# Supplementary Written Evidence from Spotlight on Corruption

## Introduction

Spotlight on Corruption is an anti-corruption charity that shines a light on the UK's role in corruption at home and abroad.[1] We strive to ensure the UK has transparent, accountable institutions that prevent corruption and allow democracy to flourish. To achieve this we highlight corruption and the harm it causes, and campaign to ensure the UK implements and enforces its anti-corruption laws effectively and has strong systems in place to prevent corruption. We also act as policy entrepreneurs, researching and advocating robust and innovative policy recommendations to improve these anti-corruption systems.

We submitted evidence to the Arbitration Bill [HL] Special Bill Committee on 6 February 2024 in response to its call for evidence.[2] This further evidence is submitted on invitation from the Chair to address three additional questions as answered below.

**What is the evidence, apart from the decision in *Federal Republic of Nigeria v Process and Industrial Developments Ltd* [2023] EWHC 2638 (Comm), to suggest that there is a need to make provision in relation to powers and duties of arbitrators in respect of corruption? You refer to investor-state arbitrations, but what evidence is there outside this type of arbitration?**

1. Our concerns about the risks of corruption in arbitration relate to high-value disputes where states are involved. While this would include the specific category of investor-state arbitrations, these risks also arise more generally in the context of international arbitration. For example, the arbitration in *Federal Republic of Nigeria v Process and Industrial Developments Ltd* [2023] EWHC 2638 (Comm) was not a treaty-based investor-state arbitration but rather based on the terms of the underlying agreement between the parties and was not administered by an arbitral institution.

2. There is a significant body of literature which identifies corruption as an increasingly prominent feature of international commercial arbitration (often invoked as a defence) and points to the challenges of the arbitrator's role in this context. There are also plenty of cases

[1] Charity number (England and Wales) 1185872. Website: https://www.spotlightcorruption.org/
[2] https://committees.parliament.uk/writtenevidence/128255/pdf/

which illustrate the risks of confidential arbitration for the resolution of high-value disputes that may be tainted by corruption, but a systematic review is not possible given the secrecy of many arbitrations. We therefore do not – and cannot – know the scale of the problem. Instead, we can only form a view based on the awards that are published or surface in subsequent court proceedings. For this reason, the troubling cases that do come to public attention may be the tip of the iceberg.

3. Given that academics and practitioners have undertaken research and analysis of the arbitral case law relating to corruption,[3] we wish to confine our submission here to two further cases that we have encountered in the course of our work at Spotlight on Corruption.

The Mozambique "tuna bond" scandal

4. The "tuna bond" scandal relates to a controversial maritime project in Mozambique that was funded by a series of undisclosed government-backed loans tainted by allegations of a complex international fraud involving the bribery of public officials on a grand scale. After the Republic of Mozambique brought proceedings against a number of the banks and companies involved in the scandal, the UAE-Lebanese shipbuilding company Privinvest sought a stay of court proceedings in favour of arbitration.

5. In September 2023, the UK Supreme Court ruled that Mozambique's claims against Privinvest alleging bribery were not "*matters*" that fell within the scope of the relevant arbitration agreements and thus declined a stay of the court proceedings.[4] In grappling with this question, the courts at every level – from the High Court to the Supreme Court – engaged in a fairly narrow exercise of statutory interpretation in relation to section 9 of the Arbitration Act. The courts did not consider the broader question of whether the public interest in an open court hearing outweighed any of the parties' preference for the confidentiality of arbitration.

6. Neither did the courts address the risks of arbitration in a case of this kind – involving a "*hidden debt*" of $3 billion incurred by Mozambique

[3] See, for example, the useful lists of cases in Kathrin Betz, "Commercial Arbitration" in the Elgar Concise Encyclopedia of Corruption Law at pp. 115-119; and Kathrin Betz, "Commerical Arbitration" (chapter 6) in *ICC Cases Involving Foreign Public Bribery* (PhD thesis, 2017)

[4] *Republic of Mozambique (Acting through its Attorney General) v Privinvest Shipbuilding SAL (Holding) and Others* [2023] UKSC 32

through an alleged conspiracy of corruption. This alleged bribery implicates those holding public office at the highest levels of the Mozambican government, including President Filipe Nyusi, who is currently protected from suit by immunity as a sitting head of state,[5] and the former finance minister Manuel Chang who is on trial in the United States for his role in the scandal.

Arbitrations related to Beny Steinmetz's mining arbitrations in Guinea

7. There have been long-running disputes related to the acquisition in 2008 of mining licences in Guinea by BSG Resources, a mining company owned by Beny Steinmetz. In 2021, Steinmetz was convicted in Switzerland of paying $8.5 million in bribes to one of the wives of former Guinea president, Lansana Conte, between 2006 and 2012.[6]

8. BSG Resources sold 51% of blocks 1 and 2 of the Simandou mine to Brazilian mining gaint Vale in April 2010, but after Guinea later cancelled their mining rights, a series of arbitration disputes has arisen involving Steinmetz's companies, Vale and the Republic of Guinea.
9. In May 2022, eight years after BSG Resources launched arbitration proceedings alleging that the Republic of Guinea had wrongfully cancelled its rights to the iron ore mine, the International Center for Settlement of Investment Disputes (ICSID) in Paris found "*overwhelming evidence*" that Steinmetz's companies had "*obtained their mining rights for blocks 1 and 2 through corrupt practices*".[7]

10. In a related arbitration, Vale won a $2 billion award in April 2019 from the London Court of International Arbitration after alleging BSG Resources concealed its bribery to secure the Brazilian mining company's investment. Notably, the tribunal said there were good reasons "*not to avoid looking into bribery allegations*" in a passage worth quoting in full:

> "*The Tribunal considers that it is not the task of arbitral tribunals to be engaged in fights against corruption but also not to accept bribery as a fact of life in some countries and keep eyes shut*

[5] *Republic of Mozambique (Acting through its Attorney General) v Credit Suisse International and Others* [2023] EWHC 2215 (Comm). This decision was taken on appeal by Privinvest, and the Court of Appeal's judgment is pending following a hearing in February 2024.
[6] His bribery conviction was upheld by a Swiss appeals court in March 2023, although Steinmetz has a final appeal pending.
[7] *BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sàrl v Republic of Guinea* (ICSID Case No. ARB/14/22)

*when faced with allegations of corruption. It considers that a middle course can be found in view of the limited evidentiary and coercive powers in private commercial arbitration and the uphill task of establishing corruption which by its very nature is secretive and hidden. While the Tribunal did make findings of bribery in the present case, its findings are limited to those individuals and companies where the Tribunal felt comfortable that it could make such findings. There may be more individuals or companies that were involved in corrupt practices regarding BSGR procuring its mining rights in Guinea, but the Tribunal considers that it was not its task to investigate private corruption by local businessmen, to inquire into the question whether certain payments made were genuine compensation for advisory, consulting or other services, or whether they encompassed monies to bribe Guinean government officials. Nor was it the Tribunal's duty to look further into BSGR companies to identify which entity or individual had knowledge or participated in bribing schemes or to look upstream of BSGR whether its parents, the Balda Foundation or Steinmetz or any other individual should be accountable for bribery. The Tribunal did not make findings in relation thereto as this was not possible or necessary for the disposition of the case and to do justice to Vale's prayers for relief and BSGR's defences thereto*."[8]

**What legislative or other provisions have been made in other centres for international arbitration such as New York, Paris, Singapore, Stockholm and Geneva?**

11. We are not aware of domestic legislation in other countries which imposes a legal duty on arbitrators to investigate (of their own initiative) suspicions or allegations of corruption. As highlighted below, however, there have been a number of recent cases where foreign courts have grappled with the respective roles of the arbitrator and the court hearing an appeal or enforcement challenge. Meanwhile, a Task Force has been commissioned by the ICC Commission on Arbitration and Alternative Dispute Resolution "*to explore current approaches to allegations or signs of corruption in disputes and to articulate guidance for arbitral tribunals on how to deal with such occurrences*". [9] The result of the Task Force's work is

[8] *Vale S.A. v BSG Resources Limited*, LCIA Arbtriation No.142683 at para 1003

[9] https://iccwbo.org/dispute-resolution/thought-leadership/commission-on-arbitration-and-adr/

still in progress but its results will undoubtedly subject this issue to further scrutiny.

France

12. There is no specific provision in French arbitration legislation that addresses corruption, but the issue may arise for determination by French courts in proceedings concerning the enforcement of an international award or the challenge of a domestic award. Similar to the position under English law, an arbitral award rendered in France shall be set aside "*if its recognition or enforcement would be contrary to international public policy*" while an international award would be unenforceable in France.[10]

13. The court's role in reviewing arbitral awards which may be tainted by corruption is an issue of live discussion in France.[11] While the *Cour de cessation* showed an early reluctance to disturb a tribunal's factual findings and confined its review to legal issues arising within the scope of the award,[12] a more progressive approach has emerged in recent years. Since 2014, the Paris Court of Appeal has demonstrated a willingness to revisit the factual findings – and even seek further evidence – on public policy grounds, leading to the setting aside of major awards relating to money laundering[13] and corruption.[14] This more interventionist (or "*maximalist*"[15]) role for the court was adopted by the *Cour de cessation* in a landmark decision in 2022.[16]

14. The Paris Court of Appeal also recently annulled two arbitral awards where corruption was not alleged during the arbitration proceedings, but was raised on appeal by the respondent states, Libya[17] and Gabon.[18] Even though the states had not invoked corruption as a defence before the tribunal, the Court of Appeal held that public policy considerations may always be raised before the reviewing court and even by the court itself. An appeal in the Gabon case is

[10] Article 1520 5° of the French Code of Civil Procedure
[11] Pierre Mayer "Corruption and Arbitration: Recent Developments in French Case Law", ICC Dispute Resolution Bulletin, 2022, Issue 2; Thomas Grant "Arbitration, Corruption and Post-Award Control in English and French Courts" International and Comparative Law Quarterly volume 71, April 2022, pages 481-496.
[12] Cass. Civ. 1re, 4 June 2008.
[13] *Belokon v Kirghiszstan*, Paris Court of Appeal, 21 Feb. 2017
[14] *Alstom Transport v. ABL*, Paris Court of Appeal, 28 May 2019
[15] Pierre Mayer "Corruption and Arbitration: Recent Developments in French Case Law", ICC Dispute Resolution Bulletin, 2022, Issue 2 at page 51
[16] *Belokon v. Kirghizstan*, Cass. civ. 1re, 23 March 2022, no. W 17-17.981
[17] *Sorelec v. Libya*, Paris Court of Appeal, 17 Nov. 2020, no. 18/02568
[18] *Webcor v. Gabon*, Paris Court of Appeal, 25 May 2021, no. 18/18708

pending before the *Cour de cessation*, which will set an important precedent in this evolving area of the law.

Singapore

15. In Singapore, there is no statutory duty under the International Arbitration Act 1994 requiring arbitrators to investigate suspicions of corruption, but the courts have recognised that such a duty may arise in certain circumstances.

16. In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101, the court recognised that "*an arbitral tribunal may come under a duty to investigate allegations of corruption*" where they raise issues of public policy relevant to the dispute.[19] In particular, the court identified that "*[t]he breach of the duty to investigate must carry the risk that upholding the award that is subsequently issued may legitimise the corrupt activities*", suggesting that "*such a risk would arise if there is a causal nexus between the corrupt activities and the award*".[20]

Sweden

17. The Swedish National Committee's published response to the ICC Taskforce's questionnaire on "*Addressing Issues of Corruption in International Arbitration*" provides an instructive summary of current law and practice in Sweden on this issue.[21]

18. Reflecting the legal position elsewhere, Swedish law treats corruption as a matter of public policy and an arbitral award which violates public policy is deemed invalid.[22] While there are no specific provisions in Swedish law that permit or require arbitrators to raise suspicions of corruption, a tribunal may do so where those suspicions may render an award in violation of public policy.

19. In this regard, the ICC Swedish National Committee observes that "*[a]rbitrators are deemed to be entitled and may also be deemed obliged to raise an issue of corruption with the parties on the arbitrators' own initiative if circumstances have been disclosed in the*

[19] Para 224
[20] Para 228
[21] https://www.icc.se/wp-content/uploads/2021/11/Corruption-report-The-Swedish-National-Committee-Nov2021.pdf
[22] Svea Court of Appeal case T 603-19, judgment of 22 April 2021

*arbitration that may lead to an application of the public policy provision*".[23]

**If a duty was to be placed on arbitrators to have regard to suspicions of corruption, how would that duty operate in practice, if no allegation of corruption was raised by the parties to the arbitration?**

20. We recommend that an arbitrator's role in safeguarding the integrity of arbitration involving states should include the following:
    (a) A *duty* on the arbitrator to raise suspicions of corruption with the parties and engage in a "red flags" analysis where the issue has a bearing on the resolution of the dispute;
    (b) A *duty* on the arbitrator to publish their ruling in circumstances where they decide they cannot render an enforceable award for reasons of corruption; and
    (c) A *power* for the arbitrator to disclose any suspicions of corruption to an appropriate law enforcement authority, with *immunity* from any liability for breaching confidentiality.

Duty to raise suspicions of corruption and engage in a "red flag" analysis

21. First, arbitrators should not only be permitted but also required to raise suspicions of corruption with the parties and adopt a "red flags" approach to assessing the evidence. The "red flags" approach, which uses key indicators to detect illicit activity, finds strong support in several soft-law guides including the "Corruption and Money Laundering in International Arbitration Toolkit" developed by the Basel Institute on Governance[24] and the "Guidelines on Agents, Intermediaries and Other Parties" produced by the International Chamber of Commerce.[25]

22. There are many examples of arbitrators following a "red flags" approach. In *Metal-Tech Ltd v Republic of Uzbekistan*, for example, the arbitrators set out the list of "Key Red Flags" identified by Lord Woolf in his 2008 report on "Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems Plc,[26]

[23] Page 1. See also Supreme Court case NJA 2015 p. 433
[24] Basel Institute on Governance and the Arbitration and Crime Competence Centre, "Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators" (April 2019): https://baselgovernance.org/publications/corruption-and-money-laundering-international-arbitration-toolkit-arbitrators
[25] https://iccwbo.org/news-publications/policies-reports/icc-guidelines-agents-intermediaries-third-parties-2010/
[26] https://www.icaew.com/-/media/corporate/files/technical/ethics/woolf-report-2008.ashx

observing that many of those indicators were present on the facts of the case before them.[27]

23. Although the "red flags" approach is widely recognised – including in the context of arbitration proceedings – as a way to identify corruption and money laundering, arbitrators do not currently have a *duty* to adopt this approach with the result that it is left to their discretion. To ensure greater clarity and consistency in the approach taken by arbitrators, we recommend that the Arbitration Bill impose this as a duty on arbitrators in arbitrations seated in England.

<u>Duty to publish decisions where an enforceable award cannot be rendered for reasons of corruption</u>

24. If an arbitrator finds that they are unable to deliver an enforceable award because of corruption, we recommend that this ruling (including the reasons for it) should be published. As we pointed out in our previous evidence to the Committee, there is heightened public interest in arbitration proceedings involving states where there are allegations or suspicions of corruption. Where the arbitrator finds that these allegations or suspicions are well founded, to the extent that an award would be contrary to public policy, there is an even greater public interest in this decision.

25. In some arbitrations, the award would have been published in the ordinary course but our proposed duty on arbitrators would require publication of the ruling in all instances where an award cannot be rendered for reasons of corruption. In this way, the Arbitration Bill would clarify that the public interest in transparency outweighs the parties' preference for confidentiality where an arbitral award has been sought which would violate public policy.

26. Ensuring greater visibility of these significant decisions involving states is in keeping with the global push for more transparency in arbitral awards. For example, the ICC announced new requirements in November 2023 for the publication of arbitral awards and documents to comply with the Brazilian Arbitration Act, which mandates publicity of arbitration proceedings administered by the São Paulo office of the ICC Court Secretariat involving Brazilian public entities.[28]

[27] *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID case no. Arb/10/3 at para 293

[28] https://iccwbo.org/news-publications/news/icc-court-expands-access-to-dispute-resolution-content/

Power to disclose suspicions of corruption to an appropriate law enforcement agency

27. This proposed duty on arbitrators to publish their ruling would only be triggered where the arbitrator concludes that corruption would render an award contrary to public policy. However, there may be cases where an arbitrator's suspicions (based on the evidence before the tribunal) do not reach the evidential threshold to render an award against public policy. As a result, the award would not necessarily be published and the arbitrator's identification and analysis of "red flags" would not become public.

28. For this reason, we recommend that the Arbitration Bill empower an arbitrator to disclose suspicions of corruption to an appropriate law enforcement agency within the jurisdiction of the seat of the arbitration. This referral would be confidential, even to the parties, and would operate in a similar manner to the process by which individuals in the regulated sector file a Suspicious Activity Report (SAR) to the Financial Intelligence Unit at the National Crime Agency.

29. Unlike the SAR regime, however, the arbitrator would not be required (i.e. under a legal duty) to refer suspicions of corruption to a law enforcement agency but rather simply empowered to do so. To ensure arbitrators are incentivised to disclose suspicions of corruption that are worthy of further scrutiny, we recommend that the Arbitration Bill immunise arbitrators from liability for any breach of confidentiality relating to a referral to law enforcement.

23 February 2024