C. Transnational Policy Implications of the New Normative Framework

The coming into being of an international consensus repudiating international corruption that is of such global reach may amount to no less than the emergence of transnational public policy. This was clearly the view of the tribunal in the recent World Duty Free case and it reads:

"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 international public policy of most, if not all, States, or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."72

Transnational public policy against international commercial corruption presents a limitation to the power of the arbitrator because this public policy transcends and is reflected in all applicable laws. Chukwumerije in fact goes further to assert that in the unlikely event of a conflict between national law and such transnational policy, arbitrators must in fact decline to apply such national law.73
D. The Role of the Arbitration Tribunal

II. The Negative Passive Role

The negative passive role is exemplified by the ruling of Justice Lagergren, the sole arbitrator in ICC Case no. 1110 (1963). He found that the evidence before him "plainly established ... that the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business." The arbitration took place in France whilst the contracts were to be performed in Argentina. He concluded that under both French and Argentine law, such a case would not be arbitrable on grounds of public policy. He also spoke of what he referred to as "a general principle of law, recognized by civilized nations, that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators." On his own motion, the Justice examined the question of his jurisdiction to decide on such a contract. Relying on the New York Convention, he found that the recognition or enforcement of an award could be refused if contrary to the public policy of the country of the competent authority. He concluded that "a case such as this involving such gross violations of good morals and international public policy, can have no countenance in any court in the Argentine or in France, or, for that matter, in any other civilized country, nor in any arbitral tribunal. Thus jurisdiction must be declined in this case.

The Lagergren case supports a negative passive role of the arbitrator by indicating that disputes involving allegations of corruption do not fall within the ambit of matters which could properly be considered as arbitrable. The role of the arbitrator in such instances is to withdraw and avoid giving a ruling on a contract that violates international public policy and bonos mores.

The limitation of this approach is that it does not prevent determined parties from simply moving on till they find a panel that is ready and willing to take on the dispute. From the perspective of the victim of corruption, this role is of limited value because it does not effectively "sanction" the act of corruption but rather avoids the issue by retreating. From the point of view of the arbitrator, in a system where the "judges" are paid and selected by the disputants, the positive passive response may not translate to good business sense on the part of the arbitrator.

89 Case no. 1110 (op. cit. fn. 88), para. 16 of award.
90 Case no. 1110 (op. cit. fn. 88), para. 23 of award.
Referring Principles:

IV.7.2 - Invalidity of contract due to bribery