Corruption in Foreign Investment—Contracts and Dispute Settlement between Investors, States, and Agents

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I. INTRODUCTION

1. PLAN OF THE ARTICLE

Corruption is omnipresent. It takes place in all countries, neither being a specific problem of developing economies nor restricted to authoritarian or transition societies. To take the country of the authors, Germany, for example, since the 1990s a public perception has arisen that many decisions on major public procurement contracts, on economic policy or on important investments may involve illicit payments, or at least the attempt of them. First the public was confronted with the Opel and Mannesmann scandals and later learned that even high-level officials like the former German State secretary of defence Holger Pfahls or members of the national parliament were involved in corrupt practices. Aside from this inglorious news from the so-called developed world, the serious effects that corruption causes to developing and transition societies cannot be ignored. To mention only the economic effects, it has been estimated that in the construction sector, depending on the country and the project, bribes can mount from 5% to 30% of the project costs. These sums are not available for use in other projects where the country may urgently need them.

Corruption is also not a recent problem. However, during the 1990s the extent of real and perceived corruption rose significantly throughout the world, becoming, according to

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4 History of corruption has become a well-documented field of study during the last years. Only for some examples cf Jakob van Klaveren, Corruption as a Historical Phenomenon and Linda Levy Peck, Corruption and Political Development in Early Modern Britain, both in Political Corruption, 73 and 219.
some scholars, even a problem "of global revolutionary force". This development occurred because of the globalization of capital flows and a new attitude towards foreign investment in the developing world. The problem of international corruption in the context of international investment is one which is closely related to business ethics.

The following study examines the legal effects of corruption on international investment contracts. It proposes solutions for contracts and dispute resolution and aims at a balance between anti-corruption values and the economic rationality of contracts, in particular the mutual responsibilities of the parties and the specifics of complex long-term projects.

The introduction gives an overview of the definitions of key terms, the legal scope of the paper and the legal instruments regulating corruption in foreign investment (i). Some general characteristics of corruption cases and some systematic remarks on the types of problems and cases are provided under (ii).

The paper examines problems related to the main contract, which is the contractual relationship between the investor and the host state or other investors (iii). It touches on problems of dispute settlement related to the main contract (iv).

In its last part, the study deals with problems of agency agreements, which are contracts between investors and intermediaries, mostly consultancy firms (v), and the dispute settlement problems related to these agency agreements (vi).

2. THE NOTION OF CORRUPTION AND THE NOTION OF INTERNATIONAL INVESTMENT

The study draws on an analysis of 36 cases from arbitration and litigation of the last three decades. The sample includes arbitration before ICC, ICSID, UNCITRAL, NAFTA and ad hoc tribunals. It was selected using the following notions of investment and corruption:

a) The term investment shall refer to foreign direct investment (FDI). According to a common definition used by the OECD and the EC, foreign direct investments are


7 27 of the cases deal with corruption in foreign direct investments FDI-processes in a strict sense (ICC No. 6401, HUBCO v. WADPA, Himpurna v. PLN, American Bell v. Iran, Mexico v. Metalad, Wena v. Egypt, ICC No. 1110, 3913, 3916, 4145, 5622, 6248, 6286, 6497, 7047, 8113, 8891, 9333, Westman v. EGT, Lunik v. Soliman, The Claude Reymond Award, The Jurgen Dohm Award, Geneva Chamber of Commerce and Industry Award of 02/23/1988, Corvetina v. Clough, State Agency A v. Respondent X, Coetzee v. Faltex, Lucreti v. Peru, World Duty Free v. Republic of Kenya). For examining corruption cases in the FDI context, it may also be helpful, beyond the FDI cases according to this definition, to look at other types of contracts. Similar problems may arise particularly in the context of purchase contracts for public procurement. It must be remembered that society develops new patterns of illegal behaviour on a constant basis, and that corruption is frequently linked to other types of crime such as price-fixing, insider trading, tax evasion, illegal rebates, antitrust, environmental crime, money-laundering, smuggling, illegal armament trade, and fraud. Considering some of these problems may be helpful because similar problems arise in contracts linked to these crimes. 5 corruption cases without an FDI context are therefore included (ICC No. 6474, Oil Fields of Texas v. Republic of Iran, Sos v. Pakistan, Beta v. Alpha, ICC No. 7664) as well as 2 cases that deal with similar problems such as smuggling and money laundering (Solemany v. Solemany, ICC No. 2730, ICC No. 5943). The cases will be quoted in the course of the article.