.

It was Space Commission that had the responsibility of granting spaces in the orbit and it is pertinent to not that at that time radhakrishnan was the head of Antrix, ISRO, the chairman of the Space Commission and Secretary of the Department of Space. It was within his power as the Chairman of Space Commission and Department of Space that he could have consulted with the law ministry and asked for advice on the ways of annulling the contract and ecen could have sought permission from the CCS for contract termination. He on his own belief decided to terminate the contract and never went for any other option. This clearly showed that he had wrongly exercised his post and powers and had annulled the contract where he had many other option which he never exercised and thus Antrixs' arguments did not stand before the International Chamber of Commerce.

The second arbitration was not filed by Devas Multimedia, but rather by the company's investors which include Columbia Capital and Telecom Ventures. Because Telecom Ventures is based out of Mauritius, the case was filed under the Indo-Mauritius bilateral investment treaty.

Initially the Indian government preferred arbitration under the Permanent Court of Arbitration (PCA), which functions under the rules specified by the United Nations. Antrix-Devas agreement was terminated in the year 2011 and Devas decided not to exercise or exhaust local remedies and decided to go in for arbitration and at the same time Indian government decided to go for arbitration under the United Nations and not under the International Chamber of Commerce rules on Arbitration. It always wanted to go for arbitration under the PCA because it knew that PCA would look into the matter in a fair way.

This was the biggest mistake that India committed by not going for International Chamber of Commerce. The permanent Court of Arbitration ruled in favor of Devas and held that the act of termination of the contract in the year 2011 amounted to expropriation and it had indeed violated the fair and equitable treatment under the Bilateral Investment Treaty to the foreign investors of devas.

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The PCA based its finding on the fact that the contract was terminated and it clearly denied Devas of the commercial use of S-band spectrum and the same amounted to expropriation of investment made by the investor as foreign shareholders which indeed resulted in a breach of the Bilateral Investment Treaty.

According to information provided by Devas, Columbia Capital invested $15 million in the hybrid satellite-terrestrial project. Telecom Ventures, through its Mauritius subsidiary, invested another $15 million. These were all considered as upfront fees that had to be oaid at the time the agreement was signed. Telecommunications giant Deutsche Telekom (DT) after the agreement was made invested a little over $100 million while helping Devas with technical expertise and procurement power for building up the terrestrial network.

Antrix argued before the arbitral tribunal that even in case the contract is terminated the initial payment that was made as upfront should be paid back and the same has been claimed by devas in form of compensation. But devas also argued for the rest 100 million which were provided by Deutsche Telekom and the future profits which it was going to earn from its customers which they never got.

The Indian government had created such an event which they called it as force majeure but the same was not instead the Indian government has essentially carried out an act of renowned domain that takes away the investments made by Devas' foreign investors and shareholders. The same has been considered as a sovereign right under the title of expropriation but the state is also liable to pay financial compensation in such event as per the terms of the Bilateral Investment Treaty.

There has been huge damage which has been claimed by the parties for the violation of rights under the head of expropriation specifically indirect expropriation and fair and equitable treatment. The Permanent Court of Arbitration will decide on the quantum of compensation which has to be paid for such acts.

There is another case which is brought by DT against India under the Germany-India Bilateral Investment Treaty which is even of a similar amount where the amount claimed is of $100 million of investment by the German Telecom giant. The tribunal has started hearing the oral arguments and which will be battled out by the Indian government completely misjudged by the International Chamber of Commerce arbitration case, and the merits of the case in Paris.

Determining who is wrong and right when it comes to international arbitration is a fool's game. The Antrix-Devas deal's fatal flaw, which some could argue only came into existence after the 2G scam, was that it allotted natural resources to a private sector player without completely justifying how that one company (Devas) was chosen.

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There have been a number of mistakes which indeed call for an analysis of the fact that as to why the CCS and ISRO heaped on a force majeure clause to terminate the contract; an indication has been made towards a potential corruption which was done by the head of DoS as well as some say that it was the incompetence of the UPA government to address the issues directly as it was going through a major crisis at that time and wanted something's to be let gone. But it can be seen the manner in which the efforts were made to bring the Antrix-Devas deal come to an end by the Indian government it can be seen that it has left the government which includes Antrix and Radhakrishnan with very little legal ground to argue on and if such are the situations than India is bound to loose in any of the future international arbitrations.

But to the contrary it can be argued that DT's stake in Devas and the claims of potential future earning from the Antrix-Devas deal is a totally misleading for deciding the financial compensation as the same may not have made so much of profits from the deal and it always remains uncertain. When it comes to investment arbitration it has been seen that the claims on future profits have been ignored by the tribunals. It was also another point that the government should have tried to investigate in the matter and find out links of corruption from the CAG report and if the same would have been done than the same would have changed the path of this investment arbitration claim.

5. CONCLUSION AND SUGGESTIONS

The below are the conclusion and suggestion on the above mentioned issues which have been raised.

5.1 APPROACH OF ARBITRATION TRIBUNAL WHILE DECIDING CORRUPTION CASES

The Arbitrators are required to have awareness of the responsibility they have been given in deciding the matter. The arbitrators have been given the area in which they can play and can take the decision which are called the legal parameters. It has been seen that some rules do not grant any discretion and at that time the arbitrator has to stick to what is given in the law without making any deviation. However we have seen that there is considerable room which is given to interpret

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to interpret laws where there are two laws which are exactly the opposite of each other and both have comparable authoritative claims. It is suggested that so long as the arbitrators take the decision within the framework and their decisions are according to the law and also satisfy the expectations of the parties to the suit and also the international community than that won't be an issue and they can exercise jurisdiction and make choices as they deem feet. Advocates also help the judges in making decisions, that is, in advising, making or appraising social choices. "The policy framework of anti-corruption decision making in international investment arbitration thus demands an understanding of the competing interests involved and the complex of policy choices that are then called law."[229] International investment arbitration is more of a power granting and decision making way in certain prescribed manner,[230] but it has certain restrictions so that the powers are exercised in a rightful manner and as it was intended to work. This dissertation has attempted to draw out every policy that has been present and various laws and has also addressed the short comings of these laws.

At first we addressed the nature of transnational corruption in international investment law and identified that there are consistent leitmotifs in corrupt relationship between the public official of the host state and a foreign investor. Emphasis was also given on the fact national and international ideas given by governments, NGOs, and the international community. The idea of transnational corruption in national theme in the decades following the making of the U.S. Foreign Corrupt Practices Act in the late 1970s had sometimes been effective and sometime not, but particularly since 2000, the corruption activities have been controlled. The major capital producing and capital exporting countries that is United States and United Kingdom have tried to make their legislations on corruption complete and additionally they have increasingly utilized the domestic authority formed under these laws to prosecute people for bribery in appropriate ways. Against United States and United Kingdom there are states such as Switzerland which have been traditionally called as safe havens for conduction the illegal activity of corruption. But they have similarly begun to try people or have started confiscating suspected corrupt assets of foreign public officials from their home, national banks, supported by domestic legislation in order to bring transparency and accountability.

When you see corruption it has remained an obstinate reality and curtailment is still an issue, but still there has been significant improvement when it comes to transnational corruption in foreign

[229] W. Michael Reisman, *'A Theory about Law from the Policy Perspective, in Law and Policy'* (1975), 75–6; Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240.

[230] W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION: BREAKDOWN AND REPAIR 1 (12th ed. 1992) ('Viewed in its broadest conception, arbitration is a delegated and restricted power to make certain types of decisions in certain prescribed ways.')

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investment, especially when we talk about the large scale criminal investigations that are conducted against large multinational companies by domestic prosecutorial bodies, which has called for fines and have been punished for evasing of funds and white collar crime in United States.

The national laws and the emphasis of corruption from the domestic point of view has also called concern from international arena where transnational corruption remains largely an issue. During the 1990s and 2000s the international community saw many multilateral conventions to deal with corruption, first with bribery by foreign businesses (such as the 1997 OECD Convention), and more recently, when the demand side of public sector corruption have been brought in the legislative ambit, none of these legislations have helped in providing real teeth to their proscriptions. Conventions have not been much of a prerogatives of curbing and prosecuting corruption done by national authorities, thus they have not helped the international law in getting control of function for combating transnational corruption. It has been noticed that ideas for effective anti-corruption checking and committed dispute settlement mechanisms to decide cases of transnational corruption including United Nations proposal for an effective arbitral framework have failed. Even there has been no indication of any such mechanism which can settle all such disputes and even the states do not make an effort towards the same. Initially we have concluded that the only way to control transnational corruption is to make the laws on international investment law stronger.

When an analysis of all the cases on international investment law that addressed corruption it had been made a clear conclusion was drawn we could clearly relate international anticorruption norms into international investment arbitration. The objective of investment arbitration law was principally to protect the investor and hold the state liable the acts of public officials and was taken as, its traditional purpose as a dispute settlement was to hold the state liable for the alleged violation of investment treaty only when there was a violation of law because of corruption. Corruption has always been utilized by the host state as defence against the jurisdiction of the tribunal although the investor might claim that there are violation of Bilateral Investment treaty in the form of expropriation or violation of fair and equitable treatment through bribe solicitation or extortion, against the jurisdiction of the tribunal, which even incudes the claims of the investor on jurisdiction or the enforceability of the investment contract at issue.

Even with all those laws and policy investment arbitration has only helped less and has only marginal effect in controlling corruption. It has been seen that the major arbitral tribunal decision are the World Duty Free v. Kenya in 2006 and Metal-Tech v. Uzbekistan in 2013 which has used the anti-corruption law that has decided the in a manner that determined the outcome of the case,

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which has also shown the increase in the number of cases which has been placed at issue.

In Metal- Tech the tribunal has adopted a pro-active approach towards the standard of proof which is required in deciding the matter has been encouraging in a case where the investor was not willing to accept the charge of corruption but the arbitral tribunal went on deciding the issue of corruption and even when there was no finding of corruption by any investment arbitration tribunal. There are some difficulties involved in making corruption attributable to the party one of the major reason being that it requires high standard of proof as laid down in various case laws and thus it becomes difficult to apply and the other forms of issue involved in proving or regarding the illegality of fraud or any other violations done by the host state. In some of the cases what was held is that the state will not be held liable to account for their non-pursuit of the very corruption that they alleged as a defence.

Later we have analyzed that corruption had less effect on investment arbitration issues. It has been argued that corruption did indeed affect the arbitral outcomes but the same did not happen above the table as the same happened in an unarticulated manner and in an unreasoned manner, either through other issues which were directly affected by corruption such as fraud or illegality or else the same happened either by colouring the investment arbitrator's gratitude of the equities of the case.

The identity of arbitrators was also taken as a factor with the tendency of many of the actors in investment arbitration have hardly relied on the attitudes of party autonomy and consent that saturate when it comes to international commercial arbitration underwriting to the reluctance to rule directly on transnational-corruption issues and it is also important to note that the same can be achieved through other means. When we look at the current law that is prevalent on evidence concerning transnational corruption especially on the burden of proof and the standard of proof, it was identified that arbitrators prefer or choose higher or lower standard of proof on the basis of the facts of the case and the role that they believe corruption would play in the decision that will be given by the arbitrator or else in the ultimate outcome of the arbitration. The case laws that supported the high standard of proof were also considered.

Additionally we went on seeing the issue on state responsibility for corruption done by the public officials and even whether the state can be held liable for the acts of public officials and does it attach international responsibility. The question that was asked was that who can be made internationally liable for corruption in case of foreign investment and whether state can be made liable whether States can be held accountable in the same manner as investors for corruption (or at all). The conclusion that was drawn from the case laws provide suggest that host states cannot be made liable when corruption is done in such a manner where the public has been affected as

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public action which was required to be done by the public official has been purchased and the state will be internationally held liable. State will be held liable in case where the bribe solicitations or attempts at extortion committed by its public officials.

When it comes to attribution there is a bilateral nature of corruption which involves the investor and the host state but the host state raises the same as a complete defence. This itself goes against the very basics of investment arbitration that is to allow the investor to approach a forum to redress the dispute against the state that has violated the investors right under the Bilateral Investment treaty. Corruption under this situation is considered as a threshold that restricts the investor from approaching a forum and limits the access to an investor to approach an arbitral tribunal and make state internationally responsible for the acts of its public official. Than we later analysed various doctrines dealing with the legality and fairness within the sphere of international law on state responsibility. We also discusses the scope of estoppel and acquiescence which can be used by a state defence for its act of corruption.

5.2 DECISION MAKING ON CORRUPTION

When it comes to decision making on corruption we identify the apparently conflicting policy orientations involved in applying anti-corruption norms within the reach of international investment arbitration. The intention here is not to provide a script from which the arbitrators will make the investor liable but the attempt is to formulate generally applicable rules or canons that would guide arbitral decision-making which are more than focused on the results of corruption in investment arbitration. These attempts are helpful but incomplete, and underscore the difficulty of distilling the problem into readily usable formulae or axioms, however desirable that would be for practitioners and the academy alike. When it comes to corruption cases we find that the facts that are presented by the parties are dispositive; the degree of alteration and complexity involved in those facts clearly proves that corruption issues will continue to resist attempts at reduction and rule-making even in matters of categorization, proof, and sanction.

This study shows that it is very important to identify the policy issues that are involved and which concerns every arbitrator and it is the duty of the arbitrator to reconcile and balance whenever corruption-related matters arise in investment arbitration cases.

The main aim of arbitration was to make the investor safe about its investment as the investment treaty will protect the rights of the investor Arbitration was thought to be the final assurance of foreign investors that its investment treaty rights can be enforced, thereby presumably helping attract further investment, which ultimately contributes to the economic development of that State. As observed by Rudolf Dolzer defended investment arbitration from those who criticized

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who asserted that the system of arbitration was unjust and unfair to host states, "one of the primary beneficial effects of establishing an international system of arbitration for investment disputes is what 'economists call the externally anchored discipline of the domestic legal system of the host State'."[231] "This means, in essence, that investment treaty protections given real teeth through an effective dispute settlement mechanism create 'a powerful incentive for the host state to live by the rules of an investment-friendly climate, and such an international system provides advantages for those authorities in the host state which are competent to defend these disciplines'."[232]

"Overall, the current regime of investment arbitration is far from perfect, but it is not a system so intrinsically flawed as to be incapable of balancing investor protections with host State developmental and human rights goals; indeed, in many cases these goals are mutually reinforced precisely through investment arbitration."[233] "And even in their own terms, neither the public policy of anti-corruption nor that of investor protection was meant to be peremptory in nature, drowning every other consideration that might exist over the life of an investment."[234] "Indeed, the idea that anti-corruption is an inflexible 'trump' that deprives tribunals of jurisdiction or automatically invalidates contracts seems incompatible with a discourse of fairness, as no flexibility is left for the negotiation of other values and interests within the system."[235]

One might feel that when we look at the studies on corruption and investment arbitration we see that ICSID convention has best addressed the issue of corruption and was created as an international shield to corruption professed as prevalent in developing States. There was clear lack of governance on the part of many recipients of foreign capital, the investors never trusted the domestic courts as they thought that they were unfair and were impartial as they were vulnerable to corruption in developing countries, which was the biggest reason for internationalization of dispute resolution through arbitration and the development of international investment arbitration.

Additionally other actors failed to establish any other system that could have controlled transnational corruption, and thus has made investment arbitration as the primary mode of solving issues in transnational corruption and even for punishing the act of corruption, particularly for

[231] Rudolf Dolzer, 'Comments on Treaty Arbitration and International Law', in International Arbitration 2006: Back to Basics? ICCA International Arbitration Congress series no. 13 (Albert Jan van den Berg (ed.), Kluwer, 2007), 894, 896.
[232] Id. Dolzer, 'Comments on Treaty Arbitration'; Alabama Claims Arbitration (1874), 1 Moore International Arbitrations 495.
[233] Charles Brower and Stephan Schill, '*Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?',* 9 Chi. J. Int'l L. 471, 497–8 (2009).
[234] Westacre Investments Inc. v. Judoimport-SDPR Holdings Co. Ltd, High Court, Queen's Bench Division, XXIII YBCA 836, p. 862 (1998).
[235] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 15–18 (13th ed. 1995).

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foreign investments at the highest end of the value spectrum. However such arbitral tribunals are elephants with no teeth as they do not have criminal jurisdiction over matters of transnational corruption as they were primarily made to protect and promote investment instead of not allowing the investors to pursue their claim because of the fact that they indulged in corruption.

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