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Arbitrators, Corruption and the Poetic Experience

(“When power corrupts, poetry cleanses”)

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When power corrupts, poetry cleanses – those words were spoken by President Kennedy during an address at Amherst College in October 1963, one short month before he was assassinated in Dallas. Kennedy’s address at Amherst College was devoted to the memory of the great American poet Robert Frost, and it resonates, in my opinion, with sentences even more powerful and more memorable than President Kennedy’s inaugural address in January 1961.

In a preface to the sentence which I have chosen for the caption of my lecture this evening, and in remarks that will deeply inform my lecture, President Kennedy said: “When power leads men towards arrogance, poetry reminds him of his limitations. When power narrows the areas of man’s concern, poetry reminds him of the richness and diversity of his existence. When power corrupts, poetry cleanses.”

Although I love poetry, I am no poet. I am a jurist who has dabbled for more than twenty years now in the field of international arbitration. Where then, you may well ask, is the link between corruption in arbitration and poetry? I believe this link

to be subtle and yet very simple: it is when arbitrators uncover a factual matrix tainted by corruption that they should most earnestly heed the call of poetry.

Professor James Boyd White in a paper entitled “The Judicial Opinion and the Poem”, defines the center of poetic experience as a paradox, a way of joining elements that seem to belong apart, of reconciling opposites. He calls this “contraries comprehended”. Contraries comprehended is when voices, feelings, languages that are not normally placed together are united to create harmony.¹ My remarks today will be guided by the views of the poetic experience espoused by Professor White. I invite you this evening to think of poetry as the harmonious reconciliation of opposites; opposites that may first appear to be irreconcilable.

What then is the link between this poetic experience, this harmonious reconciliation of opposites, and the topic of my lecture, arbitration and corruption? As I said, arbitrators facing corrupt transactions should pay heed to the call of poetry—they should pay heed to poetry precisely because when they enter the treacherous territory of bribery and illicit agreements, they fall squarely within a

¹ James Boyd White, “The Judicial Opinion and the Poem: Ways of Reading, Ways of Life” (1984) 82 Mich. L. Rev. 1669.

form of poetic paradox, a paradox where they must face seemingly irreconcilable loyalties. Corruption, like few other scourges of society, challenges the arbitrator's loyalties, corruption puts the arbitrator at the crossroads of his allegiance to the parties, to party consent and the arbitration agreement and his allegiance to the international legal order, to his role as guardian of good morals in international trade, to what some, like Pierre Lalive, have called transnational public policy.²

The prospect of this choice—and its consequences—leads arbitrators, and here I paraphrase President Kennedy, to tread cautiously and to narrow their area of concern to the parties. We do not need to look very far to find evidence of this attitude. Think of the paucity of arbitral tribunals that expressly deal with corruption, think of the scarcity of awards where corruption was outcome-determinative,³ and think also of the many procedural excuses such as a heightened standard of burden of proof relied on by so many tribunals to avoid deciding issues

² For the classic exposition of the concept see Pierre Lalive, “Ordre Public Transnational (ou Réellement International) Et Arbitrage International” (1986) Rev. d. Arb 329. Although the use of transnational public policy in international arbitration has been met with a degree of criticism, see W. Michael Reisman, “International Public Policy (So-called) and Arbitral Choice” in *International Commercial Arbitration in International Arbitration 2006: Back to Basics?* (2007) (“As a public international lawyer who believes that international law is a real and important system of law, I object to a concept whose notorious imprecision and subjectivity gives international law a bad name.”).

³ See for an extensive and thoughtful review of existing awards in international investment arbitration Aloysius P Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014). In the context of commercial arbitration, Abdulhay Sayed provides the most rigorous treatment in *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004).

of corruption altogether. This is evidence, writ large, of arbitrators who have understated their responsibilities to the international community's commitment to control corruption and give international law a bad name. We, arbitrators, have no choice but to reexamine our position unless we are prepared to accept the not so veiled accusations that international arbitration is a safe harbor for corruption,⁴ an accusation that ultimately could add yet another layer to questions about the system's legitimacy. In other words: if we wish to provide the international legal framework governing corruption with an effective enforcement mechanism, we must find a way to reconcile both our loyalty to the parties and our adherence to the international legal order as conjured by international anti-corruption treaties. We need to reconcile the tension between these opposites and address issues of corruption as poets would for the benefit of the world community.

After a brief review of the international condemnation of corruption, I will detail the serious shortcomings of the current control mechanisms and what role we, as

⁴ See e.g. Thomas Kendra and Anna Bonini, "Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?" (2014) *Journal of International Arbitration*, p. 447 ("some commentators have argued that international arbitration must shake off the reputation that it has developed as a safe harbour for corruption").

arbitrators, must play in order to palliate these shortcomings. In the end, I will attempt to demonstrate that arbitrators need to head the call of poetry.

1. The Multiple Facets of the Global Anti-corruption Campaign

I think it is vital that we first remind ourselves to what incredible degree states have now reached a consensus on the condemnation of the bribery of foreign officials by individuals and companies—what is also known as transnational corruption. It is not my remit today to review all the international efforts and international treaties adopted to curtail corruption. In the context of international arbitration, this has already been exhaustively undertaken by many eminent jurists such as Pierre Lalive, Michael Reisman and Louis Llamzon.⁵ A reminder of the more salient initiatives will suffice to demonstrate the extent to which the anti-corruption sentiment is shared among members of the international community.

The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the first international multilateral anti-

⁵ See the two works referenced in fn 4, in particular Chap. 4 of Llamzon, *Corruption in International Investment Arbitration* and Chap. 6 in Sayed, *Corruption in International Trade and Commercial Arbitration*.

corruption instrument marked the real beginning of the international anti-corruption campaign. A number of regional anti-corruption treaties were entered into around this time as well.⁶ The most noteworthy development in the international campaign to control transnational corruption came in 2003 with the adoption of a comprehensive and near universal international anti-corruption treaty: the United Nations Convention against Corruption. The Convention, ratified today by over 160 states, is symbolic of how corruption is now recognized by the international community as a serious impediment to economic and social development⁷ and a global problem that requires collective action beyond national borders

The OECD Convention was modeled after the United States Foreign Corrupt Practices Act adopted after the Watergate scandal and meant to constrain the payment of bribes to foreign officials by U.S. entities. However, it sought to constrain transnational corruption by acting only on the supply-side of corruption.

⁶ See e.g. Inter-American Convention against Corruption (1996) 35 I.L.M. 724; Civil Criminal Law Against Corruption (1999) E.T.S. 173; Civil Law Convention on Corruption (1999) E.T.S. 174.

⁷ On corruption's pernicious effect on the economy and society see e.g. Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge, 1999). See also for the brief overview of the economic literature that associates corruption with poor economic and social development is Philip M. Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation" (1999) 24 Yale J. Int'l l. 257.

It focused on the individual that is offering or paying the bribe. The UN Convention, on the other hand, recognized that corruption, by definition, involves two parties, the bribe-payer, the supply-side of corruption, and the public official receiving or soliciting the briber, what is generally termed as the demand-side of corruption.⁸ In order to constrain transnational corruption action on both sides of this equation is obviously required.

There can be no doubt that the adoption of these international instruments was a great achievement. But we need to recognize how much still remains to be done in order to curtail transnational corruption. The limits of these international instruments need to be articulated and explained, in order that we may find mechanisms to address these limits. And we, international arbitrators, have a vital role to play in the process.

The major shortcoming of international anti-corruption treaties has been their lack of enforcement mechanisms at the international level. I start with the OECD

⁸ See e.g. Article 16(1) of the UN Convention (“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 [...]”) and Article 16(2) of the same Convention (“Each State Part shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official [...]).

Convention; the Convention only provides for the domestic enactment of anti-corruption legislation⁹ and for an advisory system of monitoring and peer review. It does not set out any international enforcement mechanisms. Enforcement of the Convention's provisions is left to national legislation and national courts. Nearly all of the other anti-corruption conventions, Europe's Civil Law Convention on Corruption,¹⁰ the African Union's Convention on Preventing and Combating Corruption,¹¹ or even the UN Convention operate in the same way.

Leaving enforcement to national institutions, particularly in states where corruption is rampant, will result, of course, in an uneven application of anti-corruption legislation. A number of arbitral awards have already elucidated this fact. I commence with the often quoted World Duty Free v. Kenya award, where the tribunal noted that when Kenya was presented with evidence of bribe solicitation by its former president, "no attempt ha[d] been made by Kenya to

⁹ Article 1(1) states that "[e]ach Party shall take such mechanisms as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official [...]"

¹⁰ Article 1 of the Convention provides that "[e]ach Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption [...]"

¹¹ For example, Article 5(2) of the Convention provides that State Parties "[s]trengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force".

prosecute [him] or to recover the bribe in civil proceedings”.¹² A similar issue arose in Wena Hotels v. Egypt, where the tribunal concluded that “given the fact that the Egyptian government was made aware of this [corrupt] agreement [...] but decided (for whatever reason) not to prosecute Mr. Kandil, the Tribunal is reluctant to immunize Egypt from liability in this arbitration”.¹³

Why are states reluctant to adopt effective international enforcement mechanisms to sanction corrupt public officials or companies? And why should the international community rely exclusively on national legislation? In a seminal volume on bribery, my friend Professor Reisman, after having reviewed the wording of these Conventions, attempted to provide an answer to these questions. He used the principles of the myth system and the operational code to describe the dynamics of bribery.¹⁴ According to Professor Reisman, in the myth system, all the rules and prohibitions against corruption, such as those in the UN Convention, are clearly expressed. The operational code, on the other hand, clarifies when and how

¹² *World Duty Free Co. Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006, para. 59.

¹³ *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, para. 116.

¹⁴ W. Michael Reisman, *Folded Lies: Bribery, Crusades, and Reforms* (Free Press, 1979). This framework was also applied to investment arbitrations by Aloysius (Louis) Llamzon in Chap. 4 of his recent book *Corruption in International Investment Arbitration*.

these rules and prohibitions should apply. What states say about corruption may actually be very different from the conduct that they consider acceptable. In other words, and very simply put, whereas states applaud international anti-corruption instruments, they are very skeptical when the time comes to enforce their public commitments.¹⁵

2. Alternative Means for the Enforcement of Anti-corruption Obligations

In recent years, a number of suggestions have been made to introduce a universal system in order to enforce these grand anti-corruption principles.

For example, the World Bank, in collaboration with the United Nations, put forward the idea of an “International Anti-Corruption Forum” (IACF). The Forum was meant to provide “an international arbitration mechanism allowing for decisions on the commercial effects of corruption and bribery”.¹⁶ However, to this

¹⁵ A similar duality has been observed by some authors in regards to the relationship of international lawyers with international law, see e.g. Martti Koskenniemi, “Between Commitment and Cynicism: Outline for a Theory of International Law as Practice”, in: Collection of Essays by Legal Advisers of States, Legal Adviser of International Organizations and Practitioners in the field of International Law, (United Nations, NY, 1999), 495-523.

¹⁶ UNODCCP, Anti-Corruption Tool Kit (2002), pp. 120 onwards.

date, discussions that would have led to the creation of the Forum remain inconclusive.

The establishment of either a court or an arbitral tribunal that would review public-sector contracts and international commercial transactions in order to identify corruption has also been recommended by some academics.¹⁷

However, these proposals and suggestions which have come to naught should not prevent us from searching and identifying mechanisms to control transnational corruption outside of these grand anti-corruption conventions. An example of a successful mechanism of this type that I know well is the World Bank Group's sanction system and its Sanctions Board that I have chaired since 2012. In 1996, the then President of the Bank, James Wolfensohn, in a now ubiquitous metaphor, characterized corruption as a cancer¹⁸ and firmly set anti-corruption policies on the World Bank's radar. Following these remarks and a number of reports,¹⁹ the World Bank's anti-corruption policy was adopted by its Board of Directors in September

¹⁷ See e.g. Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999); Paul D. Carrington, "American Law and Transnational Corruption: Is There a Need for Lincoln's Law Abroad?" in *The Civil Law Consequences of Corruption* (Nomos, 2009).

¹⁸ James Wolfensohn, "People and Development", in J.D. Wolfensohn and A. Kircher, *Voice for the World's Poor: Selected Speeches and Writings of World Bank President James D. Wolfensohn, 1995–2005* (2005), p. 50.

¹⁹ The World Bank, "Helping Countries Combat Corruption: The Role of the World Bank," September 1997.

1997. The more salient features of this policy were the incorporation of anti-corruption provisions directly into lending decisions, and the condemnation of fraud and corruption in projects and programs financed by the Bank.

A sanctions process was devised to sanction companies and individuals engaged in fraud and corruption. The end game of the process is the debarment of corrupt contractors from World Bank financed contracts.²⁰ Debarment means that a corrupt contractor is disqualified, either temporarily or permanently, from any Bank-financed contract.²¹ In order to frame the process which could lead to debarment, a mechanism for investigating fraudulent and corrupt activities was established, which today falls under the purview of the World Bank Group's Integrity Vice Presidency. INT conducts witness interviews, makes site visits, and gathers documents in the course of its investigation into the activities of companies and individuals. An Evaluation and Suspension Officer then makes an initial determination whether the evidence presented by INT is sufficient to conclude that a sanctionable practice has been committed. In the event the Respondent contests

²⁰ Scope Williams, "The Debarment of Corrupt Contractors from World Bank-Financed Contracts" (2007) 36 Public Contract LJ, p. 280.

²¹ *Guidelines: Procurement under IBRD Loans and IDA Credits*, Jan. 2011, para. 1.16 (d). This also applies to e.g. subcontractors, consultants, suppliers. The debarment generally applies to all Multilateral Development Banks.

the allegations of fraud or corruption from INT or the sanctions recommended at the first tier of review, the Sanctions Board conducts a *de novo* review of the case with memorials, a hearing, testimony of witnesses, arguments by counsel, in other words a true arbitration. The Sanctions Board publishes fully reasoned decisions on liability and appropriate sanctions in each case, which increases both the transparency and the deterrent impact of the sanctions system²². Through its diverse membership, (today, not only a Canadian but also a South African, a Brazilian, an American and a Senegalese), the Sanctions Board has been able to draw on a variety of legal traditions in its own practice and the development of its case law. It is of particular interest to note that the Sanctions Board applies a simple “more likely than not” standard of proof to its proceedings.²³ After INT has discharged its initial burden of proving that it is more likely than not that a sanctionable practice has been committed by the Respondent, the burden of proof shifts to the Respondent which must demonstrate, under the same standard, that it

²² See Published decisions of the World Bank Group Sanctions Board, available at <http://go.worldbank.org/58RC7DVWW0>

²³ Section 8.02(b)(i) of the Sanctions Procedures.

did not engage in such practices.²⁴ The process has proven very effective to identify and deter wrongdoers and, on the other hand, to release those who may have been wrongly accused. Approximately one-fifth of the Respondents that have appealed to the Sanctions Board have ultimately been released due to insufficient evidence²⁵. The majority, however, are sanctioned²⁶. Importantly, the World Bank is not working alone. Cross-debarment and harmonization efforts with other International Financial Institutions strengthen the impact of the World Bank's sanctions system. At present, there are over 650 firms and individuals on the World Bank Group's public debarment list, which includes nearly 100 debarments imposed pursuant to cross-debarment²⁷.

The World Bank system provides an example of an efficient tool to tackle corruption. The question I pose is whether the system, in particular its investigation method, could serve as a template for international arbitration.

²⁴ Section 8.02(b)(ii) of the Sanctions Procedures.

²⁵ World Bank Group Sanctions Board Law Digest at pp. 25, 26 (2011), available at <http://go.worldbank.org/S9PFFMD6X0>; Sanctions Decision No. 59 (2013); Sanctions Decision No. 60 (2013); Sanctions Decision No. 64 (2014); Sanctions Decision No. 73 (2014).

²⁶ See, e.g., Sanctions Board Decision No. 50 (2012); Sanctions Board Decision No. 63 (2014); Sanctions Board Decision No. 66 (2014); Sanctions Board Decision No. 70 (2014); Sanctions Board Decision No. 72 (2014).

²⁷ World Bank Listing of Ineligible Firms and Individuals, available at <http://worldbank.org/debarr>.

The World Bank has “walked the talk”. It has not only hailed the grand anti-corruption principles of international instruments such as the OECD and the UN Conventions, it has acted and put in place an effective mechanism to enforce and eradicate the cancer of corruption. And, noticeably, it has adopted a standard and burden of proof which, while respecting due process, allows for the fair prosecution of firms and individuals who very often resort to opaque and obscure methods in order to engage in and conceal fraud and corruption.

And what about corruption in international arbitration? I refer of course to both commercial and investor-state arbitrations. I note at the outset that, in both investment treaty and commercial arbitration, evidence of suspect intermediation agreements, also known as contracts for corruption, and contracts obtained by corruption will occasionally surface.²⁸ It is the presence of the state in investment treaty arbitral proceedings that can make that particular form of dispute settlement a potent tool for positive and effective control of transnational corruption. Have

²⁸ On the distinction between these two contracts see the excellent explanation by the Tribunal in *Niko Resources (Bangladesh) Ltd. v. People’s Republic of Bangladesh et al.*, ICSID Case Nos. ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19 Aug. 2013, para 443 (“In contracts of corruption, the object of the contract is the corruption of a civil servant and this object is intended by both parties to the contract. In contracts obtained by corruption, one of the parties normally is aware of the corruption and intends to obtain the contract by these means”).

states in these cases been held accountable by tribunals for their public anti-corruption commitments?

3. The Attitude of International Arbitrators to Corruption

The general condemnation of transnational corruption and the international instruments adopted to reflect this condemnation in recent years are not foreign to international arbitration tribunals. In 1963, Judge Grenmar Lagergreen in a seminal statement wrote in an ICC Award that “corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations”.²⁹ Recent cases have made explicit references to modern international anti-corruption treaties. In 2006, the World Duty Free v. Kenya tribunal stated that “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 the

²⁹ Case No 1110 (1963) (International Chamber of Commerce) reprinted in J. Gillis Wetter, “Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case. No. 1110” (1994) 10 Arb.Int. 277 at 290.

international public policy of most, if not all, States”.³⁰ More recently, last year, the Metal-Tech v. Uzbekistan tribunal, to which I will return later, after stating that “the international community of States has... sought to address the issue of corruption with a targeted effort to eliminate corrupt practices in the public service sector and criminalize corruption in domestic legal orders,”³¹ proceeded to examine many of the international treaties to which I have referred earlier.

However, and I come back now to the dichotomy which I mentioned at the outset of my lecture, despite the often repeated respect that arbitral tribunals display for international anti-corruption instruments, tribunals have, in fact, been reluctant to engage and deal with cases of corruption adopting an attitude that can be assimilated to private skepticism. There is a manifest reticence on the part of arbitrators, as convincingly demonstrated by Llamzon in his recent Treatise, to act on evidence of corruption when it raises its ugly head. As a result, all too often, if corruption is alleged by either party, it is rarely outcome determinative. As I said

³⁰ *World Duty Free Co. Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006, para. 38.

³¹ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 290.

earlier, positive findings of corruption in international arbitral decisions are very rare.³²

And, tribunals will often avoid making a positive finding of corruption by insisting on a heightened evidentiary threshold for proof of corruption, beyond that of a balance of probabilities or by declining jurisdiction.³³

Antonio Crivellaro, in a study ten years ago of international commercial arbitration cases that dealt with corruption, found that, in most cases, tribunals required a very high standard of proof.³⁴ Recent cases have not reversed this trend. Thus, in a recent FIFA arbitration, a panel of CAS arbitrators, dismissed allegations and evidence of corruption and concluded, due to what it considered insufficient evidence, that “the standard of proof to be applied in this arbitration is that of ‘comfortable satisfaction’”³⁵.

³² See the table provided by Llamzon, *Corruption in International Investment Arbitration*, Chap. 7.

³³ See e.g. Cecily Rose, “Questioning the Role of International Arbitration in the Fight Against Corruption” (2014) 31 *Journal of International Arbitration* 183.

³⁴ Antonio Crivellaro, “Arbitration case law on bribery: issues of arbitrability, contract validity, merits and evidence” in *Dossier of the ICC Institute of World Business Law: Arbitration – Money Laundering, Corruption and Fraud* (Paris, 2004).

³⁵ *CAS 2011/A/2625 Mohamed Bin Hammam v. FIFA*.

Crivellaro's conclusions find echo in the practice of investment arbitration tribunals. In EDF (Services) v. Romania, the tribunal stated that the "seriousness of the accusation of corruption [...] demands clear and convincing evidence". It also determined that there was a "general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption".³⁶ Heightened standards of proof will, of course, make a finding of corruption very problematic as corruption is notoriously difficult to prove and direct evidence is not often available. It is not surprising that in the two cases where a positive finding of corruption was made, the corrupt conduct was admitted in one³⁷ and, in the other, the tribunal, on its own, vigorously investigated the indicia of corruption³⁸.

Some tribunals have also avoided dealing with matters of corruption by simply declining jurisdiction.³⁹ In International Systems & Controls Corp v. Industrial

³⁶ *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 221.

³⁷ *World Duty Free Co. Ltd. V. Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006.

³⁸ *Metal-Tech Ltd. V. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013.

³⁹ For an extensive discussion of these various techniques see Cecily Rose, "Questioning the Role of International Arbitration in the Fight Against Corruption" (2014) 31 *Journal of International Arbitration* 183.

Development and Renovation Organisation of Iran et al,⁴⁰ the Iran-US Claims Tribunals, after allowing for the delayed submission of evidence of corruption, declined jurisdiction and did not rule on the evidence submitted. In a strongly worded dissent, Judge Brower argued that the Tribunal's '[p]alpable reluctance to grasp the nettle of alleged Imperial corruption in Iran' had led it to choose a 'graceless jurisdictional exit'⁴¹.

Why, I ask, are arbitral tribunals reluctant to investigate corruption? Should arbitrators engage proactively whenever indicia of corruption surface without concerning themselves with consequences to the parties' expectations? And what about the situation where, tempted though they may be to investigate, "*sua sponte*", indicia of corruption in the record, corruption has not been pleaded by the parties?⁴²

In order to extract arbitrators from a paradigm modeled on state attitudes of private skepticism and operational codes *vis-à-vis* the control of transnational corruption, I

⁴⁰ *International Systems & Controls Corp. v. Industrial Development & Renovation Organization of Iran, Iran Wood & Paper Industries, Mazandaran Wood & Paper Industries & Islamic Republic of Iran*, Award 256-439-2 (1986) 12 Iran-USCTR 239.

⁴¹ *International Systems & Controls Corp. v. Industrial Development & Renovation Organization of Iran, Iran Wood & Paper Industries, Mazandaran Wood & Paper Industries & Islamic Republic of Iran*, Award 256-439-2 (1986) 12 Iran-USCTR 239, para. 1.

⁴² See « Corruption in Arbitration – Law and Reality” by Michal Hwang S.C. and Kevin Lim (2011)

offer as an alternative model the poet and his vision of harmony and contraries comprehended. Arbitrators need to seek a degree of harmony between their allegiances to the parties and their allegiance to the international community, rather than choosing to be bound by one commitment over another. One may object by saying that the poet has tools - poetic forms, imagery, meter and rhyme - to achieve harmony, and that it is unclear how these would translate into the arbitrator's world of laws.

My first answer to this question relies more on theory than practice. I offer a legal interpretation that, in my view, translates the essence of the poetic experience to the arbitrator's real world. Professor Lon Fuller's in his treatise on *The Morality of Law*,⁴³ refers to the difference between the morality of duty and the morality of aspiration. Fuller explains that the morality of duty consists of applying the basic rules without which an ordered society is impossible, and whose transgression leads to punishment. The morality of aspiration, on the other hand, is the morality of excellence, of the fullest realization of human powers. A failure to realize it does not lead to sanctions or punishment, but rather to a failure to achieve

⁴³ Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969).

excellence. For instance, a doctor must obey certain minimum ethical requirements and strict duties (duty). But a good doctor aspires to exceed these minimum rules, he aspires to achieve more, he strives towards excellence beyond these minimum requirements (aspiration). Morality of aspiration includes ideals and principles beyond the strict minimum. According to Fuller, these two moralities are a continuum. They represent an ascending moral scale.⁴⁴

If I apply this theory to the theme of my lecture, I begin at the bottom of the scale, with the morality of duty. At this bottom point, the scale would include, for instance, the rules and duties of the arbitrator as set out in the applicable arbitration rules and the arbitration agreement. As I ascend the scale, however, at some point, the morality of duty ends and the higher demands of the morality of aspiration begin. This is where I currently place the international community's universal condemnation of corruption. I say currently, because these different moralities can morph into each other. As rulings and decisions addressing international corruption become more prevalent in arbitration, international anti-corruption norms become

⁴⁴ See Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969), pp. 9 onwards.

more concrete. They take the shape of rules and decisions which enter within the domain of the morality of duty, but soon gain in obligatory force.

The arbitrator-poet for me is keenly aware of his duties to the parties, to the entities that have entrusted him with their dispute; but he also aspires to certain ideals of international justice and morality. There is no real choice to be made between these two moralities, at least not if the arbitrator, like the doctor, wishes to excel in his practice. He must compose with and adopt both of these commitments. In other words, he must seek in discharging his awesome responsibilities, the poetic equivalent of harmony.

4. Arbitrators as Poets - A Practical View

I will conclude with a more practical answer to my theme of harmony by giving two examples where arbitrators or judges have, in my view, demonstrated commitments required to effectively denounce and investigate corruption.

Let me first begin with all due modesty with the case of Maritime Delimitation and Territorial Questions between Qatar and Bahrain in which I had the privilege of

sitting as judge ad hoc of the International Court of Justice. The aspect of the case I would like to focus on is a procedural development regarding the submission of the pleadings on the merits. When Qatar came to deposit its Memorial on the merits it included an unexpected cache of 82 documents that significantly strengthened its territorial contentions. Qatar asserted that the documents were reproductions from originals found in the archives of the Emir. Bahrain proceeded to challenge the authenticity of these documents, asserting that they were all forgeries. Glaring errors had been found in them stated Bahrain, from misdated seals, to letters written or received by authors' long dead on the dates they were sent or received. In response to Bahrain's allegations, the Court ordered a round of pleadings devoted to the authenticity of the disputes documents. Qatar ultimately distanced itself from its submission, requesting that all of the alleged fraudulent documents be disregarded. It explained that "[i]n effectively removing the documents from consideration in the case, Qatar's intention was to enable the court to address the merits of the case and the parties to prepare their replies without further procedural complications."⁴⁵

⁴⁵ Court's Order of 17 February 1999.

In its decision in 2001, the Court did no more than narrate minimal elements of the fraudulent documents. It did not provide a scintilla of criticism of the attempt fundamentally to mislead the Court and to distort the course of international justice. For my part, in a separate opinion I wrote that these forged documents on which Qatar had so vitally relied to plead its case had “polluted” and “infected” the whole of Qatar’s case.

I continued: “While I must accept, as I do, Qatar’s disclaimer and apologies, in my opinion I cannot consider Qatar’s case without having in mind the damage that would have been done to the administration of international justice, indeed to the very position of this Court, if the challenge by Bahrain of the authenticity of these documents had not led Qatar, eventually, to inform the Court that it had “decided [to] disregard all the 82 challenged documents for the purposes of the present case”.

If we think back to Fuller, my intervention would squarely fall within the domain of aspiration. Admittedly, my separate opinion did not punish or sanction Qatar, as it would have had if it been made under the guise of a morality of duty, but it

served to point and reinforce the ideals of international justice that the Court stands for. Similarly, when arbitrators concern themselves with cases of corruption, they should not marginalize their ideals and aspirations, but should be outspoken when they feel that a particular conduct merits international reprobation. I recognize that the conflict of loyalties is relatively less pervasive in a standing judicial body such as the ICJ, but more difficult in arbitrations where the parties are the originators of the proceedings. In that sense, investigating corruption in international arbitration requires a degree of fortitude and courage.

It is only through an avowed conviction in the international condemnation of corruption that we, arbitrators, can undertake the investigation of corruption. When we reach this conviction, we need to frame it within a careful balancing between the arbitrators' duties, his loyalty to the parties, and his aspirations, his concerns, for international good morals.

The recent award in Metal-Tech v. Uzbekistan to which I referred earlier, provides an illustration of how ideals about controlling transnational corruption can be channeled into an active but harmonious investigation of corruption. The Metal-

Tech award, in my view, is remarkable for several reasons, no less for the fact that it is the first investment treaty case where corruption proved to be outcome determinative. The Tribunal was chaired by the well-known Swiss arbitrator, Gabrielle Kaufmann-Kohler. The Tribunal's analysis of corruption was based on consultancy agreements signed between Metal-Tech and three Uzbek consultants. The Tribunal suspected the illicit nature of these agreements when a number of new facts emerged during the hearing. First, it received an amendment to earlier consultancy agreements on the record which described the consultants as being primarily engaged in "lobbyist activity." Second, the Tribunal learned that the consultants were compensated by payments totaling approximately USD 4 million. In light of these new elements, the Tribunal acted, in its own words, "ex officio", as neither party had raised allegations of corruption, and issued a procedural order requesting the production of additional testimony and evidence regarding the agreements. The Tribunal's finding, that the agreements amounted to corruption in violation of Uzbek law, was based notably on adverse inferences and the analysis

of several red flags regarding the consultancy agreements that it opined were determinant to the outcome of the proceedings.

The approach taken by the Metal-Tech Tribunal in investigating corruption should be seen in terms of Fuller's moral scale as the continuum I described earlier between the morality of duty and the morality of aspiration. This continuum provides a legal and practical lens through which we can envision the arbitrator-poet harmoniously tackling matters of corruption.

At the top of the scale, at the morality of aspiration, we can place the decision by the Metal-Tech Tribunal to begin investigating corruption. The pursuit of an investigation, particularly when neither party has alleged corruption, requires fortitude and belief in the arbitrators' mission to the international community. This is particularly true in view of the level of uncertainty and indeterminacy typical of corruption investigations since evidence of corruption is often difficult to find in the record. I do not mean to argue that arbitrators should go on fishing expeditions in search of corruption. We must be prepared to face uncertainty and even

surprises when we investigate a factual issue, such as corruption, that is “by essence difficult to establish” to quote the Metal-Tech Tribunal.⁴⁶

As we move down the scale, we find loosely defined procedural tools whose use still requires a degree of commitment to the international anti-corruption campaign.

Drawing upon circumstantial evidence is a good example of such a tool. The Metal-Tech tribunal relied on circumstantial evidence, on so-called “red flags”⁴⁷ or indicators of corruption, which provide arbitrators with “a number of factors which any adjudicator with good common sense would consider when assessing facts in relation with a corruption issue”.⁴⁸ Without necessarily leading to a clear finding of corruption, these red flags may point to areas that require the Tribunal’s attention.⁴⁹

As we continue downwards, inching closer to the morality of duty, we arrive to procedural tools requiring less commitment while being more constraining, such as adverse inferences. The Metal-Tech Tribunal listed several examples where the Claimant was asked to provide evidence of services rendered by the consultants

⁴⁶ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 243.

⁴⁷ See Metal-Tech’s discussion on the use of red flags at para. 293.

⁴⁸ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 293.

⁴⁹ In the commercial arbitration context, see e.g. ICC Case No. 8891, the tribunal reached its conclusion on the basis of four indicia of corruption or circumstantial evidence.

but failed to comply with the requests. It drew from this a number of inferences noting that “the inference that inexorably emerges from this dearth of evidence is that the Claimant can provide no evidence of services, because no evidence of services or at least no legitimate services [...] were in fact performed [by the Consultants].”⁵⁰ In this context, I note that the International Bar Association Rules on Taking of Evidence in International Commercial Arbitration provides for the drawing of adverse inferences when one party has failed to cooperate with an order by a tribunal.⁵¹ These inferences may be critical to reaching a sufficient threshold of proof in matters of corruption.

As we reach the bottom of the scale, we find ourselves within the purview of the rights and duties prescribed by the morality of duty. This is the territory of such unassailable principles as due process. The Metal-Tech award is illustrative of an investigation conducted with regard to the due process rights of the parties. Throughout its investigation of corruption, the Tribunal gave both parties the opportunity to make submissions on the issues of corruption, and requested, on

⁵⁰ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 265.

⁵¹ IBA Rules on the Taking of Evidence in International Commercial Arbitration, art. 9(5), (6).

several occasions, additional submissions, the production of testimony and evidence.

An arbitrator in the process of dealing with a factual matrix where corruption exists, travels along the entire scale of Fuller's morality. He harmoniously integrates the aspirations of the international community, engaging in an investigation when suspicions of corruption arise, using procedural tools that require variable degrees of certainty and commitment to the international anti-corruption campaign, while having due consideration for his duties and the rights of the parties, through the respect of such unassailable principles as due process, fairness and impartiality.

I started my lecture with a reference to President Kennedy and Robert Frost.

Allow me to close it with another reference to JFK and the great American poet.

Robert Frost was invited to Kennedy's inauguration ceremonies in 1961

After the ceremony where he recited a poem he had composed for the occasion, "Dedication", Frost called on the new President to receive Kennedy's thanks for participating in the event. He presented Kennedy with a manuscript copy of the

“Dedication” poem. He also gave the President the advice: “Be more Irish than Harvard. Poetry and power is the formula for another Augustan Age. Don’t be afraid of power”.

At the foot of the typed thank-you letter Kennedy sent, he wrote “It’s poetry and power all the way!”

I hope that in the future, we, international arbitrators, carefully weigh Kennedy’s words when we have to deal with issues of corruption. We should not be afraid to use the power which we have.