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ADDRESSING CORRUPTION ALLEGATIONS IN INTERNATIONAL ARBITRATION

By
Ginger Snapp*

I. INTRODUCTION

Brody K. Greenwald¹ and Jennifer A. Ivers² wrote *Addressing Corruption Allegations in International Arbitration* to provide a comprehensive overview of the key corruption issues that arise in international arbitration.³ The authors guide the reader through six chapters all of which can be divided into three arcs representing issues that arise before, during, and after corruption has been alleged. This review works through each individual chapter in detail. The first three chapters make up the first arc and provide a well-written and insightful background as to what corruption is, the requirements for establishing it, and the burdens and standards of proof that are used in tribunal and court decisions.⁴ The fourth chapter starts the second arc and dives into the role that corruption plays in real-life practice while citing to several major international cases which have been affected by corruption.⁵ The last two chapters form the third arc and examine the legal consequences and other issues that can arise after a case has been affected by corruption.⁶

Although a very instructive piece of literature, this book falls apart at the seams halfway through.⁷ Chapters one through four are relevant, organized, and informative, while chapters five and six are extraneous, disorganized, and poorly written.⁸ Though the authors intend to organize the book into chronological arcs, it instead naturally falls into two halves.⁹ The split between the

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³ BRODY K. GREENWALD & JENNIFER A. IVERS, *Addressing Corruption Allegations in International Arbitration* (Koninklijke Brill NV eds., BRILL RESEARCH PERSPECTIVES 2018).

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *Id.* at 50-83.

⁸ Greenwald, *supra* note 2, at 1-84.

⁹ *Id.* at. 2-15, 38-49, 50-75.

first and second half of the book is so readily apparent that it reads like two separate pieces of work. It appears the authors either ran out of energy and time or did not collaborate when deciding on structure, content, and citations. The second half of the book is repetitive, lacks any coherent main points, and misses several significant arguments.¹⁰ Further, the citations in the second half significantly falter both in the lack thereof and accuracy.¹¹ While the opening part of this book is a praiseworthy resource guide accessible to even lay readers, the latter portion is an unorganized disarray of arbitrary facts.

II. DESPITE LONGSTANDING EFFORTS TO COMBAT CORRUPTION, IT REMAINS ENDEMIC IN MUCH OF THE WORLD

Chapter one begins the first arc of the book and sets the groundwork for the rest of the chapters by providing an informative background about what corruption is and how it affects all people.¹² Any person could pick up this guide, read this chapter, and have a basic and well-informed idea of corruption and its role in the modern world. The content of this chapter makes it clear that allegations of corruption will likely continue as a crucial issue for international arbitration disputes despite preventative practices.¹³

The book defines corruption as “the misuse of a public or private position for direct or indirect personal gain.”¹⁴ Additionally, corruption encompasses crimes such as bribery, insider dealing, influence-peddling, abuse of power, nepotism, revolving doors between the private and public sectors, and conflicts of interest.¹⁵ Corruption undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life for all people, and allows organized crime, terrorism and other threats to human security to flourish.¹⁶

In 1977, the United States passed the Foreign Corrupt Practices Act (“FCPA”), and became the first country to enact major legislation prohibiting the bribery of foreign public officials.¹⁷ In 1996, the member States of the Organization of American States, minus Cuba, followed suit and enacted the Inter-American Convention against Corruption.¹⁸ Since the passage of these pioneer prohibitions, nearly every state across the globe has ratified one or more similar international anticorruption conventions.¹⁹ Further, most, if not all, countries have criminalized

¹⁰ Greenwald, *supra* note 2, at 50-83.

¹¹ *Id.*

¹² *Id.* at 3-8.

¹³ *Id.* at 9.

¹⁴ *Id.* at 3.

¹⁵ Greenwald, *supra* note 2, at 3.

¹⁶ *Id.* at 6 (citing to G.A. Res. 58/4, ¶ 1 (Dec. 14, 2005)).

¹⁷ *Id.* at 4 (“[T]he FCPA also prescribes civil and criminal penalties for knowingly falsifying books and records or circumventing or failing to implement an adequate system of internal accounting controls . . .”).

¹⁸ *Id.*

¹⁹ *Id.* at 4.

corruption because it is contrary to international public policy.²⁰

Despite the substantial efforts of many states and international organizations to stamp out corruption, bribes are still routinely demanded and paid.²¹ In 2017, Transparency International reported that nearly one in four people stated that they had paid a bribe within the past year.²² Similarly, the World Bank found that businesses and individuals pay more than US \$1 trillion combined in bribes every year.²³

After the author explains the factual background as presented above, the remainder of this chapter and the subsequent chapters begin to shift their focus from corruption in general to bribery alone. Bribery is only one of the seven types of corruption explicitly mentioned in this chapter, yet it becomes the sole focus for the rest of the book, while the other above-mentioned types of corruption are never again discussed.²⁴ The authors treat the terms “corruption” and “bribery” as synonyms; however, the two words have different meanings. According to Black’s Law Dictionary, bribery is “the corrupt payment, receipt, or solicitation of a private favor for official action” while corruption is “an impairment of integrity, virtue, or moral principle.”²⁵

If the authors intended to write a book on bribery, the title and chapter headings should have indicated so instead of misleading readers. A more comprehensive guide to corruption would have included examples and definitions of all the types of corruption, instead of focusing exclusively on bribery. One reason the authors may have chosen to direct their focus towards bribery is because it is the most prevalent form of corruption in international arbitration.²⁶ However, this distinction was not made and subsequently, the reader is misled.

III. THE REQUIREMENTS FOR ESTABLISHING CORRUPTION

While chapter two is an instructive and well-structured portion of an overall useful book, it seems to have missed the mark at accomplishing what its title claims to accomplish. The authors not only disregard all other types of corruption, they further narrow their scope by focusing only on the tip of the corruption iceberg, missing out on the opportunity to delve into the root cause of corruption, which is the virtually unlimited discretion that the arbitrator retains.²⁷ Chapter two is supposed to describe the requirements to establish corruption, but it

²⁰ Greenwald, *supra* note 2, at 7.

²¹ *Id.* at 8.

²² *Id.* at 8 (“[T]ransparency International reported bribery rates of 20% in accession countries, 23% in sub-Saharan Africa, 28% in Asia Pacific, 29% in Latin America and the Caribbean, 30% in the Middle East and North Africa, and 30% in the Commonwealth of Independent States . . .”).

²³ *Id.* at 8 (citing to S.C. Res. 13493 (Sept. 10, 2018)).

²⁴ *Id.* at 3. (“[T]he other forms of corruption are: insider dealing, influence-peddling, abuse of power, nepotism, revolving doors between the private and public sectors, and conflicts of interest . . .”).

²⁵ Black’s Law Dictionary (11th ed. 2019).

²⁶ Greenwald, *supra* note 2, at 8.

instead repeats the issue referenced in the last chapter, and explains the requirements to establish bribery.²⁸

The chapter begins by diving right into the mandatory elements of corruption. According to arbitral tribunals considering similar definitions of corruption, there are three requirements to establish corruption: (i) the promise, offer, or giving of something of value; (ii) intended for a public official or another person or entity; (iii) in order for that official to take or refrain from taking official action.²⁹ Because of the three-fold requirement, corruption is notoriously difficult to establish. Further, there is typically little or no physical evidence because the parties involved use evasive means to ensure no trail of their wrongdoing, making corruption even more difficult to prove.³⁰

After the authors give a general explanation of how to establish what they claim to be corruption, but what is in actuality bribery, they then go on to state several noteworthy observations. Firstly, a bribe does not need to be cash or some tangible form, it may be anything of value.³¹ Next, a crime is committed upon the offer or promise to give a bribe regardless of when or whether a payment is ever made.³² Also, bribes may be negotiated and paid indirectly, meaning that the person offering the bribe does not need to know the identity of the ultimate beneficiary.³³ Similarly, it is unlawful to offer or give a bribe to a public official even if he or she is not in a position of power or authority to accept the specific bribe at issue.³⁴ However, other courts and tribunals have dismissed allegations of bribery when a so-called public official did not actually have the authority by law to take or refrain from taking the bribe in question.³⁵ Furthermore, the foreign public official does not need to benefit directly from the bribe so long as the beneficiary is “another person or entity.”³⁶ Lastly, bribery has an element of criminal intent, or *mens rea*, because bribery must be committed intentionally, willfully, knowingly with a “bad purpose,” or with a conscious disregard.³⁷

An additional noteworthy observation that the authors failed to include is what breeds

²⁷ Inna Uchkunova, *Arbitral, Not Arbitrary – Part I: Limits to Arbitral Discretion in ICSID Arbitration*, KLUWER Arbitration Blog (Jan. 29, 2013), <http://arbitrationblog.kluwerarbitration.com/2013/01/29/arbitral-not-arbitrary-part-i-limits-to-arbitral-discretion-in-icsid-arbitration/>.

²⁸ Greenwald, *supra* note 2, at 3-8, 10.

²⁹ *Id.* at 9-10.

³⁰ *Id.* at 18.

³¹ *Id.* at 10.

³² *Id.*

³³ Greenwald, *supra* note 2, at 10.

³⁴ *Id.* at 10.

³⁵ *Id.* at 14.

³⁶ *Id.* at 11 (citing to G.A. Res. 58/4, (Dec. 14, 2005)).

³⁷ *Id.* at 14.

corruption, which is the amount of discretion that an arbitrator retains.³⁸ Because arbitrators have nearly unlimited discretion with regards to case outcomes, parties are likely to bribe or engage in other corrupt practices in order to receive a favorable outcome.³⁹ Exact definitions of arbitrator discretion are rare, so as not to limit the arbitrator's powers.⁴⁰ Further, an arbitrator's decision is final and legally binding, granting the arbitrator nearly absolute power over the parties.⁴¹ Though the explanations and descriptions summarized above are straight-forward and accurate, the scope is far too narrow. The authors focus solely on bribery when there is a plethora of other forms of corruption and even more importantly, key points like the root cause of corruption, that need to be pursued.

IV. THE BURDEN AND STANDARD OF PROOF FOR ALLEGATIONS OF CORRUPTION

In contrast to the earlier, more organized and more accessible chapters, the reader must read much more carefully to dissect chapter three. The reason this chapter is so difficult to sort through is because the authors provided an excessive number of confusingly worded subheadings.⁴² Unfortunately, the subheadings, which should be aimed at making the chapter easier to follow, actually make it even more difficult to understand. Additionally, this chapter was one of the longest chapters within the book for no apparent reason other than to emphasize the importance of burdens and standards of proof in arbitration.⁴³

Like the previous two chapters, chapter three also begins with a set of definitions to provide some background for the reader. The burden of proof is defined as “the legal burden borne by the party that must persuade the tribunal in order to prevail on its entire case or a particular issue.”⁴⁴ The standard of proof is defined as “the amount of evidence needed to establish either an individual issue or the party's case as a whole.”⁴⁵

The burden of proof lies with the party alleging the corruption, whether it is the claimant

³⁸ Uchkunova, *supra* note 27.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Greenwald, *supra* note 2, at 15-34 (The subheadings in this chapter of the book are: “The Burden of Proof is on the Party Alleging Corruption,” “Most Courts and Tribunals Require More Compelling Evidence to Prove Corruption and Fraud,” “The Standard of Proof Applied by National Courts,” “The Standard of Proof Applied by International Courts and Tribunals,” “Corruption May Be Proved through Circumstantial (Rather than Direct) Evidence,” and “Tribunals Have the Power to Draw Adverse Inferences against Either Party for Failing to Produce Evidence.”).

⁴³ *Id.* at 15-37.

⁴⁴ *Id.* at 15.

⁴⁵ *Id.* at 20.

or the respondent.⁴⁶ The opposing party has no legal burden to disprove the allegation.⁴⁷ Several tribunals have ruled that if a party adduces some evidence which supports their allegation of corruption, the burden of proof now shifts to the opponent.⁴⁸ While some courts support a shifting burden in corruption cases, other courts, and the authors of this book, are firmly against it.⁴⁹

The authors describe a shifting burden as problematic for several reasons. First, arbitration is neither an interrogative system where the court establishes the facts, nor a system where the case relies on one party to rebut another party's argument.⁵⁰ Second, there are serious due process concerns with requiring the accused party to prove it did nothing wrong, because this is incompatible with the right to a fair trial.⁵¹ Due process means that each party is entitled to fair treatment.⁵² A shifting burden completely undermines fair treatment because it changes the judicial process, and its rules as a whole, by moving the burden from the party best able to carry it to the party not equally equipped.⁵³ Requiring a party to prove the absence of corruption would be proving a negative, which is logically impossible.⁵⁴ Third, the burden of proof is a persuasive burden that requires the party bearing the burden to prove their particular issue, or lose on the issue in question.⁵⁵ This means that if the party successfully proves corruption, then they have won the issue and shifting the burden uproots the persuasive burden requirement of arbitration tribunals.⁵⁶

After the burden of proof has been thoroughly discussed, the authors move on to the standard of proof as used in investment arbitral proceedings. As similarly stated above, the standard of proof is the level of proof needed in a case, which is established by assessing all evidence.⁵⁷ Courts and tribunals differ as to the applicable standard of proof, although the majority require more compelling evidence to prove corruption.⁵⁸

⁴⁶ Greenwald, *supra* note 2, at 15-16.

⁴⁷ *Id.* at 16.

⁴⁸ *Id.*

⁴⁹ *Id.* at 16-17. For example, the ICSID tribunals in *AAPL v. Sri Lanka* and *Karkey v. Pakistan* were both in favor of a shifting burden in certain cases. Despite this, neither of these tribunals actually shifted the burden of proof to the party accused of corruption.

⁵⁰ *Id.* at 17-18.

⁵¹ Greenwald, *supra* note 2, at 18.

⁵² Black's Law Dictionary (11th ed. 2019).

⁵³ Greenwald, *supra* note 2, at 18.

⁵⁴ *Id.*

⁵⁵ *Id.* at 19.

⁵⁶ *Id.*

⁵⁷ Black's Law Dictionary (11th ed. 2019).

⁵⁸ Greenwald, *supra* note 2, at 15.

There are five different standards of proof applied by national courts. First, in civil law countries, the judge is the trier of fact and is not bound by any strict standards, and therefore is free to decide matters based on “inner conviction.”⁵⁹ Second, in common law countries, the standard of proof in civil proceedings is usually “preponderance of the evidence,” which requires proof that the facts alleged are more likely true than not.⁶⁰ Also, in countries based on a common law system, the standard of proof in criminal proceedings is the much higher standard of “beyond a reasonable doubt,” which requires proof coming as close to certainty as is humanly possible.⁶¹ The United States further recognizes the “clear and convincing evidence” standard of proof that is higher than “preponderance of the evidence” but lower than “beyond a reasonable doubt.”⁶² The “clear and convincing evidence” standard requires proof that the facts alleged are not merely probable but are in fact highly probable so as to establish a firm belief or conviction that the allegations in question are true.⁶³ This standard is used where the individual interests at stake are more consequential than the loss of money, or in cases alleging serious illegality such as fraud, undue influence, and corruption.⁶⁴ Lastly, England and Australia apply the “balance of probabilities” or the “more probable than not” standard of proof in all civil proceedings, regardless of the subject matter at dispute.⁶⁵ This standard is used because the more improbable the event, the stronger the evidence should be.⁶⁶ Despite using different labels for the standard of proof, the U.S., England, and Australia all require more compelling evidence to establish civil claims based on allegations of corruption or fraud.⁶⁷

On the other hand, international courts and tribunals typically do not impose any strict standard of proof.⁶⁸ The leading arbitral rules contain substantially identical provisions granting broad discretion to tribunals to resolve evidentiary issues.⁶⁹ Eleven uncited examples are provided to show that the majority rule is that “the Arbitral Tribunal shall determine the admissibility, relevance, materiality, and weight of evidence.”⁷⁰ In the absence of a precise rule establishing the standard of proof, tribunals in commercial arbitrations determine the standard

⁵⁹ Greenwald, *supra* note 2, at 21.

⁶⁰ *Id.* (citing to 29 AM. JUR. 2D EVIDENCE § 173 (2019)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Greenwald, *supra* note 2, at 21.

⁶⁵ *Id.* at 23.

⁶⁶ *Id.* at 22.

⁶⁷ *Id.* at 24.

⁶⁸ *Id.*

⁶⁹ The most prominent examples are International Bar Association Rules on the Taking of Evidence Article 9.1, ICSID Arbitration Rule 34, UNCITRAL Arbitration Rule 27.4. Greenwald, *supra* note 2, at 24.

⁷⁰ *Id.* at 24-25.

based on the applicable law, occasionally issuing conflicting decisions on an issue.⁷¹ The choice of law depends on the tribunal's determination as to whether the standard of proof is a procedural issue, a substantive issue, or subject to some international standard.⁷² Therefore, arbitrators and tribunals are entrusted with a great deal of discretion over how the relevant facts are to be found and to be proved.⁷³

Moreover, for allegations of particular gravity, such as fraud, corruption, or other serious illegality, most international courts and tribunals have applied a higher standard of proof.⁷⁴ The authors provide concrete examples of when international courts and tribunals have used three different higher standards of proof. The first higher standard of proof is the standard of "convinced of comfortable satisfaction."⁷⁵ The second higher standard is the American standard of "clear and convincing evidence."⁷⁶ And the third higher standard is when there is "no room for reasonable doubt."⁷⁷

However, a minority of courts take a slightly different approach where the seriousness of the allegation does not necessarily mean that the tribunal must apply a heightened standard of proof.⁷⁸ Although some tribunals follow this approach of applying the ordinary standard of preponderance of the evidence, their observations are still consistent with the majority view that a more rigorous assessment and more compelling evidence are required to find fraud and corruption.⁷⁹ Therefore, in most cases, tribunals will either impose a higher standard of proof or will exercise great care and require more compelling evidence to prove allegations of corruption and fraud.⁸⁰

Additionally, in cases where direct evidence of a fact is not available, numerous tribunals have held that corruption nevertheless may be proven through circumstantial evidence.⁸¹ Such circumstantial evidence must establish the specific facts alleged, and the mere existence of suspicion cannot be equated with proof.⁸² While corruption may be proven through

⁷¹ Greenwald, *supra* note 2, at 25.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 26.

⁷⁵ *Id.* at 27.

⁷⁶ Greenwald, *supra* note 2, at 27.

⁷⁷ *Id.* at 28.

⁷⁸ *Id.* at 30 (referencing cases like *Rompetrol v. Romania*, ICSID Case No. ARB/06/3, (May 6, 2013); *ECE Projektmanagement v. Czech Republic*, (Perm. Ct. Arb. 2013); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (July 26, 2007) and; *Union Fenosa v. Egypt*, ICSID Case No. ARB/14/4 (Aug. 31, 2018).)

⁷⁹ *Id.* at 30.

⁸⁰ *Id.* at 31.

⁸¹ Greenwald, *supra* note 2, at 15, 31.

⁸² *Id.* at 33.

circumstantial evidence by “connecting the dots,” it is not sufficient to allege generally that an entire government or judiciary is corrupt, or that a person or entity acted corruptly in another context.⁸³

Furthermore, many domestic arbitration acts now authorize courts and tribunals to draw adverse inferences against either party for failing to produce evidence if that party has possession, custody, or control of the evidence and was ordered to produce it.⁸⁴ An adverse inference is a legal inference, adverse to the concerned party, made from a party's silence or the absence of requested evidence.⁸⁵ One of the most effective sanctions to deter a party from concealing evidence is the threat to draw an adverse inference.⁸⁶

Despite starting out as an easy to read book, this chapter takes for granted the lay readers in the audience and stops defining legal jargon, leaving it to the readers to do their own outside research. Although a difficult chapter to read due to structural organization, this chapter mainly provides definitions of basic legal concepts with little to no room for oppositional comments.

V. FROM THEORY TO PRACTICE: PROVING CORRUPTION IN INVESTMENT ARBITRATION

Unlike the previous chapters which provided basic background definitions and information regarding corruption, chapter four starts the second arc of the book and examines several current arbitration cases affected by corruption. Parties have succeeded in proving corruption in only a few investment arbitrations.⁸⁷ This chapter uses the background provided in the previous three chapters to examine real world examples of corruption. The three cases highlighted are *World Duty Free v. Kenya*,⁸⁸ *Metal-Tech v. Uzbekistan*,⁸⁹ and *Chevron v. Ecuador*.⁹⁰ The authors chose to describe these cases in an unclear manner and excruciating detail. Only after several read-throughs was it possible for even a practiced reader to understand the lengthy run-on sentences and uncover the gist of each case.

The first and most infamous case is *World Duty Free v. Kenya*.⁹¹ The *World Duty Free* case was an arbitration proceeding that arose under a contract to build, maintain, and operate

⁸³ Greenwald, *supra* note 2, at 34.

⁸⁴ *Id.* at 36.

⁸⁵ Black's Law Dictionary (11th ed. 2019).

⁸⁶ Greenwald, *supra* note 2, at 36.

⁸⁷ *Id.* at 38-49.

⁸⁸ Greenwald, *supra* note 2, at 38 (citing to *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7 (Oct. 4, 2006)).

⁸⁹ Greenwald, *supra* note 2, at 41 (citing to *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Oct. 4, 2013)).

⁹⁰ Greenwald, *supra* note 2, at 44 (citing to *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador*, (Perm. Ct. Arb. 2018)).

⁹¹ Greenwald, *supra* note 2, at 38 (citing to *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7 (Oct. 4, 2006)).

duty-free complexes at airports in Kenya.⁹² World Duty Free’s Chairman admitted to paying a “personal donation” to the President of Kenya as part of the “consideration” to obtain the contract.⁹³ The tribunal concluded that the Chairman’s payment was a bribe to obtain the contract with Kenya because the transfer of money was covert, with the intention that it remain confidential, and an intrinsic part of the overall transaction, without which no contract would have been executed between the parties.⁹⁴

The next case mentioned in the book is *Metal-Tech v. Uzbekistan*.⁹⁵ Metal-Tech had obtained Uzbekistan’s approval to establish a joint venture with two State-owned entities.⁹⁶ At the hearing, Metal-Tech’s chairman and CEO testified that Metal-Tech had paid approximately US \$4,000,000 to three alleged consultants who included the brother of the Prime Minister of Uzbekistan and a former government official.⁹⁷ The tribunal concluded that Metal-Tech’s payments made to the consultants raised several “red flags” of corruption.⁹⁸ The biggest red flag raised was that Metal-Tech could provide no evidence of the consultant’s services, because there were no legitimate services at the time of the investment.⁹⁹

The *Metal-Tech* tribunal created a rule beneficial for future arbitration tribunals to use by identifying a number of “red flags” of corruption that, while not conclusive, are indeed warning signs that need to be taken seriously and investigated.¹⁰⁰ Common red flags of corruption include, among other things, when a consultant or other intermediary: (i) has a close personal, familial, or professional relationship with a key government decision-maker; (ii) shows up shortly before government action is to be taken; (iii) claims to know the right people to obtain the desired government action; (iv) lacks experience in the particular sector; (v) requires urgent or unusually high payments or commissions; (vi) requests to be paid in cash or through a third person or entity; (vii) provides unspecified services; and (viii) does not reside or have a significant business presence in the country where the project is located.¹⁰¹ These red flags would have been valuable if they were described earlier in the book, when the other requirements for corruption were explained, but the authors likely included it here to emphasize the relevance of the case.

⁹² Greenwald, *supra* note 2, at 38.

⁹³ *Id.*

⁹⁴ *Id.* at 39.

⁹⁵ *Id.* at 41 (citing to *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Oct. 4, 2013)).

⁹⁶ *Id.*

⁹⁷ Greenwald, *supra* note 2, at 41.

⁹⁸ *Id.* at 42.

⁹⁹ *Id.* at 41.

¹⁰⁰ *Id.* at 42.

¹⁰¹ *Id.*

The last and most recent case is *Chevron v. Ecuador*.¹⁰² *Chevron* concerned a judgement by one of Ecuador's courts, which had ordered Chevron to pay US \$18,200,000,000 in damages.¹⁰³ The tribunal in this case relied solely on circumstantial evidence and, based on the totality of the circumstances, concluded that the plaintiffs' representatives had corruptly ghostwritten at least material parts of the court's prior judgement by promising bribes to the judge.¹⁰⁴

These three examples show that most of the investment arbitration cases where corruption was proven were based on damning admissions made by the party found to have paid the bribes.¹⁰⁵ So while rare, several investment arbitration proceedings have successfully established the existence of arbitral corruption.¹⁰⁶ Though other similar cases were mentioned throughout this chapter, their presence only distracted the reader from the main points drawn from the three important cases. Despite the aforementioned surplus of corruption plaguing international investment arbitration, only three of these cases have proven corruption, furthering the author's strong conclusion that corruption is very difficult to prove.¹⁰⁷

VI. THE CONSEQUENCES OF CORRUPTION IN INTERNATIONAL ARBITRATION

Chapter five starts the third arc of the book by moving the topics of discussion from events that occur during and before a corrupt act has occurred, to events that occur after that corruption has been recognized. Although this portion of the book discusses additional issues caused by corruption, it once again misleads the readers and misses some crucial points by failing to touch on the actual consequences that someone might face if they are found guilty of corrupt practices.¹⁰⁸ The authors focus mostly on consequences of corruption on the arbitration process as a whole, not the individuals guilty of corrupt practices.¹⁰⁹ Further, much of this chapter is incoherent and the important information is not readily available. On top of that, the

¹⁰² Greenwald, *supra* note 2, at 44 (citing to *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador*, (Perm. Ct. Arb. 2018)).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 49.

¹⁰⁵ *Id.* at 38.

¹⁰⁶ *Id.* at 49.

¹⁰⁷ Greenwald, *supra* note 2, at 8 (“[N]early one in four people stated that they had paid a bribe within the past year” and “[b]usinesses and individuals pay more than US \$1 trillion combined in bribes every year . . .”).

¹⁰⁸ *Id.* at 50-72 (The subheadings used in this chapter are “Retaliating against and Causing Damage to an Investor for Corrupt Reasons Would Violate the State’s Obligation to Accord Fair and Equitable Treatment,” “Claims Arising out of Contracts Procured through Corruption or Concluded for Purposes of Paying Bribes Would be Dismissed,” “Investments Made through Corruption Would Not Be Protected under Any Treaty and Would Not Give Rise to Valid Claims,” and “Post-investment Corruption May Have Consequences for the Merits of Quantum of the Claims”).

¹⁰⁹ *Id.* at 50-74.

chapter lacks effective citations.¹¹⁰ As a whole, this chapter is the least well-written portion of the entire book.

Chapter five begins by reemphasizing the seriousness of corruption in arbitration.¹¹¹ Corruption of a state officer or arbitrator by bribery or any other form of corruption is synonymous with the most heinous crimes because it can cause massive economic damage.¹¹² Therefore, if an arbitrator, party, or state official is found guilty of corruption, the consequences are likely to be severe.¹¹³ After the authors stress the harmfulness of arbitral corruption, they present four consequences of corruption.¹¹⁴ However, these consequences are not concrete punishments for wrongdoing, as one might expect when they think of the word “consequence.” Instead, the consequences presented by the authors are actually consequent concerns or issues that corruption itself may cause or create.

The first consequence underscored in this chapter describes the supplementary costs that befall a state if they violate the obligation to accord fair and equitable treatment by retaliating against and causing damage to an investor for corrupt reasons.¹¹⁵ A number of claimants in investment arbitration have alleged that state officials solicited bribes then retaliated against investors for failing to comply with the demand.¹¹⁶ One such case that the authors mention to drive home this point is the previously cited case of *Chevron*.¹¹⁷ After it was decided that corrupt practices were used in *Chevron*, the judgment of the case was immediately annulled.¹¹⁸ The State was required to return any proceeds gained, and other corrective measures were implemented to re-establish the situation which would have existed if those internationally wrongful acts had not been committed.¹¹⁹ Although not explained by the authors, independent research reveals that similar to the tribunal in *Chevron*, other courts have held that if an arbitrator or public official acting on behalf of the State is found guilty of accepting a bribe, he or she may face a suspension, civil and criminal fines, imprisonment, injunctions, forfeiture of assets, and/or disgorgement of profits.¹²⁰

The second consequence discussed by the authors is that in both commercial and

¹¹⁰ Greenwald, *supra* note 2, at 50-74.

¹¹¹ *Id.* at 6, 50-73.

¹¹² *Id.* at 60.

¹¹³ *Id.* at 60.

¹¹⁴ *Id.* at 50.

¹¹⁵ Greenwald, *supra* note 2, at 50.

¹¹⁶ *Id.* (“[H]owever, most of these claimants have failed to meet their burden of proof . . .”).

¹¹⁷ *Id.* at 44.

¹¹⁸ *Id.* at 52.

¹¹⁹ *Id.*

¹²⁰ Hogan Lovells, *Anti-corruption and bribery penalties in the USA*, LEXOLOGY (Nov. 16, 2018) <https://www.lexology.com/library/detail.aspx?g=fba6bd7a-7f29-4da4-af9a-43d3a3065c38>.

investment arbitrations, tribunals have consistently held that contracts to pay bribes are void, and that contracts procured through corruption are, at a minimum, voidable¹²¹ because they do not give rise to valid claims.¹²² This section cites back to *World Duty Free v. Kenya* to make the point that when a contract formed based off of a bribe is annulled, any and all awards must be set aside, and both parties are ordered to bear their own costs of arbitration.¹²³

The third consequence emphasized is that investments made through corruption would not be protected under any treaty.¹²⁴ To strengthen this idea, the authors point back to *Metal-Tech v. Uzbekistan*. Many investment treaties, including the one in *Metal-Tech v. Uzbekistan*, contain clauses providing that the investor must invest in compliance with international law in order to benefit from the treaty's protections.¹²⁵ Otherwise, the tribunal may refuse jurisdiction because there is a lack of consent to arbitrate.¹²⁶ The authors are seemingly trying to make the argument that corrupt investments are inherently invalid. They have chosen only to describe obvious effects of corruption on the arbitral process instead of researching concrete civil and criminal punishments that a party or arbitrator may face if they are found guilty of certain corrupt behaviors.¹²⁷

The fourth and final consequence stressed by the authors is that “post-investment corruption, fraud, or illegality may have consequences for the merits of the claims, or the amount of compensation awarded but will not result in a lack of jurisdiction or in the admissibility of the claims.”¹²⁸ There is little to no explanation of what the authors meant by this statement and virtually no clarification on what “future claims” the authors may be referencing. Moreover, the authors do not create a new consequence of corruption but reiterate the previous points made.¹²⁹ This section would have been another ideal location for the authors to discuss personal and individual consequences of international corruption but instead they again focus only on how the arbitration as a whole is affected by corruption.

Although this chapter found a roundabout way to describe some consequences associated with the heinous crimes of corruption, it missed the mark by taking a narrow, indirect pathway. The authors chose to point their focus towards problems caused by corruption. But the actual tangible penalties that one might face from partaking in corrupt practices are missing from this

¹²¹ Black's Law Dictionary (11th ed. 2019) defines void as meaning “having no legal force or binding effect from its inception” and voidable as “may be considered valid if it is not cancelled by the aggrieved party within a reasonable time.”

¹²² Greenwald, *supra* note 2, at 56-57.

¹²³ *Id.* at 60, 61

¹²⁴ *Id.* at 63.

¹²⁵ *Id.*

¹²⁶ *Id.* at 66.

¹²⁷ Greenwald, *supra* note 2, at 50-72.

¹²⁸ *Id.*

¹²⁹ *Id.* at 50-71.

analysis in the book.¹³⁰ Throughout the book, and this chapter especially, the authors harp on the dangerous and rampant ways of corruption yet the actual consequences and standard punishments for these grave crimes are vaguely described.¹³¹

VII. OBJECTIONS BASED ON ATTRIBUTION AND ESTOPPEL WHERE THE STATE DOES NOT PROSECUTE THE ALLEGED CORRUPTION

The final chapter falls prey to the same confusing headings, rambling sentences, and immaterial substance matter as the previous two chapters.¹³² The preceding chapter delves into the consequences when a party is guilty of corruption.¹³³ The apparent aim of chapter six is to describe the consequences when the state, another party, or the arbitrator is aware of corruption but does not report it. While this is an important subject to touch on, it could have been included in the previous chapter as an additional consequence. It is unclear why this specific issue is important enough that the authors chose to create an entirely separate chapter to focus on it. Furthermore, the authors fail to explain what happens to an arbitrator or party when they fail to report corruption.

As briefly mentioned in the previous chapter, arbitrators, the state, and parties can all be guilty of corrupt practices.¹³⁴ Despite this fact, the non-state associated parties seem to face the greatest punishments while the state officials and arbitrators get off with only minor reprimands.¹³⁵ Many people find issue with this discrepancy, resulting in a push by arbitral institutions for government officials and arbitrators to be more severely punished for their wrongful conduct.¹³⁶ The push for equal punishments among arbitral parties is backed by issues of attribution and estoppel.¹³⁷

With regard to attribution, bribery is a bilateral act that by its very nature involves the participation of both the parties, state or non-state, and the arbitrator.¹³⁸ Next, a state or arbitrator should be estopped from raising corruption as a defense to any post-arbitration issues if it failed to prosecute the alleged wrongdoers in its domestic courts.¹³⁹ A state or arbitrator's failure to report on corruption could permit inferring that they were just as knowledgeable and guilty as the

¹³⁰ Lovells, *supra* note 115.

¹³¹ Greenwald, *supra* note 2, at 6, 50-74.

¹³² *Id.* at 75-83.

¹³³ *Id.* at 50-71.

¹³⁴ *Id.* at 50-74.

¹³⁵ *Id.* at 75 (“[A] state should not be immunized from its wrongful conduct in corruption cases . . .”).

¹³⁶ Greenwald, *supra* note 2, at 75.

¹³⁷ *Id.*

¹³⁸ *Id.* at 75.

¹³⁹ *Id.* at 77.

other corrupt parties involved.¹⁴⁰ However, no tribunal in an investment arbitration has prevented a party from raising a corruption defense due to its failure to bring criminal charges in domestic courts.¹⁴¹ Although a party's failure to prosecute will not preclude it from raising a corruption defense in arbitration, the tribunal may consider it when assessing the evidence of the alleged corruption and when awarding costs.¹⁴²

Despite arbitration institutions' push for equal punishments between parties to arbitration, some arbitration experts still hold steadfast to the leniency of punishments for arbitrators and government parties.¹⁴³ While harsher consequences for the investors may seem unfair, their payment of bribes violates both host state law and international public policy.¹⁴⁴ Such investors have thus forfeited their right to seek justice before courts and tribunals and have no basis to complain about the consequences of their illicit activities.¹⁴⁵

The authors end the sixth and final chapter before taking the opportunity to delve deeper into the actual punishments or penalties that a state official or arbitrator may face if they fail to report corrupt practices. Outside research reveals that if and when an arbitrator fails to address known corruption, most arbitral rules allow a party to move to remove an arbitrator for impropriety.¹⁴⁶ Although there are systems that may help a party deal with an immediate instance of corruption, there are no long lasting or perfect plans in place to discourage corruption in the system overall.¹⁴⁷ A potential solution that has been discussed amongst arbitration scholars is modification of the arbitral rules to allow for challenges against arbitrators specifically on corruption grounds, and requiring arbitrators to base their decisions on objective fact, rather than their subjective view.¹⁴⁸

Throughout the final chapter, the authors make a valiant attempt to address the inconsistency between consequences faced by parties but ultimately fall short of drawing any solid conclusions. The reader is required to do outside research to determine what consequences, if any, an arbitrator may face for failing to report corrupt practices. Additionally, this portion of the book would be an excellent place for the expert authors to input their opinions on how to solve the issue of corruption in investment arbitration, but this route was unfortunately not taken. Lastly, the format, structure, and citations used throughout chapter six were entirely different and faltered in comparison to the earlier chapters, which set high expectations for the reader.¹⁴⁹

¹⁴⁰ Greenwald, *supra* note 2, at 77.

¹⁴¹ *Id.*

¹⁴² *Id.* at 83.

¹⁴³ *Id.* at 84.

¹⁴⁴ *Id.*

¹⁴⁵ Greenwald, *supra* note 2, at 84.

¹⁴⁶ Nick Gersh, *What to Do About Corrupt Arbitral Tribunals?*, THE GLOBAL ANTICORRUPTION BLOG (July 9, 2017) <https://globalanticorruptionblog.com/2017/08/14/what-to-do-about-corrupt-arbitral-tribunals/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Greenwald, *supra* note 2, at 75-83

VIII. CONCLUSION

This resource guide makes a noble attempt to deliver the main point that corruption allegations are now routinely raised in international proceedings for good reason.¹⁵⁰ The first chapter highlights that despite widespread attempts, corruption still plagues the international courts, even though it improperly equates corruption with bribery.¹⁵¹ The second chapter explains that the requirements for establishing bribery are specific and straight-forward but still hard to prove, and while accurate, the authors create too narrow a scope by limiting their complaints to bribery only and excluding other forms of corruption. Further, this chapter would create a strong opportunity to stress the relevance of arbitrator discretion and its role in breeding other forms of corruption, like bribery.¹⁵² The third chapter discusses the burden and standards of proof for corruption, which are generally high and on the alleging party. While this chapter is one of the strongest chapters substantively, lacking virtually any holes, it loses its readers through its unnecessarily lengthy descriptions and excessive and confusing subheadings.¹⁵³ The fourth chapter provides insight into how corruption is rampant, now more than ever, through concrete case examples.¹⁵⁴ The fifth chapter delves into the consequences faced by the arbitrators, parties and/or governmental officials found guilty of corruption. This chapter, probably the hardest to decipher, hits on some important post-corruption effects while leaving out the major penalties that parties actually face for partaking in corrupt practices.¹⁵⁵ The sixth chapter delves into a supplementary consequence faced by arbitrators or parties that do not report on known corruption. The authors seemed to miss out on an opportunity to explain the role of the arbitrator and how he or she may be responsible for preventing or reporting corruption.¹⁵⁶ All in all, the authors tried diligently to provide an insightful and educational resource guide of corruption in arbitration. If the authors would have been more coherent and consistent in their structural preferences and substantive factual patterns, this book could have been nearly perfect.

¹⁵⁰ Greenwald, *supra* note 2, at 84.

¹⁵¹ *Id.* at 3-9.

¹⁵² *Id.* at 9-15.

¹⁵³ *Id.* at 15-37.

¹⁵⁴ *Id.* at 38-50.

¹⁵⁵ Greenwald, *supra* note 2, at 50-74.

¹⁵⁶ *Id.* at 75-83.