D. Initial Attempts at Definitions of "Corruption" and "Bribery"

While there may be differences of opinion as to what kinds of conduct constitute corruption, there should be little disagreement as to the notional legal definition of corruption. "Corruption" derives from *corrumpere*, "to break". Thus corruption has been defined as a situation in which "agents and public officers break the confidence entrusted to them". It has also been defined as the "perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, esp. in a state, public corporation, etc.". Transparency International has defined corruption as the "abuse of entrusted power for private gain". A further approach to corruption and bribery has been to posit two broad categories: (i) "according to rule" corruption, whereby a bribe is paid to receive preferential treatment for something that the bribe receiver is required to do by law and "against the rule" corruption, whereby a bribe paid to obtain services that the bribe receiver is prohibited from providing. Furthermore, most modern States consider the definition of corruption and bribery to extend to all persons induced to act corruptly in discharge of duties, whether public or private. Thus corruption may include a private person bribing a public person, a public person bribing a private person, a public person bribing a public person and a private person bribing a private person.

Corruption is also to be distinguished from fraud, and it is primarily the former which is the subject of these lectures even while fraud may constitute corruption and corruption may also constitute fraud. At the same time, they are legally distinct. Fraud has been defined as the knowing misrepresentation of the truth of a material fact to induce another to act in a manner detrimental to his interests. In common parlance, we sometimes speak of the "five fingers of fraud", namely that (i) a person made a material false statement, (ii) he knew the statement to be false, (iii) he intended to deceive the victim, (iv) the victim justifiably relied on the false statement, and (v) the victim was damaged. As stated, we may also distinguish between fraud in inducement to enter into a contract, which may result in illegality *ex post*, as opposed to fraud in entering into a contract, which may result in illegality *ab initio*. The former is sometimes associated with the "gun held to the head" while the latter is sometimes represented by the protestation of "That's not my signature!"

E. International and Transnational Efforts to Define "Bribery"

In the present day, there is a wide range of international conventions which condemn and interdict bribery, as do the national laws of various States. Thus, a number of instruments negotiated, signed and ratified under the aegis of the Organisation for Economic Co-

operation and Development (OECD) have the express aim and purpose of prohibiting acts constituting bribery. Foremost here is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Further international conventions prohibiting bribery include the Inter-American Convention against Corruption (1996), European Union Convention on the Fight against Corruption Involving Officials of Member States (1997), Council of Europe Criminal Law Convention on Corruption (1999), Council of Europe Civil Law Con-
The most recent and universal effort toward combating bribery within the international context is the United Nations Convention against Corruption (hereinafter "UN Anti-Corruption Convention"), which as of 24 December 2012 has 140 Signatories and 165 States parties.

As stated earlier, corruption and bribery have been most closely associated and preoccupied with public officials and the public domain. For example, a definition of bribery is prescribed in the UN-Anti-Corruption Convention and the OECD Anti-Bribery Convention respectively. Both conventions can and should be purposefully considered in order to ascertain an appropriate delimitation or definition of the prohibition against bribery in international law.

Thus, Article 15 (a) of the UN Anti-Corruption Convention defines "bribery of national public officials" in relevant parts as follows:

"[W]hen committed intentionally:
(a) 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 exercise of his or her official duties."

Similarly, Article 1 (1) of the OECD Anti-Bribery-Convention defines bribery in relation to "foreign public officials" in relevant part as follows (emphasis added):

"[The conduct] of any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

For purposes of the definition of "bribery", Article 16 (1) of the UN Anti-Corruption Convention is essentially identical to Article 1 (1) of the OECD Anti-Bribery Convention.

Statutory definitions of bribery in most national criminal laws to which I have had exposure are also essentially the same or to similar effect. Indeed, bribery is sanctioned by the criminal law of most, if not all, countries.

The foregoing definitions of "bribery" consider it from the perspective of corruption by the payer of a public-sector bribe as opposed to by the payee or recipient. Such conduct can of course also constitute corruption and bribery. The mirror image of Article 15 of the UN Convention, but applicable only to national public officials, is the intentional solicitation or acceptance by a national or foreign 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. This direction obviously covers the situation in which the public official either accepts the offer of bribery by a private person or the public official or requests or demands the same on the official's own initiative.

Furthermore, the definition of illegality in the sense of bribery has been expanded to include conduct exclusively in the private sector, without involvement of a public official. Thus Article 21 of the UN Convention defines corruption by the payer of a private sector bribe as intentionally promising, offering or giving directly or indirectly of an undue advantage to any person who directs or works, in any capacity, for a private sector entity for the person himself or herself or for another
person in order that he or she, in breach of his or her duties, act or refrain from acting\textsuperscript{161}. In turn, corruption by the recipient of a private-sector bribe is defined as intentional solicitation or acceptance directly or indirectly of an undue advantage by any person who directs or works, in any capacity, for a private sector entity\textsuperscript{162}. The procedural and substantive challenges posed by these definitions are apparent, all the more so in the context of international commercial or investment treaty arbitration which likely involves a multiplicity of bodies and principles of law which may be applied. The evidentiary challenges can likewise be daunting.

First, "intent" must be shown generally. Second, the "promising, offering, giving or receiving" of an undue advantage must be proven, whether "directly or indirectly". Third, an "undue advantage" must be shown in situations where the advantage or the "undue" nature of the advantage are not always apparent, especially as bribery is typically masked, concealed or otherwise disguised. Fourth, the private or public capacity of the person giving or receiving the undue advantage may be critical, particularly as will be seen in the case of a person whose action is to be attributed to a public authority. Fifth, the conduct of acting or refraining from acting in breach of a duty must be proven.

In short, it can be well imagined that corruption on either the payer or the payee end and either in the public or the private sector may be more difficult to allege and prove than initially meets the eye. Only if and when an allegation of corruption reaches a critical level of plausibility or veracity would it then normally achieve the potential of triggering consequences for the arbitral tribunal in the way already broadly outlined and discussed in detail below.

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\[\ldots\]

\[\text{(d) Inadmissibility or voidness on the basis of breach of public policy}\]

Where jurisdiction has been upheld and the investor committed illegality in relation to a commercial contract, may its claims may be deemed to breach transnational public policy, resulting in inadmissibility or voidness? It is possible to apply transnational public policy against fraud and corruption to a commercial contract, as an extension of or component of the otherwise applicable rules of national law. Moreover, unlike in the investment treaty context, in the commercial context it is possible to declare a contract "invalid" or "void" for illegality. In this regard, there has been consistency in the willingness to apply local and international law concurrently, but inconsistency in the outcomes. Thus, it will be rare that a finding of corruption offending public policy will be deemed to result in a denial of jurisdiction, as was decided by \textit{Lagergren} in ICC Case No. 1110 (1963). More common will be a possible denial of admissibility: for example, \textit{SIREXM v. Burkina Faso}, ICSID (2000) - corruption and fraud in relation to an investment contract, leading to voidness at law and "breach of public order". And a further possibility will be a finding of voidness of the contract: for example, \textit{World Duty Free} - claims not "maintainable" as a matter of ordre public international and public policy under the contract's applicable laws".

In all of these cases, there is an equal application of the fundamental maxim that illegality cannot become a source of legal right to the wrongdoer, either as a component of national law or of international law informing national law.


\textsuperscript{139} Oxford English Dictionary.

\textsuperscript{140} Transparency International FAQs on Corruption, available at http://www.transparency.org/whoweare/organisation/faqs_on_corruption.

\textsuperscript{141} Oxford English Dictionary.

\textsuperscript{142} See Art. 15 (a) of the United Nations Convention against Corruption, International Legal Materials, Vol. 43 (2004), p. 37, which entered into force on 14 December 2005: "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 . . . “ (Emphasis added.)

143 The differentiation between “according to rule” corruption and “against the rule” corruption is the approach chosen by Transparency International.

144 H. Raeschke-Kessler and D. Gottwald, supra footnote 60, pp. 587 et seq.


146 Lincoln Land FS v. Mau (In re Mau), 293 BR 919, 923 (Bankr. CD Ill. 2003).

147 See, e.g., P. V. Tytell, “The Detection of Forgery Fraud”, in A. J. van den Berg, supra footnote 41, p. 315.


149 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, supra footnote 79.


152 Council of Europe Criminal Law Convention on Corruption, supra footnote 80.

153 Council of Europe Civil Law Convention on Corruption, supra footnote 80.


156 United Nations Convention against Corruption, supra footnote 142.

157 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, supra footnote 79.

158 United Nations Convention against Corruption, Art. 16 (1) (bribery of foreign public officials and officials of public international organizations) provides: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, 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, in order to obtain or retain business or other undue advantage in relation to the conduct of international business."

159 See, e.g., Secs. 304, 307 Strafgesetzbuch [Austrian Penal Code] [StGB]; Art. 337, Código Penal [Brazilian Penal Code] [CP]; Arts. 301-307a, Bulgarian Criminal Code; Art. 250, Chilean Criminal Code; Secs. 160-162, Czech Criminal Code; Sec. 122, Danish Criminal Code; Secs. 331-336, Strafgesetzbuch [German Criminal Code] [StGB]; Korean Act on Preventing Bribery of Foreign Public Officials in International Business Transactions; Sec. 276a, Norwegian Penal Code; Art. 10, Japanese Unfair Competition Prevention Law - Supplementary Provisions; and Arts. 267, 268, Slovenian Penal Code.

160 "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offense, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, 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."

161 Art. 21 (a), United Nations Convention against Corruption.

162 Art. 21 (b), United Nations Convention against Corruption.

**Referring Principles:**

IV.7.2 - Invalidity of contract due to bribery