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Author

Domitille Baizeau
Tessa Hayes

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The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte

Domitille Baizeau; Tessa Hayes

(*) (**)

I Introduction: Scope of the Question

In late March 2016, just days before news broke of the massive "Panama Papers" document leak exposing widespread use of offshore shell companies for tax evasion and other financial crimes, (1) journalists reported on another leak of internal documents, this one concerning a little-known Monaco-based company called Unaoil. (2) Although the Unaoil leak itself was comparatively small in size, the illegal behaviour it allegedly unmasked was on a grand scale. According to the investigative report, Unaoil's emails revealed that billions of dollars of government contracts around the world had been awarded as a result of bribes paid by Unaoil as an intermediary for major multinational corporations. The documents also apparently showed that some clients knew about and intended Unaoil's bribery of officials, but that others thought they were contracting for legitimate consulting services. (3) Unaoil had in fact previously been declared clean in reports issued not only by a prominent international law firm and major accounting firms, but also by a noted anti-bribery compliance firm, TRACE International. (4) The episode illustrates the pervasiveness of the problem of corruption, as well as how hard it can be to vet intermediaries. (5)

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At the same time, the past few decades have seen a worldwide trend of increased transparency, compliance efforts and good governance requirements, in recognition of the colossal social and economic costs of corruption. As Transparency International, which describes itself as a non-profit "Global Anti-Corruption Coalition", explains,

"Corruption impacts societies in a multitude of ways. In the worst cases, it costs lives. Short of this, it costs people their freedom, health or money. The cost of corruption can be divided into four main categories: political, economic, social and environmental.

On the political front, corruption is a major obstacle to democracy and the rule of law....

Economically, corruption depletes national wealth....

Corruption corrodes the social fabric of society. It undermines people's trust in the political system, in its institutions and its leadership....

Environmental degradation is another consequence of corrupt systems." (6)

It is now almost universally agreed that corruption is a grave international harm, and that international arbitration ought not to sanction it and cannot ignore it. However, as an arbitrator with limited powers and mandate, implementing these principles in the real world is challenging.

Allegations of corruption are sensitive, as they imply criminal wrongdoing by one or both parties. Difficult questions of sufficiency of evidence and standards of proof almost inevitably arise, as corrupt behaviour is often well hidden by its perpetrators. (7) Furthermore, the stakes are high, as a positive finding of corruption typically results in a dismissal of the claims. Whether the issue is treated as a matter of jurisdiction, admissibility, or merits – a somewhat unsettled and context-dependent question, although it is now widely agreed that corruption allegations are arbitrable – (8) the upshot will generally be the same and a finding of corruption outcome-determinative. (9) This is so even if the tribunal may temper the result, for instance by taking into account the benefit to the respondent of services rendered by the claimant when allocating costs (10) or, more rarely, allowing the claimant to collect out-of-pocket expenses but not profits. (11) Whether more-nuanced remedies should be developed to account for the reality of situations "where most, if not all, actors are tainted by corruption" (12) is an important question, but is outside the scope of this article.

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When the arbitral tribunal suspects corruption, particularly difficult questions arise as to (a) whether it can or should raise the legal issue of corruption *sua sponte*, that is, on its own motion, where neither party has raised it, and (b) to what degree it can or should pursue factual investigations of corruption *sua sponte*. (13)

Although much has been written on the treatment of corruption in international arbitration, arbitral tribunals seem traditionally to have been hesitant to plunge into the murky waters of corruption on their own initiative. To date, there are very few cases in which tribunals have made a positive finding of corruption where a party has pleaded the issue, (14) and even fewer known instances of arbitral tribunals enquiring into corruption suspicions *sua sponte*. (15) There are in fact only two main published cases involving *sua sponte* initiatives concerning corruption, each illustrating one of the two types of inquiry: one case long ago in which the arbitral tribunal raised corruption as a legal issue on its own initiative, (16) and another one

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more recently in which the arbitral tribunal sought additional factual evidence on its own initiative to determine whether corruption had occurred. (17)

There are good reasons for such reluctance: in an adversarial system such as arbitration where it is normally incumbent on each party to prove its claims, a *sua sponte* investigation upsets the normal burden of persuasion between the parties. (18) The tribunal may also be concerned about exceeding its mandate, impinging on party autonomy, or offending due process guarantees such as impartiality and the right to be heard. (19) Moreover, additional fact-finding by the tribunal may be expensive and time-consuming, and may still not illuminate the existence (or lack) of corruption with clarity. (20)

Ultimately, however, none of these concerns should present an insurmountable obstacle. Although "the challenge to the tribunal in assessing when such independent investigation is appropriate and permissible is considerable", (21) the exercise is a valuable one, and one which arbitrators should not shy away from.

This article addresses the tribunal's duty and power to raise and investigate corruption *sua sponte*, either where no allegation has been made, or where one has been made in passing but pleaded and/or substantiated unsatisfactorily. It explores the reasons why and the circumstances in which arbitrators should be prepared to address corruption *sua sponte*, how arbitrators can pursue their inquiry in practice and how they should evaluate the resulting evidence. First, however the concept of "corruption" must be defined.

II Defining Corruption

A threshold question is, of course, what constitutes corruption. While there is a large degree of consensus on the broad definition of "corruption", there is no universal agreement as to those acts which cross the line into illegality.

1 International Consensus and Local Variations

Transparency International defines corruption broadly as "the abuse of entrusted power for private gain". It distinguishes three types of corruption: "grand, petty and political, depending on the amounts of money lost and the sector where it occurs", which it describes as follows:

"Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.

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Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.

Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth." (22)

The unanimity on corruption being an international harm is evidenced by the widespread adoption of international conventions against corruption. (23) The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 (OECD Convention) marked a major development in this regard; it entered into force in 1999 and now counts forty-one states parties (all thirty-four OECD members and seven non-members). (24) Regional agreements have also abounded. Shortly before the OECD Convention was signed, the Organization of American States adopted the Inter-American Convention Against Corruption, (25) while the European Union adopted the Convention Against Corruption Involving Officials to target intra-EU corruption, as well as the Civil Law and Criminal Law Conventions on Corruption. (26) The African Union Convention on Preventing and Combating Corruption was signed in 2003 and entered into force in 2006; forty-eight of the fifty-four members of the African Union have now signed the convention, and thirty-seven have ratified it. (27) Most significantly in terms of scope and scale of participation, the United Nations Convention Against Corruption of 2004 (UNCAC), which was adopted in 2003 and entered into

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force in 2005, currently counts 178 states parties – more than 90 percent of the UN members. (28)

The UNCAC, essentially reprising the language of the OECD Convention, defines public bribery as:

"The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties." (29)

However, there remains some diversity in definitions of corruption across jurisdictions, including with respect to the distinction between the bribery of public officials and private sector bribery. Hence, under the UNCAC, countries must criminalize the former but need only "consider" criminalizing the latter. (30)

Some difficulty, including for arbitrators, also derives from the fact that certain practices may not be unlawful or contrary to public policy under a particular applicable law or local customs and "codes of conduct".

The first example is that of facilitating or "grease" payments, made to accelerate the carrying out of routine government acts to which the person making the facilitating payment is legally entitled – that is, to speed up a non-discretionary process, rather than to influence a discretionary process. Facilitating payments constitute illegal bribery under many laws, including the UK Bribery Act, (31) but other laws, most prominently the US Foreign Corrupt Practices Act (FCPA), make exceptions for such payments, (32) which is a choice that countries are permitted to make under the OECD Convention. (33)

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A second, and potentially more problematic, example is that of gifts. Depending on the circumstances, including value, frequency and timing, a contribution might be considered to be part of a common, lawful practice in the country where it is made, but not necessarily by third parties, including arbitrators. Art. 5 of the ICC Rules on Combating Corruption provides a list of the criteria to be taken into account when determining at what point the offer of a gift becomes an unlawful practice, (34) but applying them is not easy for businesses and may be problematic for arbitrators.

An even more delicate issue is "influence peddling", also known as "trading in influence", whereby third parties, in exchange for money or other advantage, agree to use their influence with a public official in order to achieve a favourable business outcome for the principal. While it is related to bribery, the difference is that no compensation passes directly to the public decision-maker. The UNCAC does not require the criminalization of influence peddling, but provides that states parties "shall consider" criminalizing the offer or receipt of compensation made with the purpose of inducing someone to "abuse his or her real or supposed influence". (35) Influence peddling is explicitly prohibited for instance in France, (36) while other countries allow more latitude in what is considered legitimate lobbying as long as money or other undue advantage does not pass to a public official. (37) Influence peddling therefore may represent something of a grey area. As the late Professor Pierre Lalive put it, "the delicate problem remains to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal 'commissions'." (38)

Finally, some national laws go even further by banning the use of intermediaries in public procurement in particular sectors or entirely, as a preventative measure in light of the high risk of corruption. (39) Depending on the applicable law, therefore, contracts with intermediaries that provide for assistance in securing public contracts may be unlawful even in the absence of any offer or acceptance of an undue pecuniary advantage to or by public officials.

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Beyond the above uncertainties, however, there is overwhelming agreement that bribery of public officials, whether direct or indirect, violates most domestic laws and transnational public policy.

2 Applicable Law and International Public Policy

The starting point for the arbitral tribunal in assessing the validity of claims in light of anti-corruption norms is to consider what qualifies as corruption under the law applicable to the merits of the case. (40)

The tribunal may also consider transnational principles of public policy. The condemnation of corruption is indeed now widely accepted to be a matter of "truly international" or "transnational" public policy: (41) that is, part of the "global consensus on fundamental economic, legal, moral, political, and social values". (42) As the tribunal in *World Duty Free v. Kenya* famously stated,

"In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy." (43)

Even before the OECD Convention and the UNCAC codified anti-corruption norms, arbitrators often did not base corruption-related decisions exclusively on domestic laws, but also relied on transnational principles of public policy. (44) Nowadays, given the nearly universal adoption of the UNCAC, arbitrators can safely be guided by transnational anti-corruption principles, in particular as set out in the UNCAC.

If the applicable law were to conflict with transnational public policy, the tribunal should favour transnational norms. (45) At the same time, given that the law applicable to the merits may prohibit a broader range of behaviours than what is condemned under transnational public policy – for instance, with regard to gifts or influence peddling – it remains essential to look to the specific provisions of the applicable law.

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The tribunal may also consider the mandatory laws of the place of performance, as the law most closely connected to the contract, and the law of the arbitral seat (in order to protect the award from being set aside). (46) A common conflict-of-laws rule in a number of jurisdictions is that foreign mandatory law (i.e., not that of the chosen law) shall apply only if it has a close connection to the contract and can be said to form part of what truly constitutes international public policy, as opposed to a lesser level of mandatory provisions considered to fall only under "domestic" public policy. (47) Numerous tribunals have applied this approach. (48)

A classic example of the distinction between domestic and transnational public policy is the

prohibition of intermediary contracts in public procurement, which a number of arbitral tribunals, as well as the Swiss Federal Supreme Court, have held to be merely domestic public policy, such that it cannot override the parties' choice of another law that does not prohibit such contracts. (49)

Finally, the tribunal could consider the law of the place where corruption took place or had its effects, in the event that this is different from the place of performance of the contract or investment. However, while the local law where corruption took place may well be pertinent to criminal liability, it should not affect the validity of the contract or investment in the absence of a close connection such as being also the law of the place of performance.

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III Why investigate? Duty and power to enquire into corruption *sua sponte*

It is uncontroversial that the tribunal may, and indeed should, examine allegations of corruption when raised by a party. (50) The more difficult question is to what extent the tribunal can and should investigate suspicions of corruption where (1) neither party has raised the matter but evidence comes to light that leads the tribunal to strongly suspect that corruption occurred; or (2) a party has pleaded, or simply insinuated corruption, but made little effort to substantiate its allegations.

With regard to the first scenario, it might seem surprising that a respondent would relinquish the "easy out" of a corruption defence where available, but such reluctance can be explained by concerns about criminal liability and/or reputational damage. This is particularly the case when private parties are concerned. Criminal liability should be of less concern to sovereign parties, as specific individuals rather than the state would be affected, (51) and specific individuals – often from a previous government – could be blamed. (52) How often private parties pass on a corruption defence in order to avoid any admission that they have engaged in illegal practices is, of course, hard to know. Some parties may even seek out arbitration through respected arbitral institutions to give a veneer of legitimacy to corrupt dealings. (53)

The second scenario, where a party raises but unsatisfactorily pleads corruption, is probably more common. (54) This covers both good-faith allegations that suffer from a lack of available evidence and bad-faith allegations or insinuations made simply to "taint" the other side's case and the tribunal's mind. (55) In such cases, the tribunal has to decide whether simply to rule that the party has failed to make its corruption case, or to press for more information.

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In either scenario, the tribunal may find itself faced with the awkward choice between (a) accepting the case as presented by the parties and possibly either inadvertently condoning illegal behaviour or, conversely, letting unsubstantiated allegations improperly colour the deliberations, or (b) investigating and thus expanding its enquiry beyond the case as defined by the parties' submissions.

1 Why Arbitrators Should Be Prepared to Investigate Corruption Sua Sponte

On the one hand, where a party has failed to do the work of pleading and supporting an argument that it would benefit from, one can question why the tribunal should proceed and do that party's work. (56) On the other hand, corruption entails public interests beyond those of the parties, setting corruption apart from standard legal arguments which a party may fail to raise or prove.

From a moral and political perspective, it has been submitted that arbitrators have a "public responsibility to the administration of justice", which goes hand in hand with the autonomy accorded to them by national courts; that states and companies alike today are making efforts to eliminate corruption, and arbitrators can and should best support those efforts by being proactive; and that, since ineffective judiciaries are a root cause of the tenacity of corruption, the interests of the international arbitration community itself are served by actively assisting in anti-corruption efforts, rather than being seen as weak and complicit in corruption. (57)

These macro-level arguments are convincing, but there are also more immediate concerns at a case-specific level that weigh in favour of *sua sponte* corruption enquiries.

First, the arbitral tribunal has a duty to render an enforceable award, meaning one that does not violate public policy (as corruption does). (58) While case law suggests that, realistically, a reviewing court is unlikely to overturn an award because the tribunal has failed to investigate or find corruption, (59) the enforceability of the award remains a fundamental guiding principle for arbitrators.

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Perhaps most pressingly for arbitrators, a major ethical and legal concern in not addressing strong suspicions of corruption is that the tribunal risks making itself complicit in the parties' wrongdoing. (60) The fact that the parties may insist on the legality of the contract does not resolve this issue. (61) Indeed, if both parties resist the tribunal's enquiries, there is arguably all the more reason to pursue the enquiry, as it may suggest the parties' collusion in hiding corruption. (62) In some cases, such as where the parties request the tribunal's approval of a suspicious award by consent, the tribunal may have no choice but to resign in order to avoid becoming an accessory to the parties' sham proceedings. (63) In most cases, however, withdrawing is not a desirable response; the tribunal would do better to investigate corruption

to the best of its abilities and to issue an award on that basis. (64)

Whether arbitrators have an accompanying duty to report suspicions of corruption to national authorities is somewhat controversial. Some consider that such an obligation "would be totally incompatible with the private nature of their mission and the trust the parties have in them", (65) while the opposing view is that arbitrators have duties to the international community beyond their responsibilities to the parties. (66) But, as a commentator sensibly puts it, "if there is a duty, it must come from statute, regulation or similar and not from the views of the arbitration community." (67) As things stand, there is no evident duty to report corruption that can be gleaned from institutional rules, published arbitral awards, national laws or jurisprudence. (68) Subject to the applicable laws of the seat, arbitrators should therefore not feel obliged to report suspicions of corruption.

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Additionally, further investigation by the tribunal may be necessary to confirm or dispel an uncertain yet damaging accusation of corruption, which might otherwise continue to hang in the air and improperly affect the tribunal's decision-making process. (69)

Ultimately, the moral and public policy arguments for *sua sponte* corruption inquiries are entirely consistent with – and perhaps even a necessary corollary of – the arbitral tribunal's basic mandate to evaluate the parties' claims under the applicable law, which includes public policy provisions. (70) As discussed below, arbitrators have the power to make such enquiries, even if there are limits to such powers.

2 The Arbitrators' Powers to Investigate Corruption Sua Sponte

Investigating corruption *sua sponte* may require the tribunal either to raise corruption as a legal issue or to seek additional factual evidence, or both. These two powers – raising an issue of law and investigating facts – are separate but related. The tribunal derives such powers from either the parties' agreement, the arbitration law, or the arbitration rules; in practice, however, the parties are unlikely to make an express provision for arbitrator initiatives, therefore it is the laws and rules that provide the true basis for such capacity. (71)

a Power to raise issues of law

The arbitral tribunal's ability to raise issues of law *sua sponte* is not directly addressed in most arbitration laws and rules. (72) The English Arbitration Act 1996 is something of an exception, leaving it to the tribunal – "subject to the right of the parties to agree any matter" – "to decide all procedural and evidential matters", including "whether and to what extent the tribunal should itself take the initiative in *ascertaining* the facts *and the law*". (73) The Mauritius International Arbitration Act 2008 has adopted this approach. (74) The Dutch Code of Civil Procedure and the Danish Arbitration Act also have unusual provisions specifically permitting the arbitrator to use local courts to request information on a foreign law or a judicial opinion on European Union law, respectively; (75) however, the focus of these provisions appears to be on clarifying the content of the law rather than raising a new issue of law not addressed by the parties, although admittedly the difference is a subtle one.

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Most leading arbitration rules, such as the ICC Arbitration Rules, the UNCITRAL Arbitration Rules and the Swiss Rules of International Arbitration, are silent on the matter. Notably, however, the London Court of International Arbitration (LCIA) Arbitration Rules follow the English Arbitration Act 1996 in providing explicitly that the tribunal may conduct enquiries on issues of law after giving the parties a reasonable opportunity to respond:

"The Arbitral Tribunal shall have the power … to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, *including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law* applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute." (76)

One potential basis for the power to raise issues of law *sua sponte* is the civil law principle *iura novit curia*, "the court knows the law", meaning that the court may apply the law independently of how the parties have pleaded it (subject, of course, to due process requirements). (77) Common law jurisdictions do not strictly recognize the principle *iura novit curia*, but under US federal law, the court is expressly authorized to raise and determine issues of foreign law not raised by the parties (although "in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely"). (78) However, there is substantial debate as to what extent *iura novit curia* and other state-court principles apply in international arbitration. (79) It has also been suggested that the broad grants of procedural authority in some arbitration laws and rules can be read as implicitly authorizing the tribunal to investigate issues of law. (80)

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Despite the dearth of explicit legislative or institutional authorizations, it is generally uncontroversial that an international arbitral tribunal is entitled to raise issues of law on its own initiative in relation to public policy and the legality of the contract. Considering the tribunal's duty to issue an enforceable award, and that an arbitral award may be set aside or refused enforcement if it violates public policy, (81) the tribunal certainly has a responsibility to consider applicable mandatory norms. (82) This is subject only to the due process requirement that the tribunal must inform the parties of any additional issues of law it intends to address and give them a chance to respond, as further discussed below. (83)

This was essentially the conclusion of the International Law Association (ILA), which, while in general discouraging arbitrators from introducing legal issues not raised by the parties, recognized an exception with regard to overriding mandatory laws:

"In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award." (84)

The treatment of corruption falls squarely within this approach.

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An analogous instance of *sua sponte* application of mandatory public policy by arbitral tribunals can be found in European Union antitrust laws. (85) In *Eco-Swiss v. Benetton*, the European Court of Justice (ECJ) held that Art. 81 of the EC Treaty, which renders contracts prohibited by the competition law "automatically void", was an overriding mandatory provision that applied regardless of the parties' contractual choice of law, and that an arbitral tribunal's failure to address Art. 81 should result in the award's annulment if a country's "domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy". (86) While the ECJ did not couch its decision in terms of the arbitrator's responsibility to raise the issue, but rather in terms of the remedies available to domestic enforcing courts, the obvious effect is that a tribunal wishing to render an enforceable award concerning EU member states must raise the applicability of Art. 81, even if the parties do not do so. (87) The holding therefore stands for the principle that arbitral tribunals can and should address applicable provisions of international public policy *sua sponte*.

b Power to seek additional evidence

Whereas the basis for the tribunal's ability to raise the legal issue of corruption *sua sponte* is a little nebulous, the tribunal's authority to investigate facts appears more clearly referred to in arbitration laws and rules.

The laws of several prominent international arbitration jurisdictions provide either explicitly or implicitly that the tribunal may seek evidence on its own initiative. (88) For instance, Swiss law provides that "[t]he arbitral tribunal shall itself conduct the taking of evidence", which is understood to mean that the tribunal may seek evidence ex officio. (89) The US Federal Arbitration Act (FAA) provides that arbitrators "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case". (90) French law provides that "the arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters", "may call upon any person to provide testimony", and "may enjoin" a party to produce any item of evidence in its possession. (91) Brazilian, Chinese, German, Japanese arbitration laws also all provide for the arbitral tribunal's power to collect evidence on its own initiative. (92)

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Other arbitration laws allow the tribunal the same power to gather evidence, but specifically require that the arbitral tribunal submit any additional facts to the parties for comment. This is the case under the Korean arbitration law, which adopts the approach of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). (93) While it does not explicitly address *sua sponte* investigations, the UNCITRAL Model Law does provide that "[a]ll statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party" and that "any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties". (94) The implication is that the tribunal may seek evidence in addition to that submitted by the parties, subject to the requirement of communication. (95) As discussed below, this is in any event the best practice to follow in order to ensure due process.

Other jurisdictions make the arbitrators' power to investigate factual issues specifically subject to the parties' contrary agreement. For instance, as discussed in Sect. III.*2.a* above, in the United Kingdom, as well as in Mauritius, the arbitration law by default grants the arbitral tribunal ex officio investigative powers, subject to the parties' agreement to the contrary. (96) Similarly, the Hong Kong Arbitration Ordinance, provides that "[u]nless otherwise agreed by the parties, an arbitral tribunal may, when conducting arbitral proceedings, decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those arbitral proceedings". (97)

By contrast, in the Netherlands, the Supreme Court has held that the tribunal's power to investigate facts *sua sponte* is contingent upon the parties' *prior* express agreement. (98) Arbitrators sitting in the Netherlands would thus be well advised to seek the parties' authorization at the outset, in an early procedural order. Again as a matter of best practice, tribunals at other seats might wish to do the same so as to head off any future objections on due process grounds.

Under most arbitration rules, the arbitral tribunal is empowered to conduct factual investigations of its own accord, again provided that the principles of due process are

P 241 respected by communicating new evidence with the parties. Among others, the ICC Arbitration Rules give the tribunal broad powers "to establish the facts ... by all appropriate means" and to "summon any party to provide additional evidence" at any time. (99) The UNCITRAL Arbitration Rules also provide that "the arbitral tribunal may require the parties to produce documents, exhibits or other evidence". (100) The ICSID Convention similarly provides that unless the parties agree otherwise, the tribunal may "call upon the parties to produce documents or other evidence", as well as "visit the scene connected with the dispute, and conduct such enquiries there as it may deem appropriate". (101)

This position is also adopted by the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), which are intended to represent international best practices. Art. 3(10) permits the tribunal to "(*i*) request any Party to produce Documents, (*ii*) request any Party to use its best efforts to take or (*iii*) itself take, any step that it considers appropriate to obtain Documents from any person or organisation", (102) while Art. 4(10) permits the tribunal to request testimony from any witnesses of fact. (103) Finally, Art. 6(1) allows the tribunal, after consultation with the parties, to appoint independent experts. (104)

It should be noted, however, that legal cultures vary substantially with regard to how active the adjudicator in state court proceedings is expected to be in seeking additional evidence, and may thus have an impact on an arbitrator's perceived power to be more or less inquisitorial. At one end of the spectrum, German courts have primary responsibility for seeking factual evidence, while at the other end of the spectrum, in England it is the parties who are typically and historically responsible for presenting the facts. (105) Arbitrators from different legal traditions are thus likely to have internalized different notions of how proactive they ought to be. (106) This is no different when it comes to investigating the facts *sua sponte* in the presence of suspicion of corruption, whether alluded to or not by the parties. In other words, the illegality of contracts obtained through or for corruption will usually be uncontroversial, but the approach and inclination towards *sua sponte* investigation may differ. This will also be true when it comes to the standard of proof, as discussed further below. (107)

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3 The Limits – Real and Perceived – to the Arbitrators' Powers to Raise and Investigate Corruption Sua Sponte

Despite the apparent leeway in factual and legal enquiry afforded to arbitral tribunals, arbitrators rarely seem to use their investigatory powers to explore matters of corruption. There are legitimate reasons to be concerned about the implications of taking investigative initiatives in particular in this area, including the risk that the award may be set aside or refused enforcement, or that the arbitrators themselves may be challenged, on the basis that they acted ultra petita, failed to respect the parties' right to be heard, or demonstrated partiality by assisting one party. (108) Ultimately, however, none of these concerns per se should stop the tribunal from enquiring into corruption, as long as it follows fundamental principles of due process.

a Exceeding the arbitrators' mandate

One frequently stated concern is that, in addressing the possible existence of corruption although the parties have not raised the issue, the tribunal risks exceeding its mandate and violating the basic rule that the adjudicator may not award more than has been sought (the *ne ultra petita* principle). An award may indeed be set aside and denied enforcement if it contains decisions on matters that have not been submitted by the parties. (109) On the other hand, the tribunal has a duty to make best efforts to render an enforceable award, (110) and an award that disregards corruption may be open to challenge or unenforceable for violating international public policy. In this regard, it has been said that a *sua sponte* corruption enquiry presents a "confrontation between fundamental principles in arbitration". (111)

This is perhaps the most commonly voiced issue, but arguably the least worrisome. A *sua sponte* corruption enquiry and decision present no real risk of resulting in an ultra petita award, as long as the corruption issue is relevant to the claims and defences submitted by the parties. (112) For instance, where the parties have asked the tribunal to rule on rights arising
P 243 out of a certain agency contract, whether or not that contract is in fact an illegal contract for bribery is not merely relevant to the parties' claims, it is determinative of them. Similarly, if a bilateral investment treaty requires – as many do – that a qualifying investment be made in accordance with the laws of the host state, the fact that a given investment was procured through corruption in violation of the host state's laws may be determinative of arbitral jurisdiction. (113)

In either case, the tribunal is investigating corruption not for the sake of punishing it as a wrongful conduct, but for purposes of determining the validity of the claims. In so doing, it simply ensures to the best of its ability that the arbitral process does not sanction corrupt acts. The important caveat is that the arbitral tribunal's mandate is indeed limited to the disputes properly before it under the terms of the arbitration agreement, such that the corruption allegation must be determinative of the legal claims at issue. (114)

When it comes to raising corruption as an issue of law, "determinative of the legal claims" should be understood to mean determinative regardless of the parties' actions in the legal proceedings. This principle is perhaps best illustrated by the distinction between void and voidable contracts. Under most legal systems, contracts *for* an illegal purpose, such as

corruption, are void ab initio as a matter of public policy, while contracts *obtained by* corruption are only voidable – that, is, they are not automatically void, but may be avoided by the innocent party. (115) The impact of this dichotomy was highlighted in a recent English decision upholding an arbitral award, in which the English Commercial Court reaffirmed that English public policy requires courts to refuse to enforce illegal contracts, "such as a contract to pay a bribe", but that "[t]here is no English public policy requiring a court to refuse to enforce a contract procured by bribery". (116) The court went on to explain that "[i]t is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other". (117)

If a contract is void ab initio, by operation of law, under an applicable mandatory provision, then the arbitral tribunal can and should raise the issue. That was the case in *Eco-Swiss v. Benetton* with respect to EU competition law. This situation is also exemplified by the *Lagergren Case*, the seminal case on corruption in arbitration, which concerned a *sua sponte* finding that the contract was void as a contract *for* corruption. (118) In that case, the parties agreed in a *compromis* to arbitrate claims arising out of a consulting agreement for assistance in obtaining contracts from the Argentinian government under Juan Perón. Although the parties did not raise the issue of corruption, it became clear to Judge Gunnar Lagergren from witness testimony that a substantial portion of the consulting commissions were in fact intended as bribes for political appointees in Perón's government. Holding that such a contract violated international morals and therefore could not be adjudicated in any forum, whether arbitral or state, Judge Lagergren declined jurisdiction. (119) Again, as mentioned in Sect. III.*1* above, even if both parties maintain that the contract is enforceable (as, indeed, was the case in the *Lagergren Case*), the parties' position is not determinative of the contract's enforceability.

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By contrast, if under the applicable mandatory law and public policy, a contract is only *voidable* – that is, the contract is valid unless the innocent party actively chooses to avoid it – it is debatable whether the arbitral tribunal should raise the issue. Interestingly, in *World Duty Free v. Kenya*, a contractual dispute and a case in which the claimant admitted that it had obtained its contract through the most blatant of bribery, the tribunal dismissed the claims on the basis that Kenya had validly avoided the contract by its counter-memorial in the arbitration. (120) If, rather than leaping on the corruption defence, Kenya had remained idle when the claimant made its admission of bribery, it is questionable whether the tribunal would have been justified in raising the corruption defence.

In other words, if evidence before the Tribunal strongly suggests that a party procured a contract through corruption, but the other party has not seized the opportunity to avoid the contract, for instance for fear of possible criminal liability (somewhat unlikely in the context of a state contract and a state respondent, but not impossible), a tribunal raising the issue further may be found, in some jurisdictions, to have exceeded its mandate and/or violated its obligation of impartiality. The tribunal is on much firmer ground in addressing corruption *sua sponte* when the invalidity of the contract is effected automatically, by operation of law.

Most cases of corruption involve intermediaries, (121) often entailing intermediary contracts for corruption which are void ab initio. However, there are also cases where the principal, at the time of entering into the contract, believed that it was entering into a legitimate consulting contract, and the agent committed corruption without the principal's knowledge or approval. (122) In such cases, the intermediary contract should not be void ab initio, as the intended purpose of the contract was not corruption, but the principal might still be able to avoid the contract, particularly if the contract included a legality clause requiring the agent to follow anti-corruption norms (as is recommended and appears to be increasingly prevalent). (123)

More generally, the distinction between void and voidable contracts is more likely to pose a problem in commercial arbitrations than in investment-treaty arbitrations. In the investment-treaty context (which *World Duty Free* was not), legality clauses requiring the investment to be made in accordance with local laws may create an obstacle to jurisdiction regardless of whether the contract or investment is void ab initio or whether the respondent state attempts to avoid the contract. In *Metal-Tech v. Uzbekistan*, for instance, violation of such a provision led to dismissal of the claims. (124) Although in that case Uzbekistan had already raised a corruption defence, in such situations where corruption would create a jurisdictional flaw, the fact that the parties have not raised the issue of corruption should not be seen as a waiver. (125) While normally jurisdictional objections must be pleaded or be forgone, public policy objections must be considered an exception to this rule. (126) In other words, the importance of such public policy issues dictates that tribunals should not be deterred from raising the issue of corruption as a jurisdictional matter where the parties have failed to do so.

b Due process concerns: Right to equal treatment and right to be heard

Another concern often raised is that by enquiring into corruption on its own initiative, the arbitral tribunal risks contravening two fundamental principles of due process: the parties' right to equal treatment, as the enquiry could be perceived as unduly helping one party; and the parties' right to be heard, as basing a decision on an issue or fact not raised by the parties could violate a party's right to fully present its case. (127)

It is evident that a finding of corruption will benefit one party (typically the respondent) at the expense of the other, and this can be seen as endangering due process and thus the award. (128) The situation is admittedly sensitive, and when making *sua sponte* enquiries, as Gary Born explains, the tribunal should "act with great delicacy" and "should request evidence only

P 245 where it is material to deciding the disputes pending before it, and then only where it appears that the parties have not provided sufficient information to permit a satisfactory decision". (129) Particularly where the corruption suspicions apply to only one of the parties, the tribunal must take extra care to remain even-handed. (130)

However, the fact that the corruption issue will *be favourable* to one party should not be equated to the tribunal's *favouring* that party. As the tribunal observed in the leading case of *Metal-Tech v. Uzbekistan*,

"[t]he idea … is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act." (131)

If arbitrators can give a reasoned justification for the initiative and can affirm that they would have acted the same way regardless of the party affected, accusations of partiality should not pose a threat. (132) There is at least one known example, in a case heard under the arbitration rules of the Vienna International Arbitral Centre (VIAC), of a party challenge to an arbitrator for raising issues of corruption and money laundering ex officio. The Secretariat of VIAC rejected the challenge because it found that the tribunal's suspicions were reasonable and its procedural orders "carefully drafted and well reasoned". (133)

Similarly with regard to the parties' right to be heard, addressing corruption *sua sponte* should not threaten the award as long as the tribunal gives each party an equal and reasonable opportunity to present its response to any suspicion or conclusion of corruption. (134) Different jurisdictions have varying standards for finding a violation of the right to be heard. For instance, France requires any new legal basis to be brought to the parties' attention, (135) while Switzerland has quite a stringent threshold of "unpredictability", such that the tribunal need
P 246 alert the parties only to new legal arguments that the parties could not have reasonably anticipated to be relevant. (136) Regardless of national divergences on the right to be heard, it is prudent to give the parties an opportunity to comment on any new issue of fact or law on which the tribunal intends to base its decision, (137) even if such may, practically, be difficult when new issues arise during the deliberations. Scrupulous communication with the parties regarding any *sua sponte* initiatives should be considered a matter of best practice. (138)

It may also be wise for the tribunal to clarify under what conditions it may take *sua sponte* initiatives on issues of fact and law at the outset of the proceedings, perhaps in an early procedural order – before any such issue actually arises with respect to a particular party. (139)

Additionally, where the tribunal is composed of three arbitrators, it is advisable for *sua sponte* enquiries to be communicated to the parties by the president of the tribunal rather than a party-appointed arbitrator, who may be viewed with some distrust by the non-appointing party. (140)

However, ultimately, issues of due process can be dealt with fairly easily, and arbitral tribunals should not hide behind these concerns in order to avoid raising sticky questions of corruption.

c The arbitrators' lack of police powers

A third common criticism or concern is that arbitral tribunals are simply not equipped to investigate and thus to rule on corruption allegations. (141) Moreover, additional investigation may be costly in terms of time and money, and still may not lead to certainty. (142)

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Granted, if the issue is framed in terms of stamping out corruption, then indeed an arbitral tribunal is poorly placed to combat corruption: the tribunal does lack police powers which would aid it in gathering evidence and, most importantly, allow it to impose criminal sanctions upon a finding of corruption. The arbitral tribunal's task is, however, a humbler one: simply to determine the validity of civil claims under a particular contract or treaty in light of applicable laws and norms, including public policy.

As for the arbitral tribunal's limited power to compel evidence, it is not normally viewed as a bar to the fair determination of claims in arbitration. Even if corruption is typically hidden by the parties, as Gary Born points out, "there is little reason why a tribunal would not be able to unearth the truth relating to bribery allegations any less ably than it does with other allegations that parties vigorously contest." (143) Moreover, as discussed in greater detail below, arbitrators do have a wide range of means to aid in gathering evidence. (144)

Arbitrators may of course worry that findings of corruption in that context can have a drastic impact on the individuals implicated, where not only the evidentiary means available to the tribunal but also the standard of proof differ from those of a criminal court or public prosecutor. In states where the rule of law is not fully respected, a corruption finding by an arbitrator may even be given outsized importance in order to target an individual in criminal proceedings in the home state, perhaps using that person as a political scapegoat. This is undeniably a factor that arbitrators ought to take into consideration and perhaps find ways to work around, but it should not stop them from initiating enquiries into corruption altogether. Equally, arbitrators should not be too quick to search for corruption, an issue to which we now turn.

IV When to investigate? Situations that should trigger *sua sponte*

corruption enquiries

It has been said that arbitrators "should not turn themselves into investigators, policemen or prosecutors". (145) This holds true where there is "*no* evidence" of corruption, but not where there are indicia of illegality. (146) Another key – and difficult – question, therefore, is what facts should suffice to turn an arbitrator into an investigator.

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1 Strong Suspicion Triggered by "Red Flags"

Typical situations which may raise suspicions of corruption in international arbitration are:

(1) A commercial dispute between an agent and principal for payment of commissions, where the agency contract is suspected of actually being a contract to obtain a contract through bribes.

(2) A commercial dispute between a foreign contractor and a state entity, where the contract under which claims are brought is suspected of having been obtained through corruption.

(3) An investment-treaty dispute between a foreign investor and a host state, where the investment at issue is suspected of having been made or obtained through corruption.

(4) An investment-treaty dispute between a foreign investor and a host state, where the investor alleges illegal treatment as a result of refusing to pay bribes. (147)

In practice, an arbitral tribunal will not often find itself in a straightforward situation like the one in *World Duty Free v. Kenya*, where the head of the foreign investor freely admitted paying US$ 2 million as a "personal donation" to the Kenyan president, complete with a handover of a suitcase full of cash. (148) According to the OECD's study of 427 foreign-bribery enforcement proceedings in 17 countries, three quarters of such proceedings involved intermediaries. (149) Indeed, most of the known arbitrations dealing with suspicions of corruption involve intermediary contracts, (150) and that would seem to be the most likely context in which arbitrators will be faced with the decision of whether to investigate corruption.

Over the past few decades of anti-corruption enforcement and compliance efforts, various authorities and organizations have established lists of "red flags" for identifying suspicious relationships that may disguise bribery. (151) Although the wording varies, the substance is largely coextensive. A useful list is that found in the ICC Guidelines on Agents, Intermediaries, and Third Parties, which identifies the common red flags as follows:

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"– The operation takes place in a country known for corrupt payments (e.g., the country received a low score on Transparency International's Corruption Perceptions Index).

– The Third party [i.e. the agent or intermediary] is suggested by a public official, particularly one with discretionary authority over the business at issue; ...

– The Third party has a close personal or family relationship, or business relationship, with a public official or relative of an official; ...

– Due diligence reveals that the Third party [operates through] or is a shell company or has some other non-transparent corporate structure ...;

– The only qualification the Third party brings to the venture is influence over public officials, or the Third party claims that [s/]he can help secure a contract because [s/]he knows the right people;

– The need for the Third party arises just before or after a contract is to be awarded; ...

– The Third party's commission or fee seems disproportionate in relation to the services to be rendered;

– The Third party requires payment of a commission, or a significant portion thereof, before or immediately upon the award of a contract;

– The Third party requests unusual contract terms or payment arrangements that raise local law issues...." (152)

In a similar vein, the tribunal in ICC Case No. 8891 identified four indicia of illegality:

(i) the agent is unable to provide proof of its activities;

(ii) the duration of the agent's activities (considering that a very quick yet successful result may indicate a lack of real work that can only be explained by bribery);

(iii) whether the agent was to be paid a commission as a percentage of the value of the contract awarded (considering that percentage-based remuneration is unusual); and above all

(iv) the amount of the commission (considering that 1 per cent or 2 per cent, and not more, should be the norm). (153)

These indicia have been addressed and followed by subsequent tribunals. (154)

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All of these red flags, however, should be approached with some caution. In particular, it is debatable whether remuneration based on a percentage of the value of the project can be considered suspect (there are vast sectors of the world economy in which this remuneration system is used, in particular if the added value of the work provided cannot be reflected solely in an hourly or daily fee).

More generally, indicia that at first sight appear nefarious may in fact, in context, be benign, and vice versa:

"Vague contractual terms, especially with regard to the agent's obligations can, indeed, hide parties' illegal intentions. Inversely, very detailed contractual terms do not necessarily reflect the parties' true intentions. First, the contract may be simulated. Second, inexperienced draftsmen, inappropriate contract forms, and the parties' intention to circumvent provisions of a local law prohibiting the use of agents are all examples of more or less 'legitimate' factors that may influence the terms of the contract, without necessarily indicating an intention to bribe local officials." (155)

"Red flags" should not, on their own, suffice to support a finding of corruption without first seeking explanations from the parties, but they can serve to trigger an evidentiary enquiry by the tribunal. (156) There can be no bright-line number of how many red flags should be present in order to trigger an enquiry, but certainly the more are present, the greater the scrutiny merited. (157)

As appears from the list above, red flags generally address the former case, i.e. that of illegitimate third-party contracts. Contracts obtained by corruption can be even harder to identify than contracts for corruption. Other than general red flags regarding the frequency of corruption in a given sector or country, which alone would not be enough to trigger an investigation by the tribunal, there may be little to signal that the contract is tainted. For that reason, if the underlying corruption is not raised by a party, it is fairly unlikely to emerge on its own to a degree sufficient to trigger a *sua sponte* enquiry. Moreover, as noted above, if the parties have not raised the issue of corruption in any way, it may be questionable whether an enquiry could be said to be truly relevant to the determination of the claims before the tribunal, since in many jurisdictions contracts obtained by corruption are not void ab initio but are only voidable, meaning that the invalidity must be invoked by a party. (158)

This is not to say that red flags can never be used with regard to contracts obtained through corruption. In fact, a contract obtained through corruption often involves an initial contract for corruption. *Sua sponte* enquiries may be prompted in relation to contracts obtained through corruption, where the illegality of the tainted contract poses a jurisdictional barrier and evidence concerning an intermediary contract used to obtain the primary contract raises sufficient red flags.

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The chief example of ex officio investigation based on red flags indeed concerns a contract obtained through corruption. In *Metal-Tech v. Uzbekistan*, Uzbekistan had argued from the beginning that the tribunal lacked jurisdiction because, inter alia, the claimant's investment had been made and operated in contravention of Uzbek laws, (159) but the arbitral tribunal's suspicions were ultimately piqued by the testimony of the claimant's own witness at the hearing regarding payments under certain consulting contracts, which were facts that had not been raised by Uzbekistan. The tribunal decided to actively pursue the matter by requesting further document disclosure and witness evidence concerning the nature of the payments, the services provided, and the qualifications of the alleged consultants. These *sua sponte* evidence requests are emblematic of the hands-on approach employed by the tribunal throughout the proceedings: for instance, already prior to the hearing (after which the tribunal launched its further enquiries), the tribunal had ordered the claimant "to conduct a 'further comprehensive search' for documents evidencing payment to any official or employee of the Government since 1994 and to 'report on the actions taken in conducting the search'". (160)

The *Metal-Tech* tribunal ultimately found that the claimant was unable to give any indication of bona fide performance of the consulting contracts. Given the substantial amounts paid (more than US$ 4 million, representing 20 per cent of the contract value), the so-called consultants' utter lack of qualifications to execute the technical services described in the contract, as well as their influential government connections (one consultant was the brother of the prime minister), the tribunal concluded that at least some of the consulting contracts were in fact contracts for corruption. The claimant's investment therefore did not qualify for protection under the treaty, as it had been made in violation of Uzbek bribery laws.

While *Metal-Tech* is not a purely *sua sponte* case in that Uzbekistan had already raised a corruption defence, the *Metal-Tech* tribunal set a striking precedent of *sua sponte* factual investigation of corruption. With a less proactive tribunal, or one less willing to connect the dots of circumstantial evidence, the claimant's sketchy consulting agreements might well have slipped under the radar and the outcome might have been radically different.

Recently, another investment-treaty tribunal has followed the *Metal-Tech* tribunal's approach, issuing a procedural order seeking further evidence before ruling on new allegations of corruption by the respondent state. (161) It is too early to say whether this approach represents a new trend in arbitration, but it is unquestionably a promising sign.

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2 Unsubstantiated Allegations of Bribery "Tainting" the Proceedings

In stark contrast to the *Metal-Tech* case – which so far appears to stand virtually alone as a case where the tribunal actively pursued a factual investigation and requested additional evidence – there are a number of cases in which the tribunal seems to have made a point of *avoiding* ruling on corruption, instead dismissing the claims on unrelated grounds. (162) For instance, in one unpublished award known to the authors, the tribunal, stating that it "has no powers of making its own enquiries and depends on the evidence produced to it by the Parties", explicitly left the respondent's allegation of corruption undecided; instead, the tribunal held the claimant's consulting fees to be excessive and reduced them below the amount already paid, which effectively resulted in a dismissal of the claims. (163)

This approach is sometimes troubling. The question lurking in the background in such cases is indeed whether "unresolved" corruption allegations unduly influence the tribunal's deliberations. It has been suggested that:

"In reality, many arbitrators will allow corruption allegations to colour their judgment without actually stating that that is the case, chiefly due to the evidential difficulties faced if they were explicit in their views." (164)

F-W Oil Interests v. Trinidad and Tobago is another case where the tribunal seems to have thrown up its hands at the parties' poorly pleaded corruption allegations and to have been relieved to be able to rule on another basis. (165) In that case, the claimant ultimately withdrew its allegations of bribery, "under pointed questioning from the Tribunal itself as to whether there was any real evidence to sustain allegations of that breadth and gravity", (166) and the respondent ultimately did not pursue its own vague accusations. With the bribery allegations withdrawn, the tribunal was able to rule on other grounds (dismissing the claimant's claims). (167) The tribunal clearly took the allegations seriously, but it held a questionably narrow view of its own powers:

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"The Tribunal was naturally much concerned from the outset about how these allegations and cross-allegations should be dealt with in its findings, not merely because of their serious nature, but as much because it was faced with the problems inherent in investment arbitrations (by contrast with proceedings in a court of law): no evidence on oath, and no compellability of witnesses." (168)

Yet like the *Metal-Tech* tribunal, the *FWO* tribunal was constituted under the ICSID Convention and therefore had no less power to investigate.

There may be circumstances in which corruption allegations truly are not determinative of the case, and in such cases it seems perfectly justifiable to rule on other grounds and leave the corruption question open. As the *FWO* tribunal correctly stated, "it is no part of the function of a Tribunal such as this to pass moral judgement on the behaviour of one or another Party, or indeed both Parties, but simply to decide on the validity of the claims brought, and on their legal consequences." (169) On the other hand, the *FWO* tribunal also noted that, "if allegations of corruption had been made and had proved to be well founded, it would have had a most substantial effect on the view of the case taken by the Tribunal". (170) If bribery, if proven, would have changed the outcome, then perhaps rather than encourage the claimant to withdraw its allegations, the tribunal could have sought further evidence – if only to fully satisfy itself that there was no evidence in support of such allegations.

Another troubling situation occurs where a party does not openly plead corruption, but merely hints at it, apparently in the hope of "tainting" the tribunal's mind. (171) In his separate opinion in *InternationalThunderbird Gaming v. Mexico*, the late Professor Thomas Wälde rightly condemned this practice as "a poisonous way to conduct litigation". (172) Namely, he criticized Mexico's unsubstantiated insinuations of bribery concerning success fees paid to the claimant's "lawyer-lobbyists" in connection with the obtaining of a favourable government opinion, which he considered a ploy to try to sway the tribunal. (173) Unusually, the effect of the alleged corruption did not go to the legality of the contract or to the jurisdiction of the tribunal, but rather to the legitimacy of the claimant's expectations with regard to its investment. Although the majority dismissed the claimant's claims on grounds unrelated to corruption, alluding only obliquely to Mexico's insinuations, Wälde suggested that unspoken

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effects of the veiled accusations against the claimant could perhaps be seen in an unusual costs award, allocating three quarters of both the arbitration costs and the respondent's legal costs to the claimant. (174)

Wälde is to be commended for addressing the corruption issue head-on in his separate opinion, but one wonders nonetheless whether he – together with his fellow arbitrators – might have done more to address the issue *during* the proceedings. Wälde stated that he "advocated throughout this procedure for pressure under the – limited – powers of the tribunal" to get the "key players" to appear and testify, but to no avail. (175) It is not clear how he exerted those powers, however, or whether, like the *FWO* tribunal, he and his co-arbitrators underestimated the investigatory powers accorded to the tribunal under the applicable rules and law (in this case, the UNCITRAL Rules and the FAA). Additionally, considering that Mexico bore the burden of proof on any corruption defence, Wälde drew a negative inference as to the strength of Mexico's case on corruption from its failure to present the relevant officials as witnesses; this was a valid use of adverse inferences, but it is unclear whether he communicated to the parties his intention to draw such an inference.

In a situation like *Thunderbird*, where the insinuated corruption would not render the contract void or deprive the tribunal of jurisdiction, the tribunal does not have the same public policy

justification for raising or investigating corruption *sua sponte* as in the *Lagergren Case* or *Metal-Tech v. Uzbekistan*. Thus, if corruption would not be determinative of the claims at issue if pleaded and proved, (176) or if the suggestions are not accompanied by sufficient indicia to justify an enquiry, then simply ignoring them may well be the right course of action. But if a party's insinuations are (a) sufficiently strong so as to risk biasing the tribunal, (b) supported by a number of red flags, *and* (c) decisive of the legal claims, the tribunal should bring the issue out into the open and use its powers to further investigate whether these insinuations had any basis, even if it ultimately decides on other grounds.

As one commentator puts it,

"Although the exercise by arbitrators of their power to call for evidence on undeveloped issues can be seen as an activist or intrusive exercise with respect to the ordinary operation of the burden of proof, in another sense, where the issue risks to simmer and to affect the arbitrators' award, raising it gives control back to the parties. Where arbitrators are silent or passive, they retain to themselves the secret keys to decision-making, and in that way they disempower the parties." (177)

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In short, both as a public policy matter and to protect the arbitral process, where parties' accusations of corruption set off alarm bells and can be decisive of the legal claims, the tribunal should at least consider putting its ex officio investigative powers to use.

V How to investigate? Practical points for *sua sponte* corruption enquiries

Once sufficient red flags of corruption have been raised, the question is what the tribunal can and should do on its own initiative in order to move from a strong suspicion of corruption to corruption as a sufficiently proven fact. This involves (1) gathering evidence, and (2) assessing the evidence.

1 Gathering Evidence

While arbitral tribunals admittedly do not have the powers to compel that state courts do, the discovery tools available to arbitral tribunals should not be underestimated. As mentioned in Sect. III.*2.b* above, under most institutional arbitration rules, the tribunal may request production of additional documents, witness evidence and expert evidence. (178)

In the typical case of suspicions over an intermediary arrangement, the tribunal would want to seek further documentary and testimonial evidence including details about:

- the services provided, including as against the services set out in the contract;
- the intermediary's qualifications to carry out the alleged services;
- the intermediary's personal relationships with relevant public officials; and even
- whether any criminal investigation or proceedings have been initiated by domestic authorities.

Under certain arbitration laws, the domestic courts at the seat of arbitration may be available to assist the tribunal in compelling the production of evidence, in the event a party or witness refuses to comply. (179) For instance, Art. 184(2) of the Swiss Private International Law Act (PILA) provides that "[i]f the assistance of state judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal, may request the assistance of the state judge at the seat of the arbitral tribunal". (180) This includes situations "where a witness is expected to refuse to appear to give oral evidence, or refuses to appear due to apparent logistical obstacles". (181) This implies that the evidence (documents or witnesses) are located at the seat of the arbitration. Approaching foreign courts is more difficult; some national arbitration laws permit court assistance of foreign arbitral tribunals, but this is by no means a uniform rule. For instance, the English Arbitration Act 1996 provides for the possibility of court assistance in securing the attendance of witnesses to arbitral tribunals seated outside of the United Kingdom (subject to the court's discretion as to the appropriateness of such support), (182) as does the German arbitration law, (183) while the Swiss PILA is limited by its terms to tribunals seated in Switzerland. (184) Meanwhile, US law provides that the district court where "a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a *foreign or international tribunal*", but there is disagreement about whether the statute applies to arbitral tribunals. (185) Finally, where evidence is located abroad, it may, in theory, be possible to apply to the courts at the seat of arbitration for assistance in obtaining international judicial assistance from the foreign jurisdiction pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970; this is the case in Switzerland. (186) However, the international judicial assistance system is slow and rarely resorted to by arbitral tribunals in practice. (187)

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Ultimately, even without subpoena support from state courts, the tribunal can bolster the effectiveness of its own evidence requests with a clear warning as to the adverse inferences that may be drawn if a party fails or is unable to comply (discussed further in the next section). (188) This should provide a powerful incentive for parties to comply with the tribunal's requests. (189)

Additionally, if there happen to be parallel criminal proceedings or investigations, the tribunal may request evidence gathered in those proceedings insofar as it can be disclosed. (190) The tribunal may even consider staying the arbitration while criminal proceedings are pending. (191)

One problem that may arise in gathering evidence is how to deal with the personal safety of witnesses called to give evidence of corruption; potential witnesses may refuse to testify, claiming that it would put them in danger, which may be true. (192) While national courts may provide assistance with discovery and provisional measures, ensuring witness protection in their home state (often far from the seat) is much more difficult for tribunals. Claims of personal endangerment should certainly be given careful consideration before the tribunal makes an adverse inference based on the failure by a party to put forward satisfactory testimony evidence. In *Metal-Tech*, the tribunal considered such concerns "not convincing", observing that they could have arranged for the witnesses' protection. (193) There are indeed instances where international tribunals have taken measures to ensure the protection of at least the "whistle blowers" of illegal activity, including strong restriction on the disclosure of the witness's identity. (194)

Another difficulty in gathering testimonial evidence occurs where witnesses may be entitled under the law of the seat to refuse to give evidence. In Switzerland, for instance, parties and third parties are justified in refusing to testify under various circumstances; by way of example, third parties cannot be forced to give evidence if one of the parties to the dispute is their spouse, parent, child or other "close associate" as defined by statute or if testifying would expose themselves or a "close associate" to criminal or civil liability. (195) In such cases, the court cannot properly make an adverse inference from the witness's exercise of his or her personal right not to testify, (196) and by extension, neither should the arbitral tribunal. In Switzerland, arbitral tribunals indeed often notify the witnesses of their right not to testify on certain matters at the outset. (197)

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Lastly, in the case of institutional arbitrations, the tribunal should remember that it can also turn to the administering institution for practical advice on dealing with suspicions of corruption. The ICC International Court of Arbitration, for instance, has reported that the Court "has on several occasions been asked by arbitrators to share its experience of cases in which corruption has been at issue and discuss the practices followed when it has been confronted with such issues". (198) The deep institutional experience at such organizations can provide useful guidance.

2 Evaluating the Evidence

The typical lack of direct evidence to substantiate corruption is perhaps the most significant challenge in ruling on corruption. Instead, tribunals must rely on circumstantial evidence, (199) that is, "[e]vidence based on inference and not on personal knowledge or observation". (200) In French, this is often referred to as the "*faisceau d'indices*". (201)

That circumstantial evidence may be used to prove corruption (or any other claim, for that matter) is widely accepted in theory. (202) In practice, however, tribunals rarely find that the available circumstantial evidence suffices to prove corruption. (203) Indeed, even in one of the main cases cited for the proposition that circumstantial evidence may be used, the tribunal did not actually hold that corruption was proved. (204) This suggests that, in spite of lip service paid to circumstantial evidence, tribunals may not be trusting themselves to rely on logical inferences.

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There is also uncertainty and inconsistency about the standard and burden of proof to be applied. Some tribunals require a heightened standard of proof, such as "clear and convincing evidence" or even "beyond a reasonable doubt", while others apply the regular standard of "preponderance of evidence" (i.e., more likely than not). (205) This in itself may discourage arbitrators from raising the issue *sua sponte* or investigating even where an allegation is made and some red flags are present.

Tribunals and commentators are also split on the related issue of burden of proof: some advocate shifting the burden of proof to the party denying corruption to show that it did *not* commit corruption, while many find such a burden-shifting scheme to be improper, which appears to be the right approach. (206)

The peculiarity of a *sua sponte* enquiry, where the parties are not making allegations, is that there can be no pre-determined burden of proof. A *sua sponte* initiative by the tribunal can thus be said to upset the normal burden of proof, under which each party must prove the facts on which it relies. (207) The few known tribunals that have raised or investigated issues of corruption *sua sponte* have in fact not articulated classic standards or burdens of proof. In the *Lagergren Case*, Judge Lagergren merely stated that corruption was, "in [his] judgment, plainly established from the evidence". (208) In *Metal-Tech v. Uzbekistan*, having concluded that the "factual matrix" did "not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the tribunal itself sought further evidence of the nature and purpose of such payments", the tribunal considered that corruption had to be established with "reasonable certainty". (209) While these standards of "plainly established" and "reasonable certainty" are somewhat hard to place on the common-law scale of standards of proof – they may be more easily compared to the civil law standard of the "*intime conviction du juge*", or the judge's "intimate conviction", which applies to all types of claims – they are notably *not* heightened standards like those of clear and

convincing evidence or beyond a reasonable doubt.

A persuasive position has been set out by a commentator, addressing both the standard of proof and how to apply it, based on the practice in English courts. In his view, the standard should remain one of preponderance, with no burden shifting, but the evidence may need to
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be more "cogent" depending on the inherent likelihood of the facts alleged. (210) The corresponding flexible approach involves "looking at the 'balance' of the evidence before [the adjudicator]" and "when appropriate, relying on inference to fill the gaps that circumstance leaves unfilled". (211) Such use of circumstantial evidence should not be confused with applying a "low" standard of proof, a confusion which "conflates two separate issues – the standard of proof and the probative value of circumstantial evidence". (212)

In accordance with this approach, arbitral tribunals can also apply adverse inferences where parties that presumptively should have certain evidence fail to produce it. (213) For instance, in the context of a corruption enquiry into an agency agreement, if neither party provides evidence that legitimate services were provided, a reasonable inference is that no legitimate services were provided and that the contract's real purpose – or, at any rate, the agent's real activity – was corruption. (214)

This is what happened in *Metal-Tech v. Uzbekistan*. The tribunal made it clear that it "required explanations", (215) specifically putting the claimant on notice that large payments to consultants would be subject to heightened scrutiny, that the claimant was expected to have evidence or knowledge of the services provided by its agents or third parties, that the claimant had failed to provide such evidence so far, and that "contemporaneous documents supporting these facts would assist the Tribunal in reaching a conclusion regarding the Respondent's corruption defense". (216) When the claimant did not produce such evidence, the tribunal concluded that "[t]he fact is that it was unable to do so", and took that conclusion into account in making its determinations on corruption. (217)

While the use of adverse inferences – i.e., inferences based on a *lack* of evidence – is arguably
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more controversial than simply using positive circumstantial evidence, (218) it is supported by numerous commentators, (219) as well as the IBA Rules. As set out in Art. 9(5) of the IBA Rules,

"If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party." (220)

Some rules of thumb to follow in deciding whether to draw an adverse inference are:

(i) if one of the parties has requested an adverse inference against the opposing party, that party should have done its part to produce all the relevant evidence in its own possession;

(ii) it must be reasonably expected that the party against whom the adverse inference is being made would have access to the evidence which has been requested and not produced;

(iii) the inference should be consistent with the facts already established and "logically related to the evidence being withheld". (221)

Furthermore, as a matter of due process, if the tribunal intends to draw an adverse inference from a failure to produce evidence, it should give a clear warning to the parties beforehand. (222)

By using circumstantial evidence, being willing to make adverse inferences, and applying a normal preponderance standard, the tribunal gives itself the best chance of making a reasonable determination as to whether or not corruption did occur.

VI Conclusion

At least in theory, the position of the well-known *Westacre* tribunal that "[i]f the defendant
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does not use it [the word bribery] in his presentation of facts an Arbitral Tribunal does not have to investigate" (223) appears to have been roundly rejected. (224) Additionally, the English court's statement in the subsequent enforcement proceedings that corruption is not as serious a violation of public policy as drug-trafficking does not appear to represent contemporary international consensus. (225)

It would be tempting to see an evolution from an "eyes shut" approach to "zero tolerance", (226) but the available case law suggests a disconnect between commentary and arbitral practice, at least with regard to *sua sponte* corruption enquiries. Certainly there have been major developments in terms of national legislation, international instruments, and global awareness concerning corruption. However, there are still many arbitrators today who find it inappropriate to seek evidence or draw conclusions beyond what the parties have submitted, including on matters of corruption, and the fact remains that the known instances of tribunals investigating suspicions of corruption *sua sponte* are extremely few. Time will tell whether this is bound to change.

In a world that increasingly condemns corruption, arbitral tribunals can do their modest part to combat corruption by stepping up their alertness to red flags that may indicate unsavory

behavior and taking the initiative to follow up with requests for evidence and explanations.

This is indeed a delicate exercise, but not an impossible one if arbitrators bear in mind certain key principles regarding *sua sponte* corruption enquiries:

- The issue of corruption and thus the enquiry should be directly relevant to resolution of the legal claims, to avoid ruling *ultra petita*.
- The enquiry should be justified on the basis of red flags or other evidence, not mere vague suspicion, to avoid accusations of partiality.
- The tribunal must be conscientious about communicating with the parties and giving them a chance to address the issue by producing evidence and making submissions, so as to guarantee their due process right to be heard.
- The tribunal should avail itself of the full range of fact-finding tools available to it under the applicable arbitration rules and law.
- Finally, the tribunal should apply the normal preponderance standard of proof for civil claims and should not be afraid to draw reasonable, logical inferences from circumstantial evidence or the parties' failure to produce evidence that should be within their control.

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Arbitrators should also find comfort in the fact that a proactive approach is now largely advocated and even expected, particularly as the arbitral process comes under ever-greater scrutiny as a tool to resolve international disputes.

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****)** *Tessa Hayes*: Attorney in the International Arbitration Group of LALIVE, Geneva.

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60) R. H. KREINDLER, "Aspects of Illegality", p. 222.

61) See, e.g., the *Lagergren Case* in J. G. WETTER, "Issues of Corruption before International Arbitral Tribunals", p. 291.

62) R. H. KREINDLER, "Aspects of Illegality", p. 281.

63) See B. M. CREMADES and D. J. A. CAIRNS, "Trans-national Public Policy", p. 82; P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 41; Teresa GIOVANNINI, "Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?" in Domitille BAIZEAU and Bernd EHLE, eds., *Stories from The Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider)* (Kluwer Law International 2015) p. 60 at p. 69. The authors are personally aware of at least two cases of arbitrators refusing to render an award by consent and resigning under such circumstances.

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67) T. K. SPRANGE QC, "Corruption in Arbitration", pp. 137-138.

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69) See Sect. IV.*2* below.

70) See R. H. KREINDLER, "Aspects of Illegality", p. 277 ("Flowing from the various duties of the arbitrator ... is a duty to adjudicate the dispute in its various facets. This includes the determination of the illegality, also in those situations where the tribunal may need to initiate an inquiry in to the illegality itself.").

71) Pierre MAYER, "The Arbitrator's Initiative: Its Foundation and Its Limits" in D. BAIZEAU and F. SPOORENBERG, eds., *The Arbitrator's Initiative*, ASA Special Series No. 45 (2016) p. 1.

72) T. GIOVANNINI, "Ex Officio Powers to Investigate", pp. 60-61, 66; P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", p. 188; Veit ÖHLBERGER and Jarred PINKSTON, "The Arbitrator and the Arbitration Procedure, Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaced Concerns About Impartiality" in Christian KLAUSEGGER, Peter KLEIN *et al.*, eds., 2016 *Austrian Yearbook on International Arbitration* (2016) p. 101 at p. 106.

73) English Arbitration Act 1996, Sects. 34(1) and 34(2)(g) (emphasis added). See T. GIOVANNINI, "Ex Officio Powers to Investigate", pp. 62-63; P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 39; Christian P. ALBERTI, "*Iura Novit Curia* in International Commercial Arbitration: How Much Justice Do You Want?" in Stefan Michael KROLL, Loukas A. MISTELIS, et al., eds., *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) p. 15.

74) Mauritius International Arbitration Act 2008, Sect. 24(3)(g); Revised Mauritius Legislation Handbook, p. 205, para. 96(c).

75) Dutch Code of Civil Procedure, Art. 1044 ("1. The arbitral tribunal may, through the intervention of the President of the District Court at The Hague, ask for information as mentioned in article 3 of the European Convention on Information on Foreign Law ...."); Danish Arbitration Act, Sect. 27(2) ("If the arbitral tribunal considers that a decision on a question of European Union law is necessary to enable it to make an award, the arbitral tribunal may request the courts to request the Court of Justice of the European Communities to give a ruling thereon."). See discussion in ILA, "Final Report: Ascertaining the Contents of the Applicable Law", Rio de Janeiro Conference (2008) p. 13; T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 64; C. P. ALBERTI, "*Iura Novit Curia* in International Commercial Arbitration", p. 16.
76) LCIA Arbitration Rules, Art. 22.1(iii) (emphasis added).
77) ILA, "Final Report: Ascertaining the Contents of the Applicable Law", p. 3; T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 66.
78) U.S. Federal Rules of Civil Procedure, Rule 44(1), 1966 Advisor Committee Notes. See also ILA, "Final Report: Ascertaining the Contents of the Applicable Law", p. 11; Gabrielle KAUFMANN-KOHLER, "The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions", ASA Special Series No. 26 (2006) p. 87 at p. 90.
79) T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 66; C. P. ALBERTI, "*Iura Novit Curia* in International Commercial Arbitration", p. 15.
80) P. MAYER, "The Arbitrator's Initiative", p. 2 (discussing the Swiss PILA, Art. 182(2); French Code of Civil Procedure, Art. 1509; ICC Arbitration Rules, Arts. 19 and 22(2); UNCITRAL Arbitration Rules, Art. 17(1); and Swiss Rules, Art. 15(1)).
81) New York Convention Art. V(2)(*b*).
82) See R.H. KREINDLER, "Aspects of Illegality", p. 235.
83) See Sect. III.*3.b* below.
84) ILA, "Final Report: Ascertaining the Contents of the Applicable Law", p. 23 (Recommendations 6, 13); ILA Resolution No. 6/2008 from the Biennial Conference in Rio de Janeiro, August 2008, "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration," Annex: International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (Recommendations 6, 13).
85) See ILA, "Interim Report on Public Policy", pp. 19-20; Allan PHILIP, "Arbitration, Money Laundering, Corruption and Fraud: The Role Of The Tribunals" in Kristine KARSTEN and Andrew BERKELEY, eds., *Arbitration – Money Laundering, Corruption and Fraud*, Dossiers of the ICC Institute of World Business Law (2003) p. 147 at p. 149; A. MOURRE, "Arbitration and Criminal Law", p. 105.
86) *Eco Swiss China Time Ltd (Hong Kong) v. Benetton International NV*, Court of Justice of the European Union, 1 June 1999, C-126/97, [1999] 2 All ER (Comm) 44.
87) ILA, "Interim Report on Public Policy", p. 19; A. PHILIP, "Arbitration, Money Laundering, Corruption and Fraud", p. 149.
88) T. GIOVANNINI, "Ex Officio Powers to Investigate", pp. 59-60; P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 39. *Contra*, ILA, "Final Report: Ascertaining the Contents of the Applicable Law", p. 5, n. 10.
89) Swiss PILA Art. 184(1). See also T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 61.
90) Federal Arbitration Act, 9 U.S. Code Sect. 7. See also P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 39.
91) French Code of Civil Procedure Art. 1647. See also P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 39.
92) T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 61.
93) Korean Arbitration Act Art. 25(4). See also T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 62.
94) UNCITRAL Model Law, Art. 24(3).
95) T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 62; P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 39.
96) English Arbitration Act 1996, Sects. 34(1) and 34(2)(g); Mauritius International Arbitration Act 2008, Sect. 20(3).
97) Hong Kong Arbitration Ordinance, Cap. 609, Sect. 56(7).
98) See T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 63.
99) . ICC Arbitration Rules, Art. 25. See also ICDR/AAA International Arbitration Rules, Art. 20(4); LCIA Arbitration Rules, Art. 22.1; Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules), Art. 24; China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules (CIETAC Rules), Art. 41(1); Swiss Rules of International Arbitration, Art. 24(3); ICSID Rules of Procedure for Arbitration Proceedings, Art. 34(2)(a). See commentary by P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 38; T. GIOVANNINI, "Ex Officio Powers to Investigate", pp. 64-65.
100) UNCITRAL Arbitration Rules (2010), Art. 27(3).
101) ICSID Convention Art. 43.
102) IBA Rules on the Taking of Evidence in International Commercial Arbitration (the IBA Rules), Art. 3(10) (2010).
103) IBA Rules, Art. 4(10).
104) IBA Rules, Art. 6(1).
105) P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", pp. 188-189; P. MAYER, "The Arbitrator's Initiative", p. 3.
106) M. SCHERER, "Circumstantial Evidence", p. 31.
107) See Sect. V.*2* below.

108) T. GIOVANNINI, "Ex Officio Powers to Investigate", pp. 72-73.
109) See, e.g., New York Convention, Art. V(1)(c) (recognition and enforcement may be refused if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration"). Regarding the possible setting aside of ultra petita award, see, e.g., Swiss PILA, Art. 190(2)(c) (award may be annulled "if the arbitral tribunal's decision went beyond the claims submitted to it"); English Arbitration Act 1996 Sect. 68 (award may be challenged in case of "serious irregularity, including "the tribunal exceeding its powers"). See also commentary by R. H. KREINDLER, "Aspects of Illegality", p. 252; Christian ALBANESI and Emmanuel JOLIVET, "Dealing with Corruption in Arbitration: A Review of ICC Experience" in 24 ICC Special Supplement 2013: Tackling Corruption in Arbitration (2013) p. 27 at p. 35.
110) See, e.g., ICC Rules of Arbitration, Art. 41.
111) C. ALBANESI and E. JOLIVET, "Dealing With Corruption in Arbitration: A Review of ICC Experience", p. 35.
112) M. HWANG and K. LIM, "Corruption in Arbitration – Law and Reality", p. 16; R. H. KREINDLER, "Aspects of Illegality", p. 252.
113) See, e.g., *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013).
114) See B. M. CREMADES and D. J. A. CAIRNS, "Trans-national Public Policy", p. 84 (The tribunal "should firmly reject the argument that illegal activities in other contracts or circumstances are evidence that similar conduct taints the contract in dispute.").
115) See, e.g., European Civil Law Convention on Corruption, Art. 8(1) and (2). See also A. P. LLAMZON, *Corruption in International Investment Arbitration*, paras. 4.42-4.43; M. HWANG and K. LIM, "Corruption in Arbitration – Law and Reality", pp. 64-66.
116) *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm), para. 49(1)-(2).
117) *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm), para. 49(2).
118) *Lagergren Case*, para. 2, in J. G. WETTER, "Issues of Corruption before International Arbitral Tribunals", p. 291.
119) It is worth noting that while Judge Lagergren has been widely criticized for his approach in dismissing the claims on jurisdiction (non-arbitrability) rather than on the merits, his decision to address corruption *sua sponte* in the first place does not appear to have been questioned, nor has it been argued that he exceeded his mandate. When it is evident that there is a contract for corruption, it becomes undeniable that, at the very least, the tribunal may (if not must) address it.
120) See *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case No. ARB/00/7) para. 188(1).
121) OECD Foreign Bribery Report, p. 8.
122) See A. SAYED, "*La question de la corruption dans l'arbitrage commercial international*", p. 656.
123) See, e.g., ICC Commission on Corporate Responsibility and Anti-Corruption, "ICC Guidelines on Agents, Intermediaries and Other Third Parties" (2010) p. 6. The authors are aware of a number of such consulting agreements entered into by multinationals in which this is the case.
124) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 372.
125) R. H. KREINDLER, "Aspects of Illegality", p. 246.
126) See Howard M. HOLTZMANN and Joseph E. NEUHAUS, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration [Legislative History and Commentary]* (1989) p. 479; R. H. KREINDLER, "Aspects of Illegality", pp. 246-247.
127) See, e.g. UNCITRAL Model Law Art. 18 ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.") See also V. ÖHLBERGER and J. PINKSTON, "The Arbitrator and the Arbitration Procedure", pp. 108-110; Sophie NAPPERT, "Raising Corruption as a Defence in Investment Arbitration" in Domitille BAIZEAU and Richard H. KREINDLER, eds., *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law (2015) p. 175 at p. 181.
128) See P. MAYER, "The Arbitrator's Initiative", p. 4; P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", p. 190.
129) G. BORN, *International Commercial Arbitration*, p. 1998.
130) R. H. KREINDLER, "Aspects of Illegality", pp. 220-221.
131) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 389.
132) V. ÖHLBERGER and J. PINKSTON, "The Arbitrator and the Arbitration Procedure", pp. 108-109; P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", pp. 190-191.
133) V. ÖHLBERGER and J. PINKSTON, "The Arbitrator and the Arbitration Procedure", pp. 108-109.
134) R. H. KREINDLER, "Aspects of Illegality", pp. 222-223, 253. See also T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 75; P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", p. 219.

135) See T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 70. See also *Cour d'Appel de Paris, Pole 1 - Chambre 1*, Case No. 14/19164 Judgment of 15 March 2016, discussed in Damien GERADIN and Emilio Paolo VILLANI, "Iura Novit Curia Stealing the Limelight (Again)", Kluwer Arbitration Blog (22 April 2016) <http://kluwerarbitrationblog.com/2016/04/22/iura-novit-curia-stealing-the-limelight-again/> (last accessed 23 June 2016).
136) *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.*, Bundesgericht, I. Zivilabteilung, 2 March 2001, 19 ASA Bull. 3 (2001) p. 531 at para. 6(a). See also T. GIOVANNINI, "Ex Officio Powers to Investigate", p. 71; Bernhard BERGER and Franz KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd edn. (2015) para. 1126.
137) See ILA, "Final Report: Ascertaining the Contents of the Applicable Law", p. 23 (Recommendation 8).
138) See ILA Resolution No. 6/2008 from the Biennial Conference in Rio de Janeiro, August 2008, "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration", Annex: International Law Association Recommendations on Ascertaining the contents of the Applicable Law in International Commercial Arbitration; T. K. SPRANGE QC, "Corruption in Arbitration", p. 135; P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", p. 219.
139) P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", pp. 175, 192; C. P. ALBERTI, "*Iura Novit Curia* in International Commercial Arbitration", pp. 29-30. See also G. KAUFMANN-KOHLER, "The Arbitrator and the Law", p. 93; ILA, "Final Report: Ascertaining the Contents of the Applicable Law", p. 16.
140) P. MAYER, "The Arbitrator's Initiative", p. 5.
141) See, e.g., Kiera S. GANS and David M. BIGGE, "The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic Authorities", 10 TDM (2013, no. 3) p. 1 at pp. 3-4. See also *F-W Oil Interests, Inc. v. The Republic of Trinidad andTobago*) (*FWO v. Trinidad and Tobago*), ICSID Case No. ARB/01/14, Award (3 March 2006) para. 211.
142) P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 43; see also P. LANDOLT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", p. 202.
143) Gary BORN, "Bribery and an Arbitrator's Task", Kluwer Arbitration Blog (October 11, 2011) <http://kluwerarbitrationblog.com/2011/10/11/bribery-and-an-arbitrators-task/> (last accessed 23 June 2016).
144) See Sect. V.1 below.
145) A. MOURRE, "Arbitration and Criminal Law", p. 111. See also G. BORN, *International Commercial Arbitration*, p. 1997; P. FRIEDLAND, "Fact-Finding by International Arbitrators", pp. 40-41.
146) A. MOURRE, "Arbitration and Criminal Law", p. 111 (emphasis added).
147) See A. CRIVELLARO, "The Course of Action Available to International Arbitrators to Address Issues of Bribery and Corruption", 10 TDM (2013, no. 3) p. 1 at pp. 1-2.
148) *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case No. ARB/00/7) para. 130. See commentary by A. MENAKER and B. K. GREENWALD, "Proving Corruption in International Arbitration", pp. 89-90; S. NAPPERT, "Raising Corruption as a Defence in Investment Arbitration", pp. 175-176.
149) OECD Foreign Bribery Report, p. 8.
150) See C. ROSE, "Questioning the Role of International Arbitration", p. 184; M. SCHERER, "Circumstantial Evidence", p. 29.
151) See, e.g., FCPA Guide; UK Bribery Act 2010 Guidance; ICC Guidelines on Agents, Intermediaries and Third Parties.
152) ICC Guidelines on Agents, Intermediaries, and Third Parties, pp. 4-5.
153) ICC Case No. 8891 (1998), 2000 ICC Collection vol. IV p. 564. See commentary by A. CRIVELLARO, "Arbitration Case Law on Bribery", p. 142; José ROSELL and Harvey PRAGER, "Illicit Commissions and International Arbitration: The Question of Proof", 15 Arb. Int'l (1999, no. 4) p. 329 at pp. 331-334.
154) ICC Case No. 12990 (December 2005), excerpted in ICC International Court of Arbitration, Special Supplement: Tackling Corruption (2013) pp. 52-62.
155) M. SCHERER, "Circumstantial Evidence", p. 31.
156) Pierre Yves TSCHANZ and Jean-Marie VULLIEMIN, "*Chronique de jurisprudence étrangère : Suisse*", 2001 Rev. Arb. 4, Comité Français de l'Arbitrage ("*Une piste peut être proposée : la présence d'indices active le devoir de rechercher l'arrière-plan économique et de solliciter les explications complémentaires des parties.*").
157) *Cf.* FCPA Guide, p. 60 (in the context of companies' risk-based due diligence, "[t]he degree of scrutiny should increase as red flags surface").
158) See Sect. III.*3.a* above.
159) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 110(i) (explaining that the respondent argued in its counter-memorial on the merits – i.e., prior to the hearing at which the tribunal raised questions about the consulting contracts – that "the Claimant engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment").
160) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 256.
161) *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex"), and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (ICSID Case Nos. ARB/10/11 and ARB/10/18), Procedural Order 13 (26 May 2016).

162) See A. P. LLAMZON, *Corruption in International Investment Arbitration*, para. 1.31; C. ROSE, "Questioning the Role of International Arbitration", pp. 185-191.
163) Unpublished ICC award (2010).
164) Maziar JAMNEJAD, *World Duty Free v. The Republic of Kenya: A Unique Precedent? A summary of the Chatham House International Law discussion group meeting held on 28 March 2007*, available at <http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Moi_World_Duty...> p. 14 ("In reality, many arbitrators will allow corruption allegations to colour their judgment without actually stating that that is the case, chiefly due to the evidential difficulties faced if they were explicit in their views."); M. HWANG and K. LIM, "Corruption in Arbitration – Law and Reality", p. 37.
165) *FWO v. Trinidadand Tobago*. See discussion in C. ROSE, "Questioning the Role of International Arbitration", pp. 190-192.
166) *FWO v. Trinidad and Tobago*, para. 210.
167) C. ROSE, "Questioning the Role of International Arbitration", p. 190.
168) *FWO v. Trinidad and Tobago*, para. 211.
169) *Ibid.*
170) *Ibid.*, para. 212.
171) Under the lawyers' regulations of some jurisdictions, it would be an ethical violation to suggest criminal behaviour unless the allegation was material to the case and there were reasonable grounds for believing the allegation to be true (see, e.g., Solicitors' Regulation Authority (SRA) Code of Conduct, Sect. IB(5.8)). However, such ethical requirements are not universal, and unsupported insinuations are not out of the ordinary in international arbitration.
172) *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) para. 118.
173) *Ibid.*, paras. 20, 111-118. See commentary by A. P. LLAMZON, *Corruption in International Investment Arbitration* paras. 6.132-6.147; C. ROSE, "Questioning the Role of International Arbitration", p. 204.
174) *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) para. 147. See also A. P. LLAMZON, *Corruption in International Investment Arbitration*, paras. 6.140, 6.144.
175) *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) para. 113.
176) See, e.g., *RSM Production Corporation v. Grenada*, Annulment Proceeding, Decision On RSM Production Corporation's Application for a Preliminary Ruling of 29 October 2009, ICSID Case No ARB/05/14, paras. 6-7, 25. In that case, the arbitral tribunal rejected the claimant's submission that, in assessing a particular witness's credibility, the tribunal should take into account the claimant's allegation that the witness had accepted a bribe in a separate deal. The Annulment Committee declined to reexamine the corruption allegations in part because the witness's testimony was not decisive of the issue. See discussion in A. P. LLAMZON, *Corruption in International Investment Arbitration*, paras. 6.271-6.273.
177) P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 45.
178) See, e.g. LCIA Arbitration Rules, Art. 22.1, ICC Rule 25, ICSID Art. 43.
179) G. BORN, "Bribery and an Arbitrator's Task".
180) Translation of Swiss PILA from B. BERGER and F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, p. 746.
181) Gabrielle NATER-BASS, "Commentary on the Swiss Rules, Article 25 [Evidence and hearings, II]" in Manuel ARROYO, ed., *Arbitration in Switzerland: The Practitioner's Guide*, (2013) p. 512.
182) English Arbitration Act 1996, Sect. 2(3). See commentary by Charles C. CORRELL, Jr. and Ryan J. SZCZEPANIK, "No Arbitration Is an Island: The Role of Courts in Aid of International Arbitration", 6 World Arbitration and Mediation Review (2012 no. 3) p. 578. For tribunals seated in the United Kingdom, it is also possible for a UK court to issue to a foreign court a request to examine a witness located abroad, pursuant to its powers to provide support to the arbitral tribunal under Sect. 44(2)(a); however, the power is very rarely used. See also David St John SUTTON, Judith GILL and Matthew GEARING, *Russell on Arbitration,* 24th edn. (2015) para. 7-198.
183) *Zivilprozessordnung* (ZPO), Sects. 1050, 1025(2), 1062(4). See commentary by Gerhard WAGNER, "General Provisions, § 1025 – Scope of Application" in Karl-Heinz BÖCKSTIEGEL, Stefan Michael KRÖLL, et al., eds., *Arbitration in Germany: The Model Law in Practice,* 2d ed. (2015) p. 63, para. 34; Jean-François POUDRET and Sébastien BESSON, *Comparative Law of International Arbitration* (2007) para. 598.
184) Swiss PILA, Arts. 176(1), 184(2). C. C. CORRELL and R. J. SZCZEPANIK, "No Arbitration Is an Island", p. 578; J. POUDRET and S. BESSON, *Comparative Law of International Arbitration*, para. 597.
185) 28 U.S. Code Sect. 1782 (emphasis added). See commentary in Nigel BLACKABY, Constantine PARTASIDES, Alan REDFERN and J. Martin HUNTER, *Redfern and Hunter on International Arbitration,* 7th ed. (2015) paras. 7.39-7.44.
186) Elliott GEISINGER and Pierre DUCRET, "Ch. 5: The Arbitral Procedure" in Elliott GEISINGER and Nathalie VOSER, eds., *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd ed. (2013) pp. 91-92.
187) *Ibid*, p. 92.
188) M. HWANG and K. LIM, "Corruption in Arbitration – Law and Reality", pp. 34-36.

189) See C. ROSE, "Questioning the Role of International Arbitration", p. 214 (observing that "[i]f arbitral tribunals drew adverse inferences more regularly in cases involving corruption, then perhaps parties would generally be more forthcoming, at least in cases where no wrongdoing occurred".).
190) See, e.g. *Niko Resources v. Bangladesh et al.* (ICSID Case Nos. ARB/10/11 and ARB/10/18), Decision on Jurisdiction (19 August 2013) para. 382 (using the Agreed Statement of Facts used in the criminal conviction of Niko Canada in Canada). See also C. ROSE, "Questioning the Role of International Arbitration", p. 219.
191) The decision whether or not to issue a stay in light of pending criminal proceedings is a matter for the arbitral tribunal's discretion. See the recent decisions of the Swiss Supreme Court, *A.___ SA v. B.___ SA*, 4A_532/2014; *Y.___SA v. B.___*, 4A_231/2014; *Y.___ SA v. B.___*, 4A_247/2014.

192) S. NAPPERT, "Raising Corruption as a Defence in Investment Arbitration", p. 180.
193) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 264.
194) The authors are aware of at least one case where this was done. The identity of a key witness, who testified on the illegal activities of the foreign investor, was disclosed only to the tribunal, the Claimant's counsel and two of its key representatives under strict obligation not to disclose it to any third party; the identity was disclosed neither during the recorded testimony nor in the award.
195) Swiss Code of Civil Procedure, Arts. 165, 166.
196) Swiss Code of Civil Procedure, Art. 162; BOHNET et al., *Code de procédure civil commenté*, *ad* Article 162 N.1.
197) See ZR 110/2011 S. 78 (1 January 2011), holding that in order to make false testimony before an arbitral tribunal punishable under the Swiss Criminal Code, the arbitrator must (1) remind the witness to tell the truth, (2) inform him or her of the criminal consequences of false testimony and (3) inform him or her of any privilege or right to refuse testimony the witness may have.
198) C. ALBANESI and E. JOLIVET, "Dealing With Corruption in Arbitration: A Review of ICC Experience", p. 35.
199) See M. SCHERER, "Circumstantial Evidence", p. 31.
200) Black's Law Dictionary (9th ed.).
201) See M. SCHERER, "Circumstantial Evidence", p. 31; P. Y. TSCHANZ and J. VULLIEMIN, "*Chronique De Jurisprudence Etrangère : Suisse*".
202) See, e.g., C. B. LAMM, H. T. PHAM and R. MOLOO, "Fraud and Corruption in International Arbitration", p. 703.
203) See C. ROSE, "Questioning the Role of International Arbitration", p. 184.
204) *JanOostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL), Final Award (23 April 2012) para. 303.
205) A. MENAKER and B. K. GREENWALD, "Proving Corruption in International Arbitration", pp. 82-83.
206) See A. MENAKER and B. K. GREENWALD, "Proving Corruption in International Arbitration", p. 80.
207) P. FRIEDLAND, "Fact-Finding by International Arbitrators", p. 42.
208) *Lagergren Case*, para. 17, in J. G. WETTER, "Issues of Corruption before International Arbitral Tribunals", p. 293.
209) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 243.
210) Constantine PARTASIDES, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World", 25 ICSID Rev.–FILJ 1 (2010) p. 47 at p. 58; accord, M. HWANG and K. LIM, "Corruption in Arbitration – Law and Reality", p. 36.
211) C. PARTASIDES, "Proving Corruption in International Arbitration", p. 59.
212) A. MENAKER and B. K. GREENWALD, "Proving Corruption in International Arbitration", p. 90.
213) M. HWANG and K. LIM, "Corruption in Arbitration – Law and Reality", pp. 35-36; A. MENAKER and B. K. GREENWALD, "Proving Corruption in International Arbitration", p. 92.
214) A. MENAKER and B. K. GREENWALD, "Proving Corruption in International Arbitration", pp. 94-95.
215) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 239.
216) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 253. See commentary by R. H. KREINDLER, "Practice and Procedure Regarding Proof: The Need for More Precision" in Albert Jan van der BERG, ed., *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, no. 18 (Kluwer Law International 2015) p. 171.
217) *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013) para. 390.
218) R. H. KREINDLER, "Practice and Procedure Regarding Proof", pp. 156-157 ("uniformity is lacking as to the proper role of adverse inferences and whether such inferences can or should be drawn by the arbitrator expressly or impliedly").
219) See, e.g. A. MENAKER and B. K. GREENWALD, "Proving Corruption in International Arbitration", pp. 94-95; C. B. LAMM, H. T. PHAM and R. MOLOO, "Fraud and Corruption in International Arbitration", p. 706; M. SCHERER, "Circumstantial Evidence", p. 31.
220) IBA Rules, Art. 9(5).
221) C. B. LAMM, H. T. PHAM and R. MOLOO, "Fraud and Corruption in International Arbitration", p. 706.

222) M. SCHERER, “Circumstantial Evidence”, p. 31; Harold FREY, “The Arbitrator’s Initiative: Fact-finding” in D. BAIZEAU and F. SPOORENBERG, eds., *The Arbitrator’s Initiative*, ASA Special Series No. 45 (2016) p. 58.

223) *W., a Corporation organized and existing under the laws of the Republic of X. v. F., a State agency, and U., a bank authorized and existing under Y. law*, Final Award, ICC Case No. 7047/JJA, 28 February 1994, 13 ASA Bull. (1995, no. 2) p. 301 at p. 343.

224) See B. M. CREMADES and D. J. A. CAIRNS, “Trans-national Public Policy”, p. 80 (“The assertion made in the *Westacre* arbitration that an arbitral tribunal has no duty to investigate bribery unless one of the parties explicitly raises the issue is incompatible with the modern significance of bribery in international public policy.”).

225) *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd* [1998] 2 Lloyd’s Rep. 111, 131 (aff’d, [1999] 2 Lloyd’s Law Reports, 65); discussed in A. SAYED, *Corruption in International Trade and Commercial Arbitration*, p. 53. Compare UNCAC, Foreword of the Secretary General (“Corruption is an insidious plague that has a wide range of corrosive effects on societies.”).

226) A. CRIVELLARO, “The Course of Action Available to International Arbitrators”, p. 13.