

Perspective From Counsel in Investor-State Disputes

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Corruption and Investor-State Disputes: UNCAC Perspective
Conference of the State Parties to the UN Convention Against Corruption
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Corruption in International Arbitration: Trends in Practice

1. Expansion of the Forms of Corruption Involved

- Early cases: unspecified “corruption”
- Transnational Bribery
- Trading in Influence

2. The Demand Side of Corruption

- Investors allege Extortion, Solicitation by Public Officials
- 1/3 of the Cases

3. State Responsibility for Corruption

- Asymmetry in treatment between Supply and Demand Sides
- Implications for the System

TYPOLGY OF INVESTOR WRONGDOING

*“An investment will not be protected if it has been created in violation of national or international principles of **good faith**; by way of **corruption, fraud, or deceitful conduct**; or if its creation itself constitutes a **misuse of the system of international investment protection** under the ICSID Convention. It will also not be protected if it is made in **violation of the host State’s law.**”*

- Hamester v. Ghana, ICSID ARB/07/24, Award,
18 June 2010, para. 123

CORRUPTION ALLEGATIONS

1. “Corruption” in its Generic Sense

- Often in commercial arbitration
- Often involves consultancy agreements
- Party alleging corruption proves the existence of the red flag in order to prove “corruption”
 - Large amount of money
 - Lack of skill or relevant expertise
 - Close personal relationship
- Contract is often *void ab initio* – it is a contract for corruption

Article 34. Consequences of acts of corruption

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

CORRUPTION ALLEGATIONS

1. Transnational Bribery

- The most typical corruption-related allegation
- Definition is taken from UNCAC and the OECD Convention
- Ex. *Kim v. Uzbekistan* (2017):

595. For instance, that the OECD Convention, which Respondent cites as indicative of international public policy, takes as its focus the bribery of government officials.⁴⁴⁶ Thus, the titular concern of the OECD Convention is “Combating Bribery of Foreign Public Officials in International Business Transactions” and the substantive provisions of the Convention bear out this conclusion. The UN Convention, which Respondent also cites, also has this focus.

596. Simultaneously, the Tribunal acknowledges that the effort to combat corruption is an evolving area. Insofar as the UN Convention makes broader reference to “Trading in Influence”, or “Bribery in the Private Sector”, the relevant articles of the Convention use the language “consider making”. This language matches the evolving and serious effort to combat corruption. It also suggests a lower level of consensus amongst the parties to the Convention as to corruption within the private sector, a sector governed by a broad range of criminal statutes. In that sense, the language employed, if anything, supports the conclusion that the scope of international public policy is focused on the corruption of governmental officials.⁴⁴⁷

CORRUPTION ALLEGATIONS

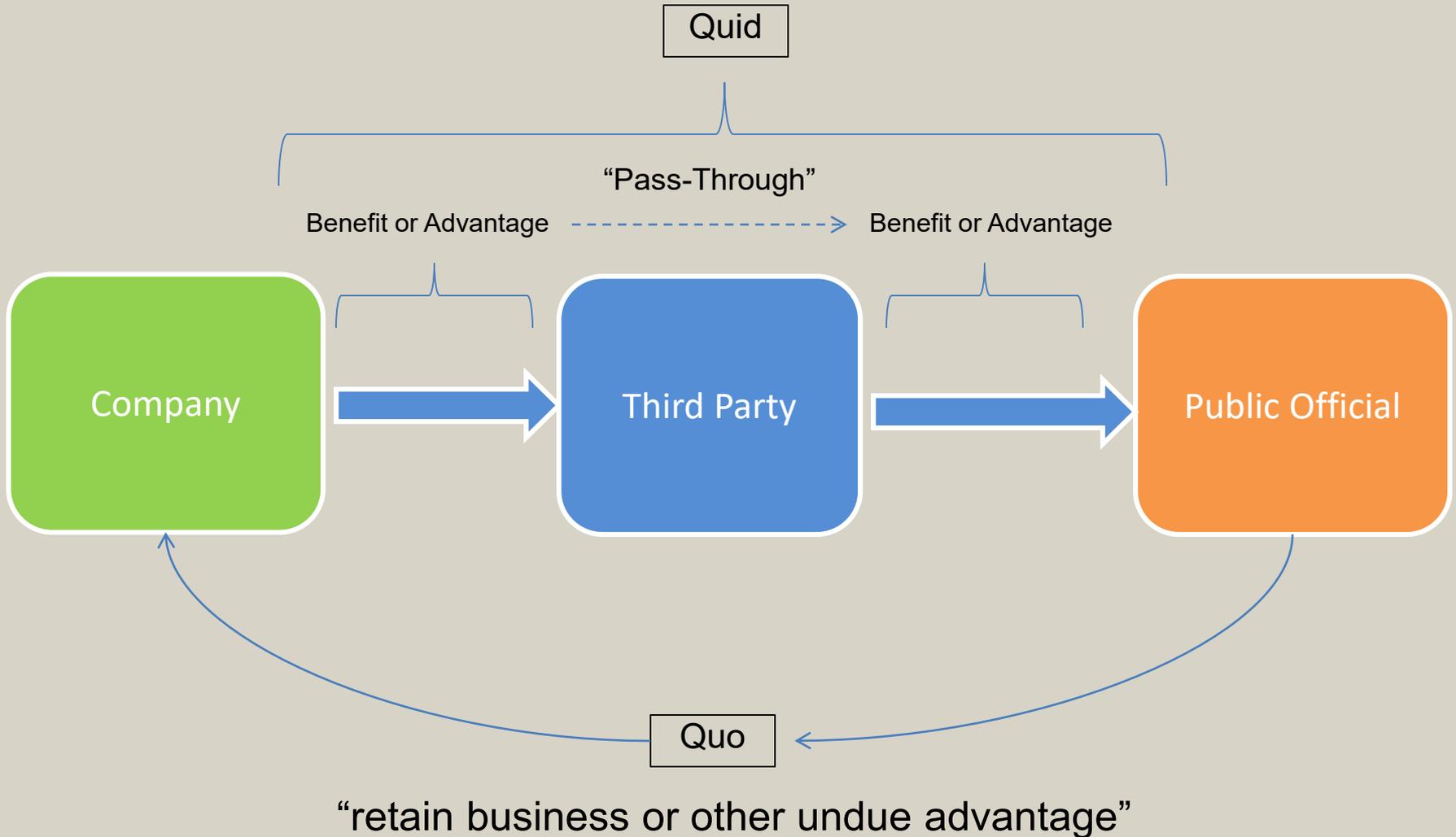
1. Trading in Influence

- Increasingly being alleged in treaty arbitration
- Definition is taken from national law as well as UNCAC
- Lack of consensus on ‘lobbying’
- Examples
 - Methanex v. US (2005): ‘lobbying’ is legal in the US and therefore campaign contributions not influence peddling
 - Niko v. Bapex (2019): Use of local consultant not necessarily trading in influence:

*“[i]t is, thus, not any engagement of a lobbyist that falls under the sanction of Section 163. The sanction applies only if the lobbyist is engaged to induce the public servant, not by the strength of his or her argument (as e.g., the advocate before the judge) but – to repeat – by **relying on the personal relationship** with the public servant.”*

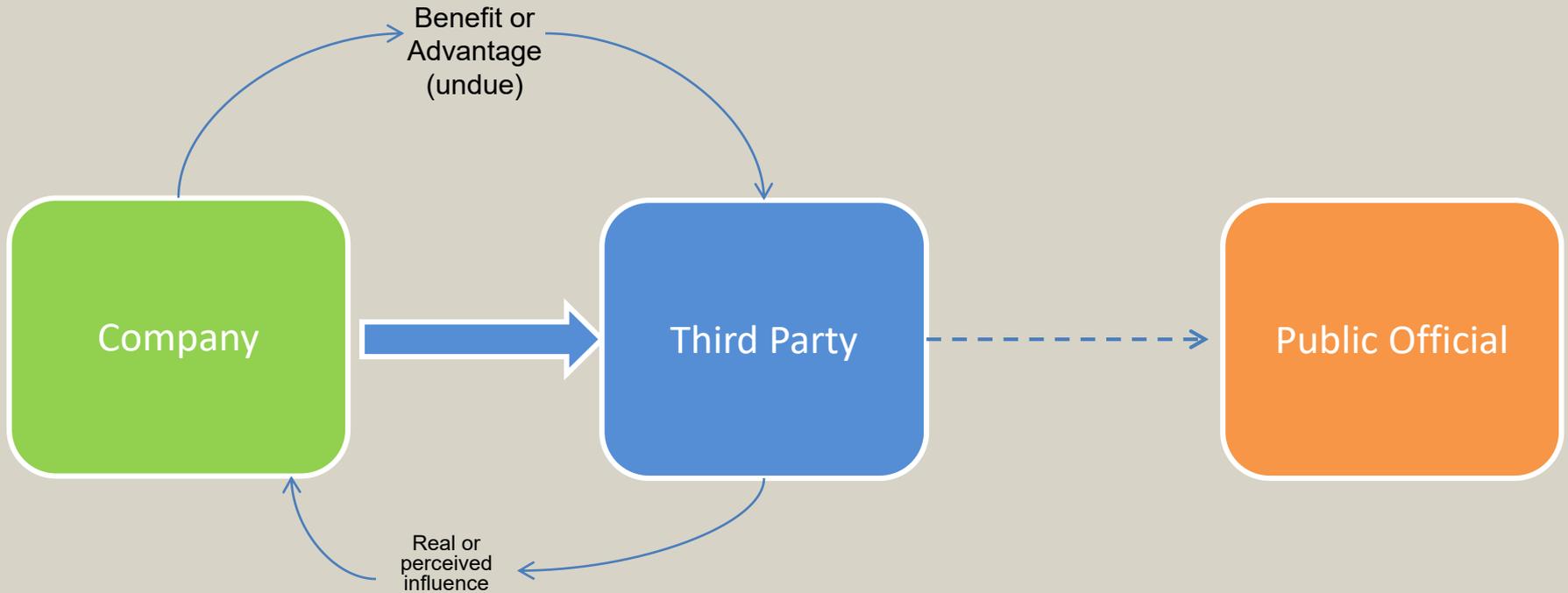
At most, Bribery would lead to the Voidability of the Contract

Provision of benefit with intent



Influence Peddling Alone Would Not Lead to Either Voidability or Voidness

Provision of benefit with intent



Proving Corruption:
How much evidence necessary?

BRIBERY

must prove quid pro quo

TRADING IN INFLUENCE

Seeking Improper
Influence

ILLEGALITY

Objective:
violation of law

II. PENALIZING DEMAND-SIDE CORRUPTION

Examples of Investor allegations of Public Official Corruption:

1. Methanex v. U.S. (2005)
2. F-W Oil v. Trinidad & Tobago (2006)
3. Rumeli v. Kazakhstan (2008)
4. EDF (Services) v. Romania (2009)
5. RSM v. Grenada (2009)

Typically, these are bribe solicitations

STATE RESPONSIBILITY FOR CORRUPTION?

EDF (Services) v. Romania (corruption as investor claim)

Investor claimed that Prime Minister solicited a \$2.5 million bribe, and when not paid, investment was “attacked”

“a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and ‘exercising a State’s discretion on the basis of corruption is a [...] fundamental breach of transparency and legitimate expectations.’ ” (para. 221)

STATE RESPONSIBILITY FOR CORRUPTION?

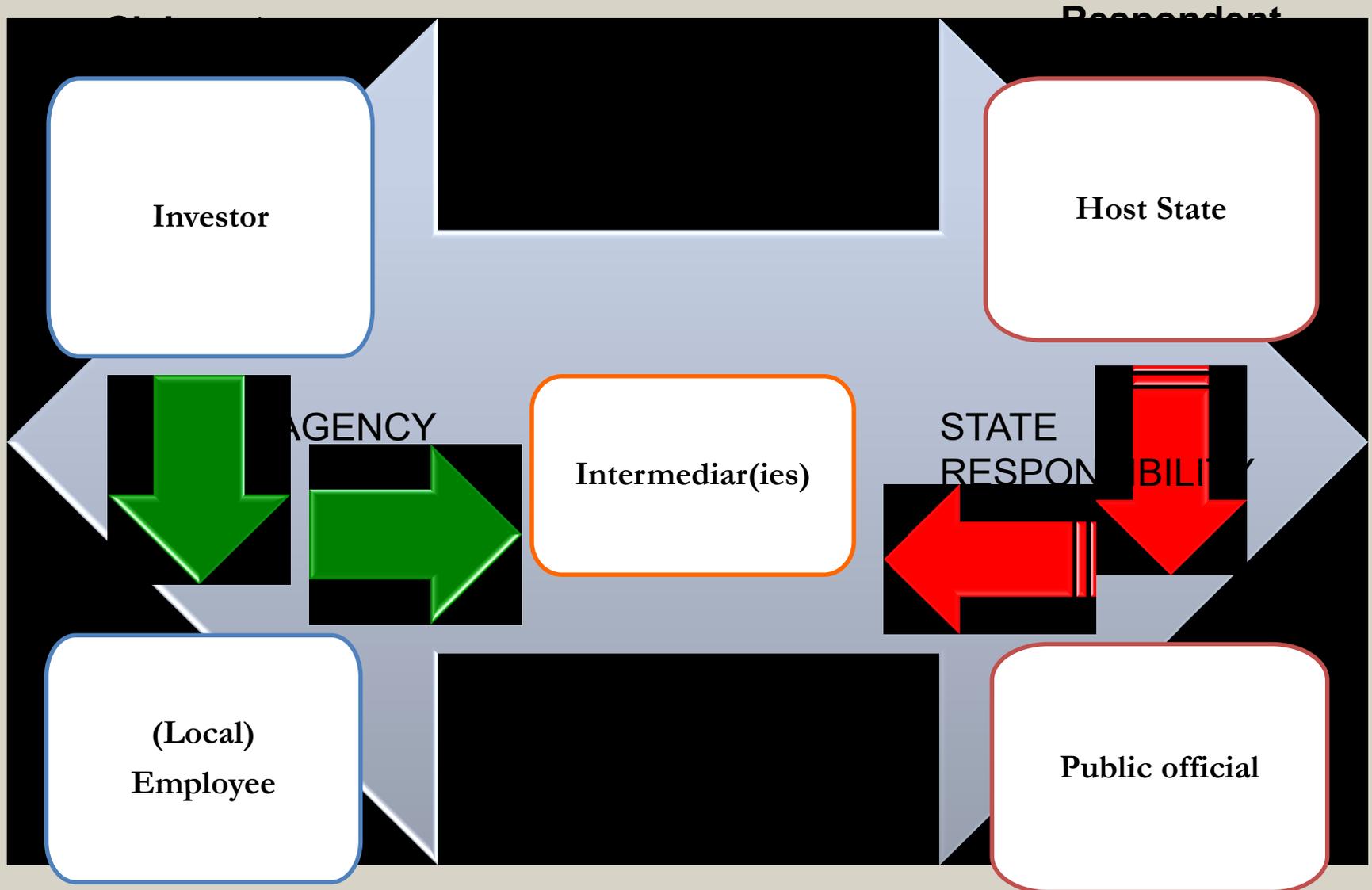
World Duty Free v. Kenya (2006) (Corruption as a defense)

- Bribe received by Kenya's head of State. But Tribunal did not consider this sufficient to consider the bribe "legally to be imputed to Kenya itself."

*Mr. Ali's payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is **not legally to be imputed to Kenya itself**. If it were otherwise, the payment would not be a bribe. (para. 169)*

*The President was here acting corruptly, to the detriment of Kenya and in violation of Kenyan law (including the 1956 Act [outlawing corruption]). **There is no warrant at English or Kenyan law for attributing knowledge to the state** (as the otherwise innocent principal) of a state officer engaged as its agent in bribery. (para. 185)*

BILATERAL: Corruption in Foreign Investment



WRONGDOING	NATURE	HOW PLED IN ARBITRATION
CORRUPTION	<p>Bilateral: Investor + Public Official</p> <p>Covert, but with public manifestation:</p> <ul style="list-style-type: none"> • Violation of Host State Law (variance bribe) • Discretion exercised to favor investor (<i>quid pro quo</i>) 	<p><i>Shield (mostly):</i> Bribery</p> <p><i>Sword (sometimes):</i> Extortion, Corrupt Solicitation (unconsummated)</p>
FRAUD	<p>Unilateral: investor alone</p> <p>Misrepresentation + deceitful intent + reliance</p>	<p><i>Shield (almost always)</i></p>
OTHER ILLEGALITY UNDER HOST STATE LAW	<p>Unilateral</p> <p>intent sometimes unnecessary</p>	<p><i>Shield</i></p>

III. STATE RESPONSIBILITY FOR CORRUPTION?

Basic Question:

*Should States be held to account for the corruption
of its public officials in the same way
Investors are accountable for corruption
of its employees and Agents?*

STATE RESPONSIBILITY FOR CORRUPTION?

- **The idea that States are responsible for the acts of their public officials and agents forms the bedrock of international law**

“If one attempts ... to deny the idea of State responsibility because it allegedly conflicts with sovereignty, one is forced to deny the existence of an international legal order” – Prof Roberto Ago, ILC Rapporteur

- **A State can only act through its public officials**

“A State is represented by its government [i.e., the aggregate of all officers and men in authority], whose acts are imputable to it as its own.” Bin Cheng, General Principles of Law (1953)

- **It is no defense to say that the public official’s acts were illegal, unsanctioned, or outside scope of authority**

STATE RESPONSIBILITY FOR CORRUPTION?

Article 7, ILC Articles on State Responsibility:

“Excess of Authority or Contravention of Instructions. The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity **acts in that capacity, even if it exceeds its authority or contravenes instructions.**”

- **SPP v. Egypt (1992):** “If such unauthorized or *ultra vires* acts could not be ascribed to the State, all State responsibility would be rendered illusory.” (para. 85)

STATE RESPONSIBILITY FOR CORRUPTION?

2 “Attribution asymmetries”

1. Asymmetry based on identity

- **Corporations** almost always liable for the corruption of their employees and their agents.
- But **States** *as a matter of law* may not be responsible for the corruption of public officials

2. Asymmetry based on nature of corrupt act

- **Extortion, Solicitation** by public official: State may be held responsible (EDF Services v. Romania)
- **Consummated bribery**: State not held responsible

State Responsibility for Corruption

Possible Explanation for the Asymmetry

- Knowing **participation** of investor in consummated corruption negates State responsibility
- This element of participation deprives the investor of the ability to claim that public official was acting with apparent authority, since a public official engaged in bribery is manifestly not “act[ing] in that capacity” (Art. 7, ILC Articles)

STATE RESPONSIBILITY FOR CORRUPTION?

Justification for corruption “trump” / non-State responsibility:

1. Deterrent – “will help end the scourge that is corruption” (IISD).

- BUT: public officials incentivized and investors not likely to be deterred by corruption trump [*Judge Donoghue, ICSID Review (2015)*]

2. Protection of the public

- World Duty Free: *“the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world.”* (para. 181)
- BUT: one can say this about all areas where States are held responsible (e.g. environment, human rights violations)
- Is public protected when public officials are not held to account?

STATE RESPONSIBILITY FOR CORRUPTION

So far, “responsibility” of State only found in costs decisions:

*“The law is clear – and rightly so – that in such a situation [of an investment tainted by corruption] the investor is deprived of protection and, consequently, the host State avoids any potential liability. **That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims.** Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.”*

-- Metal-Tech v. Uzbekistan (2013), *para.* 422

NOTE: Spentex v. Uzbekistan

REQUIREMENT THAT THE HOST STATE PROSECUTE?

Q: Should State be required to show that effective steps taken to prosecute public officials as a condition to the defense?

- Principles of **acquiescence, estoppel**
 - Part of the law on State responsibility
 - A State's failure to assert a claim *when it would be expected to do so* amounts to acquiescence
 - once State is aware of corruption, its failure to act by prosecuting those public officials implies acquiescence
 - *World Duty Free* found it “highly disturbing” (para. 180) that former President solicited bribe, was not prosecuted, and yet Kenya was allowed to raise defense
 - Should we be disturbed by States being left unaccountable and being given incentives to be unjustly enriched?
 - Requiring prosecution – modest corrective

Questions
&
Discussion