VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT

OPEN SOCIETY
JUSTICE INITIATIVE

INTERNATIONAL INVESTMENT LAW & THE FIGHT AGAINST CORRUPTION

WORKSHOP

June 17, 2009

Agenda

Open Society Justice Initiative, 400 West 59th Street, New York, NY 10019

Introduction

The Open Society Justice Initiative (the ***Justice Initiative***) and the Vale Columbia Center on Sustainable International Investment (the ***VCC***) are exploring the possibility of embarking upon an initiative to address a possible hole in the fabric of international anticorruption law within the international regime for the protection of foreign investments.

Though issues of bribery or similar corruption of government officials by foreign investors have, as of yet, come up in only a relatively modest number of investor-state arbitrations, increased global awareness of the scope and baleful impact of such corruption and ratcheted up foreign anti-bribery enforcement by the United States and some other countries have begun to bring corruption into the arbitration arena. International arbitral tribunals deciding disputes between a foreign investor and the government of the host state for the investment based on the International Investment Agreements (IIA) regime will be increasingly put in the position of having to make determinations about the relevance and/or legal impact of allegations of corruption regarding the establishment or maintenance of a foreign investment arrangement.

The absence of provisions concerning bribery or corruption – and more generally relating to investor responsibility – in the more than 2,600 existing Bilateral Investment Treaties (BITs) makes analysis of related allegations a complex task. If and how to address these issues is left to the discretion of tribunals and subject to interpretative exercises which do not necessarily reveal straightforward approaches to the treatment of corruption allegations and, even less, rules to support the tribunals' findings of illegality or guidance as to available remedies. So far, arbitrators have provided what we perceive as uneven responses to cases in which corruption (or the somewhat analogous matter of fraud) has been suspected or expressly alleged. In a number of these cases the manner in which arbitrators dealt (or avoided dealing) with such allegations generates concern.

In one group of cases ("Eyes Shut" cases), arbitrators appear to have been reticent to address allegations of corruption, seemingly seeking to rationalize avoiding inquiry into strong indicia of corruption on thin procedural grounds, or because the state had not itself pursued – or concluded – domestic criminal investigations of corruption allegations (*Siemens v. Argentina*, *Azurix v. Argentina*, *Wena v. Egypt, African Holdings v. Congo, Siag & Vecchi v. Egypt*). A second set of cases suggests a possible trend towards "Zero Tolerance", with tribunals denying investor claims *in toto* on jurisdictional or substantive grounds, based on the state's defense of bribery or fraud in inducement of the investment opportunity (*World Duty Free v. Kenya*, *Inceysa v. El Salvador*, *Plama v. Bulgaria*, *Fraport v. Philippines*).

The project proposal under consideration in this Workshop would aim to investigate relevant sources of international law in order to establish explicitly the rules for addressing corruption situations, grounded in "international custom" and "general principles of law" as understood

under article 38 of the Statute of the International Court of Justice.[1] Such rules would, we anticipate, in appropriate circumstances, encourage arbitrators to inquire into allegations of corruption and would provide the basis for their subsequent decisions.

It is, however, difficult to predict with precision what rules might emerge from the research. Even in this early phase, an additional concern is coming into focus: it is possible that the rules that emerge from the research may not be optimal to advance the most effective remedies for fighting corruption. For example, we suspect that one possible outcome from the research may be a rule that could put too much power into the hands of kleptocratic governments by allowing them to escape their own responsibility for perpetrating or tolerating corruption by authorizing states to challenge the jurisdiction of arbitral tribunals or to "void" investment contracts when disputes emerge in order to protect states from liability, leaving aggrieved investors with no practical remedy for what could be great and unjust harms. Such a possibility might create a perverse disincentive for anticorruption reform by governments.

Even if the outcome of the research is clear and relatively clear rules concerning the treatment of corruption and its consequences arise, there still remain issues as to cases in which both parties try to avoid allegations of corruption or refuse to provide evidence of suspected acts or veiled allegations of wrongful conduct. Questions will need to be addressed regarding the capacity of arbitrators to introduce these issues, to request and obtain evidence on them, and to make reference in their award to rules to which the parties have not made recourse during the proceedings.

A detailed description of the research project and discussion of these concerns is to be found in the "**Workshop Concept Paper**" that we are sending together with this Program.

Contemplated Research

The formulation of the rules would require (i) comparative research of legal systems, as well as (ii) complementary research of international instruments and initiatives to fight corruption in order to determine whether they can be translated into rules of international law applicable to investment arbitration. The research would in this manner promote reliance upon other sources of international law in the development of International Investment Law (IIL) and would establish a methodology for its elaboration.

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[1] Article 38 of the ICJ Statute defines "international law," for purposes of ICJ adjudication, as comprising:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

- The comparative research would analyze comparable situations in national legal systems to identify common rules relating to corruption and liability.
- The complementary research would analyze existing instruments and initiatives at the international level to fight corruption in order to identify common state practice and *opinio juris*.

The results of both the comparative and the complementary research phases should be discussed by a larger team of academic experts and government representatives, the business community and NGOs in a workshop organized to explore the alternatives and determine the best ways to translate the research results into effective rules to fight corruption through arbitration.

The rules would be published in a final report that would be accompanied by relevant materials gathered during the research. The resulting publication should also be an important contribution to the fight against corruption on other fronts (*i.e.* international human rights courts and commissions that apply international law).

To conduct this work, we have contemplated the possibility of having a core research team supported by leading scholars and practitioners in the relevant jurisdictions. We have also considered the creation of an advisory board to guide the research process, the examination of its results and the dissemination of its outcome.

Objective of the Workshop

The aim of the Workshop is to seek guidance from recognized experts in the field and discuss the scope and viability of the proposal, the relevance of the identified concerns and the best way to conduct the contemplated research.

For this purpose, we would like to invite you to consider the matters set out below, which constitute the discussion topics of the Workshop Program.

Please note that in setting out the proposed agenda below we do not expect nor desire artificially to limit or constrain discussion, and we recognize the many interconnections among the topics distinguished below.

Program

9:15 – 9:30 am	Registration
9:30 – 9:45 am	**Welcoming Remarks & Introductions** • Karl Sauvant – Executive Director VCC • Ken Hurwitz – Anticorruption Senior Legal Officer, Justice Initiative **Overview of the Project** • Andrea Saldarriaga – Project Coordinator
9:45 – 10:15 am	**Section I: Notice of corruption: investigating allegations or suspicion of corruption involved in the inception or maintenance of an investment underlying a dispute** **Chair: Mark Kantor** • Circumstances in which the issue of corruption might or could arise in an investor-state arbitration: state raises it as a defense; investor raises it as an alleged treaty violation; third party raises it (per *amicus* filing or equivalent). • Can an arbitrator look into the matter *sua sponte*? Are there limits to arbitrator's power to raise or explore the question? Is the arbitrator ever required (legally obliged) to look into it?
10:15 – 11:00 am	**Section II: Presentation of evidence & level of proof** **Chair: Mitesh Kotecha** • If parties refuse to provide evidence of suspected allegations of corruption, can a third interested party introduce such evidence? • What would be the level of proof required to prove the existence of corruption? Irrefutability? Adequacy? Reasonability? Certainty? Sufficiency? • Should criminal prosecution in national jurisdiction be a necessary element of evidence? Should it be a condition for the admission of evidence? Should it impact the assessment of the evidence submitted?
11:00 – 11:15 am	**Coffee Break**

11:15 – 12:00 pm **Section III: Declaration of illegality and remedies for corruption**

Chair: Kevin Davis

- If the arbitrator concludes that corruption has affected the investment, how does he go about providing legal basis for determining that corruption is illegal? Does this illegality prevent the tribunal from asserting jurisdiction? Is it a discussion of the merits? Does it matter at which procedural stage the matter is examined/introduced?

- What would be the role of concepts like "international or transnational public policy" in the determination of illegality of an alleged corrupt practice? What would be the content of such concepts? Do they provide sufficient basis for the adjudication of the case?

- Once the illegality has been established, how does the arbitrator go about finding a remedy? What remedies might be available? Voidance of the investment arrangement and dismissal of the complaint ("zero tolerance")? Equitable allocation of blame?

- Could an arbitrator devise a remedy apportioning culpability or responsibility for corruption according to relative degrees of guilt, determined by one or more of the following elements: (i) having seriously tried to prevent and/or punish corruption within the organization or government; (ii) having reasonable systems in place to prevent corruption; (iii) (for a state:) having succeeded in investigating and punishing the corrupt officials concerned; (iv) the seniority of the person engaged in the actual corrupt transaction; (v) the amount of the bribe; (vi) the actual harm resulting from the bribe and the favors it obtained; or other factors?

- What legal standards could the arbitrator rely on to devise such a remedy? Could the interests of the affected national populations (as distinct from "states") be brought into consideration?

12:00 – 12:30	**Section IV: Value of Formulating "Rules" of international law with regard to corruption** **Chair: Andrea Saldarriaga** • Might carefully researched and authoritatively supported formulation of "Rules" on these questions above ("notice of corruption" "level of proof" "illegality of corruption" and "remedies for corruption") reflecting "general principles of international law" and "international custom" have potential value by making options available to arbitrators they might not otherwise come up with, or providing support and comfort for taking decisions the arbitrator might otherwise feel lack sufficient legal grounding? • How should the investigation of such rules be best conducted?
12:30 – 1:00 pm	**Section V: Opportunity to have an impact on arbitral "jurisprudence" relating to corruption** **Chair: Devashish Krishan** What would be points of entry through which a party interested in the development of salutary "jurisprudence" could disseminate results of research into international "Rules" relating to corruption that might have influence on how arbitrators handle corruption issues?
1:00 – 2:00 pm	**Working Lunch** • Conclusions • Next steps Closing Remarks: • Karl Sauvant – Executive Director VCC • Robert O. Varenik, Director of Programs, Justice Initiative