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AFFIXING STATE LIABILITY FOR CORRUPTION IN THE INFRASTRUCTURE SECTOR

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1. INTRODUCTION

A. Infrastructure sector and Institutional Investors

Institutional investors, both private and state-owned play an essential role in providing and channelling long-term finance which is pivotal in satisfying investment needs across all sectors in the economy and especially in real, productive assets such as 'infrastructure'.[1] When broadly defined 'Infrastructure' would include both economic and social infrastructure. The former comprising of (i) transport (e.g. ports, airports, roads, bridges, tunnels, parking); (ii) utilities (e.g. energy distribution networks, storage, power generation, water, sewage, waste); (iii) communication (e.g. fixed/mobile networks, towers, satellites); and (iv) renewable energy (solar, wind, hydro energy) and the later comprising of schools; hospitals and defence buildings, prisons, and stadiums. [2]

The OECD report on 'Infrastructure to 2030' published in 2006/2007, estimated global infrastructure requirements in 2030 to be in the order of US$ 50 trillion[3]. Future investment needs in economic infrastructure are over 4% of GDP than past spending on a global basis. Projections are much higher for developing countries at an average of 6%–8%.[4] Investment in social infrastructure and for achieving green targets or development goals (e.g. the UN Millennium Development Goals) require additional resources, but little is known about the size.[5] The International Energy Agency has estimated the adapting to and mitigating the effects of climate change over the next 40 years to 2050 will require around USD 45 trillion or around USD 1 trillion a year.[6] Such levels of investment cannot be financed by traditional sources of public finance alone. Institutional investors such as banks, mutual funds, private equities, hedge funds, REITs, etc. are thus called to play a more active role in bridging the infrastructure gap and provide the capital and long-term financing that would support this requirement.

Traditionally, the capital needs for infrastructure development were met by combination of local public sources, multilateral agencies and foreign aid agencies and the private sector has been a small player, with one notable exception, the telecommunications sector.[7] However, the national budgets, international aid and private local financiers do not have sufficient resources and wealth to meet the necessary capital requirement for the aforesaid financial needs in emerging markets. With growing demand for capital, these emerging economies are directly or through domestic private players getting into high-value deals with institutional investors to fill this capital deficit. Thus, governments in emerging economies have been increasingly attracting foreign capital for infrastructure investments. This includes through direct equity or debt funding in a State-owned infrastructure project, Public-Private Partnership (PPP) projects, Projects privatized through tenders and other through forms participation such investment in form of infrastructure bond, development loans or lines of credit.
Developed States on the other hand remain a key source of such foreign investments through various kinds of entities such as Sovereign Wealth Funds (SWF), Sovereign Banks, Public Pension Reserve Funds and other State-owned financial institutions (SOFI).[8] In fact such State owned Enterprises collectively are one of the most important financiers and they own or control more than 15,000

foreign affiliates and control more than US$ 2 trillion worth of foreign assets around the world. [9] With the growing interest in emerging markets and infrastructure as a new asset class, institutional investors, especially SWFs and SOFI, are emerging as a potentially major source of funding for infrastructure projects in these developing countries.[10] Thus, either as the investor or as the recipient, nations across the globe are witnessing an interaction of institutional investment into the infrastructure space.

B. Corruption in the infrastructure

However, a key area of concern for institutional funding in the infrastructure sector is the vulnerability of infrastructure sector, especially in emerging economies, to corruption and undue influence due to the extent of public official's discretion over the project, the large sums of money involved and the various stakeholder involved (including elected and non-elected public officials, lobbyists, civil society organisations, trade unions, regulators, contractors, consultants, engineers and suppliers).[11] In one scenario, corruption persists between the project operators and state authorities, in all forms and at different stages of the project, beginning at establishment and continuing till the completion of the project. When such corruption is later uncovered by local anti-corruption authorities and enforcement agencies, it, in many instances leads to investigations and enquiries against project companies involved in the development of the infrastructure. In some case pending these inquiries and investigations or trial on charges of corruption, bank accounts of the project operator are frozen, land and equipment is attached and several internal documents and business data is seized.[12] Eventually in some cases it leads to cancellation of contracts,[13] licenses,[14] permissions, approvals, clearances etc. connected with the tainted project.[15] Such investigations and repercussions intensify when senior government or leadership are accused to be involved in such corruption owing to a strong anti-corruption agenda displayed by opposition.[16] This process is spread over a period of time and gradually erase all economic benefits which could be derived from the project. In another scenario, corruption of state authorities by local politicians or competitors leads to unfavourable measures against the infrastructure project and project operator, including disabling operation of project and eventual cancelation/ transfer of project to another project operator.

Today in an infrastructure project, multiple stakeholders have an economic interest. This would not only include the project operator or its foreign partners who are appointed to construct and/or operate the project, but also include the institutional investors who have either funded project operators or state governments to meet capital needs for the project. This investment could be in form of direct project finance, loans, debt funding or equity funding through bonds, credit notes, debentures, shares and various other financial instruments. Criminal sanctions against such projects and project operators owing to later discovered corrupt scheme between them and state authorities often causes institutional investors a loss of substantial or complete economic value of their investment. Motivated actions of state authorities to the detriment of the infrastructure project or project operator also has the same effect on the economic interest of the institutional investor. In many cases the investment made by

institutional investors, often in millions and sometimes in billions of dollars, is sunk-cost and eventually written-off.

What legal remedies are available to institutional investors in such situations? One clear way is to explore remedies against the project operators or competitors who have been involved in the corrupt act. If the corruption took place between the project operator and state authorities at the time of establishment of the project the institutional investor may have a case for misrepresentation and fraud against the project operator. If it occurred during the operation of the project, then the claim could be of breach of investment contract or tort. If the loss is owing to corruption between competitors and state authorities, a remedy in tort would lie against the competitor. However, every case of corruption needs two to do the tango. The project operators being on the supply-side of corruption and the state authorities being on the demand-side. This paper focuses on the remedies an institutional investor has against the demand-side of corruption i.e. the host-state having international responsibility for actions and omissions committed by corrupt state authorities.

Section 2, discuss the growing trend of anti-corruption in international law and identifies investment arbitration as an appropriate remedy for institutional investors to affix state liability for corruption in the infrastructure sector. Section 3, discuss the importance for institutional investors to be third party to corruption, be able to assail treaty protection and have recourse to investment arbitration. Section 4, examines the case for liability of a host-state for corruption of state authorities under the International Investment Agreements (IIA). Section 5, discusses the standard of proof of corruption that an institutional investor would have to meet to establish its claim for corruption against the host-state. Section 6, discuss the measure of compensation due to institutional investors for losses suffered on account of corruption by state authorities. Section 7, concludes by highlighting the need to shift the jurisprudential focus in investment arbitration from supply-side of corruption to demand-side of corruption and role institutional investors can play in causing the same.

2. USING INVESTMENT ARBITRATION TO AFFIX STATE LIABILITY FOR CORRUPTION

A. Internationalisation of anti-corruption norms

All systems of law, including the international law, contain concepts designed to avoid misuse of the law.[17] States are increasingly entering treaties where they agree to certain standards of conduct with regards individuals (individually or collectively) and breach of those standards entails responsibility on the international plane. Internationalization of anti-corruption norms, which started in the 1970s but accelerated in the 1990s gave birth to several international agreements which were adopted primarily to criminalize corruption and come to an international consensus in dealing with administrative and civil law aspects relating to the fight against corruption.[18] These strings of conventions finally culminated into the widely ratified United Nations Convention Against Corruption,

2003 ("**UNCAC**")[19]. While it is often criticized for its non-mandatory, qualified, and vague provisions,[20] UNCAC did mobilize global consensus that 'the prevention and eradication of corruption is a responsibility of all States'.21 Arts.15, 16, 18 and [21]of the UNCAC form a widely accepted definition of corruption. These articles identify the bribery of national public officials (Art. 15), the bribery of foreign public officials and officials of public international organizations (Art. 16), trading in influence (Art. 18) and bribery in the private sector (Art. 21), as corruption. Manifestations of the fight against corruption are found also in the Vienna Convention of the Law of Treaties and in the ICSID Convention. In effect, Article 50 of the VCLT allows a State whose consent has been obtained through corruption to invalidate a treaty and Article 52(1)(c) of the ICSID Convention provides for the annulment of an award if there was corruption on the part of a member of an ICSID tribunal. As the anti-corruption movement has gained global prominence, there has also been greater consideration of the role of international courts and tribunals in combating corruption.[22] This is clearly reflected in international commercial arbitration awards. Contracts which have as their object the corruption of civil servants have been denied effect by Courts in several countries[23] and arbitral tribunals. [24]

Judge Lagergen's award in ICC Case No. 1110[25] is first such well-known award, where he found that the agreement on which the claims before him were based 'contemplated the bribing of Argentinian officials'. He relied on 'the general principles denying arbitrators the power to entertain disputes of this nature' and concluded that parties to such contracts 'have forfeited the right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.[26] Today, corruption as an issue has even reached the International Court of Justice. The crux of the *Equatorial Guinea v France*[27] is claim of sovereign immunity by Equatorial Guinea for its Vice President who is being prosecuted in France for his corruption and abuse of wealth in Equatorial Guinea. Even the jurisdiction of the court is based on the 2000 United Nations Convention against Transnational Organized Crime. In December 2016, the ICJ has granted some interim reliefs in favour of *Equatorial Guinea* but what will be more interesting is if and how the Court will deal with the interaction of sovereign immunity with acts of corruption. International anti-corruption norms have also been in the focus of human rights authors and practitioners in the last decade.[28] There is abundant literature by international human rights authors suggesting that corruption may violate a State's obligations under ICCPR and ICESCR, *inter alia* (1) to protect the right to equality and non-discrimination, (2) to protect right to equality before courts and tribunals and right to fair trail, (3) to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ICESCR.[29] Also, human rights monitoring bodies have in their reports identified instances of corruption and examined their interaction with human rights
obligations.[30]

B. Investment arbitration and state liability for corruption by state authorities

Investment arbitration is not naturally designed to interface with a national or transnational criminal law regime.[31] Bilateral investment treaties and multilateral

investment treaties do not expressly provide obligations for either the investor or the host-state with regard to corruption, bribery and money laundering.[32] It is thus a matter of significant debate in academia as to whether there exists any duty upon arbitrators to investigate allegations of corruption and/or report any findings of corruption to the relevant authorities.[33] While some scholars recognize that state responsibility can assist in the speedy criminal prosecution of corrupt public officials by imposing real consequences for the failure of a State to take corruption seriously[34], relatively little attention has been paid to the international law on state responsibility, particularly the degree to which host-states can be held responsible for the corrupt acts of their public officials.[35] In spite of this discouraging aperture in academia, the tribunal in *F-W Oil Interest v Trinidad and Tobago* [36] has emphasized the very serious implications of State corruption and noted that:

"…this Tribunal (as, we assume, any ICSID Tribunal) is bound to take the most serious view of allegations of State corruption – if backed by proper evidence […] if allegations of corruption had been made and had proved to be well founded, it would have had a most substantial effect on the view of the case taken by the Tribunal, and most particularly so if and when it came to the point at which the actions or omissions of the State came to be measured against the standard of treatment for foreign investment laid down in the BIT."

In that case, the investor claimed that the wrongful conduct it faced on part of the State was in retaliation for its refusal to pay US$ 1.5 million bribe in connection with an oil and gas contract.[37] Similarly in *EDF (Services) Limited v Romania*[38] the investor alleged corruption as the basis of its claim of investment treaty protection as the then- Prime Minister of Romania was alleged to have solicited a US$ 2.5 million bribe from the investor at a point after the investment. In *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*[39] the investors claimed to be victims of corrupt practices in the host-state, including actions taken by a Bratislava court and the local tax office, that resulted in its subsidiaries bankruptcy. In *Methanex Corporation v United States*[40] the investor alleged corruption as the basis of decision taken by Governor Davis of State of California to ban MBTE, which affected its business to produce, transport and market methanol. In *Rumeli Telekom AS & Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhastan*[41] the investor as part of its claim of denial of justice alleged systematic corruption of the judiciary in Kazakhstan and solicitation of bribe by a Khazakh judge, who purportedly offered to issue a decision in favour of the investor in return.[42] In *RSM Production Corporation* v *Grenada* investor alleged that the Grenada denied its application for an exploration license and terminated an earlier agreement because another corporate entity paid or was to pay an alleged bribe to the then Attorney General of Grenada. [43] In *ECE Projektmanagement* v *Czech Republic* the investor based its claim for breach of fair and equitable treatment and expropriation on the allegation of preferential treatment accorded to the rival owing to corrupt scheme of administrative officers of Czech Republic.[44]

While in none of the above cases the investor has been successful in establishing corruption, they do evince the utility of investment arbitration to affix state liability for the corrupt act of its state authorities. Thus, investment arbitration seems to be

a forum beginning to be used to affix state liability for corruption. There is a clear consensus in jurisprudence on its availability as an international dispute mechanism to bring claims against the demand-side of corruption being host-state liable for corruption of state authorities.

3. REQUIREMENT TO BE THIRD-PARTY TO THE CORRUPTION

A. Jurisdiction and admissibility objection premised on corruption

Today many host-states have raised corruption by investors as a defence to claims under investment arbitration either as a defence to the jurisdiction of the tribunal and with regards to admissibility of the claim.[45] World Duty Free v Kenya[46] is one of the first such cases where an investment arbitration tribunal concluded not to have jurisdiction in cases where the underlying contract was obtained by corruption and stated that '…claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.' [47] The tribunal in Metal-Tech v. Uzbekistan decided that it lacked jurisdiction as the investment was procured by corruption and therefore there was no investment in accordance with the law as required by the underlying treaty and no consent according to the treaty and the ICSID Convention. Since then a number of investment tribunal have treated corruption on the part of an investor in procuring its investment as a jurisdictional impediment, contingent upon treaty specifications.[48] Even where there is no explicit legality clause in the underlying investment treaty, it has been debated whether all treaties contain an implicit legality condition that could serve as a bar to jurisdiction. These debates suggest that the notion of 'investment' under the ICSID Convention or the applicable treaty is interpreted as covering only those investments made in good faith and in accordance with host-state law barring recourse to investment arbitration to investment established through corruption.

Some tribunals have also found corruption to constitute under certain circumstances a breach of the principle of good faith, an abuse of right or an abuse of process.[49] They have underlined the fundamental nature and the long-standing recognition of the principle of good faith as a matter of domestic and international law, including investment law.[50] Thus, serious cases of fraudulent conduct, such as corruption, have been held to be contrary to international or transnational public policy[51] and arbitral awards have condemned such corruption invalidating corrupt contracts as contrary to bonos mores.[52] These decisions suggest that a claim arising from an investment tainted by illegality may be declared inadmissible on the basis of transnational public policy.

The tribunal in *Phoenix v. Czech Republic* [53] insisted on the duty of arbitral tribunals not to protect an abuse of the system of international investment protection under the ICSID Convention or bilateral investment treaties. Similarly, the tribunal in *Europe Cement v. Turkey* [54] stated that 'conduct that involves fraud and an abuse of process deserves condemnation'. In *David Minnotte and Robert Lewis v. Republic of Poland* [55], the tribunal held that, notwithstanding the absence of an express legality requirement in the BIT, 'it is now generally accepted that

investments made on the basis of fraudulent conduct cannot benefit from BIT protection'.[56] The tribunal in *Hamester v. Ghana* held that 'an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law'.[57] The tribunal further noted that 'these are general principles that exist independently of specific language to this effect in the [t]reaty'.[58] A confidential arbitral award in the case of *Spentex v. Uzbekistan* saw claims under the Netherlands-Uzbekistan BIT dismissed due to "red flags" of corruption surrounding the claimant's investment.[59]

However, one commentator suggests that doctrines of recognition, acquiescence, and/or estoppel under international law, preclude a state from contradicting or objecting to a factual or legal state of affairs, which it had earlier accepted as legitimate including corruption. [60] He argues against host states benefitting from the inconsistency of raising investor corruption as an absolute defence to liability, when they had earlier consented to the investor's corrupt act.[61] He contends that host-state participation in investor corruption (through state authorities solicitation and acceptance of bribes) can, in appropriate 'circumstances', give rise to a binding recognition of the legitimacy of the investment for investment protection purposes and principles of recognition, acquiescence and estoppel prevent the host state from raising investor corruption as a jurisdiction or merits- based defence against a treaty claim. Being founded on actual or apparent State consent, the 'circumstances' in which he seek to apply this rejoinder are narrowly circumscribed to host-states which unreservedly participate in or knowingly turn a blind eye to investor corruption.[62] He basis his argument on *inter alia* arbitral authority that supports the view that a host-state which overlooks or tolerates violations of its own law in the making of an investment, can be estopped or otherwise prevented from raising the illegality of the investment as a means to deny the tribunal's jurisdiction or defeat the investor's claim on the merits. One such case is *Fraport v Philippines* where it ruled that '[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.'[63] Another example is the Tribunal in *Ron Fuchs v. The Republic of Georgia* [64] which notes 'a host-state cannot avoid jurisdiction under the BIT by invoking its own failure to comply with its domestic law'. Other cases which apply similar reasoning include *Tokios Tokeles* v. *Ukraine*[65], *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* , [66] *Desert Line v Yemen*[67] and *Railroad Development Corp.* v. *Republic of Guatemala*, [68] Thus, while some awards and commentators insist that corruption on part of the investor is an absolute bar to either the jurisdiction of the tribunal to hear the claims or admissibility of the claims, there are arguments to suggest otherwise. However, at the time of finalising this article no investment award was found endorsing such rejoinders.

B. Institutional Investors as third parties to the corruption

There is thus a growing consensus of refusing investment protection to investors

tainted by corruption in investment arbitration decisions and this approach is also largely supported by academia. One can thus conclude that today if an investor making recourse to investment arbitration is found to be involved in serious fraudulent conduct such as corruption, it is more likely than not that its claims would be defeated by the host-state brining preliminary objection against the claim on the basis of corruption. As the aforesaid would hold true even for institutional investors seeking recourse of investment arbitration to affix state liability for corruption, it is of upmost importance for an institutional investor to come to investment arbitration with clean hands, without any taint of corruption and as a third-party to the corruption, if it has to succeed in its quest to affix state liability for the corruption. Institutional Investors who themselves are involved in the corruption directly or indirectly of course will not receive protection under IIA and will have no recourse to investment arbitration.[69]

Further besides the institutional investors who directly participate in the corruption, tribunals have held that even those who unreasonably fail to perceive corruption or knew or should have known of the corruption, may not be regarded as third parties to the corruption. However, they consider failure must be a 'conscious disregard' or 'deliberate ignorance' of the corruption 'as opposed to just failing to take due care'.[70] There are a few cases under investment arbitration which support this conclusion. In *Minnotte* v. *Poland*[71], the respondent had failed to provide evidence of deliberate fraud on the part of the investor. Therefore, the tribunal assessed whether its jurisdiction was vitiated by reason of the alleged negligent failure of the investor to investigate the factual circumstances surrounding the making of their investment. At jurisdiction stage, the tribunal rejected the proposition that principles of international law, such as *ex turpi causa non oritur action* (from a dishonourable cause an action does not arise), barred jurisdiction in the event of a negligent failure to make inquiries which might (or might not) have unearthed evidence of fraud. However, on the merits, the *Minnotte* tribunal contemplated the possibility that a claim may be vitiated where the claimant unreasonably failed to perceive evidence of serious misconduct or crime by a third party:

There may be circumstances in which the deliberate closing of eyes to evidence of serious misconduct or crime, or an unreasonable failure to perceive such evidence, would indeed vitiate a claim.[72]

In the *Churchill v Indonesia* the tribunal interpreted the paragraph in *Minnotte* quoted above and noted that it

...addresses the so-called "head-in-the-sand problem", also sometimes referred to as "Nelsonian knowledge", where a claimant knew or should have known of third-party wrongdoing in connection with an investment and still chose to do nothing (as opposed to just failing to take due care). Considering the specific circumstances of the present case, the Tribunal will assess the standard of wilful blindness – also referred to as "conscious disregard" or "deliberate ignorance" – by focusing on the level of institutional control and oversight deployed by the Claimants…[73]

In *Anderson v. Costa Rica*, the tribunal denied jurisdiction for lack of an investment, since the assets acquired by the claimant had been secured by a third party that had engaged in 'aggravated fraud and illegal financial intermediation' and noted that 'prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal'.[74]

Thus, in each case before an institutional investor seek to affix state liability for corruption as a third party to the corruption, a tribunal may, at the request of the host-state, conduct an analysis of the due diligence conducted by the institutional investor on the infrastructure project and project operator at the time of making the investment or during its subsistence. The depth of the due diligence which would help institutional investors as third parties will depend on the particular circumstances of each case. However, an institutional investor will be required to have satisfied itself of non-existence of corruption keeping in mind the general business environment in the host-state, including ensuring that a proposed investment complies with local laws as well as investigating the reliability of a project operators and state authorities' representations before deciding to invest. However, once this threshold is met, an institutional investor will necessarily be regarded as a third party to the corruption and would have recourse to investment arbitration to affix liability on the State for the corruption.

4. BASIS OF LIABILITY OF HOST-STATE FOR CORRUPTION BY STATE AUTHORITIES

The expansion of trade and investment has directed the focus of international law to protection of economic interests of foreign national abroad, from the nineteenth century.[75] Even the International Law Commission (ILC) on the topic of State responsibility originally focused on the responsibility of States for injuries caused to aliens,[76] despite the more general mandate given to the ILC by the United Nations General Assembly.[77] Much attention in the first years of the work of the ILC was thus devoted to classifying the various categories of injury caused to aliens, and the ensuing obligation to provide reparation.[78] In doing so, the ILC at that time had included in certain of its draft articles substantive rules in relation to the treatment of aliens, such as the 'duty of protection' of States and rules relating to expropriation and nationalization.[79] Thus, originally there was a double focus on the responsibility of States for injuries caused to aliens and on the primary rules [81] in this respect. However, its concluded for, the 2001 Articles of State Responsibility for Internationally Wrongful Act ('ASRIWA') only focus on the secondary norms governing State responsibility and do not seek to define the contents of the primary obligations of States.[81] Thus, the ASRIWA, as it stands is of no assistance in determining if international law contains rules which could be breached by corruption of state authorities giving rise to a claim for state responsibility. The development of IIA is primarily a response to these uncertainties and inadequacies of customary international law of state responsibility for injuries to aliens and their property.[82] Today IIA are the primary international law instruments governing the protection of foreign investment.[83] They most often combine similar and sometimes identical treaty-based standards of promotion and protection of foreign investments.[84] This section discusses prevalence of primary rules under IIA which can be the basis for affixing state liability for corruption. In

most cases corruption by state authorities will breach multiple of these rules and there will be an overlap in liability.

A. Arbitrariness

Most IIAs provide for fair and equitable treatment (FET) of foreign investments.[85] This standard can be viewed as reflecting elements of the rule of law and as serving to restrain abuses of governmental power.[86] However, it is widely recognized that '[i]t is difficult to reduce the words 'fair and equitable treatment' to a precise statement of a legal obligation,' and international arbitral tribunals have generally 'proved unwilling to provide a specific definition of the content of this provision.'[87] Despite this, a number of factors have been repeatedly identified as requirement to refrain from arbitrariness in decision making as forming part of the FET standard.[88] Contrary to the debate on the subject in academia, there appears to be relatively little objection among arbitral tribunals to the notion that a state's obligation to refrain from arbitrary conduct is included in its obligation to provide fair and equitable treatment.[89] It is also generally accepted that International Minimum Standard (IMS) of treatment exists in customary international law.[90]

They serve a key role in promoting and protecting foreign investment by assessing government conduct based on internationally accepted standards of good governance.[91] In spite of its content itself remaining contentious, a number of scholars consider the prohibition of arbitrariness as an obligation under IMS and customary international law.[92] For them the prohibition of arbitrary conduct is a general principle of law, indirectly incorporated into the corpus of international law[93] and grounded on the principle of abuse of rights and the requirement of good faith[94] They explain that an abuse of rights may occur when a state exercises rights for a purpose other than that for which the right exists.[95] Thus both FET and IMS overlap significantly with respect to issues such as arbitrary treatment and unanimously require states to refrain from arbitrariness.[96]

The fact that notions of arbitrariness varies across domestic administrative systems complicates the formulation of an international principle[97] Being a multifaceted term it has different meanings depending on the context surrounding it.[98] In legal terms, Black's Law Dictionary defines 'arbitrary' as a conduct 'founded on prejudice or preference rather than on reason or fact.'[99] This definition has been adopted by several investor-State arbitration tribunals.[100] According to UNCTAD 'arbitrary' means 'derived from mere opinion', 'capricious', unrestrained', 'despotic' and arbitrary conduct has been described as 'founded on prejudice or preference rather than on reason or fact'. It explains that arbitrariness in decision-making has to do with the motivations and objectives behind the conduct concerned.[101] In ELSI Case, the ICJ explained that illegality under local law was not sufficient to make the mayor's conduct 'arbitrary' under international law. It noted that '[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law'. In *Azurix*, the tribunal stated that 'in its ordinary meaning, 'arbitrary' means 'derived from mere opinion,' 'capricious,' 'unrestrained,' 'despotic.'[102] As was the case in *Lauder* where the Tribunal found a measure as arbitrary when it was motivated by inappropriate considerations.[103] In *Siemens,* a measure was found arbitrary when it was not based on reason.[104]

The threshold of severity applied by tribunals in order to establish a finding of arbitrariness has been consistently high. In the *Neer Case*, the Mexico-US General Claims Commission referred to the standard as 'an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'[105] In the *ELSI Case,* the ICJ opined that a finding of arbitrariness "shocks, or at least surprises, a sense of juridical propriety."[106] These decisions have been criticized by some writers not only for the vagueness of the standard it enunciates,[107] but also for its lack of relevance as a precedent in the context of the FET standard.[108] Yet, it remains that this definition has been endorsed by numerous investor-State tribunals.[109] In the *Tecmed* case, the tribunal applies the *ELSI* definition's standard in conjunction with the reasonable-person standard in *Neer* in finding that state action may be characterized as arbitrary if it presents 'insufficiencies that would be recognized '. . . by any reasonable and impartial man,' or, although not in violation of specific regulations, as being contrary to the law because '. . . (it) shocks, or at least surprises, a sense of juridical propriety'.[110] Similar wording has been used by other tribunals, including *S.D. Myers v Canada* referring to treatment that 'rises to the level that is unacceptable from the international perspective'[111], *Waste Management v Mexico* speaking of 'wholly arbitrary' conduct[112] and *Thunderbird v Mexico* requiring proof of 'manifest arbitrariness falling below international standards'[113] The tribunal in *Glamis Gold, Ltd. v. United States*[114] reiterated the requirement of 'something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning also setting the threshold of liability at 'manifest arbitrariness.'[115] In the *Sempra Energy International v Argentine Republic* and *Enron Corp. and Ponderosa Assets, L. P. v. Argentine Republic*, the tribunals specified that 'a finding of arbitrariness requires that some important measure of impropriety be manifest.'[116] The tribunal in *Cargill, Inc. v. Mexico* also imposed a high threshold of liability and explain that 'arbitrariness may lead to a violation of a State's duties […] only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action […] grossly subverts a domestic law or policy for an ulterior motive'[117]

In cases of corruption in the infrastructure sector, inappropriate considerations such as bribes and favours are used to influence State authorities to take certain arbitrary actions. These include granting projects, licenses and clearances to the project companies by preference rather than on reason or fact. There can be no doubt that such arbitrary actions would often meet the threshold of 'manifest arbitrariness' and in most cases, would be achieved by 'gross subversion of domestic law for ulterior motive'. When such arbitrary actions, eventually lead to damages to institutional investors in form of cancelation or suspension of projects, a case for liability for the State will arise under IIA. Thus, institutional investors can affix state liability for corruption by using its protection against arbitrary actions under investment treaty regime as a primary norm of international law.

B. Coercion and Bad Faith

It transpires from arbitral practice that according to the 'fair and equitable treatment' standard, the host must grant the investor freedom from coercion or

harassment by its own regulatory authorities.[118] In *Waste Management v Mexico*[119] the Tribunal reasoned that FET requirement would be breached in case of deliberate conduct comprising conscious combination of the agencies of the State in order to frustrate the investment through improper means. In *Vivendi v Argentina* the Tribunal noted that politically motivated harassment may amount to a breach of fair and equitable treatment where regulatory powers are used for an improper purpose.[120] In *Desert Line Projects LLC v. Yemen*, the tribunal found a breach of fair and equitable treatment where the investor was coerced into a settlement agreement.[121] Scholars too agree that bad faith, coercion, threats, public denunciation and harassment of an investment by a host state are in most situations likely to result in a breach of fair and equitable treatment.[122]

A few cases have dealt with allegations of bribery and corruption as violations of the FET, falling within the scope of bad faith conduct on the States' part. In *EDF v Romania*[123] the investor, operating State-owned airport premises on long-term lease conditions, was denied renewal of its lease agreement. The investor alleged that on several occasions its representatives were solicited to pay bribes by persons who claimed they were acting on behalf of the Romanian government. As the investor refused to pay bribes, the government retaliated by refusing lease renewal and thus deprived the company of its business in Romania. The Tribunal was not persuaded by the evidence adduced by the investor and could not agree that the corruption allegations were substantiated. However, what may be inferred from the dicta of the Tribunal and is important for this study, is that corruption solicitation does breach the FET, such conduct would qualify as bad faith,[124] and that the breach cannot be established until the person requesting the bribe is proved to be acting on behalf of the government.[125] In *Jan Oostergetel Case* the investor acquired shares in a privatized company in the Slovak Republic. As the company had increasing debts and liabilities, some of its creditors, including the tax authorities, applied for bankruptcy proceedings. The company was found insolvent, and its property was distributed to creditors in accordance with a realization plan. The investor alleged that their business had been ruined by the Slovak financial mafia and particularly local competitors who wanted to acquire unlawfully the assets of the claimant's company. For this purpose, they instituted the bankruptcy proceedings, bribed the Slovak authorities, including the judiciary, and finally obtained the assets upon the company's dissolution. The Tribunal in its dicta noted that, if it had been proven, corruption would have been bad faith to the effect of a breach of the FET.[126]

In both situations, the investor faced an unfavorable attitude due to (a) unwillingness to bribe the corrupt governmental officials, or (b) actions of corrupt government officials who are bribed and instructed to harm the investor under the influence of third parties. Such acts clearly qualify as bad faith on the State's part. Thus, institutional investors or their investments, facing losses stemming from such unfavorable attitude of host-states owing to corruption by competitor or politicians, can claim for breach of fair and equitable treatment standard under an IIA.

C. Legitimate Expectations

While there has been a serious debate in academia on protection of legitimate expectations of an investor as a part for the fair and equitable treatment standard under investment treaties,[127] tribunals have identified the protection of legitimate expectations as a key/dominant element of fair and equitable treatment standard.[128] In fact, references to legitimate expectations have become ubiquitous in IIA claims and award. [129] While there is no agreement on the nature of expectations of an investor are protected, many awards hold this to include expectations arising from the foreign investor's reliance on specific host state conduct, usually oral or written representations or commitments made by the host state relating to an investment, relied typically by making an initial investment or the expansion of an existing one.[130] This understanding of 'legitimate expectation' is closely related to the principle of estoppel and state responsibility under public international law for unilateral acts[131] and arise as a result of specific state conduct directed at the investor in the form of oral or written representations, undertakings or commitments, various types of administrative acts such as licenses or permits or providing an official opinion or view, upon which the investor relies on.[132] The NAFTA tribunal in *Thunderbird v Mexico* describes the elements of legitimate expectations as situation where a States conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the State to honour those expectations could cause the investor (or investment) to suffer damage.[133]. The Tribunal in *SPP* v *Egypt*[134] held that acts of Egyptian officials cloaked with the mantle of Governmental authority and communicated as such to foreign investors, whether legal under Egyptian law or not, created expectations are protected by established principles of international law.[135] Similarly, in *MTD v Chile*, the tribunal found that Chile by authorizing a development project under a foreign investment contract for a project which was refused to proceed on the basis that it ran afoul of predetermined urban development policies[136] acted contrary to the investor's 'basic assumptions.' [137]

Corruption in infrastructure projects by State officers on several occasions leads to breach of legitimate expectation of institutional investors. In all cases where institutional investors make the decision to invest based on government approvals and licenses of a project obtained through corruption, it places reliance on the validity on such approvals and licenses. When eventually the approvals and licenses run fowl on account of corruption, host-states representations with regards the legitimacy of such projects to the institutional investor through such approvals and licenses prove false. Such situations would squarely fall within the ambit of breach legitimate expectations giving rise to liability of the host-state.

However it may be noted that tribunals have taken into account the host-state's circumstances when considering if there has been a failure to protect legitimate expectations[138] The Tribunal in *Bayindir v Pakistan*, explained that in analysing reasonableness of expectations of the investors 'all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State'.[139] The approach in *Bayindir* is consistent with *Generation Ukraine v. Ukraine*,[140] *Parkerings v. Lithuania*,[141] *Duke v. Ecuador*,[142] and *Biwater v. Tanzania*.[143] Thus, while institutional investors may have a case for breach of legitimate expectation when its revealed

that approval and licenses granted to a project were obtained by corruption, it may be subject to the general perception of prevalence of corruption in a given host-states. One could argue that some host-states like Yemen and South Sudan, which are ranked at 170 and 175 in the Corruption Perception Index by Transparency International[144] or Syria and Somalia, who are amongst the 15 UN members who have not ratified the UNCAC and are ranked 173 and 176 (last) in the Corruption Perception Index by Transparency International[145], may not give rise to legitimate expectations of government approvals and licenses being free from corruption. However, today almost 182 parties to the UNCAC have acknowledge that prevention and eradication of corruption is a responsibility of all States[146] and this global sentiment against corruption should definitely be considered in determining the veracity of investors' expectations of propriety on part of state authorities.

D. Indirect Expropriation

Expropriation can occur in myriad ways but primarily it can be classified in two ways: (i) forms of expropriation in which the state openly and deliberately seizes property, and/or transfers title to private property to itself or a state-mandated third party;[147] and (ii) forms of expropriation in which a government measure, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits.[148] The former is often referred to as 'direct' expropriation and the latter as 'indirect' expropriation to identify the latter.[149] The tribunal in *Starrett Housing Corporation v. Iran* explains indirect expropriation as 'measures taken by a state [which] interferes with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.' [150] The tribunal in *Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran v. Iran* explain this form of expropriation as 'a deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.'[151] There also seems to be a general consensus amongst several tribunals that for indirect expropriation to occur the deprivation of economic use and enjoyment shall be substantial or such as if rights related to investment had ceased to exists.[152] One form of indirect expropriation discussed by several scholars[153] is 'constructive expropriation' or 'de facto expropriation' or most commonly 'creeping expropriation'.[154] According to some scholars the term creeping expropriation refers to a series of separate government measures[155] that, although not expropriatory when considered as separate and distinct measures, are expropriatory when considered cumulatively.[156] UNCTAD's paper on Taking of Property defines creeping expropriation as 'the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment'.[157] Reinisch finds that creeping expropriation 'may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights. […]

The focus is on the cumulative effect of various acts and omissions, which may sometimes allow their characterization as an expropriation only in retrospect.'[158] Though writings may use different language when describing the composite act constituting creeping expropriation, some scholars argue that they generally refer to the composite act as understood as per Article 15[159] of the ASRIWA.[160] Thus different definitions of creeping expropriation by various authors point to the following constitutive elements of creeping expropriation: (i) a composite act with a distinctive temporal element, (ii) the attribution of each act (constituting a composite act) to the State, and (iii) the substantial deprivation which proves that the sequence combination of different but attributable acts effectively deprived the investor of its investment.[161] Tribunal too have discussed creeping expropriation time and again.[162] In the *Generation Ukraine* the arbitral tribunal rejected the plea based on the creeping expropriation after having concluded that '[c]reeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the state over a period of time culminate in the expropriatory taking of such property.' In *BiWater v. Tanzania,*[163] the Tribunal found examining the cumulative effect of different acts attributable to Tanzania 'akin to the accumulation effect that is well-recognised in the specific context of creeping expropriation.'[164] For the tribunal in *Siemens* v *Argentina* '[b]y definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.' [165] Thus, creeping expropriation is a form of indirect expropriation which comprises of several acts that have an adverse effect on the investment which eventually have the effect of depriving the institutional investor of the economic use and enjoyment of its investment while keeping the title of investment unaffected. In such form of expropriation, it is not required for each adverse act to be an illegal act.

Institutional Investors on several occasions face a complete deprivation of their investments owing to series of measure taken by corrupt state authorities followed by State measure taken to counter corruption. Other times state-authorities through their bad faith and coercive actions stemming from corrupt schemes between themselves and politicians or competitors to destroys the entire infrastructure project. It is submitted these forms of deprivation of institutional investor's investment is akin to creeping expropriation. Take for example a project for development of a business hub for which public tenders are invited by a State 'X'. Project Company 'Y' successfully participates in the tender and obtains a contract to develop and operate the business hub (Project). However, Y's success in the tender is simply owing to the corrupt scheme with officers of X. After obtaining the Project, Y approaches Institutional Investors 'Z' to fund the Project. After conducting requisite diligence on the Project Z investment 100 Million into the project. For three years the corrupt scheme between Y and officers of X

persists during which Y receives ownership of a sizeable plot of land, licenses, and approvals to operate the Project. In the fourth year, criminal investigation agency of X initiates an investigation against Y accusing it for obtaining the tender by a corrupt scheme with officers of X. In the fifth year, after complying with necessary legal requirements X issues a decree cancelling the Project. In such a situation, there are a series of act which are attributable to the host-state. First being grant of the Project, second being grant of land, licenses and approvals during the operation of the Project and third being a decree cancelling the Project. As discussed above the first and seconds acts could arguably violate obligations on host-state to refrain from arbitress and to protect legitimate expectations of investors. It is submitted that while the third and final act attributable to the State is a legal act, being the decree to cancel the Project, international law will look at the composite effect of all three acts attributable to the host-state to determine if there is an expropriation of Z's investment owing to corruption by X's officers. As the cumulative effect of these three acts would deprive Z of the economic interest and enjoyment of its investment, for no fault of Z, they would be looked at as indirect creeping expropriation requiring compensation from X to Z. This is because the principle of respect for property rights of aliens, forms part of generally accepted international law[166] and by acting in a corrupt manner X's officers undeniable disrespect property rights of Z in the Project. A case which supports this argument is *Siag & Vecchi v Egypt*[167] which dealt with Egypt's confiscation of a hotel site because the investors had received some financing from an Israeli company for the project.[168] While the tribunal agreed that confiscation was in and of itself is not an illegitimate act but as Egypt had failed to meet the requirements under the Italy–Egypt BIT the tribunal found it to be unlawful expropriation which was compensable as per principles of international law.

While under customary international law, a State may forfeit property to enforce its laws, without compensation, it does not incur responsibility only subject to an analysis of proportionality and reasonableness.[169] This requirement for reasonableness and proportionality is also subscribed by the European Court of Human Rights in the case of *James and Others v UK*[170] where it calls for reasonable relationship of proportionality between expropriation and the aim sought to be realised. For it 'the requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden' [...].' It considers that 'a measure must be both appropriate for achieving its aim and not disproportionate thereto'.[171] When X indirectly expropriates investment of Z for punishing acts of corruption of its own officers, Z faces a severe burden for no fault of his own. Compensation should thus be due as a balancing act, to remove any disproportionate burden on Z of X's own officers' corruption. In Judge Rosalyn Higgins words, the decision lies in deciding 'whether such losses shall be borne by the individuals on whom they happen to fall (in which case […] no compensation is due) or whether they shall be socialized, i.e., borne by the common treasury…'[172] As Z faces loses owing to no fault of his, it only seems reasonable that the impact of corruption on its investment should be compensated by the host-state.
Lastly, it is submitted that such compensation will be due to Z even if X's domestic law provides for no compensation to its owns nationals in similar situations. This is because, unlike nationals, investors generally play no part in the election or

designation of its authors nor have been consulted on its adoption.' [173] Thus, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals. [174] This view is supported by tribunals in *Tecmed v Mexico*[175] and *Azurix v Argentina*[176]. The tribunal in *Quasar de Valores v Russian Federation*[177] justifies compensation to investors even in cases of expropriation of foreign assets for *bona fide* public interest on the basis that such exportation is only for '…the accomplishment of regulatory objectives for the benefit of a national community of which the investor in not a member.' Thus, as Z neither play any part in election of the authors of corruption and nor benefited from the community interest which X's national benefit from the cancelation and confiscation of the Project, it should have a claim compensation despite their being no equivalent provisions under domestic law.
Thus, in situations where a State cancels licenses or confiscates projects in the infrastructure sector owing to corruption of its own officers in pursuance of its laws, in a non-discriminatory way and complying with due process requirement, it must compensate innocent institutional investors as a balancing act to remove the disproportionate burden on them and to compensate for the unlawful acts of its officers that cause the impairment to the investment. This is especially in light of the fact that the confiscation/ cancellation is only occasioned owing to the corrupt conduct of its own official. Such an approach is in line with the global sentiment of focusing the consequences of corruption both on the demand and supply sides. If States are permitted to cancel/confiscate projects tainted with corruption without any consequences on itself, it would be counter-productive to the global fight against corruption which is evidenced in the preamble of UNCAC.[178] In fact, the requirement of compensation for indirectly expropriated investment of an innocent institutional investor is supported by Article 34 of the UNCAC which states that:

"*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address the consequences of corruption. In this context, State Parties may consider a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action*."

The essential elements to be taken from this provision is that while the consequences of corruption may lead to the annulment or rescission of a contract or the withdrawal of a concession, rights of third parties acquired in good faith must be protected and given due regard. Thus, the question is nuanced when the institutional investor's grievance is based on corruption as a third party to the corruption. Once the institutional investor can establish that it is a *"third party"* that acquired rights *"in good faith"* it would have certain protections recognised by international law which should include compensation for investments indirectly expropriated owing to confiscation / cancelation of infrastructure projects on account of corruption of State officials. Similarly, when the indirect creeping expropriation occurs owing to bad-faith and coercive acts of state-authorities it would too be compensable.

5. STANDARD OF PROOF OF CORRUPTION FOR AFFIXING STATE LIABILITY

It is undisputable that in cases where institutional investors assail to investment arbitration seeking to affix state liability for corruption, the burden of proving corruption will lie on them. Following the maxim *onus probandi incumbit actori* (or *actori incumbit probation*), the prevailing principle in international dispute resolution is that each party has the burden of proving the facts on which it relies.[179] The procedural rules applied by international courts and tribunals recognize this rule widely, and tribunals have consistently confirmed this in the case law.[180] Thus, the important question which needs consideration to affix state liability for corruption in infrastructure projects using investment arbitration is not the burden of proof but the standard of proof of corruption an institutional investor will have to meet before the tribunal can reach a positive finding on the fact of corruption.

It is widely acknowledged that an allegation of corruption is a very challenging one to prove owing to the difficulty of procuring direct evidence establishing its existence. Despite this a number of commercial arbitration awards issued under the International Chamber of Commerce (ICC) rules have proposed a standard of proof higher than the balance of probabilities, to prove allegations of. [181] If one was to examine the majority award in *EDF v Romania,* it may appear that the same high threshold for proof of corruption exists even in investment arbitration. In that case the Tribunal set a relatively high threshold for proof of corruption, stating that there was general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.[182] However, this statement may not be entirely correct. In fact, some commentators have critiqued the Tribunal in *EDF* as having imposed too high a standard of proof on the Claimant and argue given that corruption is difficult to prove, tribunals should not react by imposing an even higher burden of proof than usual. Some refer to the tribunal's approach to the standard of proof has also been characterized as an 'eyes shut' approach to proof of corruption [183] A careful analysis of case law establishes, contrary to the Tribunal's finding in *EDF*, that the standard of proof for allegations of corruption in investment treaty cases remains contested, with some arguing for tribunals to apply the general principle of balance of probabilities[184] and others supporting the implementation of a higher standard.[185] This is primarily because in admitting evidence as to alleged corruption, tribunals have considerable discretion as to the admissibility and weight of evidence under regularly applicable procedural rules.[186] As a result, there has been no consistently applied standard of proof by tribunals in the investment arbitration context with regards to allegations of corruption. In fact, tribunals seem to sidestep formal discussions of the applicable standard of proof and instead concentrate on the evidence at hand and the probative value of such evidence in accordance with the flexibility and authority afforded to them.[187] It appears that once a tribunal finds that evidence is sufficient to establish corruption in a given fact-scenario the institution investor will be deemed to have satisfied the standard of proof for corruption and the burden of disproving existence of corruption would shift of the host-state. Scholars, particularly those focused on improving the effectiveness of arbitration in combating corruption, too have argued the importance of such burden-shifting advocating the greater utilization of a number of solutions to perennial evidentiary problems in corruption.[188] Also apart from identifying

appropriate instances where the burden of proof should be shifted they suggest a number of techniques through which burden-shifting can be achieved including (i) reliance on circumstantial evidence; (ii) drawing on factual findings in domestic proceedings and (iii) drawing adverse inferences. In cases where institutional investors seek to affix state liability for corruption the focus should be on employing the aforesaid which could help them meet the standard of proof of corruption and shift the burden of the host-state to disprove corruption.

A. Reliance on Circumstantial Evidence

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.[189] The *Methanex v. United States* award is instructive in this regard, as its endorsement of the 'connect the dots' methodology to reach a conclusion based on proven facts and discusses the applicability of circumstantial evidence in investment arbitration case law.[190] Thus, in reaching a conclusion of allegations of corruption tribunals consider a number of factors including the inherent likelihood (or not) of corruption in the circumstances and link between the advantage bestowed and the improper advantage allegedly obtained,[191] which are not direct but circumstantial evidences of corruption. In *Metal- Tech*, for example, the tribunal recognized the international community's establishment of lists of indicators of corruption (or 'red flag') and considered red flags 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, to reach its finding on existence of corruption.[192] These 'red flags' can be conceived as potential forms of circumstantial evidence that, once established, can lead to a shifting of the burden of proof, requiring the rebuttal of allegations by evidence to the contrary, failing which certain inferences and conclusions might be drawn.

In establishing it claim for State liability arising from corruption of its officers, especially in cases where the alleged breach is of a primary obligation to refrain from acting bad-faith or coercion, institutional investors often will find it difficult to adduce direct evidence of demand of bribes by State officers or payment of bribes by competitors. However, convincing evidence of bad-faith and coercive action itself could play a crucial role as circumstantial evidence in satisfying the standard of proof of corruption and shifting the burden to disprove corruption on the host-state.

B. Factual findings in domestic proceedings

While tribunals have explored the question of the extent to which evidence obtained during anti-corruption investigations could be used as evidence or ordered for disclosure in an investment arbitration and whether evidence obtained during investment arbitration proceedings could be disclosed to host State investigating authorities, they have adopted varying approaches to conclusions reached by local investigation authorities on the case in hand before it. In *TSA Spectrum* v. *Argentine*, the arbitral tribunal came to its own conclusion that

corruption was not established on the facts available, even though criminal investigations had been started in Argentina in connection with the concession and to which there had not yet been an outcome.[193] However, in *Niko Resources v Bangladesh* the tribunal accepted and indeed solicited information from various domestic proceedings and investigations and concluded that the investors' guilty plea before Canadian courts was evidence enough that it had committed acts of corruption.[194] Similarly, in *Africa Holding Co. v Democratic Republic of Congo*[195], the tribunal agreed to take into account evidence from domestic criminal proceedings.[196] Likewise, in the *Fraport v Philippines* concurrent to the arbitration, a law enforcement agency within the host State undertook an investigation as to whether the investor had breached the host State criminal law. To assist with its analysis as to whether or not the investment had been made 'in accordance with' host State laws, the Tribunal ordered that the host-state disclose the entire case file of that law enforcement agency in order to assist with the Tribunal's jurisdictional analysis and then analysed that case file as compared to documents produced during the arbitral proceedings.[197] In *EDF v Romania* too, the Tribunal compared an initial interview of one of the investor's witnesses by the Romanian Anti-Corruption Agency, during which he denied having any knowledge of the identity of who had solicited a bribe, to the evidence given by that same witness during the arbitration proceedings during which that witness made specific allegations that a certain government official had solicited a bribe from him.[198]

When an institutional investor faces damages owing to corruption in the infrastructure sector it is often caused, as discussed above, owing to a State's own finding of corruption leading to cancelation of projects and confiscation of land and licenses. In such situations, it would only be prudent for institutional investors to rely on records in domestic proceedings with regards corruption of State officials. A State after taking positive steps on basis of these proceedings, will find it difficult to deny existence of corruption. Such evidence would undoubtedly satisfy the standard of proof for corruption and shift the burden of the State to establish why liability should not be affixed.

C. Drawing adverse inferences

According to the tribunal in *Rompetrol Group N.V. v Romania* '[w]hether a proposition has in fact been proved by the party which bears the burden of proving it depends not just on its own evidence but on the overall assessment of the accumulated evidence put forward by one or both parties, for the proposition or against it.'[199] This is because investment arbitration decisions concerning investor wrongdoing seem to draw conclusions on the basis of inference, either because a party did not produce evidence when asked to do so by the tribunal or because that party should have had within its possession exonerative evidence but did not produce it.[200] The *Metal-Tech* tribunal considered that adverse inferences can indeed be drawn in appropriate instances to prove corruption and states that 'the Tribunal may draw appropriate inferences from a party's non- production of evidence ordered to be provided.'[201]

Thus, institutional investors alleging corruption should take advantage of the various mechanisms at their disposal to substantiate corruption allegations and

overcome evidentiary obstacles. This would include requests for production of documents[202] from domestic proceedings and administrative decision making in connection with the projects; inspection of originals[203] and requests for examination of witnesses including officers accused and subordinates[204]. If these requests go unheeded, they may also request the tribunal to draw adverse inferences.[205] This will help institutional investors fortify its case for corruption and establish a case of state liability.

6. Measure of compensation for losses owing to Host-State corruption

Borzu Sabahi in his book *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* concludes that since the nineteenth and early twentieth century arbitration cases involving protection of foreign nationals, monetary compensation was the preferred remedy.[206] One example he notes is the *Lusitania* Cases.[207] which grew out of the sinking of the British ocean liner *Lusitania*, torpedoed by a German submarine off the coast of Ireland on 7 May 1915, during the period of American neutrality. Of the 197 American citizens aboard the Lusitania at that time, 69 were saved and 128 lost. The Government of Germany assumed liability for the losses of the American nationals through its note of 4 February 1916. A three-person commission presided over by umpire Parker rendered a decision on the reparation due by Germany to the United States by virtue of the losses suffered by American citizens. The tribunal deemed the principle of monetary compensation the cornerstone of the international law of reparation and noted:

"It is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received. It is variously expressed as 'compensation', 'reparation', 'indemnity', 'recompense', and is measured by pecuniary standards, because, says Grotius, 'money is the common measure of valuable things"

It is thus not surprising that compensation is the most common type of remedy sought and awarded in investor state arbitration cases.[208] With regards the measure of compensation, *Sabahi* notes that in historically tribunals have awarded full compensation and have required payment of money for both the actual material damage (damnum emergens) and for lost profits (lucrum cessans).[209] He traces the source of this measure to Roman and civil law.[210] He supports his conclusion by citing various authorities including Edwin Borchard's seminal work in Diplomatic Protection of Citizens Abroad which notes that 'international law … has provided no fixed measure by which damages may be assessed, but in this respect, has followed the Roman and the civil law in vesting wide discretionary powers in the judge or arbitrator.'[211] He submits that considering that the great majority of the international disputes that were, in fact, litigated at the time involved economic or other injury to foreign nationals or their property, this approach represented a jurisprudence constant.[212] This measure for compensation for injuries to foreign nationals, prevalent since the nineteenth century is in line with ASRIWA under which breach of a legal obligation which

triggers duties by the violator to *inter alia* compensate for damages caused which cover any financially assessable damage including loss of profits insofar as it is established. [213] Further, the ASRIWA commentaries to articles on kinds of reparation under international law (restitution,[214] compensation,[215] and interest[216]) refer to individual–state disputes on a par with inter-state disputes. The article thus adopts this measure of compensation under international law and submits that in cases where bases of liability of host-state is breach of IIAs owing to corruption of State authorities the compensation due to institutional investors will include payment of money for both the actual material damage and lost profits.

As seen in Section 4, in cases of corruption by state authorities it is likely that there will multiple violations of IIA arising from the same set of governmental acts. This phenomenon reflects the level of convergence (and overlap) between and among various bases of liability.[217] Multiple violations, however, will not entitle institutional investors to multiple sets of compensation. The rule against double recovery prevents this.[218] Thus, once liability is affixed for corruption the host-state will be liable to make full compensation of the losses which will be a collective measured for all bases of liability of the host-state.

7. Conclusion

While governmental corruption is sometimes known as passive[219] this does not imply that the state authority is a passive victim of the briber. In fact, most times it is the state authorities who plays a more active and demanding role than the briber. However, notwithstanding the acknowledgement state responsibility to eradicate corruption under the UNCAC by its 176 members, many States have seemingly viewed their international anti-corruption obligations as largely limited to addressing the supply-side of bribery transactions, i.e. on the bribe givers.[220] even with the increase in mutual legal assistance and civil society pressure that has been wisely suggested by some, States lack the political will to assist in the investigation and prosecution of their own officials and authorities.[221] One clear reason is that States do not regularly face real consequences when they do not cooperate in the battle against corruption.[222] Thus while States have focused attention on disrupting and prosecuting bribe payers, they have largely ignored or been reluctant to robustly address the demand side of bribery, that is, the corrupt state authorities who solicit or demand bribes[223] The same holds true for corruption related cases in investment arbitration where the majority discourse is towards examining corruption as a preliminary defence to the claimant's case without focusing on the consequences of corruption on the host-state.

Today there is, growing literature seeking to direct attention to the demand-side aspects of global corruption.[224] However research into legal remedies aimed at the demand-side of corruption has largely focused at the level of the individual corrupt foreign official i.e. (i) strengthening transparency and reporting regimes,[225] (ii) augmenting forfeiture mechanisms and (iii) in some rare case utilizing other available extraterritorial criminal laws (like anti-money laundering laws) in order to hold corrupt foreign officials accountable for bribe solicitation and extortion under domestic laws.[226] This article attempts to change focus of legal remedies against

the demand-side of bribery to host-states, and explores how investment arbitration can be useful to hold States accountable under international law for corruption of state authorities in the infrastructure sector.

One cannot deny the ever-growing need of institutional funding to meet the capital requirement in emerging economies for infrastructure development and the serious impact of corruption in the infrastructure sector has on institutional investors. IIA are designed to protect investors and their investments and the need of the hour is to protect institutional investors from this adverse impact of corruption. As discussed above, corruption of state authorities violates some basic primary obligation of the host-state under the investment treaty regime including obligation not to impair investments through arbitrariness in state actions, bad-faith or coercive actions, breach of legitimate expectations of the investor and indirect expropriation. A State undeniably entails international liability for breach of these primary obligations and investment tribunals have the jurisdiction to affix such liability.

While it may not be the role of investment tribunals to act as international courts acting to enforce the rule of law, by affixing State liability for losses suffered by innocent third parties owing to corruption of state authorities investment tribunals will implicitly perform such a role while maintaining its function of adjudication of investment disputes. Adjudication of claims by innocent third parties against host-states for corruption of state authorities will not only help in recovering the losses caused by corruption but also change the focus of international investment law on the demand-side of corruption. If States are held liable by international tribunals for corruption of state authorities, it can provide the necessary push to create political will in State to bring their focus on the demand-side of its international anti-corruption law. Thus, by affixing State liability for corruption investment arbitration can play a dual of role of providing restorative and retributive justice for State corruption, through international law.

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1 Della Croce, R. and J. Yermo, 'Institutional Investors and Infrastructure Financing', (2013) *OECD Working Papers on Finance, Insurance and Private Pensions*, No. 36, OECD Publishing, Paris. <http://www.oecd.org/daf/fin/privatepensions/WP_36_InstitutionalInvestorsAndInfrastructureFinancing.pdf>

2 *see* Della Croce, R. (2011), "Pension Funds Investment in Infrastructure: Policy Actions", *OECD Working Papers on Finance, Insurance and Private Pensions*, No. 13, OECD Publishing, Paris, p.7

3 ibid, p.1

4 George Inderst, 'Infrastructure Investment, Private Finance, and Institutional Investors: Asia from a Global Perspective', (2016) ADBI Working Paper 555. Tokyo: Asian Development Bank Institute, available at <https://www.adb.org/sites/default/files/publication/179166/adbi-wp555.pdf>, at p. 7

5 ibid, p.8

6 Della Corce, 'Pension Funds Investments' (n.2), p. 1

7 Fiona Stewart and Juan Yermo, 'Infrastructure Investment in New Markets: Challenges and Opportunities for Pension Funds', (2012) OECD Working Papers on Finance, Insurance and Private Pensions, No. 26, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5k8xff424vln-en>, at p. 10.

8 Adrian Blundell-Wignall, Yu-Wei Hu and Juan Yermo, 'Sovereign Wealth and Pension Fund Issues', (2008), OECD Working Papers on Insurance and Private Pensions, No. 14 <http://www.oecd.org/finance/private-pensions/40345767.pdf>

9 United Nations Conference on Trade and Development, 'World Investment Report 2014, Investing in the SGDs: An Action Plan, (United Nations Publication) 2014 <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf>, at p. ix.

10 Stewart and Yermo, 'Infrastructure Investment in New Markets' (n. 7), at p.10

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11 For country wise example *see* David Hall, 'Privatisation, multinationals, and corruption', November 1999 Development in Practice Vol 9 (5).

12 For example, in 2012, India's auditor general indicted the Andhra Pradesh government for giving away large tracts of government land to private parties without safeguarding the interests of the state. Soon thereafter Central Bureau of Investigation, India stared criminal proceedings against perpetrators of this corruption including leader of the opposition in the Andhra Pradesh Legislative Assembly and president of YSR Congress Party YS Jagan Mohan Reddy and I Shyam Prasad Reddy, managing director of Indu group to whose group companies several such projects were allotted. In 2015, the Enforcement Directorate of India attached properties of companies belonging to Indu Projects Limited's and its group companies. BS Reporter Institutional, 'ED attaches assets of Indu Projects promoter Syam Prasad Reddy' *Business Standard* (Hyderabad 2015) <http://www.business-standard.com/article/current-affairs/ed-attaches-assets-of-indu-projects-promoter-syam-prasad-reddy-115020900359_1.html>. Investors such as Credit Suisse PE, Citigroup Venture Capital, Maple Holdings, IDFC, Sun Apollo and Red Fort Capital are said to have substantial investment in these projects. Madhav A Chanchani, 'Credit Suisse PE Invests $113 Million In Hydrabad's Indu Projects', *VC Circle* (2008) <http://old.vccircle.com/news/real-estate/2008/08/12/credit-suisse-pe-invests-113-million-hydrabad%C2%92s-indu-projects>

[13] For example, the scam involving Devas Multimedia, an India Company, whose owners include German-Deutsche Telekom and affiliates of two US-based investment funds and Indian government-owned satellite company Antrix. The aim of the project was to provide broadband wireless services to the remote areas of India. However, the deal failed to take off, as the then Indian government in 2011 initiated action for termination of contract with Antix after India's auditor-general questioned the US$160 million Antrix had charged Devas for the spectrum, which he alleged had been acquired without commercial bidding. The auditor-general suggested the government had substantially undervalued the 70 MHz frequency it had granted Devas, noting that it had previously raised US$15 billion from the auction of only 15 MHz. FP Staff, 'Antrix-Devas case: Fifteen points to help you understand the deal', *First Post* (2016) <http://www.firstpost.com/business/antrix-devas-case-fifteen-points-to-help-you-understand-the-deal-2918312.html>

[14] For example, the 2G spectrum scandal was an Indian telecommunications scam and political scandal in which politicians and Indian government officials were accused of undercharging mobile telephone companies for frequency allocation licenses, which they used to create 2G spectrum subscriptions for cell phones. On 2 February 2012, the Supreme Court of India ruled on a public interest litigation (PIL) related to the 2G spectrum scam and declared the allotment of spectrum "unconstitutional and arbitrary", cancelling the 122 licenses issued in 2008 under A. Raja (Minister of Communications & IT from 2007 to 2009), the primary official accused. India Today Online, 'What is the 2G spectrum Scam?' *India Today* (2012).<http://indiatoday.intoday.in/story/what-is-the-2g-scam-all-about/1/188832.html>

[15] For example, NuCoal Resources Ltd. is a natural resources company that focuses on minerals exploration and mining. Although it is based in New South Wales, Australia, nearly one third of the company's shares are held by U.S. registered shareholders. Five Intuitional investors collectively hold 30.17% in NuCoal. In December 2009, NuCoal acquired all the issued capital of Doyles Creek Mining Pty Ltd (DCM) for $94 million and thereby Exploration Licence 7270 (EL 7270). On 23 November 2011, the NSW Government announced that the Independent Commission Against Corruption (ICAC) would be tasked with undertaking an inquiry into the circumstances of the initial grant of EL 7270 to DCM. On 18 December 2013, ICAC delivered its final recommendatory report to the NSW Government. On 31 January 2014, the NSW Government passed legislation to cancel EL 7270, David Marchese, 'Mining company steps up compensation fight against Australian government', *ABC News* (Newcastle 2016) < http://www.abc.net.au/news/2016-11-11/mining-company-steps-up-compensation-fight-against-government/8017098 >

[16] For example, the case of Odebrecht, a Brazlian multi-national construction giant. It has recently pleaded guilty to building a secret internal group called the 'Division of Structured Operations', where workers facilitated bribery payments by the new-age, routing through offshore entities and the old-school, cash delivered in packages or suitcases. These payments were made to members of Brazil's congress, officials at Brazil's two leading political parties and government officials in dozen countries across three continents. In all, the company is allegedly benefited to the tune of $1.4 billion. Linette Lopez, 'One name has thrown politics in the Western Hemisphere off-kilter, and it's not Trump' *Business Insider* (2017) < http://www.businessinsider.in/One-name-has-thrown-politics-in-the-Western-Hemisphere-off-kilter-and-its-not-Trump/articleshow/58917288.cms >

[17] *Venezuela Holdings B.V. and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, at ¶ 167.

[18] These include the 1996 Inter-American Convention against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 1999 Council of Europe Civil Law Convention on Corruption; the 1999 Criminal Law Convention on Corruption and the 1999 Civil Law Convention on Corruption, both adopted under the aegis of the Council of Europe and the 2003 African Union Convention on Preventing and Combating Corruption.

[19] UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, available at: http://www.refworld.org/docid/4374b9524.html [UNCAC]

[20] Cecily Rose, *International Anti-Corruption Norms: The Creation and Influence on Domestic Legal Systems* (OUP, 2016) p. 106-113

[21] *UNCAC* (n.19), Preamble.

[22] Utku Coşar, 'Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions' in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges* (ICCA Congress Series, Volume 18, Kluwer Law International, 2015) 531, at p. 531.

[23] See e.g. *Swiss Federal Supreme Court in National Power Corp. v Westinghouse*, (1994) ASA Bulletin 244, at p. 247; *European Gas Turbines v Westman*, (1994) Revue de l'arbitrage 359.

[24] See e.g. ICC case 3913, Award of 1981, in Derains, 'Note on ICC case 4145, Award of 1984', (1984) Journal du droit international, (Clunet), 985,at p. 989; ICC Case 3916, *Loewe*, Award of 1982, in Sigvard Jarvin and Yves Deraines, eds. *Collection of ICC Arbitral Awards 1974-1985*, (1st ed., Kluwer Law International, 1994), at pp.507-511; ICC Case No. 7047, *Westcare* v. *Jugoimport*, Bulletin de l'Association suisse de l 'arbitrage,1995, p.332; ICC Case 7664, *Frontier AG & Brunner sociedade v Thomson CSF*), Award of 31 July 1996, in Sayed, *Corruption in International Trade a nd Commercial Arbitration* (Kluwer, 2004), at pp. 306-307; ICC case 8891, Award of 1998, (2000) Journal du droit international (Clunet), 1080. See also *Himpurna California Energy Ltd. v PT Perusahaan Listruik Negara*, Award of 1999, (2000) Yearbook Commercial Arbitration, vol. XXV, p. 44, stating that the arbitrators "*would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption*"

[25] *Mr X, Buenos Aires v Company A*, (1994)10 Arbitration International 282.

[26] *ibid,* at 294

[27] Immunities and Criminal Proceedings (*Equatorial Guinea* v. *France*), Request for indication of Provisional Measures, Order dated 7 December 2016 < http://www.icj-cij.org/files/case-related/163/163-20161207-ORD-01-00-EN.pdf>

[28] *See* Julio Bacio Terracino, *The International Legal Framework Against Corruption* (Intersential 2012).

[29] *See* Julio Bacio Terracino, 'Corruption as a Violation of Human Rights' (2008) International Council on Human Rights Policy http://www.ichrp.org/files/papers/150/131_terracino_en_2008.pdf

[30] See Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97, 22 February 2006, at ¶ 25-27.

[31] Joe Tirado, Matthew Page and Daniel Meagher, 'Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship' (2014) ICSID Review Vol. 29 (2) 493 at p. 493

[32] This is now changing for example see 2015 Model BIT adopted by India Article 9 – Obligation Against Corruption which places an obligation on investors to refrain from corruption either prior too or after the establishment of investment. <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf >

[33] Bernardo Cremades, 'Corruption and Investment Arbitration' in Gerald Aksen and others (eds), *Liber Amicorum in Honour of Robert Briner* (2005) at p. 203,; Antonio Crivellaro, 'Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence' in Kristine Karsten and Andrew Berkeley (eds), *Arbitration, Money Laundering and Fraud* (ICC Institute World Business Law 2003) at p.109 ; Sara Nadeau-Seguin, 'Commercial Arbitration and Corrupt Practices: Should Arbitrators be bound by a duty to report corrupt practices?' (2013) 10(3) TDM <https://www.transnational-dispute-management.com/article.asp?key=1963>; Kieara Gans and David Bigge, 'The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic Authorities' (2013) 10(3) TDM. <https://www.transnational-dispute-management.com/article.asp?key=1955 >

[34] See A.P. Llamzon, 'State Responsibility for Corruption: The Attribution Asymmetry in International Investment; Arbitration' (2013) 10 (3) TDM <https://www.transnational-dispute-management.com/article.asp?key=1958 >

[35] *ibid*.

[36] ICSID Case No. ARB/01/14, Award dated 3 March 2006.

[37] *ibid, para 210*

[38] ICSID Case No. ARB/05/13, Final Award 8 October 2009 < www.italaw.com> (Unless otherwise stated all investment arbitration cases cited are available at www.itlaw.com)

[39] UNCITRAL, Final Award 23 April 2012.

[40] UNCITRAL, Final Award 3 August 2005.

[41] ICSID Case No. ARB/05/16, Final Award 29 July 2008.

[42] *Ibid, paras 652-653*

[43] ICSID Case No. ARB/05/14, Decision in Annulment Proceeding 29 October 2009.

[44] PCA Case No. 2010-5, Final Award 19 September 2014.

[45] *Southern Pacific Properties v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Final Award 20 May 1992; *Himpurna California Energy Ltd (Bermuda) v PT (Pesoro) Perusahaan Listruik Negara (Indonesia)* (1999) 14 Mealey's International Arbitration Reporter A1 para. 220; *Wena Hotels Ltd* v*Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Final Award 8 December 200; *Tanzania Electric Supply Co.* v *Independent Power Tanzania Ltd*, ICSID Case No. ARB/98/8, Final Award 12 July 2001; *Empresas Luccheti, SA and Luccheti Peru, SA* v *Republic of Peru*, ICSID Case No.ARB/03/4, Final Award 7 February 2005; *International Thurderbird Gaming Corp* v *Mexico*, NAFTA Final Award 26 January 2006; *Inceysa Vallisolentana, SL* v *Republic of El Salvador*, ICSID ARB/03/26 Decision on Jurisdiction 2 August 2006;*World Duty Free Company Ltd* v *Republic of Kenya*, ICSID Case No. ARB/00/7 Final Award, 4 October 2006; *Fraport AG Frankfurt Airport Services Worldwide* v *Republic of Philippines*, ICSID Case No. ARB/03/25 Final Award 16 August 2007; *Industria Nacional de Alimentos, S.A. and Indalsa Peru S.A.* v *Republic of Peru*, ICSID Case No.ARB/03/4 Decision on Annulment 5 September 2007; *Siemens* v *Argentina*, ICSID Case No. ARB/02/8 Decision on Jurisdiction 3 August 2004; *African Holding Company of America, INC*

et Societe Africane de construction au Congo SARL v Republic Democratique due Congo, ICSID Case No. ARB/05/21 Decision on Jurisdiction 29 July 2008; *TSA Spectrum de Argentina SA* v *Republic of Argentina*, ICSID Case No. ARB/05/5 Final Award 19 December 2008; *Siag and Vecchi* v *The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009; *Azpetrol International Holdings BV et al* v *The Republic of Azerbaijan*, ICSID Case No. ARB/06/15 Final Award 8 September 2009; *Metal-Tech* v *Republic of Uzbekistan*, ICSID Case No. ARB/10/3 Final Award 4 October 2013; *Niko Resources (Bangladesh) Ltd.* v. *People's Republic of Bangladesh, BAPEX and PETROBANGLA*, ICSID Case No. ARB/10/11 and ARB 10/18, Decision on Jurisdiction 19 August 2013; *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 Final Award 6 December 2016; *Spentex Netherlands, B.V. v Republic of Uzbekistan*, ICSID Case No. ARB/13/26 Final Award 27 December, 2016.

[46] *World Duty Free* (n 45)

[47] *ibid*, at ¶157.

[48] *Metal- Tech* (n 45); *Fraport* (n 45); *Desert Line Projects LLC v The Republic of Yemen,* ICSID Case No. ARB/05/17, Final Award 6 February 2008 and *Alasdair Ross Anderson et al v. Republic of Costa Rica,* ICSID Case No. ARB(AF)/07/3 Final Award 19 May 2010; *Inceysa* (n 45)

[49] *See*, *Inceysa* (n. 45); *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24 Final Award 27 August 2008 139; *Europe Cement Investment and Trade S.A. v Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 Final Award 13 August 2009; *Alasdair* (n. 48); *Metal-tech* (n.45).

[50] *See*, *Inceysa* (n.45), ¶ 230; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 Final Award 15 April 2009, at ¶ 144; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24 Final Award 18 June 2010, at ¶ 123; *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No. ARB/08/18 Final Award 7 February 2011, ¶ 116; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 Decision on Jurisdiction 4 August 2011, at ¶ 646.

[51] See *World Duty Free* (n. 45), ¶¶ 139, 161, 192(1); *Metal-Tech Ltd.* (n 45), ¶ 292; *Inceys* (n 48), ¶ 246.

[52] Terracino, The International Legal Framework against Corruption (n 28), at p. 75-77; *see,* ICC Case no. 2370, (1984) Jurnal du Droit International 914; *Hilmarton Ltd*. v *Omnium de Traitement de Valorisation SA*., (1994) 19 Yearbook of Commercial Arbitration 105; ICC Case No. 6248, (1994) 19 Yearbook of Commercial Arbitration 124

[53] *Phoenix* (n 50)

[54] *Europe Cement* (n 49)

[55] ICSID Case No. ARB(AF)/10/1 Final Award 16 May 2014

[56] *ibid*, ¶ 131.

[57] *Hamester* (n 50), ¶ 123.

[58] *ibid*, ¶ 124.

[59] *Spentex* (n. 45). This award is noteworthy for the tribunal's handling of the costs of the arbitration, where a major ty of August Reinisch and Stanimir Alexandrov stressed Uzbekistan's own role in the corrupt on at issue in this case, and "urged" the it to make a substantial ($8 million) donation to a United Nations anti-corrupt on fund. The tribunal warned that Uzbekistan's failure to make such a payment would lead to an adverse cost order in the case, with the government held liable for the costs of the proceedings, as well as reimbursing the claimant for 17% of more than $17

million in legal fees and expenses. (Conversely, if Uzbekistan made the contribution, it would bear only its own legal costs, and half the cost of the proceedings.). The award is confidential is not available in public domain.

[60] *see* Kevin Lim, 'Upholding Corrupt Investors' Claims Against Complicit or Compliant Host States – Where Angels Should Not Fear to Tread', (2012) Yearbook on International Investment Law & Policy, at para 69-82.

[61] *ibid*, at para 81.

[62] ibid

[63] *Fraport* (n 45).

[64] ICSID Case No. ARB/07/15 Final Award 3 March 2010.

[65] ICSID Case No. ARB/02/18 Decision on Jurisdiction 29 April 2004.

[66] ICSID Case No. ARB (AF)/00/2 Final Award 29 May 2003.

[67] *Desert Line* (n 48).

[68] ICSID Case No. ARB/07/23 Final Award 29 June 2012.

[69] For example (1) - The Commonwealth Development Corporation (CDC) is a private equity fund run by the UK's Department for International Development and in 2012 was linked to money laundering and fraud by the James Ibori, governor of the oil-rich Delta State in Nigeria, who pleaded guilty to stealing up to £3 billion from the state. According to the Financial Times: "CDC helped fund three Nigerian companies under investigation for providing a front behind which associates of Mr Ibori could launder money…. The fund put £62 million of money, backed by taxpayers, into Emerging Capital Partners, a US-based fund. ECP has in turn bought shares in Nigerian companies that anti-corruption campaigners say have been used by Mr Ibori's allies to process money gained through fraud." If proven guilty, CDC of course will not have any recourse to investment arbitration to recover losses it suffers owing to corruption of state authorities in this case. *See* FT. 'CDC Is Linked to Ibori Fraud Scandal'. (Financial Times 2012) <http://www.ft.com/cms/s/0/1814303c-87d4-11e1-b1ea-00144feab49a.html#axzz1sJTT6vNd.>

For example (2) - The 'Gorilla' file is a transcript of lengthy eavesdropping by the Slovak Intelligence Service (SIS) during 2005 and 2006 which was leaked at the end of 2011. It consists of a series of meetings involving leading Slovak politicians, and executives of the private equity firm Penta, which has a central role in the processes. The meetings were largely concerned with the payment of bribes by the multinationals involved in various privatisations, and the allocation of the money to individuals and parties. The discussions especially concern the privatisation of electricity and gas, but also of healthcare, district heating, airport, and water. The energy multinationals mentioned include RAO UES (Russia), Enel (Italy), Eon and Siemens (Germany) and EDF (France). If proven guilty, Penta of course will not have any recourse to investment arbitration to recover losses it suffers owing to corruption of state authorities in these cases. See Euractive, Slovak politics rocked by 'Gorilla' corruption scandal' (Euractive Online 2012) <http://www.euractiv.com/section/justice-home-affairs/news/slovak-politics-rocked-by-gorilla-corruption-scandal/ >

[70] *Churchill* (n 45)

[71] *Minnotte* (n 55)

[72] *Minnotte* (n 55)

[73] *Churchill* (n 45)

[74] *Anderson* (n. 48)

[75] E. Root, 'The Basis of Protection to Citizen's Residing Abroad' (1910) 4 AJIL 517, at p. 518-519.

[76] *See* F. V. Garcia Amador (Special Rapporteur on State Responsibility), 'Second Rep. on the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. Part I: Acts and Omission', ILC UN Doc. A/CN.4/106 15 February 1957.

[77] See G.A. Res. 799 (VIII), U.N. GAOR, 4th Sess. Supp. No. 10, UN Doc. A/2589 7 December 1953, at 52.

[78] *See* F. V. Garcia Amador (Special Rapporteur on State Responsibility), 'Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens - Reparation of the Injury' Arts. 7 & 9, ILC UN Doc. A/CN.4/134 26 January 1961.

[79] ibid

[80] Primary rules of international law are customary and treaty rules laying down substantive obligations of States. On the contrary secondary rules are those which establish (i) on what conditions a breach of a 'primary rule' may be held to have occurred and (ii) legal consequences of this breach. *see* Antonio Cassese, *International Law* (2ed. 2005), at p. 244

[81] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2003), at p. 2.

[82] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer Law International 2009), at p.41

[83] *ibid,* at p.1

[84] *ibid*

[85] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd Edition 2012), at p. 130 ; R Dolzer and M Stevens, *Bilateral Investment Treaties* (1995), at p.58; S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYBIL 99, at p.113–14; I Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008); K Yannaca-Small, 'Fair and Equitable Treatment Standard' in K Yannaca-Small (ed), *Arbitration under International Investment Agreements* (2010), at p. 385; S W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in S W Schill (ed), *International Investment Law and Comparative Public Law* (2010), at p.151; A Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (2012).

[86] Newcombe and Paradell (n. 82), at p. 238

[87] See *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13 Final Award 8 October 2009, at ¶ 215

[88] *Waste Management, Inc*. v. *United Mexican States*, ICSID Case No. ARB (AF)/00/3 Final Award 30 April 2004, at ¶ 1198; *Ronald S. Lauder* v. *Czech Republic*, Ad Hoc Arbitration, UNCITRAL Rules, Award of 3 September 2001, at ¶ 292.

[89] Arbitral awards that have acknowledged as much, either directly or indirectly, include: *LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc. v Argentine Republic,* ICSID Case No ARB/02/1 Decision on Liability 3 October 2006*; CMS Gas Transmission Co. v Argentine Republic,* ICSID Case No. ARB/01/8 Final Award 12 May 2005; *Tecmed* (n 66) ; *Noble Ventures, Inc*. v. *Romania*, ICSID Case No ARB/01/11 Final Award

[90] P. Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law?', (2010) 28 Pennsylvania State International Law Review 675, at p. 680.

[91] Newcombe and Paradell (n.82), at p. 238

[92] Newcombe and Paradell (n.82), pp. 237, 249–250; Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (OUP 2008), at p.176; Todd Weiler, 'Methanex Corp. v. U.S.A: Turning the Page on NAFTA Chapter Eleven?' (2005) 6 J. World Invest. & Trade 917; Todd Weiler and Ian Laird, 'Standards of Treatment' in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (OUP 2008) at p. 284–285; Santiago Montt, State Liability in *Investment Treaty Arbitration* (Hart Publ. 2009) 295, at p. 310. *Contra:* Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in A. Reinisch (ed.), *Standards of Investment Protection* (OUP 2008), at p. 110 (for whom "non-impairment standard [prohibiting arbitrary and unreasonable acts] imposes a standard of conduct on governments that is arguably substantially higher than that required by customary international law").

[93] See B. Cheng, *General Principles of Law* (London Stevens & Sons Ltd 1953), at p. 133.

[94] *Ibid*; A.C. Kiss, *L'abus de droit en droit international* (Paris Librairie générale de droit et de jurisprudence, 1952).

[95] See Newcombe and Paradelle (n.82); A. Kiss, 'Abuse of Rights,' in Encyclopedia of Public International Law, ed. R. Bernhardt, Vol. 1 (Amsterdam North-Holland Pub Co 1992), at p. 4-5.

[96] OECD (2004), 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers on International Investment, 2004/03, OECD Publishing http://dx.doi.org/10.1787/675702255435, at p.25

[97] M. Sornarajah, 'The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?', in F. Ortino, L. Liberti, and A. Sheppard (eds.), *Investment Treaty Law, Current Issues II* (2007), at p. 176.

[98] Patrick Dumberry, 'The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105', 15 JWIT 117 (2014), at p.121

[99] Black's Law Dictionary (8th ed., West Group 2004), see under 'arbitrary'.

[100] Jacob Stone, 'Arbitrariness, The Fair and Equitable Treatment Standard and the International Law of Investment' (2012) 25 Leiden J. Int'l L. 77, p. 94

[101] UNCTAD, Fair and Equitable Treatment (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012) 78. The report refers to: Oxford English Dictionary 464 (2nd ed., Clarendon Press 1989); *Lauder* (n.88), at para. 221; *Plama Consortium* (n 49), at para. 184; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18 Decision on Jurisdiction and Liability 21 January 2010, at para. 385.

[102] *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12 Final Award 14 July 2006

[103] *Lauder* (n 101).

[104] *Siemens A.G. v Argentine Republic*, ICSID Case No ARB/02/8 Final Award 6 February 2007, at ¶ 319.

[105] *L. F. H. Neer and Pauline Neer (U.S.A.) v United Mexican States*, (1926) 4 RIAA. 60.

[106] *Elettronica Sicula S.p.A. (ELSI)* (*US v. Italy*), 1989 ICJ Reports 15, at ¶ 128.

Kurt J. Hamrock, 'The ELSI Case: Toward an International Definition of "Arbitrary Conduct"' (1992) 27 *Tex. Int'l L. J.* 837–864, at pp. 849–863,

[108] Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 137.

[109] Jacob Stone, 'Arbitrariness, The Fair and Equitable Treatment Standard and the International Law of Investment' (2012) 25 LJIL 77, at. p.94 (referring to a number of cases) and p. 100 indicating that '[o]f the ten tribunals that feature a threshold for determining arbitrariness, seven reference the ELSI standard either directly or indirectly"). See, for instance, *Mondev International Ltd.* v. *United States*, ICSID Case No ARB(AF)/99/2 Final Award 2 October 2002, at ¶ 127; *Pope and Talbot Inc. v. Canada*, UNCITRAL Phase II Award 10 April 2001, at ¶ 63 and 64.

[110] *Tecmed* (n 66), at ¶ 154.

[111] *S.D. Myers Inc. v. Canada*, UNCITRAL First Partial Award 13 November 2000, at ¶ 266

[112] *Waste Management, Inc v United Mexican States* ('Number 2'), ICSID Case No ARB(AF)/00/3 Final Award 30 April 2001, at ¶ 98.

[113] *Thunderbird* (n 45)

[114] UNCITRAL Final Award, 8 June 2009

[115] *ibid,* ¶ 779, 786, 788, 803, 805, 807, 817, 824, 828

[116] See *Sempra Energy International v Argentine Republic*, (ICSID), Case No. ARB/02/16 (Award), 28 September 2007, at para. 318; *Enron Corp. and Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3 Final Award 22 May 2007, at ¶ 281

[117] *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/02, Award, 18 September 2009, at ¶ 296.

[118] *Saluka* (n 89), at ¶ 307-308.

[119] *Waste Management Number 2* (n 112), ¶ 98.

[120] *Compañiáde Aguasdel Aconquija S.A. and Vivendi Universal S.A.v. Argentina* (Award, 20 Aug. 2007), at ¶ 7.4.24.

[121] *Desert Line* (n. 67).

[122] Newcombe and Paradell (n 82), at p. 294

[123] *EDF* (n 38)

[124] *ibid* ¶ 221.

[125] *ibid* ¶ 232.

[126] *Jan Oostergetel* (n 39)

[127] *See*, Michele Potesta, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', (2013) ICSID Review Vol. 28 (1) 88.

[128] *Tecmed* (n 66), at ¶ 154; *Waste Management* (n 112), at ¶ 98; *Occidental Exploration and Production Company* v. *Ecuador* UNCITRAL Final Award 1 July 2004, at ¶ 183; *Saluka* (n 89), at ¶ 302. *See*, L. Paradell, 'The BIT Experience of the Fair and Equitable Treatment Standard', in F. Ortino, L. Liberti, A. Sheppard & H. Warner, eds, *Investment Treaty Law, Current Issues II* (London: BIICL, 2007), at p. 117.

[129] Newcombe and Paradell (n 82), at pp. 233 – 298; *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador,* ICSID Case No ARB/04/19 Final Award 18 August 2008, ¶ 1342, 340*; Jan de Nul NV and Dredging International NV v Egypt*, ICSID Case No ARB/04/13 Final Award 24 October 2008.

[130] See Christoph Schreuer and Ursula Kriebaum, 'At What Time Must Legitimate Expectations Exist?', in Jacques Werner and Arif H Ali (eds), *A Liber Amicorum: Thomas Walde. Law Beyond Conventional Though*t (2009), at p. 265–76.

[131] Newcombe and Paradell (n 82), at p. 278-79

[132] Schreuer and Ursula, Legitimate Expectation (n 130), at p. 276

[133] *Thurderbird* (n 45)

[134] *South Pacific Properties* (n. 45)

[135] *ibid*, at ¶ 82-83.

[136] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, UNCITRAL Final Award 25 May 2004, at ¶ 188-189

[137] *ibid*, at ¶ 188

[138] Nick Gallus, 'The 'Fair and Equitable Treatment' Standard and the Circumstances of the Host State' in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), at. p.234

[139] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29 Final Award 29 August 2009, para. 192.

[140] ICSID Case No ARB/00/9 Final Award 16 September 2003, at ¶ 20.37

[141] ICSID Case No. ARB/05/8 Final Award 11 September 2007, at ¶ 278, 306 and 335.

[142] *Duke Energy* (n 129).

[143] ICSID Case No ARB/05/ 22 Final Award 24 July 2008, at ¶ 601

[144] See Corruption Perception index published by Transparency International on 27 January 2017, https://www.transparency.org/news/feature/corruption_perceptions_index_2016 , (last visited August 6, 2017)

[145] *ibid*

[146] See UNCAC (n 19), Preamble

[147] See J.H. Herz, 'Expropriation of Foreign Property' (1941) 35 AJIL 243; S. Friedman, *Expropriation in International Law* (London Stevens & Sons Limited 1953) and B.A. Wortley, *Expropriation in Public International Law* (Cambridge University Press 1959).

[148] Necombe and Paradell (n 82), at p. 322

[149] ibid

[150] *Starrett Housing Corporation v. Islamic Republic of Iran* (1983) 4 Iran-US CTR 122, at ¶154.

[151] See *Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran v Islamic Republic of Iran*, (1984) 6 Iran-US CTR 219, at ¶225.

[152] *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, UNCITRAL Final Award 12 January 2011, at ¶148

[153] L. Yves Fortier/Stephan L. Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor', (2004) 19 ICSID Review - Foreign Investment Law Journal 2, at p. 293; Veijo Heiskanen, 'The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunals', (2007) 8 Journal of World Investment & Trade 2, at p. 215; Anne K. Hoffman, Indirect Expropriation, in August Reinisch (ed.), *Standards of Investment Protection* (Oxford 2008), at p. 151; Saul Litvinoff, "Creeping" Expropriation, Revista Juridica de la Universidad de Puerto Rico, 33 (1964) 2, 217; Burns H. Weston, 'Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping' Expropriation', (1975) 1 Virginia Journal of International Law 16, at p. 103; August Reinisch, 'Expropriation' in Peter Muchlinski and others. (eds.), *The Oxford Handbook of International Investment Law* (Oxford 2008) at p. 407; W. Michael Reisman/Robert D. Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation', (2003) 1 British Yearbook of International Law 74, at p.115; Christoph Schreuer, 'The Concept of Expropriation under the ECT and other Investment Protection Treaties', in Clarisse Ribeiro (ed.), Investment Arbitration and The Energy Charter Treaty, Huntington 2006, at p. 108.

[154] ibid.

[155] Necombe and Paradell note that the term has generally been given a wide interpretation in public international law and by IIA tribunals *citing Fisheries Jurisdiction Case (Spain v. Canada)* [1998] ICJ Rep 432, at para. 66, 'in its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby.', Necombe and Paradell (n 82), at p. 337.

[156] Weston, Constructive Taking; E.P. Mendes, 'The Canadian National Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law' (1981) 14 VJTL 475; Schreuer, Concept of Expropriation (n 153), at p.127

[157] UNCTAD, Taking of Property, UNCTAD Series on issues in international investment agreements, (2000) UNCTAD/ITE/IIT/1 5, at p. 9-10.

[158] Reinisch, Expropriation (n 153), at p. 426-427

[159] Article 15 of ASRIWA states 'Breach consisting of a composite act: The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

[160] Schreuer, Concept of Expropriation (n 153), at p. 109.

[161] see *ibid*.

[162] *Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana,* UNCITRAL Award on Jurisdiction and Liability 27 October 1989; *Siemens* (n 104); Vivendi II (n 120); *Phillips Petroleum Co. Iran* v. *Iran*, Award No. 425-39-2 of 29 June 1989, 21 Iran-U.S. C.T.R. 79; ICSID, *Biwater* (n 143).

[163] *Biwater* (n 143).

[164] *Ibid.* at ¶ 456.

[165] *Siemens* (n. 104), at ¶ 263.

[166] F.V. García-Amador, 'Fourth Report of the Special Rapporteur - Responsibility of the State for Injuries Caused in its Territory to the Persons or Property of Aliens - Measures Affecting Acquired Rights' (1959) 2 YBILC 1, at p. 4. Also see F.V. García-Amador and others, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (New York Oceana Publications Inc. 1974).

[167] *Siag and Vecchi* (n 45).

[168] *Ibid, at p.* 429-44.

[169] For discussion on this, see Newcombe and Paradelle (n 82), p.358

[170] (1986) 8 EHRR 123

[171] *ibid*, at pp.19-20

[172] Higgins, Rosalyn, 'The taking of property by the state: recent developments in international law' in *Collected Courses of The Hague Academy of International Law* (Volume 176 The Hague Academy of International Law).

[173] see *James and Ors*. (n 170)

[174] ibid

[175] *Tecmed* (n 66)

[176] *Azurix* (n 102)

[177] SCC Final Award 20 July 2012.

[178] UNCAC (n 19), Preamble

[179] Durward V. Sandifer, *Evidence before International Tribunals* (University Press of Virginia, 1975), at p. 127 ('[t]he burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention').

[180] See e.g. UNCITRAL Rules, Article 27(1); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* [1984] ICJ Rep. 392, at p. 437 ('it is the litigant seeking to establish a fact who bears the burden of proving it'); *Metal-Tech* (n 45), at ¶ 237 ('The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals.')

[181] Antonio Crivellaro, 'Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence' in Kristine KARSTEN and Andrew BERKELEY, eds., Arbitration – Money Laundering, Corruption and Fraud (ICC Publications 2003) 109, at p. 115 ("There were fourteen cases in which a 'high' standard of proof was applied, i.e., more than 50% of cases.").

[182] *EDF (Services)* (n 38), at ¶ 221

[183] See eg Constantine Partasides, 'Proving Corruption in International Arbitration: A Balanced Standard for the Real World' (2010) 25(1) ICSID Rev–FILJ 47 and Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration Law and Reality' (2012) 8(1) Asian Intl Arb J 1, 21–35, 115–116. (n 23) and Sophie Nappert, 'Nailing Corruption: Thoughts for a Gardener—A Comment on World Duty Free Company Ltd v The Republic of Kenya' (2013) 10(3) TDM, 64.

[184] *Cosar* (n 22), at p. 533

[185] *Wena Hotels Case*, supra n [ ], paras. 77, 117. *EDF Case*, supra n [ ]at ¶ 221; *Rumeli Telekom* (n 45), *Bayindir* (n 139), at ¶ 142 See also, *Himpurna* (n 24).

[186] See eg. the ICSID Rules of Procedure for Arbitration Proceedings (April 2006), Article 34; Arbitration Rules of the United Nations Commission on International Trade Law (2010) Art 27(4); or the IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010) Art 9(1).

[187] *Libananco Holdings Co. Limited v. The Republic of Turkey,* ICSID Case No ARB/06/8 Final Award, 2 September 2011, at ¶ 126; See also Florian Haugeneder And Christoph Liebscher, 'Chapter V: Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof' in Christian KLAUSEGGER and others (eds.), *Austrian Arbitration Yearbook 2009* (C.H. Beck, Stämpfli amp; Manz 2009) 539, at p. 546.

[188] Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' (2014) 31 *J. Int'l Arb.* 183

[189] See ICC Case No. 4145 (a fact can be proven by circumstantial evidence if its leads to 'very high probability'); <https://www.trans-lex.org/204145/_/icc-award-no-4145-yca-1987-at-97-et-seq-/>; ICC Case No. 8891 ('indices must be serious'), (1998) JDI - Clunet 4/2000, 1076

[190] *Methanex* (n 45).

[191] *Sistem Mühendislik İnŞaat Sanayi A.Ş.* v. *Kyrgyz Republic*, ICSID Case No ARB(AF)/06/1 Final Award 9 September 2009, at ¶ 43

[192] *Metal-Tech* (n 45), at ¶ 293.

[193] *TSA* (n 45).

[194] *Niko Resources* (n 45), at ¶ 422.

[195] *Africa Holding* (n 45)

[196] *ibid*, at ¶ 52.

[197] *Fraport* (n 45)

[198] *EDF* (n 38), at ¶ 223.

[199] *The Rompetrol Group N.V. v Romania*, ICSID Case No ARB/06/3 Final Award 6 May 2013, at ¶ 179.

[200] Aloysius P Llamzon, *Corruption in International Investment Arbitration* (OUP 2015), p. 231

[201] *Metal-Tech* (n 45), at ¶ 245

[202] Provided for in ICSID Arbitration Rules, Rules 33 and 34(2); ICSID Convention, Art. 43; and UNCITRAL Arbitration Rules, Art. 27(3). See, e.g., *Libananco Holdings Co. Limited v. Republic of Turkey,* ICSID Case No ARB/06/8 Decision on Preliminary Issues 23 June 2008, ¶ 68 and 71; *Europe Cement* (n 49), at ¶ 15; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No ARB(AF)/06/2) Final Award 17 September 2009, at ¶ 34

[203] *ibid.* for legal basis.

[204] Ibid. for legal basis. See, e.g., Rumeli, op. cit., fn. 16, para. 65. CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003, para. 72.

[205] UNCITRAL Arbitration Rules, Art. 30(3) and ICSID Arbitration Rules, Rule 34(3). See, e.g., *Europe Cement* (n 49), at ¶ 99.

[206] Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP) 2015, at p. 45 citing *Russian Indemnity Case* (1912) 11 UNRIAA 421, at p. 440; Delagoa Bay & East African RR Co. (*US & Great Britain. v Portugal*) (1900) see description in Majorie M Whiteman, 3 Damages in International Law (US GPO 1943), at p. 1694

[207] *Lusitania* Cases, Opinion, (1923) 7 UNRIAA 32

[208] Sabhai (n 206), at p. 91

[209] Sabhai (n 206), at p. 45-46

[210] Sabhai (n 206), at p. 7-42.

[211] Edwin Borchard, *Diplomatic Protection of Citizens Abroad* (Banks Law Publishing 1919), at p.

[212] Sabhai (n 206), at p. 46, See also Clyde Eagleton, 'Measure of Damages in International Law' (1929–30) 39 *Yale LJ* 52, at p. 73.

[213] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 30–31, 35–36, UN Doc. A/56/10 (2001)

[214] *Crawford* (n 81), Art. 35, pg. 97, at ¶ 4, fn. 493, 495, 496, 508.

[215] *ibid, at* Art. 36, pg. 99, para 3 and 6, fn. 515-516 and 520–522; pg. 102, at ¶ 19, fn. 547, 549–550, 553, 555–556, 558; pg. 104, at ¶ 27, fn. 559–550, 562, 564–566, 570; page 105, at ¶ 32, fn. 576, 578, 579.

[216] *ibid*., at Art. 38, pg. 108, ¶ 3 and 8, fn. 609, 611 and 615, 618.

[217] Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009), at p. 69.

[218] *Sabhai* (n 206), at p. 59

[219] Organisation for Economic Cooperation and Development, *Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions,* http://www.oecd.org/daf/nocorruption/20nov2e.htm

[220] Bruce W. Klaw, 'State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities,' (2015) 33 Berkeley J. Int'l Law 60, at p. 63

[221] See, e.g., Jon S. T. Quah, 'Curbing Asian Corruption: An Impossible Dream?', (2006) 105 CURRENT HIST. 176, at p.176, (noting that "curbing corruption in most Asian nations is difficult, mainly because of a lack of political will").

[222] *Klaw* (n 220), at p.63

[223] *ibid*

[224] *ibid* citing Douglas Beets, 'Understanding the Demand-Side Issues of International Corruption', (2005) 57 J. BUS. ETHICS 6581.

[225] Bruce W. Klaw, 'A New Strategy for Preventing Bribery and Extortion in International Business Transactions', (2012) 49 HARV J ON LEGIS 303, at p.349–57.

[226] *ibid*, at p. 361-368; Joseph W. Yockey, 'Solicitation, Extortion and the FCPA', (2011) 87 NOTRE DAME L. REV. 781, at p. 834–838

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• Advising an Indian company for its dispute against a Turkish employer relating to the construction of a circulating fluidized bed combustion boiler in Istanbul, Turkey (ICC Rules, Turkey seated, Turkish law)

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