

Transparency International Anti-Corruption Helpdesk Answer

Corruption in investor-state arbitration

Authors: Jonathan Bonnitcha (jonathan.bonnitcha@gmail.com) and Alisha Mathew (alisha.m.mathew@gmail.com)

Reviewers: Vaclav Prusa, Civil Society Legislative Advocacy Centre (v.prusa@cislac.org), Kush Amin and Adam Foldes (tihelpdesk@transparency.org)

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This paper explores legal and policy issues relating to the Process & Industrial Developments Limited v Federal Republic of Nigeria arbitration, focusing on suspicions and allegations of corruption in that case. It concerns a 2010 contract relating to the construction and operation of a gas processing facility between Process and Industrial Developments Ltd (P&ID), a company incorporated in the British Virgin Islands, and the Nigerian Ministry of Petroleum Resources. Less than three years after the contract was signed, P&ID initiated arbitration, alleging that Nigeria had not performed its obligations under the contract and seeking damages for lost profits. Despite a number of corruption related red flags in the contract, Nigeria did not raise the issue of corruption in its defence in the arbitration. The tribunal concluded that Nigeria had repudiated the contract. It awarded P&ID US\$6.6 billion in damages plus 7 per cent interest per annum, even though neither party had taken significant steps to perform their obligations under the contract.

Nigeria did not immediately pay the award. In response, in 2018, P&ID commenced proceedings in English courts to enforce the award. Nigeria has now belatedly raised allegations of corruption in its attempt to avoid enforcement of the award in English courts. It alleges a long-running corrupt conspiracy in which associates of P&ID paid bribes to the Ministry of Petroleum Resources officials to obtain the contract and to ensure that the Ministry did not vigorously contest the subsequent arbitration. We take no position on whether these allegations are true; there are questions about both P&ID and Nigeria's accounts. Even if many of Nigeria's troubling claims of a long-running corruption conspiracy are false or exaggerated, the case still raises important policy questions about the intersection of corruption in public procurement, low state capacity and international arbitrations conducted behind closed doors.

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Caveat

The research and discussion in this paper is general in nature and does not constitute legal advice.

1. Introduction

1.1 Scope of the paper

The focus of the paper is corruption in investor-state arbitration. By investor-state arbitration (ISA), we mean international arbitrations in which one party is a private actor and the other party is a state, or a department or organ of a state (such as a Ministry). Investor-state arbitration can arise under a contract between the investor and the state, where the contract contains the parties' agreement to arbitrate ('contract-based ISA'), or under an investment treaty that contains the 'host' state's advance consent to arbitrate with any foreign investor from the 'home' state ('treaty-based ISA'). Both contract-based and treaty-based ISA are within the scope of our paper. *P&ID v Nigeria* is an example of contract-based ISA. In considering types of corrupt behaviour, we focus specifically on situations where it is alleged or suspected that the investor paid a bribe to acquire a contract, or other investment assets, from the host state. The aims of the paper are to provide a general introduction to how allegations or suspicions of corruption are dealt with in investor-state arbitration, to articulate policy concerns with the current approach and to identify opportunities for future reform.

1.2 Structure of the paper

The next section of the paper introduces the legal framework governing ISA. It provides a basic overview of the legal principles governing issues of corruption and indicates how such issues arise in ISA. The third section uses a series of concrete examples to illustrate how arbitral tribunals have handled allegations or suspicions of corruption in investor-state arbitration. In light of the legal analysis in the second and third sections, the final section identifies wider policy concerns relating to the intersection of corruption and ISA, and sketches some possible options for reform.

2. Legal Framework

The legal principles governing the treatment of corruption in investor-state arbitration result from the intersection of three bodies of law: the *applicable law* governing the substance of the dispute between the investor and the state; the *procedural rules* governing the conduct of the arbitration; and the *law of the seat of the arbitration*, which may place additional duties on the arbitrators. In addition, tribunals will normally be mindful of a fourth body of law – the legal principles governing subsequent challenges to an arbitral tribunal's award in domestic courts (i.e. proceedings to set aside the award in the courts of the seat of arbitration) and the associated principles governing enforcement of arbitral awards worldwide. This fourth body of law becomes directly relevant once the arbitration has concluded and a party to the arbitration seeks to enforce or challenge the tribunal's award in court proceedings.

In general, the substantive rules governing the consequences of corruption, if proven, for a dispute are found in the applicable law. These substantive rules are supplemented by over-arching principles of 'transnational public policy' derived from the

common approach of courts across jurisdictions when considering whether to allow enforcement of an arbitral award. Rules governing evidence and proof of corruption, including the extent of arbitral tribunals' investigative powers, are found in the arbitral rules, supplemented by the law of the seat. Arbitrators duties, including any duty to investigate and report corruption that may exist, arise from the intersection of the law of the seat and the procedural rules governing the arbitration.

The fact that arbitrations are governed by several intersecting bodies of law makes generalisation difficult. The precise legal principles governing allegations or suspicions of corruption in any arbitration will depend on the applicable law, procedural rules and law of the seat that are relevant to the dispute in question. These will vary from case to case. Further challenges arise from the absence of a doctrine of precedent in international arbitration, and from the facts that most arbitrations are held in secret and that many never subsequently become public. This allows divergent interpretations and practices to persist, even insofar as the same laws and rules are concerned. The following sections examine each of the four bodies of law in greater detail.

2.1 Applicable Law

The applicable law is the term used to describe the body of law that is used to decide the substantive aspects of a claim. The basic principle of arbitration is that the parties themselves choose the applicable

law, normally by agreement through a contract or treaty prior to the time at which the dispute arises. The legal consequences of corruption, if proven, depend foremost on the applicable law.

In a contract-based ISA, such as *P&ID v Nigeria*, the applicable law will be the governing law of the contract, which is typically specified explicitly in the contract. Parties are free to choose any body of law to govern their contract, with parties often choosing the law of a legal hub such as New York or England. In the case of *P&ID v Nigeria*, clause 20 of the Gas Supply and Processing Agreement ('GSPA') specified that the contract was governed by Nigerian law and, hence, Nigerian law was the applicable law in the arbitration. Principles of international law may still be relevant in contract-based ISA to the extent that they have been incorporated into the applicable domestic law¹— in this case, Nigerian law.

In a treaty-based claim, the applicable law is the treaty itself, as supplemented by other relevant principles of international law.² Domestic law is also relevant in treaty-based ISA insofar as investment treaties rely on domestic law to characterise certain rights and interests. For example, investment treaties do not contain their own rules on the nationality of individuals or corporations, so a tribunal would resolve questions relating to an investor's nationality by applying the domestic laws of the state in which nationality is claimed.³

If the treaty does not specify the applicable law, or if a contract does not contain a governing law

¹ See e.g. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992) where the tribunal determined that international law principles of *pacta sunt servanda* and fair compensation for expropriation were reflected in Egyptian law.

² George von Mehren, Claudia T Salomon and Aspasia A. Paroutsas, *Navigating through Investor-State Arbitrations: An Overview of Bilateral Investment Treaty Claims*, 59 *DISP. RESOLUTION J.* 69, 73 (2004) noting a comment by Antonio R. Parra, ICSID's Deputy- Secretary-General. See also Christopher Schreuer, *Jurisdiction and Applicable Law*

in Investment Treaty Arbitration, 1 *MCGILL J. DISP. RESOLUTION* 1, 11-12 (2014), referring to art. 8(7) of the *Argentina-Italy Bilateral Investment Treaty* as an example.

³ C.L. LIM, JEAN HO, MARTINS PAPANINSKIS, *INTERNATIONAL INVESTMENT LAW AND ARBITRATION COMMENTARY, AWARDS AND OTHER MATERIALS* 144-163 (2018).

clause, the tribunal has discretion to determine the applicable law. Tribunals will do so by reference to a range of factors, including the facts of the dispute, relevant choice of law rules, and the relevant arbitral rules.⁴

Unlike other areas of law, international arbitration does not have a doctrine of precedent. Accordingly, arbitrators are not bound to follow earlier decision of other tribunals. While this allows for flexibility and responsiveness, it also can contribute to a lack of clarity in the law, and vests considerable discretion in arbitrators. However, to the extent the doctrine of precedent forms part of the applicable law, arbitrators are bound to follow it – e.g. if the applicable law is English law, arbitrators must follow authoritative English court decisions.

2.1.1 Corruption and the applicable law

The foundational premise of arbitration is that a tribunal's power to decide a dispute depends on the consent of the parties to resolve that dispute through arbitration. For this reason, an arbitral tribunal's jurisdiction is limited to resolving the specific dispute(s) that the parties have referred to arbitration. In doing so, the tribunal applies the law that the parties have agreed would govern their dispute.

Arbitral tribunals do not have a general jurisdiction to decide whether a state's criminal laws, including criminal laws relating to corruption, have been breached. They do not have the power to convict or

acquit parties for alleged criminal offences. Arbitral proceedings lack the procedural safeguards of criminal trials, such as a judge who is independent of the parties, and the powers necessary to conduct a criminal trial, such as the ability to compel witnesses to testify.⁵ Nevertheless, tribunals can and should consider allegations of corruption that have implications for the resolution of the dispute referred to the tribunal for decision. This might, in some circumstances, include considering allegations of criminal offences, in which case the tribunal's role would be to consider the civil consequences of alleged breaches of criminal law.

In contract-based ISA, allegations of corruption are directly relevant to the resolution of the dispute insofar as they have implications for the validity or enforceability of the contract on which the investors' claims are based. So, if corruption is proven by a party, the tribunal will have to determine the legal contractual consequences of the type of the corruption in question according to the applicable law. Nigeria's belated allegation in *P&ID v Nigeria* is that the GSPA was obtained through the payment of bribes.⁶ In general, most legal systems recognise that contracts obtained through the payment of bribes are either automatically void, or voidable at the election of the innocent party.⁷ The Council of Europe's Civil Law Convention On Corruption requires state parties to adopt the latter principle – that contracts procured by bribery are voidable at the election of the innocent party.⁸ This principle is also reflected in English law.⁹

⁴ E.g. the ICC Arbitration Rules, r. 17(a); UNCITRAL Rules art. 33(3); ICSID Convention art. 42(1).

⁵ Cf KATHRIN BETZ, *PROVING BRIBERY, FRAUD AND MONEY LAUNDERING IN INTERNATIONAL ARBITRATION: ON APPLICABLE CRIMINAL LAW AND EVIDENCE* (2017), arguing that tribunals do have the power to apply criminal law (see page 23), but recognising that the procedure of arbitration cannot resemble a criminal trial (see page 259).

⁶ In addition, Nigeria alleges corruption on the part of its legal representatives in the arbitration.

⁷ Alexis Mourre, *Arbitration and Criminal Law: Reflection on the Duties of the Arbitrator* 22 *ARBITRATION INT'L* 95, 100 (2006).

⁸ Council of Europe, Civil Law Convention on Corruption, Nov. 1 2003, ETS No. 174, art 8(2).

⁹ *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm).

In treaty-based ISA the legal analysis of corruption under the applicable law is slightly different, but the practical effects of such allegations (if proven) are similar. Many investment treaties explicitly require investment treaties to be made 'in accordance with the host state's laws'.¹⁰ Insofar as this requirement is not made explicit, many tribunals have found that it is implied. If the host state can establish that an investment was procured by corruption in breach of its own laws, the arbitral tribunal will not have jurisdiction to hear the case and the investors' claims will fail.¹¹

2.2 Arbitral rules

The procedural aspects of arbitration are governed by the arbitral rules. The basic principle is that the parties to the arbitration are entitled to choose the arbitral rules that will govern their arbitration. These rules deal with questions such as the appointment of arbitrators, conduct of the arbitration, timing of awards, allocation of costs etc.

There are numerous sets of arbitral rules between which the parties may choose. In general, a given set of arbitral rules could be chosen to govern either contract-based ISA or treaty-based ISA. So, while the ICSID Convention and the related ICSID Arbitration Rules are primarily associated with treaty-based ISA, there are also contract-based ISAs conducted under the ICSID Convention (e.g. *World Duty Free v Kenya*¹²). Similarly, while the International Chamber of Commerce (ICC) Rules are primarily associated with contract-based

arbitration, there may also be treaty-based ISAs under the ICC Rules (e.g. *Saab v Cyprus*¹³).

Some sets of arbitral rules are linked with particular arbitral institutions, for example the ICSID Arbitration Rules, ICC Rules and Singapore International Arbitration Centre (SIAC) Rules. If the parties have chosen a particular arbitral institution to administer their arbitration, the arbitral rules of that institution will normally apply to the proceedings. Other sets of arbitral rules are not affiliated with any particular arbitral institution and may be used to govern arbitrations that are not administered by an arbitral institution – e.g. the UNCTRAL Arbitration Rules. The role of an arbitral institution is generally limited to providing administrative support for the arbitration – e.g. a venue for hearings and a system of document management. The role of an arbitral institution is not analogous to the role of a court and does not generally involve any substantive oversight of the arbitral proceedings. Many arbitrations are not administered by any arbitral institution.

In the case of *P&ID v Nigeria*, the parties in clause 20 of the GSPA agreed that the rules of the Nigerian Arbitration and Conciliation Act 1988 would apply to any dispute under that contract, and accordingly the applicable arbitral rules in the dispute were the Nigerian Arbitration Rules. The arbitration in *P&ID v Nigeria* was not administered by an arbitral institution.

Most arbitral rules give arbitrators broad discretion in relation to the conduct of proceedings, including in determining the relevant standards of proof, admissibility of evidence, and weight to be given to

¹⁰ Schreuer, *supra* note 3, at 1.

¹¹ E.g. *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, (Oct. 4, 2013); *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award (Dec. 27, 2016).

¹² *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

¹³ *Ayoub-Farid Saab and Fadi Saab v Cyprus*, ICC Case No. 20588/ZF, Decision on Jurisdiction (Sept. 10, 2015).

evidence.¹⁴ The discretion granted to arbitrators is usually couched in broad terms, such that arbitrators have the power direct parties to produce evidence.¹⁵ In exercising this discretion, arbitrators are guided by general duties to be impartial and independent.¹⁶

2.2.1 Standard of proof and rules of evidence relating to allegations of corruption in arbitration

Arbitral rules do not specifically address allegations of corruption, however play a strong role in determining parties' ability to prove allegations of corruption. Typically, where corruption is alleged by a party to the proceedings, the general practice of most tribunals is to require the party alleging the corruption to bear the burden of proof.¹⁷ The standard of proof for corruption is not settled, with some tribunals applying the 'preponderance of evidence' standard¹⁸ – i.e. that the evidence demonstrates that the allegations are more likely to be true than not – while others have applied the higher threshold of 'clear and convincing evidence'.¹⁹

A related question is whether allegations of bribery must be proven by direct evidence, or whether circumstantial evidence, including 'red flags', is sufficient. While there is some disagreement between tribunals, the prevailing view is that circumstantial evidence is sufficient to prove corruption, but that this evidence must be evaluated with caution.²⁰ The acceptance of circumstantial evidence is premised on the understanding that corruption is difficult to prove through direct evidence, especially as tribunals lack the coercive and investigate powers of national authorities.²¹ This openness to considering 'red flags' is supported by various soft-law instruments – including the *Corruption and Money Laundering in International Arbitration Toolkit* published by the Basel Institute on Governance, as well as ICC's *Guidelines on Agents, Intermediaries and Other Parties*. The red-flag approach was employed by the tribunal in *Metal-Tech v Uzbekistan*,²² discussed in more detail in Section 3.3 below.

Support for the 'red flag' approach is grounded in arbitral rules that grant arbitrators broad discretion relating to the conduct of proceedings, and specific powers to make inquiries of the parties and to order

¹⁴ See e.g. ICC Rules art. 25; ICSID Rules r. 34.

¹⁵ E.g. ICSID r. 34(2)(a).

¹⁶ See ICSID Convention art. 14; UNCITRAL Arbitration Rules 2013 art. 11; SCC Rules 2017 art. 18.

¹⁷ See Yarik Kryvoi, *Economic Crimes in International Investment Law* 67 INT'L & COMPARATIVE L. QUARTERLY 577, 589 (2018), citing *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award ¶ 56 (27 June 1990); *Tradex Hellas v Republic of Albania*, ICSID Case No ARB/94/2, Award ¶¶ 73–75 (29 April 1999); *Valeri Belokon v Kyrgyzstan, PCA, UNCITRAL*, Award, ¶ 161 (24 October 2014). See also Andrea Menaker, *Proving Corruption in International Arbitration in DOMITILLE BAIZEAU AND RICHARD KREINDLER (EDS), ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION*, 79-80 (2015).

¹⁸ E.g. *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, ¶ 399 (Aug. 16 2007); *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Award, ¶ 124 (Jul. 26 2007).

¹⁹ E.g. *Siag Waguhi Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award ¶¶ 325-6 (Jun. 1, 2009); *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, ¶ 22, Award (Oct. 8, 2009). See also Kryvoi, *supra* note 18, at 67; Menaker, *supra* note 18, at 82-90.

²⁰ Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption In International Arbitration* 35 ARBITRATION INT'L 1, 7-8 (2019). Two notable examples of such analysis being *Metal-Tech v Uzbekistan*, and *Spentex v Uzbekistan*.

²¹ Menaker, *supra* note 18, at 91.

²² *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 248-52. (Oct. 4, 2013).

the production of evidence. In some cases, arbitral rules explicitly allow arbitrators to draw adverse inferences if a party fails to produce requested documents or other evidence.²³ Even when not granted explicitly, the power to draw appropriate inferences from non-production of evidence within the possession of a party falls within arbitrators' broad discretion relating to the conduct of proceedings.

That said, while arbitrators' have broad discretion relating to the conduct of proceedings, there is no explicit *duty* to engage in 'red flag' analysis. There remains significant variation between tribunals' willingness to draw inferences from circumstantial evidence. For example, in *Union Fenosa Gas v Egypt* the majority of the tribunal observed that Egypt had drawn attention to several 'classic "red flags"; but even the reddest of red flags does not suffice without proof of corruption before the tribunal.²⁴ The majority concluded that 'there was influence exercised by Mr El Komy [an associate of the investor] over senior decision-makers at the Ministry of Petroleum and EGPC over the SPA [the investor's contract with Egypt]; but that it was not corrupt.'²⁵ In contrast, the dissenting arbitrator considered the discrepancy between the large amounts of money involved and the fact that 'Mr. El Komy does not appear to have brought any

particular technical or other specialist expertise to the project.²⁶ He concluded that the investor's failure to provide any plausible alternative explanation for this discrepancy meant 'that we should conclude that corruption has been established by circumstantial evidence.'²⁷

2.2.2 Arbitral tribunals' power to investigate suspicions of corruption of their own motion

There is a long-standing debate about whether arbitral tribunals have the power to investigate corruption if no allegation of corruption has been raised by any party to the proceedings. The traditional conception of arbitration sees a tribunal's powers as limited to resolution of issues that the parties themselves raise in the proceedings. This view is reflected in the 1999 edition of the leading text book on international arbitration: 'it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption where none is alleged.'²⁸

This traditional view has been criticised. There is now strong support for the view that arbitrators can investigate suspicions of corruption of their own motion, even where corruption has not been alleged by any party.²⁹ This changing understanding is

²³ E.g. *International Bar Association, Rules of Evidence*, art. 9(5) and (6). See also generally *BETZ*, *supra* note 6; *Menaker*, *supra* note 18, at 82.

²⁴ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award of the Tribunal, ¶ 7.113 (Aug. 31, 2018)

²⁵ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award of the Tribunal, ¶ 7.109 (Aug. 31, 2018).

²⁶ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Dissenting Opinion of Arbitrator Mark Clodfelter, ¶ 8 (Aug. 31, 2018).

²⁷ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Dissenting Opinion of Arbitrator Mark Clodfelter, ¶ 19 (Aug. 31, 2018).

²⁸ NIGEL BLACKABY AND CONSTANTINE PARTASIDES, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION*, 153 (1999, 3rd edition)

²⁹ See *Domitille Baizeau and Tessa Hayes, The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, in ANDREA MENAKER (ED.), *INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY*, 229, (2017); Edoardo Marcenaro, *Arbitrators' Investigative and Reporting Rights and Duties on Corruption in DOMITILLE BAIZEAU AND RICHARD KREINDLER (EDS.), ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION*, 3, (2015); Alexis Mourre, *supra* note 8, at 95.

reflected in the revised passage taken from the 2015 edition of the same textbook quoted above:

If an allegation of corruption is made in plain language in the course of the arbitration proceedings, the arbitral tribunal is clearly under a duty to consider the allegation and to decide whether or not it is proven. It remains less clear, however, whether an arbitral tribunal has a duty to assume an inquisitorial role and to address the question of corruption on its own initiative where none is alleged. Initiating its own investigation and rendering a decision on the outcome of such a self-initiated investigation might leave a tribunal open to charges of straying into territory that is ultra petita [i.e. beyond the scope of the dispute that the parties agreed to submit to arbitration]. Conversely, a failure to address the existence of such illegality may threaten the enforceability of an award and thus may sit uncomfortably with an arbitral tribunal's duty under some modern rules of arbitration to use its best endeavours to ensure that its award is enforceable. Striking the right balance between these competing considerations may not be easy. For now, the extent of an arbitral tribunal's duty—if any—to probe matters of illegality of its own motion remains unclear.³⁰

Some commentators go further and suggest that arbitrators have a *duty* to investigate any suspicions of corruption, grounded in their duty to resolve the dispute according to the applicable law and to

render an enforceable award.³¹ However, it is important to clarify that, even on the most expansive views of arbitrators' powers, arbitrators do not have a general mandate to investigate corruption. Any investigation into suspicions of corruption must be relevant to the resolution of the dispute that has been submitted to the tribunal. While a tribunal might legitimately investigate possible instances of bribery that have implications for the validity of a contract on which the investor's claims in the arbitration are based, a tribunal could not legitimately investigate wider suspicions of bribery on the part of the investor that are not related to the dispute before the tribunal.

Turning to the arbitration in *P&ID v Nigeria*, the Nigerian Arbitration Rules (which are based on the UNCITRAL Arbitration Rules) grant significant latitude to arbitrators in conducting arbitral proceedings, empowering the tribunal to conduct an arbitration 'in such manner as it considers appropriate' provided the parties are treated equally.³² In particular, arbitrators are empowered under the Rules to require parties to produce evidence at any time during the proceedings,³³ and to determine the admissibility, relevance, materiality and weight of evidence.³⁴ Accordingly, a tribunal constituted under these rules could order the production of evidence relating to corruption even if not furnished by the parties, should the tribunal decide to make such an inquiry. In short, the tribunal in *P&ID v Nigeria* could have investigated suspicions of corruption relating to the award of the GSPA had it chosen to do so.

³⁰ NIGEL BLACKBAY AND CONSTANTINE PARTASIDES, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION*, 121 (2015, 6th ed).

³¹ BETZ, *supra* note 6, at 287. For the practical implications of arbitrators' duty to render an enforceable award, see Section 2.4

³² *Nigerian Arbitration Rules* r. 15(1). See also art. 17 *UNCITRAL Arbitration Rules*.

³³ *UNCITRAL Rules*, art. 24(2). See also art. 27(3) *UNCITRAL Arbitration Rules*

³⁴ *UNCITRAL Rules*, art. 25(6). See also art. 27(3) *UNCITRAL Arbitration Rules*.

Although arbitral rules do not impose a positive duty on arbitrators to investigate corruption in proceedings, arbitrators may fall under such a duty by virtue of the arbitral institutions' ethical codes; ethical codes of any member-based organisation of which the arbitrators is a member; the International Bar Association Guidelines, or the rules of the national bar association with which the arbitrator is licenced.³⁵ To our knowledge, there has been little to no discussion as to whether these ethical obligations could be implicated should an arbitrator fail to act on suspicions of corruption arising under an arbitration – indeed, this could be a subject of further inquiry.

2.2.3 Confidentiality of proceedings

Traditionally, ISA is conducted in secret. Information relating to the dispute and sometimes even the fact that the arbitration is taking place is often not disclosed. The confidentiality of arbitral proceedings intersects with and compounds the underlying problems of corruption, as public awareness and scrutiny is one mechanism by which pressure can be brought to bear on government officials (who may have private incentives that diverge from the public interest) to explain how a dispute with an investor arose.

Over the past two-decades, secrecy in treaty-based ISA has been the subject of a great deal of academic and public criticism.³⁶ This has led to reforms in investment treaties and arbitral rules that

introduce much greater transparency in treaty-based ISA.³⁷ For example, under the UNCITRAL Arbitration Rules there are now heightened standards for transparency in treaty-based ISA. Secrecy in contract-based ISA has not received the same attention, even though the underlying policy concerns are essentially the same. Contract-based ISA under the UNCITRAL Rules and all arbitrations under the LCIA and ICC rules are governed by presumptions of confidentiality, meaning the proceedings and awards are not made publicly available. So far as we are aware, the arbitration in *P&ID v Nigeria* was conducted entirely in secret, and the existence of the arbitration did not become public knowledge until 2015, following a change of government in Nigeria. At that point in time the jurisdictional and merits phase of the arbitration had already been concluded.

2.3 Law of the seat of arbitration

The 'seat' of an arbitration is a term of art that refers to the relationship between the arbitration and a particular domestic jurisdiction. It is not necessarily the place where the arbitration physically takes place (although, in practice, hearings are usually held in the seat). Rather, it is the system of law selected to have supervisory jurisdiction over the arbitration.³⁸ With the exception of arbitrations conducted under the ICSID Convention, all investor-state arbitrations have a seat in some domestic jurisdiction. Arbitrations conducted under the ICSID Convention are unique in that they are

³⁵ See Catherine A. Rogers, *The Ethics of International Arbitrators*, 3-5, (Institute of Comparative Law, Research Paper No. 08-01). For example, institutional ethical codes include the Hong Kong International Arbitration Centre's Code of Ethical Conduct for Arbitrators, or the Singapore International Arbitration Centre's Code of Ethics for an Arbitrator. The Chartered Institute of Arbitrators also has a Code of Professional and Ethical Conduct which members are expected to comply with. None of these codes impose a positive duty on arbitrators to investigate suspicions of corruption.

³⁶ *The Secret Trade Courts*, *NEW YORK TIMES*, Sept. 27, 2004, <<https://www.nytimes.com/2004/09/27/opinion/the-secret-trade-courts.html>>.

³⁷ United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, U.N. Doc. A/RES/69/116, (Dec. 10, 2014).

³⁸ Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements* 63 *INT'L & COMPARATIVE L. QUARTERLY* 517, 518 (2014).

immune from oversight by any domestic jurisdiction and, instead, supervised by a special set of international mechanisms established by the ICSID Convention.

The basic principle in international arbitration is that the parties are entitled to choose the seat of their arbitration. In contract-based ISA, this is often done by including a clause in the contract containing the agreement to arbitrate specifying the seat of any future arbitration under that contract. If a seat is not selected by the parties, or if the seat is not clear from the contract, the arbitral tribunal, or in some cases national courts, will use principles of contract interpretation to determine the appropriate seat.³⁹ In *P&ID v Nigeria*, there was disagreement between the parties about the seat of the arbitration during the arbitral proceedings themselves, and at the enforcement stage. The GSPA designated London, England as the ‘venue’ of the arbitration, but did not specifically use the term ‘seat’. Countervailing factors pointed to Nigeria as the seat of arbitration, including the fact that the contract was governed Nigerian law and the arbitration was to be conducted according to the rules of the Nigerian Arbitration and Conciliation Act. However, both the arbitral tribunal⁴⁰ and the English High Court⁴¹ determined that the seat of the arbitration was

England. Because England was the seat of the arbitration, the decision by the High Court of Lagos to set aside the arbitral award⁴² had no effect, as only the courts of the seat of the arbitration have supervisory jurisdiction over challenges to arbitral awards.⁴³

Apart from governing the relationship between the arbitration and national courts, the law of the seat is also important in determining the scope of arbitrators’ duties. As noted above, arbitral rules do not place an explicit obligation on arbitrators to investigate suspicions of corruption of their own motion. However, arbitrators may have a duties to investigate or to report suspicions of corruption arising during proceedings by virtue of the law of the seat.⁴⁴ For example, while there has been no relevant case law examining this provision, it has been argued that the duty to report suspicions of money-laundering under the Singaporean anti-money laundering legislation is sufficiently broad so as to apply to arbitrators in proceedings seated in Singapore.⁴⁵ Failure to report is punishable by conviction and a fine.⁴⁶

To the extent that they are incorporated into national laws, international instruments relating to reporting obligations may become applicable to

⁴⁰ *Process & Industrial Developments Limited v Federal Republic of Nigeria*, Procedural Order No. 12, (April 26 2016).

⁴¹ *Process & Industrial Developments Limited v Federal Republic of Nigeria* [2019] EWHC 2241 (Comm), ¶ 87.

⁴² *Process & Industrial Development Limited v. Federal Republic of Nigeria*, Federal High Court of Nigeria, Lagos Judicial Division (May 24, 2016).

⁴³ *Process & Industrial Developments Limited v Federal Republic of Nigeria* [2019] EWHC 2241 (Comm), ¶ 43. See also Powers, *Duties and Jurisdiction of an Arbitral Tribunal in NIGEL, PARTASIDES ET AL. (EDS.)*, supra note 31, at 310.

⁴⁴ See Michael Hwang and Kevin Lim, *Corruption in Arbitration – Law and Reality* 8 ASIAN INT’L ARBITRATION J. 1, 48-49 (2019), arguing that duty of disclosure contained in the Singaporean Corruption, Drug Trafficking and Other

Serious Crimes (Confiscation of Benefits) Act s 39(1) could be broad enough to require an arbitrator to report reasonable suspicions of a party’s corrupt activity. See also BETZ, supra note 6, at 285-6, noting that in Switzerland, while prosecutors and magistrates have a duty to report, arbitrators have a *right* to report, but may be incur civil liability for breach of contractual duty.

⁴⁵ See Hwang and Lim, supra note 45, at 48-9.

⁴⁶ Section 39(2) *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) [Singapore]*.

arbitrators by virtue of the law of the seat. For example, the EU Anti-Money Laundering Directives aimed at combating money laundering and the financing of terrorism imposes a duty on legal professionals to report suspicions of money laundering, however, it is commonly understood that there is an exemption for lawyers providing legal advice for the purpose of litigation.⁴⁷ When incorporating the Directives into domestic law, some national jurisdictions have specifically stated that arbitrators are not subject to the Directives.⁴⁸

The UK has incorporated each of the EU Anti-Money Laundering Directives into its national legislation.⁴⁹ Like other jurisdictions, the UK has sought to maintain the balance between reporting suspicious activity and ensuring legal professional privilege, and accordingly has indicated that generally the provision of legal advice will not be characterised as 'participation in a financial transaction' such as to fall within the scope of regulated activity under the Money Laundering

Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.⁵⁰ Similarly, participation in litigation or forms of alternative dispute resolution are also not typically considered to fall within the scope of regulated activity.⁵¹ This follows the decisions of the English Court of Appeal, which specifically excluded lawyers advising parties in legal proceedings from the scope of the reporting provisions in the UK Proceeds of Crime Act.⁵² While some argue that arbitrators can be distinguished from lawyers such that this decision would not apply to arbitrators,⁵³ this has yet to be tested in the courts.

The UK has indicated that it does not consider settlements, negotiations, out of court settlements, alternative dispute resolution and tribunal representation to constitute an 'arrangement' for the purposes of the Proceeds of Crime Act.⁵⁴ Furthermore, the UK Arbitration Act specifically grants arbitrators with immunity for acts or

⁴⁷ See Mourre, *supra* note 8, at 95; Thomas K. Sprange, *Corruption in Arbitration* in DOMITILLE BAIZEAU AND RICHARD KREINDLER (EDS), *ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION*, 137, (2015) pp. 137

⁴⁸ Patricia Nacimiento, Tilmann Hertel, Catrice Gayer, *Arbitration and Money Laundering: What are the Obligations Placed on Counsel and Arbitrators and What Risks do they Face?* *KLUWER ARBITRATION* (Nov. 10, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/11/10/arbitration-money-laundering/?doing_wp_cron=1597126526.6905949115753173828125> discussing the German Anti-Money Laundering Act.

⁴⁹ See Legal Sector Affinity Group, *Anti Money Laundering Guidance*, Law Society UK, 13-14 <<https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>>.

⁵⁰ See Legal Sector Affinity Group, *Anti Money Laundering Guidance*, Law Society UK, 15-17 <<https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>>.

⁵¹ See Legal Sector Affinity Group, *Anti Money Laundering Guidance*, Law Society UK, 15-17

<<https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>>.

⁵² The UK Proceeds of Crime Act creates an offence of entering into or becoming concerned in an arrangement that a person knows or suspects of facilitating the use of criminal property. While this provision does apply to lawyers in some contexts, the English Court of Appeal in *Bowman v Fels* [2005] EWCA Civ 226 has held it does not apply to lawyers advising parties in legal proceedings.

⁵³ Sprange, *supra* note 48, at 137; BETZ, *supra* note 6, at 51.

⁵⁴ See Legal Sector Affinity Group, *Anti Money Laundering Guidance*, Law Society UK, 89, 90 <<https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>>. Citing also the decision in *Bowman v Fels* [2005] EWCA Civ 226. In fact, the Guidance specifically states that "money-laundering for the purposes of the Proceeds of Crime Act cannot occur until after execution of the judgement or completion of the settlement".

omissions committed during in the discharge of their duties, unless committed in bad faith.⁵⁵

An in-depth analysis of money laundering is outside the scope of this paper. However, the above discussion illustrates how one jurisdiction has tried to balance reporting obligations in the context of legal professionals. Further analysis will need to be conducted to determine whether arbitrators are subject to any such reporting obligations. We are not aware of any equivalent legal regimes that might place a duty on arbitrators to report suspicions of bribery.

Insofar as arbitrators do have a duty to report suspicions of corruption or money laundering by virtue of the law of the seat, this duty is likely to be in tension with duties of confidentiality typically imposed by arbitral rules.⁵⁶ While a duty to report seem incompatible with their confidentiality obligations,⁵⁷ in some cases the confidentiality obligation is subject to a public policy exemption,⁵⁸ meaning arbitrators could be permitted to report despite the confidentiality obligation. The historical importance of confidentiality as a core principle of arbitration is reflected in the fact that there is no known precedent of arbitrators reporting illegal behaviour uncovered in the course of proceedings to state authorities.⁵⁹

⁵⁵ Section 29 UK Arbitration Act (1996).

⁵⁶ Note that the Nigerian Arbitration Rules do not seem to impose a duty of confidentiality for arbitrators.

⁵⁷ *Baizeau and Hayes*, *supra* note 30, at 230.

⁵⁸ *Marcenaro*, *supra* note 30, noting for example art. 30(1) of the London Court of International Arbitration Rules, which provides that confidentiality must be maintained “save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.” See also Hwang and

2.4 Principles governing domestic courts’ review and enforcement of arbitral awards

Unlike other areas of law, once an arbitral tribunal issues an award, the parties cannot generally appeal against the tribunal’s decision. There are, however, two further actions that parties can take in relation to the decision – the first being set aside proceedings, and the second being enforcement proceedings.

A party that is not satisfied with the award rendered by an arbitral tribunal may seek to set aside the award. Set aside proceedings can only be instigated in the jurisdiction in which the arbitration is seated, and the grounds for which an award may be set aside are set out in domestic legislation specific to each jurisdiction. Enforcement proceedings on the other hand can be brought by a party seeking to have a domestic court give effect to the arbitral award, such that the award will take on the status of a judgement within that jurisdiction. In practical terms, a successful party will commence enforcement proceedings in situations where the other party has failed to comply with the arbitral award.

Most jurisdictions’ arbitration laws enumerate the grounds on which a court can set aside an award of an arbitral tribunal seated in that jurisdiction and the grounds on which a court can refuse to enforce an award of an arbitral tribunal seated in any jurisdiction. While set aside proceedings and

Lim, *supra* note 45, at 49-50, arguing that an arbitrator disclosing of his/her own decision, rather than by legal compulsion, could potentially also fall within the public policy exception to confidentiality.

⁵⁹ *BETZ*, *supra* note 6, at 285; *Marcenaro*, *supra* note 30, at 5.

enforcement proceedings are conceptually distinct, in most jurisdictions the grounds upon which a court may set aside an award and the grounds on which a court may refuse enforcement are very similar. Historically, this similarity results from the widespread adoption of the 1958 New York Convention, which specifies the grounds on which a state may refuse to enforce a foreign arbitral award. These limited grounds for refusing enforcement were then influential in the drafting of national legislation dealing with the grounds for setting aside an award.

For example, section 68 of the UK Arbitration Act 1996 provides that an award may be set aside on the grounds of serious irregularity, including if the award was 'obtained by fraud' or if 'the award or the way in which it [was] procured is contrary to public policy'.⁶⁰ Where a party is seeking to enforce an award in the UK under the New York Convention,⁶¹ the UK Arbitration Act similarly sets out the grounds on which enforcement of an award may be refused.⁶² As with set aside proceedings, a court may refuse to enforce an award if it would be contrary to public policy to enforce the award.⁶³ Similarly, most other jurisdictions provide that national courts have the discretion to refuse to enforce an arbitral award that is contrary to public policy.

⁶⁰ Section 68(2)(g) UK Arbitration Act (1996).

⁶¹ *New York Convention on the Recognition and Enforcement of Arbitral Awards*, Jun. 10, 1958, 330 U.N.T.S. 38 (1958).

⁶² Section 103 UK Arbitration Act (1996).

⁶³ Section 103(3) UK Arbitration Act (1996).

⁶⁴ Peter Gillies, *Enforcement of International Arbitration Awards – The New York Convention* 9 INT'L TRADE AND BUSINESS L. REV. 19, 39-40 (2004).

⁶⁵ See e.g. *Union Fenosa Gas, S.A. v Egypt*, ICSID Case No. ARB/14/4/, Award, ¶. 7.48 (Aug. 31, 2018); *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award ¶ 157 (Oct. 4, 2006); *Lucinda A. Low*,

The concept of 'public policy' as a ground for refusing enforcement of arbitral awards is interpreted narrowly. Rather than referring to the specific policies in place in the jurisdiction where the enforcement proceedings are occurring, courts tend to understand public policy as a reference general notions of justice and morality, i.e. norms that are widely held.⁶⁴ This is often called 'international public policy'.

It is widely recognised that corruption is contrary to public policy.⁶⁵ For this reason, domestic courts are, generally, entitled to refuse to enforce an award where corruption on the part of the investor has been proven. However, there is some tension between this principle and courts' broader pro-enforcement bias, on which basis courts respect the binding and final nature of arbitration and are reluctant to intervene too readily.⁶⁶

This tension is illustrated by the English Commercial Court's decision in *Sinocore International Co Ltd. V RBRG Trading (UK) Ltd*, in which the court noted that there is a strong presumption that New York Convention Awards are enforceable, and indicated that public policy defences were to be treated with extreme caution.⁶⁷ Furthermore, the court noted a distinction between enforcing contracts for illegal conduct, which are contrary to English public policy, and enforcing contracts that are tainted by illegality (e.g. induced

Symposium on New Directions in Anticorruption Law: Dealing with Allegations of Corruption in International Arbitration 113 AJIL UNBOUND 341, 342 (2019); See Baizeau and Hayes, *supra* note 30, at 231..

⁶⁶ See e.g. Gillies, *supra* note 65, at 27-8 citing *Sumitomo Corp v Parakopi Compania Maritima SA*, 477 F Supp 737 (SDNY, 1979); *Seven Seas Shipping (UK) Ltd v Tondo Limitada*, 99 Civ 1164 (DLC, 1999).

⁶⁷ *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2017] EWHC 251 (Comm.), ¶ 27.

by bribery), which is not contrary to English public policy.⁶⁸ (It is important to note, at this point, that this case concerned an arbitration between private parties and that the alleged corruption differs somewhat from that alleged in *P&ID v Nigeria*.) Where a party has raised issues of corruption before the tribunal and the tribunal dismissed the allegations, it seems less likely that a court will refuse to enforce an award on public policy grounds, as enforcing courts are hesitant to reopen disputed questions of fact that have been considered and resolved by the tribunal.⁶⁹

There are also questions about when a court will allow a party to introduce new evidence of corruption as part of its efforts to resist enforcement in situations where corruption was not raised before the tribunal. If a party does not raise a matter during the arbitration, this may be influential in a court deciding to exercise its discretion to enforce an award, even if the party has proven one of the grounds upon which refusal may be warranted.⁷⁰ This approach accords with the pro-enforcement bias of many domestic courts, with the rationale being that arbitrations are intended to be final and binding, and, therefore, that the losing party should not be able to raise new matters at the enforcement stage that could have been raised during the arbitration itself.

While there have only been limited instances of parties successfully challenging the enforcement of arbitral awards on the basis of the public policy exception, there is an emerging tendency for

tribunals to take transnational public policy that were originally developed in the context of challenges to enforcement in national courts into account in their deliberations during the course of the arbitral proceedings.⁷¹ Conceptually, such an approach is often justified on the basis that arbitrators have a duty to render an enforceable award, and an award that violates public policy risks being unenforceable.⁷² From a broader policy perspective, some also argue that arbitrators hold a 'public responsibility to the administration of justice'⁷³ such that they must be proactive in identifying corruption, with others also pointing to the broader effects on the legitimacy of international arbitration should arbitrators turn a blind eye to corruption.⁷⁴

Reference to international public policy provides tribunals with an additional ground for refusing to decide disputes arising from corruptly-acquired investments, beyond arguments based on the specifics of the applicable law. For example, in the recent case of *Spentex v Uzbekistan*, a treaty-based ISA, the tribunal cited the OECD Convention on Bribery and UNCAC to show that particular acts of bribery were contrary to transnational public policy.⁷⁵ On this basis it refused to hear the investor's claims.

⁶⁸ *Sincore International Co Ltd v RBRG Trading (UK) Ltd* [2017] EWHC 251 (Comm.) ¶¶ 29-37.

⁶⁹ See e.g. *Westacre Investments Inc. v Jugoimport-SDPR Holding Co. Ltd and others* [1999] 3 All ER 864, 887; *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146

⁷⁰ *Gillies*, *supra* note 65, at 27-28.

⁷¹ E.g. *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award ¶ 138 (Oct. 4, 2006).

⁷² Baizeau and Hayes, *supra* note 30, at 229; Marcenaro, *supra* note 30, at 3; Moure, *supra* note 8, at 110.

⁷³ Baizeau and Hayes, *supra* note 30, at 229

⁷⁴ Sprange, *supra* note 48, at 135.

⁷⁵ Discussed in *BETZ*, *supra* note 6, at 130. The decision is not publicly available

3. Examples of arbitral tribunals' handling of allegations and suspicions of corruption

In the case of *P&ID v Nigeria*, Nigeria alleges that the arbitration was a 'sham'.⁷⁶ The allegation is that 'from the outset, P&ID's intent was to transform the GSPA into a claim against the FRN [Federal Republic of Nigeria], which it could then attempt to enforce through arbitration.'⁷⁷ Nigeria alleges that Ministry of Petroleum corruptly facilitated this plan, including by failing to contest the arbitration vigorously: 'The Ministry of Petroleum's handling of the FRN's defense at the jurisdiction and liability phases is notable for its suspicious failure to present any vigorous defense.'⁷⁸

We do not take any position on whether these allegations are true. Rather, in this section we consider how such allegations or suspicions might be handled by arbitral tribunals and by courts

exercising oversight or enforcement functions in relation to arbitral proceedings. We are not aware of any other publicly known cases involving specific allegations of corruption on the part of state's legal counsel in investor-state arbitration, so our analysis focuses on cases that are somewhat analogous. We begin by explaining why we think this case is better understood as involving allegations of bribery than allegations of money-laundering. We then considered three increasingly complex factual scenarios in which tribunals and courts have considered allegations of corruption.

3.1 Has Nigeria alleged bribery, money-laundering or both?

An initial question is whether the conduct that Nigeria is alleging amounts to bribery and/or money-laundering. Nigeria clearly alleges 'a series of bribery schemes' involving bribes paid by P&ID to Ministry of Petroleum officials.⁷⁹ Nigeria also makes allegations of money-laundering against P&ID.⁸⁰ In characterising the arbitration as a 'sham',

⁷⁶ *Federal Republic of Nigeria, Memorandum of Law in Support of Application for an Order Pursuant to 28. U.S.C. §1782(a) Authorizing Applicants to Conduct Discovery in this District for Use in Foreign Judicial Proceedings, In Re: Ex Parte Application of the Federal Republic of Nigeria and Abubakar Malami, the Attorney General of the Federal Republic of Nigeria, Case No: 1:20-mc-00169- LGS, United States District Court, Southern District of New York, 12, (Mar. 25 2020).*

⁷⁷ *Federal Republic of Nigeria, Memorandum of Law in Support of Application for an Order Pursuant to 28. U.S.C. §1782(a) Authorizing Applicants to Conduct Discovery in this District for Use in Foreign Judicial Proceedings, In Re: Ex Parte Application of the Federal Republic of Nigeria and Abubakar Malami, the Attorney General of the Federal Republic of Nigeria, Case No: 1:20-mc-00169- LGS, United States District Court, Southern District of New York, 12, (Mar. 25 2020).*

⁷⁸ *Federal Republic of Nigeria, Memorandum of Law in Support of Application for an Order Pursuant to 28. U.S.C. §1782(a) Authorizing Applicants to Conduct Discovery in this District for Use in Foreign Judicial Proceedings, In Re: Ex Parte Application of the Federal Republic of Nigeria and Abubakar Malami, the Attorney General of the Federal Republic of Nigeria, Case No: 1:20-mc-00169- LGS, United States District Court, Southern District of New York, 12, (Mar. 25 2020).*

States District Court, Southern District of New York, 13, (Mar. 25 2020).

⁷⁹ *Federal Republic of Nigeria, Memorandum of Law in Support of Application for an Order Pursuant to 28. U.S.C. §1782(a) Authorizing Applicants to Conduct Discovery in this District for Use in Foreign Judicial Proceedings, In Re: Ex Parte Application of the Federal Republic of Nigeria and Abubakar Malami, the Attorney General of the Federal Republic of Nigeria, Case No: 1:20-mc-00169- LGS, United States District Court, Southern District of New York, 13, (Mar. 25 2020).*

⁸⁰ *Federal Republic of Nigeria, Memorandum of Law in Support of Application for an Order Pursuant to 28. U.S.C. §1782(a) Authorizing Applicants to Conduct Discovery in this District for Use in Foreign Judicial Proceedings, In Re: Ex Parte Application of the Federal Republic of Nigeria and Abubakar Malami, the Attorney General of the Federal Republic of Nigeria, Case No: 1:20-mc-00169- LGS, United States District Court, Southern District of New York, 15, (Mar. 25 2020).*

Nigeria implies that the arbitration itself was an instance of money-laundering.⁸¹

We have doubts about this characterisation of the arbitration, even if the facts alleged by Nigeria are assumed to be true. These allegation differ from examples of money-laundering discussed in the literature on arbitration, in which the arbitration is used as a vehicle to legitimise illegally obtained funds that are already held by one party through an award ordering the transfer of those funds to a related party.⁸² Moreover, characterisation of the *P&ID v Nigeria* arbitration as money-laundering suggests that both parties to the arbitration had the common intention to use the arbitration for this purpose. In contrast, in *P&ID v Nigeria*, the central allegation is that officials within the Ministry of Petroleum obtained a private benefit by acting contrary to the interests of the Ministry and of Nigeria. There is no suggestion that *Nigeria* intended to engage in money-laundering. A more detailed analysis of the issue of money-laundering is outside the scope of this paper and may benefit from further analysis.

3.2 The simple case: the state alleges in the arbitration that the investor obtained a contract/investment by paying bribes

We begin with a simple case of corruption in ISA, in which a state alleges that the investor obtained a contract or other assets constituting its investment by payment of a bribe. This is the scenario that would have confronted the arbitral tribunal in *P&ID*

v Nigeria if Nigeria had raised the allegations of corruption during the arbitration. The legal issues raised by this scenario are now relatively settled. In contract-based ISA, the tribunal should apply the applicable law of the contract. In most cases, the applicable law of the contract will provide that the contract is either void or voidable at innocent party's election if bribery is proven. In investor-state ISA, if bribery is proven the investor's claims will usually be dismissed on the grounds that the investor did not make a lawful 'investment' that is entitled to the protection of the treaty. In both contract-based and treaty-based ISA, transnational public policy would provide an additional and mutually reinforcing ground for dismissing the investor's case. To be sure, such cases may raise complex *evidentiary* issues relating to the standard the proof and the weight to be given to circumstantial 'red flags' of corruption.⁸³ But the practical consequences of bribery, if proven, are relatively clear.

An example of a 'simple' case of corruption in ISA is the case of *World Duty Free v Kenya*. This was a contract-based investor-state arbitration, where the claimants argued that Kenya had breached the contract to operate airport duty-free stores, and had illegally taken their property. During the course of the arbitration, Kenya argued that contract had been procured by corruption and was therefore void. The investor openly conceded that it had made a payment to Kenya's then-President, but argued that this was 'a personal donation ... to be used for public purposes' in line with Kenyan cultural practices of gift giving.⁸⁴ Without referring to

⁸¹ *Federal Republic of Nigeria, Memorandum of Law in Support of Application for an Order Pursuant to 28. U.S.C. §1782(a) Authorizing Applicants to Conduct Discovery in this District for Use in Foreign Judicial Proceedings, In Re: Ex Parte Application of the Federal Republic of Nigeria and Abubakar Malami, the Attorney General of the Federal Republic of Nigeria, Case No: 1:20-mc-00169- LGS, United States District Court, Southern District of New York, 11, 16 (Mar. 25 2020).*

⁸² *E.g. Mourre, supra note 8, at 95; BLACKABY AND PARTASIDES, supra note 31, at 332-333.*

⁸³ *Discussed in Section 2.3, above.*

⁸⁴ *World Duty Free Company v Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 133 (Oct. 4, 2006).*

any legal standard, the tribunal characterised this payment as a bribe.

Having established that a bribe was paid, the legal question was then the consequences of the bribe for the contractual dispute.⁸⁵ The tribunal analysed the issue under two different, but mutually reinforcing, legal frameworks. The primary rubric that the tribunal applied was international public policy. It observed that states can deny the recognition and enforcement of foreign arbitral awards based on their own conception of public policy.⁸⁶ Notwithstanding the narrow conception of public policy that normally prevails in international arbitration, the tribunal argue that a consensus had emerged among states that corruption was contrary to public policy. It cited international treaties, national court decisions and arbitral awards as evidence. This ‘transnational public policy’ led the tribunal to conclude that claims based ‘on contract obtained by corruption cannot be upheld by this tribunal’.⁸⁷

A supplementary basis for the decision was grounded in the applicable law. The contract in question was governed by English law and Kenyan law. The tribunal held that Kenyan law was materially identical to English law and based its supplementary analysis on rules of English contract law. Both parties and the tribunal agreed that a basic principle of English law is that:⁸⁸

If, in the course of negotiating a contract between X and Y, an improper inducement

*is offered by B (acting on behalf of Y) to A (acting on behalf of X) which causes or contributes to the making of a contract ... X is entitled at his [sic] option to rescind the contract*⁸⁹

In other words, under English law the contract in question was not automatically void but, rather, voidable at Kenya’s election. The tribunal held that Kenya rescinded the contract through its pleadings in the arbitration.⁹⁰

3.3 Suspicions of corruption: arbitral tribunals’ investigation of corruption where the issue is not raised by either of the parties

More complex issues arise when corruption is not raised by either of the parties to the arbitration. In these situations, a question arises as to whether the tribunal should investigate the possibility of corruption of its own motion.⁹¹ This is the situation that faced the arbitral tribunal in *P&ID*. The tribunal noted that, in their submissions, Nigeria’s lawyers:

*Described the holder of the office [of Minister of Petroleum Resources] at the time of the GSPA as having been a “friendly” Minister who purported to commit the Government to obligations and concessions which exceeded his powers.*⁹²

⁸⁵ *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 134-36 (Oct. 4, 2006).

⁸⁶ *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 138 (Oct. 4, 2006).

⁸⁷ *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

⁸⁸ *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 163 (Oct. 4, 2006).

⁸⁹ *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 164 (Oct. 4, 2006).

⁹⁰ *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 188 (Oct. 4, 2006).

⁹¹ The Latin term *sua sponte* – ‘of its own accord’ – is used in the literature to describe this situation.

⁹² *Process & Industrial Developments Limited v Federal Republic of Nigeria, Part Final Award on Liability*, ¶41 (Jul. 15, 2015).

Considered in light of other aspects of the case – including the lack of a tender process prior to the conclusion of the contract, P&ID’s apparent lack of experience in the gas sector, Nigeria’s apparent failure to begin carrying out *any* of its obligations under the contract once the contract had been concluded, P&ID’s offshore corporate structure, and the wider history of corruption in Nigeria’s resource sector – this submission might well have been enough to raise suspicions of the possibility of corruption. From the documents relating to the arbitration that are publicly available, it does not appear that the tribunal took any active steps to investigate the possibility of corruption.

As we have seen in Section 2, there is an emerging consensus that arbitral tribunals are *entitled* to investigate suspicions of corruption of their own motion, insofar as these suspicions relate to the resolution of the dispute – for example, because such suspicions would, if proven, have implications for the validity of a contract on which the investor’s claims are based. It is less clear whether arbitral tribunals are under an *obligation* to initiate such investigations. In practical terms, there are few publicly known examples of cases where tribunals have investigated corruption of their own motion. This suggests a continuing reluctance on the part of tribunals to engage actively with the implications of corruption.

We have found only two cases in which arbitral tribunals have investigated corruption of their own motion,⁹³ both of which differ from *P&ID v Nigeria* to some extent. The first is ICC Case No 1110 of 1963. This was an arbitration between two unnamed private parties, not an investor-state arbitration. The claimant and the respondent had entered into a

contract, under which the claimant would use his influence in Argentina to obtain business for the respondent. The respondent, in turn, would pay a 10% commission to the claimant on all contracts thereby obtained. When the respondent refused to pay a commission on some of its contracts in Argentina, the claimant initiated arbitration.

While neither party argued that corruption was a legally relevant issue,⁹⁴ the respondent’s witnesses in the case admitted that the commission was intended to be used to pay bribes to procure contracts for the respondent. The claimant does not appear to have disputed this. Accordingly, no further factual inquiry was required on the part of the arbitrator. Instead, the central question was the legal consequences of this fact for the contractual dispute. Holding that a contract for bribery was contrary to international public policy, the arbitrator stated that he had no jurisdiction to decide the dispute.⁹⁵

The second case is *Metal-Tech v Uzbekistan*, a treaty-based investor-state arbitration. Strictly speaking, the case is not actually an example of a tribunal investigating corruption of its own motion, as the host state had argued in its written pleadings that ‘the Claimant engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment.’⁹⁶ The precise nature of this original allegation of corruption is unclear because, as is common in ISA, the parties’ written submissions and most other documents relating to the case remain confidential. What is clear, however, is that evidence that came to light in the hearings marked a crucial turning point in the case. At the hearing, the investor’s Chairman and CEO admitted paying several million dollars to

⁹³ Baizeau and Hayes, *supra* note 30, at 260.

⁹⁴ ICC Award No. 1110 of 1963 by Gunnar Lagergren, *republished in ARBITRATION INT’L* 282, 291 (1994).

⁹⁵ *Ibid.*

⁹⁶ *Metal-Tech Ltd v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award*, ¶¶ 110(i) (Oct. 4, 2013).

'consultants' to engage in 'lobbying' around the time that investment was made.⁹⁷ The tribunal 'considered it its duty to inquire about the reasons for such payment.' For this reason, it 'exercised its *ex officio* powers to call for additional testimony and evidence.'⁹⁸

This additional evidence raised a number of 'red flags' of corruption that the claimant was unable to explain.⁹⁹ These included the large amounts of the payments, the absence of explanation or documentation to support the investor's argument that the consultants had provided legitimate services, the fact that one of the consultants was the Prime Minister's brother, and the fact the consultants were paid indirectly through offshore companies. On this basis, the tribunal held that 'corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan.'¹⁰⁰ Because the investment treaty in question required investments to be 'implemented in accordance with' Uzbek law, the claim failed for lack of jurisdiction.¹⁰¹

Relevantly for the analysis of the decision in *P&ID v Nigeria*, on the basis of the case documents that are publicly available, it seems that Uzbekistan did not provide any direct evidence of receipt of bribes by Uzbek officials. This does not seem to have been an obstacle for the tribunal in reaching its conclusion.

⁹⁷ *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 240 (Oct. 4, 2013).

⁹⁸ *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 241 (Oct. 4, 2013).

⁹⁹ *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 293 et seq. (Oct. 4, 2013).

¹⁰⁰ *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 372 (Oct. 4, 2013).

3.4 Allegations of corruption that were not raised or considered in the arbitration are raised after the conclusion of the arbitration

The situation is even more complex when allegations of corruption are raised for the first time following the conclusion of the arbitration. In this scenario, the innocent party's failure to raise allegations of corruption in the arbitration calls for some explanation – for example, the appearance of new information that could not have been uncovered through diligent inquiries during the course of the arbitration. Nigeria has argued that its failure to raise the issue of corruption in the arbitration was due to the fact that the Ministry of Petroleum Resources was also responsible for the defence of the arbitration. We are not aware of any other cases in which a state defending an investor-state arbitration has made a belated allegation of corruption on this, or any other, basis.

An initial question is whether the arbitral award could be reopened. The basic principle is the arbitral awards are final and binding on the parties.¹⁰² Subject to limited exceptions, the 'mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.'¹⁰³ In arbitrations conducted under the UNCITRAL Arbitration Rules (on which the Nigerian arbitration rules are based), these limited exceptions include the power to correct or interpret the award. They do not include power to revise the award in light of new

¹⁰¹ *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 372 (Oct. 4, 2013).

¹⁰² UNCITRAL Arbitration Rules, art 34(2).

¹⁰³ UNCITRAL Model Law art 32(3).

evidence.¹⁰⁴ (Arbitrations conducted under the ICSID Convention are an important exception in this respect.)¹⁰⁵ In arbitrations conducted under the UNCITRAL Arbitration Rules, tribunals can issue an additional award but only on 'claims presented in the arbitral proceedings but not decided by the arbitral tribunal.'¹⁰⁶ This power to issue an additional award does not appear to be relevant to the situation in *P&ID v Nigeria*, where the investor's claims were decided by the arbitral tribunal and corruption was not raised as an issue and, in any case, the deadline for doing so has long since passed.

A state making belated allegations of corruption would then be left with the options of seeking to have the award set aside in the courts of the seat of arbitration, or resisting enforcement in any jurisdiction(s) in which the investor seeks to enforce the award. The outcome of any attempt to set-aside the award will depend on the law of the seat. Courts in most jurisdictions would accept corruption as a basis to set aside an award on public policy grounds. However, the questions of whether the courts of the seat will allow a state to make new arguments that were not made in the arbitration, and whether the courts of the seat will revisit findings of fact made by the arbitral tribunal, including by allowing the introduction of new evidence, raise more difficult issues.

In the recent French court proceedings arising out of the treaty-based ISA *Belokon v Kyrgyzstan*, the

Paris Court of Appeal allowed Kyrgyzstan to introduce new evidence of money-laundering on the part of the investor and subsequently granted Kyrgyzstan's application to set aside the arbitral award on that basis.¹⁰⁷ (However, in that case, the investor's alleged involvement in money-laundering *had* been raised as an issue by Kyrgyzstan in the arbitration.)

This leaves the possibility of resisting enforcement of the award in jurisdiction(s) where the investor seeks enforcement. In the case of *Belokon v Kyrgyzstan*, it seems that Kyrgyzstan sought to introduce the same new evidence of money-laundering in concurrent court proceedings relating to enforcement of the award in Ontario, Canada. The Ontario court struck out this evidence as irrelevant.¹⁰⁸ The contrast between the decisions of the Paris and Ontario courts illustrates the possibility of differences in approach to new evidence between jurisdictions, as well as the possibility of differences in the standards applied in set aside and enforcement proceedings.

In the case of *P&ID v Nigeria*, P&ID commenced proceedings to enforce the award in the UK in 2018. In August 2019, the English High Court granted P&ID leave to enforce the award.¹⁰⁹ However, Nigeria is now seeking to instigate set-aside proceedings and to raise allegations of corruption.¹¹⁰ These set-aside proceedings are also being pursued in English courts, given that London was the seat of arbitration. If Nigeria were

¹⁰⁴ David D. Caron and Lucy F. Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 (1995) *ARBITRATION INT'L* 429.

¹⁰⁵ *ICSID Convention*, art. 51.

¹⁰⁶ *UNCITRAL Arbitration Rules*, art 39(1); similarly *UNCITRAL Model Law*, art 33(3).

¹⁰⁷ Discussed in Gaillard, *supra* note 21, at 7-8.

¹⁰⁸ Yelena Burova, *Money Laundering Allegations by Kyrgyzstan against Latvian Investor Resurface in Paris Cour d'Appel* *CIS ARBITRATION FORUM* (Feb. 28, 2017) <[http://www.cisarbitration.com/2017/02/28/money-](http://www.cisarbitration.com/2017/02/28/money-laundering-allegations-by-kyrgyzstan-against-latvian-investor-resurface-in-paris-cour-dappel/)

[laundering-allegations-by-kyrgyzstan-against-latvian-investor-resurface-in-paris-cour-dappel/](http://www.cisarbitration.com/2017/02/28/money-laundering-allegations-by-kyrgyzstan-against-latvian-investor-resurface-in-paris-cour-dappel/)>.

¹⁰⁹ *Process & Industrial Developments Limited v Federal Republic of Nigeria* [2019] EWHC 2241 (Comm)

¹¹⁰ See Order made by the Rt. Hon. Lord Justice Flaux, in the matter of *Process & Industrial Developments Limited v Federal Republic of Nigeria*, 20 January 2020, where it was stated that the proper grounds for raising a fraud challenge

successful in having the award set-aside, the effect would be to preclude the enforcement of the award in the UK and to make enforcement of the award in any other jurisdiction difficult, if not impossible. For Nigeria, a significant practical obstacle to having the arbitral award set aside is that an application to set aside an award in English courts must be brought within 28 days of the award, although this deadline can be extended for good reason.¹¹¹

Relevantly, on 4 September 2020, after the research for this paper had been completed, the English High Court granted to Nigeria an extension of time to initiate set aside proceedings of the arbitral award.¹¹² Given the standard period in which to initiate such proceedings under the UK Arbitration Act is 28 days, the decision to grant an extension of time is unprecedented. However, an extension was seen as warranted given the strong prima facie evidence of corruption submitted by Nigeria. As a result, it now seems that the questions of corruption will receive a full examination through the set-aside proceedings, including through the introduction of new evidence.

Some guidance on how the English courts might approach such corruption allegations at set-aside proceedings can be found in *Westacre v Jugoimport*.¹¹³ The case was not an investor-state arbitration. Rather, it related to consultancy contract by which Jugoimport engaged Westacre to assist it in concluding arms sales contracts with Kuwait. When Jugoimport purported to terminate the consultancy contract, Westacre commenced arbitration. At a late stage in the arbitration,

is through set aside proceedings, rather than an application to rely upon a new ground of appeal in the enforcement proceedings.

¹¹¹ UK Arbitration Act (1996), s 70.

¹¹² *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm)

¹¹³ *We have not yet been able to find a copy of the arbitral award. This summary is based on BETZ, supra note 6.*

Jugoimport argued that the contract was void as Westacre had been using the consultancy fees to bribe Kuwaiti officials. Jugoimport cited circumstantial evidence that would now be regarded as ‘red flags of corruption’ – the very large consultancy fee of 15-20% on the arms sales and that Westacre was an ‘international paper vehicle’ domiciled in Panama.¹¹⁴ The tribunal appears to have taken a dim view of Jugoimport’s failure to raise the issue of corruption earlier. It observed that ‘it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts.’¹¹⁵ The tribunal held in favour of Westacre and ordered Jugoimport to pay the fees owing under the consultancy contract.

Westacre then sought to enforce the award in the English proceedings. Jugoimport resisted enforcement of the award on the grounds that enforcement of a contract for bribery would be contrary to English public policy. Jugoimport sought to strengthen its case through new evidence in the form of an affidavit from its legal counsel purporting to contain much more detail about the corrupt relationships between the various parties to the arms deals. Westacre was successful at first instance and the case then went on appeal to the Court of Appeal.

By a majority of 2 -1, the Court of Appeal again held for Westacre. All three judges appear to have accepted the premise that the supposedly ‘new’ evidence was material that Jugoimport ‘had every opportunity of raising before the arbitrators’.¹¹⁶ The

¹¹⁴ *Ibid*, at 185-6.

¹¹⁵ *Cited in ibid*, at 187.

¹¹⁶ *Westacre Investments Inc. v Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401 ¶1864 per Waller LJ (dissenting).

reasons for the majority's decision lay in respect for the finality of the arbitral award: 'From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected.'¹¹⁷ However, one qualification noted by Mantell LJ in the majority was that there was 'no reason to suspect collusion or bad faith in the obtaining of the award',¹¹⁸ suggesting that the outcome could have been different if collusion had been proven. The dissenting judge, in contrast, emphasized the gravity of the issue of corruption and the importance of ensuring that allegations of corruption were properly tested '[t]he arbitrator simply did not have an opportunity of considering the case as now made, and whatever their suspicion, the majority did not feel it in their place to make inquiries.'¹¹⁹

The facts in *P&ID v Nigeria* differ from *Westacre* in several respects. For one, the issue of corruption was not raised before the arbitral tribunal in *P&ID v Nigeria*. Moreover, Nigeria now alleges collusion between its lawyers and P&ID in the arbitration, which was not an allegation that was made in *Westacre*. These differences might provide grounds for distinguishing *Westacre*. Moreover, *Westacre* was a decision concerning the enforcement of an arbitral award. Justice Cranston's decision of 4 September 2020 suggests that English courts might be more willing to consider the substance of corruption allegations in the context of set aside proceedings. Judicial attitudes towards corruption may also have evolved somewhat over the past twenty years. On the other hand, Nigeria faces additional obstacles beyond those facing Jugoimport. Most obviously, English courts have already ordered the enforcement of the *P&ID* award and, despite contesting the enforcement proceedings before Justice Butcher, Nigeria failed to raise allegations of corruption.

¹¹⁷ *Westacre Investments Inc. v Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401 ¶ 887 per Mantell LJ.

¹¹⁸ *Westacre Investments Inc. v Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401 ¶ 887 per Mantell LJ.

4. Policy analysis and a reform agenda

The case of *P&ID v Nigeria* highlights policy concerns about the way that investor-state arbitration intersects with corruption. These concerns arise regardless of whether Nigeria's belated allegations of corruption are true (a question on which we take no position).

If Nigeria's allegations of corruption are true, at least insofar as they relate to the conclusion of the underlying contract with P&ID, then international arbitration has allowed an investor to convert a series of corrupt interactions with officials in the Nigerian Ministry of Petroleum Resources into an English court order for almost USD 10 billion in damages. Given Nigeria's financial position, it is unlikely this amount will ever be paid in full. However, to the extent that it is paid even in part, the burden will fall on Nigerian citizens and taxpayers, not on the allegedly corrupt officials of the Ministry of Petroleum Resources.

If Nigeria's belated allegations are false, then the arbitral tribunal's apparent failure to investigate 'red flags' of corruption relating to the underlying contract has increased the length, cost and complexity of subsequent legal proceedings. This outcome has left all parties worse off than they would be if the issue had been thoroughly investigated and the allegations dismissed. If false, the belated allegations of corruption have allowed the Nigerian state to divert attention from other questions that might otherwise be being asked – for example, questions about lack of state capacity to negotiate and manage resource contracts, and to adequately defend the state's interests in subsequent legal disputes. Even if the allegations of

¹¹⁹ *Westacre Investments Inc. v Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401 ¶ 885 per Walle J (dissenting).

corruption are entirely false, the catastrophic outcome of the case for Nigeria raises urgent questions about how its natural resources are governed, including the question of whether it is wise to agree to resolve contractual disputes through international arbitration.

4.1 Arbitration doctrine vs. political economy

In order to formulate and justify proposals for reform, it is necessary to consider why the tribunal in *P&ID v Nigeria* does not appear to have investigated red flags of corruption that were present in that case. Our discussion in Section 2 and 3 points to some possible explanations:

- Arbitration is a mechanism for resolving disputes based on parties' consent. For this reason, tribunals have historically confined themselves to deciding issues raised by the parties. This is reflected in the (outdated) view that 'it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption where none is alleged.'¹²⁰
- Parties in legal proceedings, including arbitration, are represented by legal counsel. Counsel are assumed to 'speak for' the parties. For this reason, the possibility that legal counsel may themselves be part of a corrupt conspiracy or constrained by their corrupt superiors from vigorously defending their client raises difficult issues.
- Confidentiality of arbitral proceedings means the conduct of parties and counsel is

not subject to timely public scrutiny. Such scrutiny might increase the pressure on a state to provide an account of its own conduct, including the circumstances in which a contract with a foreign investor was negotiated and concluded. Depending on the procedural rules governing amicus curiae submissions and third party intervention, transparency of proceedings might also allow participation of other actors in the case. Procedural rules governing arbitration normally deal with the question of third party intervention through joinder explicitly. There are some differences between rules but, generally speaking, third parties will only be joined in limited circumstances when they have a direct interest in the dispute.¹²¹ In contrast, procedural rules governing arbitration tend not to deal explicitly with the question of amicus curiae. In *Methanex v United States*, the arbitral tribunal held that it had the power to accept written amicus curiae submissions, in its discretion, as a result of its wider powers to control the conduct of the proceedings.¹²² Although this was a treaty-based ISA, this discretion to allow amicus curiae would appear to be equally relevant to contract-based ISA conducted under the same procedural rules.

- Legal doctrine, particularly international doctrine, tends to see the state as a unitary actor, rather than a site of political contestation between groups. These habits of thought can encourage arbitrators to attribute corruption and incompetence on the part of government officials to the state itself. This way of seeing the world makes

¹²⁰ NIGEL BLACKABY AND CONSTANTINE PARTASIDES, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION*, 153 (1999, 3rd edition).

¹²¹ See, e.g. *UNCITRAL Arbitration Rules* (2013) art. 17(5); *LCIA Rules* (2020) art. 22(1)(x).

¹²² *Methanex v United States of America, Decision of the tribunal on Petitions from Third Persons to Intervene as 'amici curiae'*, 15 January 2001.

arbitrators less sympathetic to a state's allegations of bribery on the part of the investor, because such allegations can be perceived as a state raising *its own* misconduct in having accepted a bribe to defeat a claim against it. Likewise, these habits of thought encourage arbitrators to see belated allegations of corruption as a last-ditch litigation tactic of a state aiming to avoid accountability, rather than as an outcome of complex internal processes that might have made it difficult for legal counsel acting for that state to explicitly allege corruption earlier in the proceedings.

- Arbitrators may lack familiarity with the political economy of the host state. (Although, in *P&ID v Nigeria*, it is important to acknowledge that one of the arbitrators was the former Nigerian Attorney-General, who might be expected to have had some familiarity with these issues.)
- Arbitrators may lack familiarity with the laws of the host state and may have a tendency to view arguments based on the law host state as technical and irrelevant, even if the purpose of such laws is to prevent corruption or implement a system of oversight over decisions relating to public resources. For example, in the Partial Award of June 2014, the tribunal gave short shrift to Nigeria's argument that the Ministry of Petroleum Resources possessed the capacity to enter into contracts on behalf of the Government of Nigeria.¹²³ In the Partial Award of July 2015, the tribunal described Nigeria's argument that only the Nigerian National Petroleum Corporation possessed the power to bind Nigeria in relation to gas contracts (and, therefore, that the Ministry

of Petroleum Resources lacked this power) as 'technical in the highest degree'.¹²⁴ To be sure, it is not clear whether either of Nigeria's arguments was well-founded as a matter of Nigerian law in this case. But the way these arguments were handled by the tribunal failed to recognise the possibility that substantive and procedural limits on government officials' power to enter into contracts may serve important public purposes.

- Arbitration is, historically, a mechanism for resolving disputes between parties on the same legal plane – for example, disputes between two private actors or disputes between two states. Investor-state arbitration, however, involves a dispute between a private actor and a state. The fact that states have powers and responsibilities that are distinct from those of private actors has provided the justification for significant structural reforms of treaty-based ISA over the past two decades, including through the introduction of much greater transparency of proceedings and new rules allowing the participation of amicus curiae under certain circumstances. None of these reforms have been extended to contract-based ISA, as yet.

4.2 An agenda for reform: the need for transparency in contract-based ISA

Introducing greater transparency in investor-state arbitration is an urgent reform priority. While there may be room for legitimate debate about whether disputes like *P&ID v Nigeria* should ever be resolved through international arbitration, there are no legitimate grounds for the view that such

¹²³ *Process & Industrial Developments Limited v Federal Republic of Nigeria, Part Final Award on Jurisdiction*, ¶¶ 39-41 (Jun. 3, 2014).

¹²⁴ *Process & Industrial Developments Limited v Federal Republic of Nigeria, Part Final Award on Jurisdiction*, ¶¶ 48 (Jun. 3, 2014).

disputes should continue to be resolved through international arbitrations *conducted in secret*. Greater transparency will not resolve all the problems identified in the foregoing paragraphs, but it can ameliorate several of the most pressing concerns. The movement to establish transparency as the norm in treaty-based ISA over the past two decades provides a direct model for such reforms. The fact that these reforms have not, as yet, been extended to contract-based ISA is due to idiosyncratic factors relating to how the transparency debate in treaty-based ISA evolved over time, not due to considered arguments that contract-based ISA should be exempt from the same level of transparency as treaty-based ISA.

The rationale for transparency in contract-based ISA is the same as the rationale for transparency in treaty-based ISA: such arbitrations affect public interests and it cannot be assumed that those appearing on behalf of the state in the proceedings adequately represent such public interests. In the context of allegations of corruption specifically, transparency is an important mechanism to address situations in which all those involved in an investor-state arbitration have private incentives to avoid raising the issue of corruption. That an investor may have private interests in avoiding investigation into corruption is obvious. Those representing the state may also have a private incentive to avoid investigation of corruption either because they are implicated in the original acts of corruption themselves or out of fear of retribution from more powerful officials who were engaged in the original acts of corruption.

In practical terms, the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration provide a model for what greater transparency in contract-based investor-state arbitration could look like.¹²⁵ These rules establish the basic principles that documents relating to the

arbitration should be published throughout the proceedings and that the tribunal's hearings should be open to the public. Both principles are subject to exceptions where necessary to protect confidential information.

Such reforms could be implemented through concerted action by several different actors across multiple fora. States such as Nigeria could pass domestic laws to ensure that the state's capacity to consent to arbitration in future contracts is limited to arbitration conducted according to minimum requirements of transparency. Existing contracts could be renegotiated to ensure consistency with this new approach, although to be practical such an approach should prioritise contracts above a certain threshold amount in sectors where the risk of corruption is highest. National arbitration legislation could be amended to mandate transparency in contract-based ISA. Arbitral institutions could amend their procedural rules to the same effect (pressure may need to be brought to bear on them to do this).

¹²⁵ UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2014)

<https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

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*Transparency International
International Secretariat
Alt-Moabit 96
10559 Berlin
Germany*

*Phone: +49 - 30 - 34 38 200
Fax: +49 - 30 - 34 70 39 12*

*tihelpdesk@transparency.org
www.transparency.org*

*blog.transparency.org
facebook.com/transparencyinternational
twitter.com/anticorruption*

*Transparency International chapters can use the Helpdesk free.
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