

**IMPROVING INTERNATIONAL INVESTMENT LAW'S
TREATMENT OF (ANTI-)CORRUPTION:
TOWARDS A MORE BALANCED APPROACH**

YUEMING YAN

FACULTY OF LAW
MCGILL UNIVERSITY, MONTREAL

JULY 2021

A THESIS SUBMITTED TO MCGILL UNIVERSITY IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS OF THE DEGREE OF DOCTOR OF CIVIL LAW (D.C.L.)

© YUEMING YAN, 2021

ACKNOWLEDGEMENTS

Throughout the writing of this dissertation, I have received tremendous support and assistance from many to whom I would like to express my sincere gratitude.

First and foremost, I am deeply indebted to my supervisor, Professor Andrea K. Bjorklund, for offering me invaluable comments to my dissertation and suggestions on my career development. I am deeply grateful for her endless encouragement, deep support, and infinite patience throughout my time at McGill's Faculty of Law. Without her guidance, I would not have made it. I would also like to extend my gratitude to my thesis committee members: Professor Kun Fan and Professor Geneviève Saumier. I thoroughly enjoyed my discussions with them at the annual DCL tracking meetings and I very much appreciate their constructive advice toward my thesis draft.

I wish to extend my gratitude to Professor Manjiao Chi, who has been deeply supportive of my career goals, to the Honorable L. Yves Fortier for insightful discussions at many academic conferences, to Professor Sheng Zhang for his helpful feedback on one of my thesis chapters, and to Professor Wei Zhang and Dr. Tao Sha for the insightful discussion on the interdisciplinary section of this thesis. My thanks should also go to Dr. Lukas Vanhonnaeker, Dr. Jean-Michel Marcoux, Dr. Chen Yu, and Dr. Rui Liu, from whom I received exceptional encouragement as well as practical suggestions, not only on thesis drafting but also on career development.

I want to thank the Faculty of Law, McGill University, the Nahum Gelber Law Library, the L. Yves Fortier Chair in International Arbitration and International Commercial Law, the Private Justice and the Rule of Law Research Group and the Norton Rose Fulbright Scholarship for their great support. I would also like to express my appreciation to Ms. Jillian Ohayon for editing my dissertation.

In addition, I gratefully acknowledge the consistent assistance of my colleagues at the Faculty of Law, with whom I have had the pleasure of working and interacting: thanks to Mr. Vito Di Mei, Ms. Si Chen, Dr. Ivan Ozai, Dr. Nanying Tao, and Ms. Maria Manoli. Starting over in a new city is always challenging, and the first winter in Montreal has been the longest one I have ever had. But I am extremely lucky to have many friends with me who have supported me in getting through this trying time. Many thanks to them: Dr. Jingling Song, Dr. Jianxing Mao, Mr. Weiliang Chen, Ms. Yaqing Du, and Mr. Ju Ma.

Lastly, nobody has been more important to me in the pursuit of this project than the members of my family. I would like to thank my parents (Juxiang Yang and Faqin Yan), my brother (Guanwen Yan) and my cousin (Yan Yan), whose boundless love and unconditional support are with me with time goes by. More importantly, my deepest debt is to dear Chen (and our lovely cat Mirka): thank you for your continued accompany, complete trust, and faithful love.

ABSTRACT

In recent years, investment arbitration tribunals are increasingly confronted with allegations of corruption, mostly invoked by host States as a defense to investors' claims. After an affirmative finding of an alleged corrupt act between the investor and a public official of the host State in the establishment or conduct of the investment, tribunals have adopted a binary approach to the issue – if they uphold allegations of corruption, they completely dismiss the investor's submissions. This binary approach has resulted in an asymmetry of liability for the two parties to a corrupt act (i.e., investors and host States/host State officials), failing to take into account the inherent bilateralism of corruption and the fact that domestic laws and international norms have outlawed both the act of offering and of accepting bribes. In particular, public officials' free participation in a corrupt act to advance investments is attributable to the host State and requires State responsibility under international law. Moreover, the increasingly prevalent practice of inserting anti-corruption provisions in investment treaties has reinforced this lop-sided feature, as well as offering only weak effectiveness in terms of deterring corruption. After a careful examination of the treatment of corruption issues in investment arbitration and investment treaties, this thesis proposes a paradigm shift from the current asymmetric approach to a more balanced approach. It calls on investment tribunals to take a dual-track approach that investigates *both* corruption and investors' claims, and ensures that each party assumes responsibility for its own misconduct. It also proposes that treaty drafters include anti-corruption provisions that impose strong obligations of anti-corruption on both sides of corruption (i.e., investors and host States) rather than merely on a single party to it.

RÉSUMÉ

Ces dernières années, les tribunaux d'arbitrage des différends relatifs aux investissements sont de plus en plus confrontés à des allégations de corruption, invoquées pour la plupart par les États hôtes comme moyen de défense contre les réclamations des investisseurs. Après un constat affirmatif d'un acte de corruption présumé entre l'investisseur et un agent public de l'État hôte dans l'établissement ou l'opération de l'investissement, les tribunaux ont adopté une approche binaire de la question – s'ils confirment les allégations de corruption, ils rejettent complètement les demandes des investisseurs. Cette approche binaire a abouti à une asymétrie de la responsabilité des deux parties à un acte de corruption (c'est-à-dire les investisseurs et les États hôtes / agents de l'État hôte), ne prenant pas en compte le bilatéralisme inhérent à la corruption et le fait que les lois nationales et les normes internationales ont interdit à la fois le fait d'offrir et d'accepter des pots-de-vin. En particulier, la libre participation des agents publics à un acte de corruption pour autoriser les investissements est imputable à l'État hôte et exige la responsabilité de l'État en vertu du droit international. De plus, la pratique de plus en plus répandue d'insérer des clauses anti-corruption dans les traités d'investissement a renforcé cette caractéristique déséquilibrée, tout en n'offrant qu'une faible efficacité en termes de dissuasion de la corruption. Après un examen attentif du traitement des questions de corruption dans l'arbitrage et les traités d'investissement, cette thèse propose un changement de paradigme de l'approche asymétrique actuelle à une approche plus équilibrée. Elle appelle les tribunaux d'arbitrage des différends relatifs aux investissements à adopter une approche à deux volets qui enquête à la fois sur les allégations de corruption et sur les plaintes des investisseurs, et veille à ce que chaque partie assume la responsabilité de ses propres fautes. Elle propose également que les rédacteurs de traités incluent des dispositions anti-corruption qui imposent de fortes obligations de lutte contre la corruption des deux côtés de la corruption (c'est-à-dire les investisseurs et les États hôtes) plutôt que simplement sur une seule partie.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	I
ABSTRACT	III
RÉSUMÉ	IV
TABLE OF CONTENTS	V
ABBREVIATIONS AND ACRONYMS	XI
INTRODUCTION	1
A. The Argument	1
B. The Background	2
C. The Problem	5
D. The Thesis	9
E. The Methodology	18
F. The Structure	20
PART ONE ALLEGATIONS OF CORRUPTION IN INVESTMENT ARBITRATION	23
CHAPTER 1 SIGNIFICANT ATTRIBUTES OF ALLEGATIONS OF CORRUPTION IN INVESTMENT ARBITRATION	23
A. The Typical Scenario of Allegations of Corruption	24
1. Treaty-Based	25
2. Contract-Based	27
3. Other Sources	28
B. A Corrupt Relationship	29
1. Between Representatives of the Investor and Public Officials of the Host State	30
2. A Causal Link between the Investment and the Alleged Corrupt Acts	31
3. Timing of Corruption	32
C. Substantive Standards of Proof	33

1. Rules in the Investment Treaty or Domestic Laws _____	34
2. Seriousness of the Accusation _____	35
3. No Higher Standard _____	36
D. Other Evidentiary Issues _____	38
1. Burden of Proof _____	38
2. Circumstantial Evidence _____	39
3. Domestic Proceedings against Corruption _____	41
(1) Judicial or Administrative Decisions _____	41
(2) A Lack of Domestic Investigations _____	43
E. Tribunals' Reaction to Corruption Suspects _____	44
1. <i>Sua Sponte</i> Investigations _____	45
2. Re-Examination of Allegations of Corruption _____	46
F. A Defense against the Investor's Claims _____	48
1. The Legality Requirement _____	48
2. The 'Clean Hands' Doctrine _____	50
3. Transnational Public Policy _____	52
G. Binary Approach and Asymmetry _____	53
CHAPTER 2 LEGAL RULES IN INVESTMENT ARBITRATION GOVERNING INVESTORS'	
CORRUPTION _____	58
A. The Legality Requirement in Investment Treaties _____	59
1. A Narrow Scope of the Legality Requirement _____	60
(1) Applicable Domestic Laws _____	61
(2) Seriousness of the Violation _____	62
(3) Timing of the Illegality _____	64
2. Allegations of Corruption: Outside the Scope of the Legality Requirement _____	65
(1) Host State Knowledge of Corruption _____	65
(2) Potential Abuse of Power _____	68
3. An Implied Legality Requirement? _____	72
B. The 'Clean Hands' Doctrine _____	75

1.	An Ill-Defined Notion _____	76
(1)	Principle of Equity _____	76
(2)	Other Latin Maxims _____	78
(3)	A Standalone Doctrine _____	79
(4)	Unsettled Status in International Law _____	81
2.	Alternatively, the Conditions to Apply the Doctrine Are Not Met _____	82
(1)	Reciprocal Obligations _____	83
(2)	Allegations of Corruption _____	86
C.	Transnational Public Policy _____	89
1.	The Scope of Transnational Public Policy Prohibiting Corruption _____	89
2.	Legal Consequences of a Violation of Transnational Public Policy _____	92
(1)	‘Contracts of Corruption’ _____	93
(2)	‘Contracts Obtained by Corruption’ _____	94
(3)	In Treaty-Based Arbitration _____	96
	CHAPTER 3 LIABILITY FOR CORRUPTION ON THE DEMAND SIDE _____	100
A.	The Applicable International Law on State Responsibility in ISA _____	102
1.	Investment Treaties _____	102
2.	Part One of the ILC Articles on State Responsibility _____	105
B.	The Existence of an Internationally Wrongful Act _____	107
1.	Attribution of Corruption by Public Officials _____	109
(1)	Article 4 and Article 7 of the ILC Articles on State Responsibility _____	109
(2)	Corruption: <i>Ultra Vires</i> Public Conduct or Purely Private Conduct? _____	112
i.	Two Hypotheticals _____	113
ii.	‘under the cover of capacity’ _____	115
2.	A Breach of an International Obligation of the State _____	118
(1)	Treaty Obligations Embodied in Anti-Corruption Provisions _____	119
(2)	Substantive Treatment Standards _____	120
(3)	Violations of International Obligations through Omissions _____	124
C.	A Dual-Track Approach to Allegations of Corruption _____	126
1.	Host States Should Undertake Responsibility for Corruption _____	127

(1) Duty of Reparation _____	127
(2) Restitution and Compensation _____	128
(3) Tribunal’s Discretion on Damages Awards _____	130
(4) The Need for a New Approach _____	132
2. The Content of the Dual-Track Approach _____	133
(1) First Alleged Illegality: Corruption _____	133
(2) Second Alleged Illegality (The Investor’s Claims) _____	135
(3) Legal Fees and Proceeding Costs _____	137
3. Practical Implications of the Dual-Track Approach _____	138
PART TWO ANTI-CORRUPTION PROVISIONS IN INVESTMENT TREATIES _____	142
CHAPTER 4 ANTI-CORRUPTION PROVISIONS: AN INTRODUCTION AND MAIN EXPECTATIONS _____	142
A. IIA Reform and Anti-Corruption _____	142
1. Anti-Corruption and Investor Obligations _____	146
2. Anti-Corruption and State Commitments _____	147
B. Main Expectations of Anti-Corruption Provisions _____	151
1. To Offer Practical Tools for Investment Arbitration _____	151
(1) A Different Voice _____	152
(2) Limitations of International Anti-Corruption Conventions _____	153
2. To Enhance Sustainable Development of International Investment Policy _____	156
(1) The Concept of Sustainable Development and (Anti-)Corruption _____	157
(2) Sustainable Development and IIA Reform _____	159
(3) Sustainable Development and Anti-Corruption Provisions _____	161
3. To Strike a Symmetric Balance of Interests between Investors and Host States ____	162
(1) The Need for Balancing, IIA Reform, and Anti-Corruption _____	162
(2) Possible Ways for Balancing and Anti-Corruption Provisions _____	165
4. To Attract Foreign Investment Flows _____	168
CHAPTER 5 CORE ANTI-CORRUPTION PROVISIONS IN INVESTMENT TREATIES _____	171
A. Anti-Corruption Provisions Directed at Investor Conduct _____	172

1.	CSR-Based Anti-Corruption Provisions _____	173
2.	‘Carve-Out’ Anti-Corruption Provisions _____	176
(1)	Imposing Direct Investor Obligations _____	176
(2)	Denying Treaty Protection _____	178
(3)	Precluding Access to Arbitration _____	180
B.	Anti-Corruption Provisions of State Commitments _____	182
1.	Provisions Demonstrating a Rough Commitment to Anti-Corruption _____	183
(1)	‘Each Contracting Party shall ensure/maintain...’ _____	184
(2)	‘measures and efforts are undertaken to prevent and combat corruption’ _____	187
(3)	‘in accordance with its laws and regulations’ _____	188
2.	Provisions Aiming at Establishing Cooperation and Improving Anti-Corruption Standards _____	188
(1)	‘appropriate international anti-corruption instruments’ _____	189
(2)	Specific Regional and International Anti-Corruption Standards _____	190
(3)	A Geographical Feature _____	194
(4)	Implications for Investor-State Arbitration _____	196
3.	Provisions with Concrete Anti-Corruption Measures _____	197
(1)	Legislative Anti-Corruption Obligations in the US FTAs _____	197
(2)	A Word on the Anti-Corruption Chapter in the USMCA and the CPTPP _____	203
(3)	Concrete Measures in Other Treaties _____	206
CHAPTER 6 A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ANTI-CORRUPTION PROVISIONS _____		209
A.	The Quantitative Assessment of Anti-Corruption Provisions in Investment Treaties _	210
1.	The Number of Anti-Corruption Provisions _____	210
2.	The Concentration of Anti-Corruption Provisions _____	212
3.	The Geographical Scatter of Anti-Corruption Provisions _____	215
4.	The Generational Distribution of Anti-Corruption Provisions _____	219
B.	The Qualitative Assessment of Anti-Corruption Provisions _____	223
1.	Performing Restricted Functions in Offering Tools to Investment Arbitration ____	224
2.	Contributions of Anti-Corruption Provisions of State Commitments _____	226

3. Limited Effectiveness of CSR-Based Anti-Corruption Provisions _____	227
4. Weaknesses of ‘Carve-Out’ Anti-Corruption Provisions _____	229
CONCLUDING REMARKS _____	235
A. Addressing Allegations of Corruption in Investment Arbitration: <i>From a Binary to a Dualistic Approach</i> _____	235
B. Anti-Corruption Provisions in Investment Treaties: <i>Limits and Prospects</i> _____	240
ANNEX TABLES _____	244
BIBLIOGRAPHY _____	252

ABBREVIATIONS AND ACRONYMS

ACI	Anti-Corruption Initiative
ACP	Anti-Corruption Provision
APEC	Asia-Pacific Economic Cooperation
BIT	Bilateral Investment Treaty
BLEU	Belgium-Luxembourg Economic Union
CACM	Central American Common Market
CAFTA-DR	Dominican Republic-Central American Free Trade Agreement
CCJA	Common Court of Justice Arbitration
CEO	Chief Executive Office
CEPA	Comprehensive and Enhanced Partnership Agreement
CETA	Comprehensive Economic Trade Agreement
CFIA	Cooperation and Facilitation Investment Agreement
CIL	Customary International Law
CoE	Council of Europe
COMESA	Common Market for Eastern and Southern Africa
CPI	Corruption Perceptions Index
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSR	Corporate Social Responsibility
DRC	The Democratic Republic of Congo
ECT	Energy Charter Treaty
EPA	Economic Partnership Agreement
EPCA	Enhanced Partnership and Cooperation Agreement
ETEA	Economic and Trade Expansion Agreement
EU	European Union
FCPA	Foreign Corruption Practices Act
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Protection Agreement

FIPPA	Foreign Investment Protection and Promotion Agreement
FTA	Free Trade Agreement
IACAC	Inter-American Convention against Corruption
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
ICSID Convention Arbitration Rules	The Rules of Procedure for Arbitration Proceedings of ICSID
ILA	International Law Association
ILC Articles	International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
IPA	Investment Promotion Agreement
IPFSD	Investment Policy Framework for Sustainable Development
ISA	Investor-State Arbitration
ISDS	Investor-State Dispute Settlement
MFN	Most-Favored-Nation
MNE	Multinational Enterprise
MoU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NGO	Non-Governmental Organization
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development

OECD Anti-Bribery Convention	OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions
OHADA	Organisation pour l’Harmonisation en Afrique du Droit des Affaires
PAIC	Pan-African Investment Code
PCIJ	Permanent Court of International Justice
PTIA	Preferential Trade and Investment Agreement
RIT	Regional Investment Treaty
SADC	Southern African Development Community
TIP	Treaty with Investment Provisions
TPA	Trade Promotion Agreement
TPP	Trans-Pacific Partnership
UK	The United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTOC	United Nations Convention against Transnational Organized Crime
US	United States of America
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

INTRODUCTION

A. The Argument

Arbitrators and policymakers are grappling with cross-cutting issues related to investment. Among these are corruption and other economic crimes occurring within international investment activities. This thesis illustrates the interplay between anti-corruption and international investment law and suggests changes that investment arbitrators and investment policymakers should make in the approach to these issues to enhance the ability of investor-State arbitration (ISA) and international investment treaties (IIAs) to contribute to the global fight against corruption. More specifically, the first half of this thesis examines the approaches taken by ISA tribunals to deal with corrupt acts between investors and the public officials of the host State. It argues that ISA tribunals have wrongly relied on the three legal rules – the legality requirement, the ‘clean hands’ doctrine and transnational public policy – to uphold the host States’ allegations of corruption and dismiss the investors’ claims in their entirety. It argues that public officials’ free participation in a corrupt act to advance investments is attributable to the host State and requires international responsibility. This thesis calls on investment tribunals to take a dual-track approach that investigates both corruption and investors’ claims, and ensures that each party assumes responsibility for its own misconduct. If corruption is proven, bribe payments should be confiscated to anti-corruption initiatives (ACIs) and the host State should be required to prosecute the individual officials involved or make compensation in lieu of prosecution. The host State should be also responsible for any breach of the investment treaty in the forms of full reparation like compensation. Only a portion of the compensation should go to the investor depending on the factual findings and any remaining amount should be donated to ACIs. This partial compensation system penalizing the investor’s participation in the corrupt act conveys an important message to investors that any participation in any corrupt act will prevent them from being fully compensated for their loss in investment.

The second half of this thesis presents an empirical analysis of anti-corruption provisions and policies developed in IIAs. The number of investment treaties that contain provisions expressly mentioning anti-corruption has increased, but there has been little work put into detailing or inspecting these anti-corruption provisions. This thesis then contributes to filling in this gap by investigating the interrelationships between this practice and the broader IIA reform in progress,

providing a systematic typological analysis of the existing anti-corruption provisions, and examining their quantitative and qualitative features. This thesis reveals that States have placed at least four key types of expectations on anti-corruption provisions: to offer some practical tools for investment arbitration, to enhance sustainable development of international investment policy, to strike a symmetric balance of interests between investors and host States, and to attract foreign investment flows. The typology of anti-corruption provisions developed in this thesis reveals that anti-corruption obligations or commitments are either directed at investors or host States and are formulated in different ways: a) within corporate social responsibility (CSR) clauses, b) through ‘carve-out’ statements that aim to deprive investors of treaty protection or access to arbitration in cases of non-compliance, c) by simply demonstrating a commitment without concrete measures, d) with the aim of establishing cooperation and improving anti-corruption standards, and e) illustrating a series of concrete actions, either legislative or procedural, which States must perform. Most of the identified investment treaties include only one of these categories, but there do exist some that contain hybrid rules. The quantitative analysis in this thesis suggests that the current IIA regime is overall experiencing a shortage of anti-corruption provisions and this thesis argues that we must accelerate this practice in order to meet the growing need for corruption deterrence at the international level. The qualitative finding in this thesis is that the present anti-corruption provisions are either weak in terms of enforcement or tilting the balance towards host States. The thesis finally proposes that drafters include provisions that stipulate the liability of host States for corruption, provide sufficient remedial measures for investors when confronted with solicitation, and impose strong obligations of anti-corruption on both sides of corruption (investors and host States) rather than merely on a single party to it.

B. The Background

Traditionally, the remedy available to a foreign investor for injuries caused by a government’s regulatory measures in the host State has been to seek diplomatic protection from the investor’s home State.¹ The paradigm of investment dispute settlement has been altered by the rise of the ISA

¹ See, e.g., Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford University Press, 2012); Christoph Schreuer, “Investment Protection and International Relations” in August Reinisch & Ursula Kriebaum, eds, *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (The Netherlands: Eleven International Publishing, 2007) 345; Ben Juratowitch, “The Relationship between Diplomatic Protection and Investment Treaties” (2008) 23:1 ICSID Review 10–35.

system, which enables an investor to initiate arbitration proceedings with no need for the home State to participate.² Investment tribunals are entitled to hear investors' claims against the host State on the condition that the host State has expressed consent to arbitration. Accordingly, an arbitral tribunal must first ascertain, under the principle of *competence-competence*,³ that it has jurisdiction over the dispute at hand before examining whether the alleged specific measures have affected the claimant's investments. Overall, ISA offers immediate and depoliticized juridical assistance to foreign investors.⁴

So far, investment arbitration is one of the most important and successful mechanisms developed in the realm of international investment law. One can observe a soaring number of ISA cases over the past decades; numerous disputes have been settled through investment arbitration.⁵ However, another observation is also manifest: ISA is experiencing an ongoing legitimacy crisis due to a range of issues, such as a lack of consistency in arbitral decision-making and the low transparency of the dispute resolution process.⁶ In the last decade, this legitimacy crisis seems graver in cases involving corrupt acts between investors and the public officials of the host State, because ISA tribunals have arguably delivered many decisions that failed to preserve the rule of law or to promote societal values. Instead, these decisions have functioned to incentivize corruption.⁷

² In recent years, it has also been argued that home States are reasserting more control and greater involvement in investment arbitration and treaties. See generally, Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (Cambridge University Press, 2019); Andreas Kulick, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2016).

³ This doctrine signifies that an arbitral tribunal has the authority to decide its own competence. In this sense, investment tribunals are competent to decide whether they have jurisdiction or not. Ibrahim F I Shihata, *The Power of the International Court to Determine its Own Jurisdiction: Compétence de la Compétence* (The Hague: M. Nijhoff, 1965); James Crawford, "Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture" (2010) 1:1 *Journal of International Dispute Settlement* 3–24.

⁴ Ibrahim F I Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986) 1:1 *ICSID Review* 1–25; Ursula Kriebaum, "Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes" (2018) 33:1 *ICSID Review* 14–28.

⁵ "UNCTAD, Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019, IIA Issues Note 2", (July 2020), online: <<https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf>>.

⁶ Michael Waibel et al, eds, *The Backlash against Investment Arbitration: Perceptions and Reality* (Austin, Tex.: Kluwer Law International, 2010); Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73:4 *Fordham Law Review* 1521–1625. It is also argued that not all types of inconsistent interpretations are equally harmful. Inconsistency in the interpretation of *standards* or *basic primary obligations* may be less deleterious than inconsistent interpretations of *rules* or *more structural secondary rules*. See Julian Arato, Chester Brown & Federico Ortino, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement" (2020) 21:2–3 *The Journal of World Investment & Trade* 336–373.

⁷ Joachim Drude, "Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration" (2018) 35:6 *Journal of International Arbitration* 665–718 at 718.

Corruption is widely recognized as a violation of moral values and international public policy. As Mr. Kofi A. Annan put in the Foreword to the United Nations Convention against Corruption (UNCAC):⁸

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.

In fact, this universal evil had not attracted special attention from scholars, researchers, policymakers, and practitioners in the field of international investment law until the International Centre for Settlement of Investment Disputes (ICSID) released an arbitration award on October 4th, 2006 in the case of *World Duty Free Company v. Republic of Kenya*, where dispositive corruption was discovered between the investor and the then-president of Kenya.⁹ Concisely, the claimant alleged that its property was expropriated by the government of Kenya in a way forbidden by the contract signed between them, and the investor thus sought orders of restitution or, alternatively, full compensation.¹⁰ The respondent invoked a corruption defense, contending that the contract of investment was procured by corruption and that claims based on such an investment should not be upheld.¹¹ As a result, the tribunal endorsed the Kenyan allegation of corruption and dismissed the investor's claims in their entirety.¹²

There is no denying that, alongside the increasing and rapid cross-border economic communications brought about by an increasingly globalized world, corruption has invaded international transactions; it has become a frequent occurrence in transnational economic and trade activities, including international investment. Professor Cecily Rose has reviewed over 50 arbitral awards that address corruption or anti-corruption in varying degrees and that were rendered by ICSID tribunals, International Chamber of Commerce (ICC) tribunals, the Iran-United States (US)

⁸ Foreword by Kofi A. Annan, *United Nations Convention against Corruption*, 2005, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, U.N. GAOR, 58th Sess., 51st Plen Mtg., UN Doc. A/RES/58/4.

⁹ *World Duty Free Company v Republic of Kenya*, ICSID Case No Arb/00/7, Award of 4 October 2006, 2006 [*World Duty Free v. Kenya*, Award (2006)].

¹⁰ *Ibid* at paras 74–76.

¹¹ *Ibid* at para 105.

¹² *Ibid* at para 157.

Claims Tribunal, and tribunals applying the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Arbitration Rules).¹³

More specifically in the ISA context, in his book *Corruption in International Investment Arbitration*, Dr. Aloysius Llamzon identified 24 ICSID arbitration cases and 4 UNCITRAL Arbitration Rules cases whose awards were granted from 1992 to 2013.¹⁴ Significant discussions on corruption have also been held in many post-2013 ISA cases, such as *Glencore v. Colombia* (1) (2019),¹⁵ *Niko Resources v. Bangladesh* (2019),¹⁶ *Vladislav Kim v. Uzbekistan* (2017),¹⁷ and *Spentex Netherlands v. Uzbekistan* (2016).¹⁸ This thesis builds upon the works of Rose and Llamzon by focusing on examining the discussions in these newly-issued ISA cases.

C. The Problem

International arbitral tribunals are indeed dealing with growing international economic disputes that involve corruption-related issues, and these cases contain attributes of both divergence and convergence. Primarily, some cases are contract-based¹⁹ or domestic law-based²⁰ with reference to the Convention on the Settlement of Investment Disputes between States and Nationals of Other

¹³ See generally Cecily E Rose, “Questioning the Role of International Arbitration in the Fight against Corruption” (2014) 31:2 Journal of International Arbitration 183–264.

¹⁴ See Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014).

¹⁵ *Glencore International AG and CI Prodeco SA v Republic of Colombia*, ICSID Case No ARB/16/6, Award of 27 August 2019, 2019 [*Glencore v. Colombia* (1), Award (2019)].

¹⁶ *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No ARB/10/11 and No ARB/10/18, Decision on the Corruption Claim of 25 February 2019, 2019 [*Niko Resources v. Bangladesh*, Decision on the Corruption Claim (2019)].

¹⁷ *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction of 8 March 2017, 2017 [*Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017)].

¹⁸ *Spentex Netherlands, BV v Republic of Uzbekistan*, ICSID Case No ARB/13/26, 2016 [*Spentex Netherlands v. Uzbekistan*].

¹⁹ Only a small portion of corruption cases is contract-based, including and most notably, *World Duty Free v. Kenya*, Award (2006), *supra* note 9; *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No ARB/98/8, Final Award of 12 July 2001, 2001 [*Tanzania Electric Supply v. IPTL*, Final Award (2001)]; *RSM Production Corporation and others v Grenada*, ICSID Case No ARB/10/6, Award 10 December 2010, 2010 [*RSM v. Grenada*, Award (2010)]; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No ARB/10/11 and No ARB/10/18, Decision on Jurisdiction of 19 August 2013, 2013 [*Niko Resources v. Bangladesh*, Decision on Jurisdiction (2013)]; *Pan African Minerals and others v Burkina Faso*, ICC Case No 22450/DDA, Procedural Order No 4 on Provisional Measures (French) of 11 May 2018, 2018 [*Pan African Minerals and others v. Burkina Faso*, Procedural Order No. 4 on Provisional Measures (2018)].

²⁰ See, e.g., *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award of 20 May 1992, 1992 [*SPP v. Egypt*, Award (1992)]; *Spentex Netherlands v. Uzbekistan*, *supra* note 18.

States (ICSID Convention) or other arbitration rules.²¹ Some are launched in accordance with investment treaties where provisions of investor-State dispute settlement (ISDS) are provided under which investors may seek remedies. The treaties relied upon might be bilateral investment treaties (BITs)²² or multinational agreements, such as the Energy Charter Treaty (ECT)²³ and the North American Free Trade Agreement (NAFTA).²⁴

Moreover, the modes of corrupt acts in investment transactions are markedly diverse. The allegations of corruption are either invoked by an investor as claims or raised by the host State as a defense. In the former situation, the corrupt acts, for instance, allegedly appear in the judicial system of the host State (such as in *Rumeli Telekom v. Kazakhstan*).²⁵ An investor may also allege that the respondent has engaged in wrongful acts in retaliation because it has refused to pay a substantial amount solicited by the public official of the respondent State (like in *F-W Oil Interests v. Trinidad and Tobago*²⁶ and in *EDF (Services) Limited v. Romania*).²⁷ Nevertheless, the latter situation, namely the host State invoking the allegation of corruption, is much more frequently observed, including in *World Duty Free v. Kenya*, *Metal-Tech v. Uzbekistan*, *Spentex v. Uzbekistan*, *Vladislav Kim and others v. Uzbekistan*, and more.

²¹ *Customs and Tax Consultancy LLC v Democratic Republic of Congo*, ICC Case No19515/MCP/DDA, Partial Award (French) of 22 July 2015, 2015 [CTC v. DRC, Partial Award (2015)]; *Getma International v Republic of Guinea (1)*, CCJA Case No 001/2011/ARB, Tribunal Award (French) of 29 April 2014, 2014 [Getma International v. Guinea (1), Award (2014)]; *Republic of Croatia v MOL Hungarian Oil and Gas Company Plc*, PCA CASE No 2014-15, Final Award of 23 December 2016, 2016 [Croatia v. MOL Hungarian Oil and Gas, Final Award (2016)]; *Pan African Minerals and others v. Burkina Faso*, Procedural Order No. 4 on Provisional Measures (2018), supra note 19; *Securiport v Republic of Benin*, ICC Case No22814/DDA, [Securiport v. Benin].

²² In most cases, the applicable legal instrument is the BIT signed between the host State and the home State of the investor. Making a distinction between contract-based arbitration and treaty-based arbitration is meaningful from multiple perspectives. It is essential for arbitrators to determine the breath of protection and the State's consent to arbitration, especially in a case where an investor's wrongdoing is concerned. For instance, host States have sometimes referred to the 'in accordance with host States law' clause regulated in the concerned BIT as one of jurisdictional objections; contractual agreements, however, hardly contain an express legality requirement. A detailed discussion on the legal rules governing investor misconduct is provided in Chapter 2 of this thesis.

²³ *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v The Republic of Azerbaijan*, ICSID Case No ARB/06/15, Award of 8 September 2009, [Azpetrol v. Azerbaijan, Award (2009)].

²⁴ *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, 2005 [Methanex v. United States].

²⁵ *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award of 29 July 2008, 2008 [Rumeli v. Kazakhstan, Award (2008)].

²⁶ *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award of 3 March 2006, 2006 at para 36 [F-W Oil Interests v. Trinidad and Tobago, Award (2006)].

²⁷ *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award of 8 October 2009, 2009 at para 221 [EDF (Services) v. Romania, Award (2009)].

In a typical scenario, the investment was allegedly secured by a corrupt act between the representative of the investor (e.g., the CEO) and the public official of the host State (e.g., the President). This bribe payment may be solicited by the demand side or may be initiated by the supply side. After the establishment of the investment, the host State takes certain measures (such as an illegal expropriation) over the investment, which are alleged by the investor to be a breach of the BIT signed between the host State and the home State of the investor, such as an alleged illegal expropriation. The investor then raises its claims before an investment tribunal. The host State, in turn, attempts to use corruption as a defense against the investor's claims, contending that investments procured through corruption are outside the realm of protection or access to international dispute settlement.

Since the *World Duty Free* case, an evident growth of the typical scenario of the allegation of corruption raised by the respondent States as a jurisdictional objection against investors' assertion has been observed in investor-State disputes, and a corruption defense against investors is arguably well-established in ISA.²⁸ Although a large number of such allegations have not prospered due to considerable difficulties in substantiating acts of corruption, the practice of invoking allegations of corruption continue; their low success rate has not persuaded host States to forgo their attempts at invoking the corruption defense.

As for the limited cases where corruption was outcome-determinative, they are *World Duty Free v. Kenya*, *Metal-Tech v. Uzbekistan*, and *Spentex v. Uzbekistan*. All the three tribunals have endorsed the allegations of corruption by the host States and held the investors responsible for the corrupt acts by rejecting their claims for lack of jurisdiction or as inadmissible. Investors have accordingly forfeited the right to seek redress through international dispute settlement.²⁹ This fashion of dealing with allegations of corruption is properly characterized as using a binary, all-

²⁸ Since as early as 2012, Professor Jason Yackee proposed that 'investor corruption seems to be an emerging state defense in investment treaty arbitration. But it is also a defense whose contours and consequences could and should be better specified.' See Jason Webb Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States" (2012) 3 Virginia Journal of International Law 723–746.

²⁹ International commercial arbitral tribunals seem to adopt a similar attitude towards corruption that the corrupting parties 'forfeited any right to seek assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes'. See 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) 10:3 Arbitration International 277–294 at 294.

or-nothing approach.³⁰ In many cases that allegations of corruption did not prosper for lack of evidence, tribunals have also approved the use of the binary approach, should corruption be substantiated.³¹

The binary approach allows the host State to withdraw from the corrupt acts at no cost. This renders the jurisprudence unsatisfactory and problematic, especially taking into account the inherent bilateral nature of corruption.³² Even worse, the current decisions on corruption may further *incentivize* host States to conduct corrupt acts or *ignore* the corrupt acts of its public officials, especially when an investor has nowhere to seek remedies when encountering solicitation from the demand side, ultimately generating a vicious circle. A query about whether ISA has the capacity to play a positive role in the global fight against corruption thus unfolds.³³

At the same time, under the binary approach, the tribunal will not examine whether or not the alleged regulatory measures (e.g., illegal expropriation) have violated the treaty or contract obligations by which the host State must abide. In these three cases, the claimants each alleged that the host States had unlawfully expropriated their investments, but their claims were not examined by the tribunals. This jurisprudence is likely to lead to host States ceasing to worry about legal consequences when taking regulatory measures explicitly prohibited by investment treaties. Because host States will feel confident that the proceedings will not advance to a stage whereby the tribunal examines the investors' claims regarding the wrongful acts of the host States. As a consequence, an investor who secures its investment through corrupt means will lose its case, its investment (in cases of expropriation without compensation), and the money paid in the bribe; on

³⁰ Jason N Summerfield, "The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions" (2009) 6:1 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1357>> at 10; John R Crook, "Remedies for Corruption" (2015) 9:3 World Arbitration & Mediation Review 303–316 at 305.

³¹ See, e.g., *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), 2000 at para 111 [*Wena Hotels v. Egypt*, Award (2000)]; *Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017), *supra* note 17 at para 593; *Glencore v. Colombia (1)*, Award (2019), *supra* note 15 at para 665.

³² Yueming Yan, "A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?" in Yuwen Li, Tong Qi & Cheng Bian, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 227 at 230; Lucinda A Low, "Dealing with Allegations of Corruption in International Arbitration" (2019) 113 AJIL Unbound 341–345 at 341.

³³ Rose, *supra* note 13; Romy Descour-Karnitz, "The Role of ICSID Tribunals in the Combat against Corruption" (2017) 11:1 World Arbitration and Mediation Review, online: <<https://arbitrationlaw.com/library/role-icsid-tribunals-combat-against-corruption-wamr-2017-vol-11-no-1>>; Utku Cosar, "Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions" in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges* ICCA Congress Series (Kluwer Law International, 2015) 541.

the other side, the host State will be free from any responsibility for the corrupt act and even reap from this misconduct through expropriation.

This story further develops when one sees a clear tendency of States to incorporate anti-corruption provisions in IIAs. A number of significant investment treaties have recently incorporated anti-corruption provisions, including the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA),³⁴ the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),³⁵ and the United States-Mexico-Canada Agreement (USMCA).³⁶

While the anti-corruption chapters in the CPTPP and the USMCA are not explicitly actionable or subject to arbitration, we have also identified some anti-corruption provisions in other treaties that ‘suggest a stronger normative integration of foreign investors’ responsibilities’.³⁷ Despite that, ISA tribunals have never applied any anti-corruption provisions to make decisions on allegations of corruption. It remains unknown whether and how the rising anti-corruption provisions impact the legal reasoning and jurisprudence on the related issues.

D. The Thesis

This thesis advances the idea that an affirmative finding of corrupt acts between public officials and investors should not be the sole ground for dismissing investors’ claims. A proposal to examine the two alleged illegalities (one which concerns corruption and the other which denotes the investors’ claims) in the merits phase and holding the host State responsible for both wrongdoings (if substantiated) conform with international investment law and general international law. Besides that, this thesis offers a comprehensive typology as well as a quantitative and qualitative analysis of anti-corruption provisions present in investment treaties, along with their implications for investment arbitration. This empirical study reveals the ways in which

³⁴ Art.8.18, *Comprehensive Trade and Economic Agreement between Canada and the European Union*, 2016, signed on 30 October 2016.

³⁵ Chapter 26, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018, signed on 8 March 2018, entered into force on 30 December 2018.

³⁶ Chapter 27, *United States-Mexico-Canada Agreement*, 2018, signed on November 30, 2018 with an agreement on amendments signed on December 10, 2019, effective on 1 July 2020.

³⁷ Jean-Michel Marcoux, *International Investment Law and Globalization: Foreign Investment, Responsibilities and Intergovernmental Organizations* (Routledge, 2019) at 34.

investors and host States are obliged to act in terms of anti-corruption and assesses the effectiveness of these obligations.

Illegal investment has been the subject of extensive literature in the field of international investment law and of host States' jurisdictional objections in investment arbitration. Some take the firm position that illegal investment must be excluded from treaty protection if the investment treaty expressly mandates investors to establish investment 'in accordance with host State laws'.³⁸ In the absence of such a clause, the doctrine of 'clean hands' arguably applies as a general principle of international law or an implicit legality requirement, having a similar effect of depriving investors of access to arbitration.³⁹ Additionally, in the corruption context, the concept of transnational public policy prohibiting corruption has also been introduced to establish the illegality of investment that is secured by corrupt means, given that corruption has been universally condemned as a criminal offense.⁴⁰

Other authors, however, have argued that incorporating domestic laws to determine the legality of an investment which will affect investors' rights to investment protection 'raises important potential concerns'.⁴¹ It presents the risk of States to intentionally manipulate their domestic laws, especially when some laws are so obscure or non-transparent, in order to withdraw from an alien investor the treaty protection.⁴² The concern of procedural injustice is also raised, considering that the host State is placed in a privileged position when the (il)legality of investment is a jurisdictional issue but the (il)legality of the host State's act is a merits one.⁴³ Many tribunals have established

³⁸ For discussions on the legality requirement, see generally, August Reinisch, "How to Distinguish 'In Accordance with Host State Law' Clauses from Similar International Investment Agreement Provisions?" (2018) 2:1 Indian Journal of Arbitration Law 70–83; Stephan W Schill, "Illegal Investments in Investment Treaty Arbitration" (2012) 11:2 The Law & Practice of International Courts and Tribunals 281–323.

³⁹ For a review of the 'clean hands' doctrine, see Andrea K Bjorklund & Lukas Vanhonnaeker, "Yukos: The Clean Hands Doctrine Revisited" (2015) 9:2 Diritti umani e diritto internazionale 365; Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in Kaj Hobér et al, eds, *Between East and West: Essays in honour of Ulf Franke* (Huntington, N.Y.: Juris, 2010) 309.

⁴⁰ Aloysius Llamzon, "On Corruption's Peremptory Treatment in International Arbitration: State Responsibility, Unclean Hands, and the Return of Corruption as a Jurisdictional Issue" in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* Dossiers of the ICC Institute of World Business Law (Kluwer Law International, 2015) 32; Cameron A Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims" (2012) 3:2 Journal of International Dispute Settlement 329–369.

⁴¹ Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010) at 130–131.

⁴² *Ibid.*

⁴³ *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No ARB/03/25, *Dissenting Opinion of Mr Bernardo M Cremades* (19 July 2007), 2007 at para 36 [*Fraport v. Philippines* (1), *Dissenting Opinion of Mr. Bernardo M. Cremades* (2007)].

the *de minimis* threshold⁴⁴ and the principle of estoppel⁴⁵ as exceptions to the legality requirement. It arguably appears that ‘the category of violations that do not provoke a jurisdictional infirmity is expanding in the jurisprudence.’⁴⁶

As far as the law is concerned, it is wise to interpret legal rules in a flexible and adaptable manner so as to respond to the innumerable and evolving scenarios of misconduct in this realm. The starting point of impugning illegality is undoubtedly beyond reproach, but the use of this requirement in a specific dispute should not be rigid. In complex cases especially, the question of whether or not the investment contains an element of illegality is not the sole question for a tribunal to examine. Corruption, for instance, is inherently bilateral in that not only the supply side but also the demand side are subject to punishment. This feature is evidently different from previous cases where ISA tribunals declined to confer treaty protection on investments obtained by substantial misrepresentation and fraud in the bidding process, which illegalities concerned only the investor party.⁴⁷ A denial of investors’ claims with no liability for the demand side forces one to inquire whether these seemingly asymmetric sanctions are ‘effective and actually tend to disincentivize subsequent behavior’ or are ‘ceremonial taps on the wrist’.⁴⁸ The use of this binary approach without consideration of the possibility of treaty violations (e.g., an illegal expropriation) of the host State further raises concerns over potential abuse of power.

⁴⁴ Aloysius Llamzon & Anthony C Sinclair, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct” in Albert Jan van den Berg, ed, *Legitimacy; Myths, Realities, Challenges* ICCA Congress Series 18 (Kluwer Law International, 2015) 451 at 506–507.

⁴⁵ J Hepburn, “In Accordance with Which Host State Laws? Restoring the ‘Defence’ of Investor Illegality in Investment Arbitration” (2014) 5:3 *Journal of International Dispute Settlement* 531–559; Thomas Obersteiner, “‘In Accordance with Domestic Law’ Clause: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors” (2014) 31:2 *Journal of International Arbitration* 265–288.

⁴⁶ Zachary Douglas, “The Plea of Illegality in Investment Treaty Arbitration” (2014) 29:1 *ICSID Review* 155–186 at 176.

⁴⁷ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award of 27 August 2008, 2008 [Plama v. Bulgaria, Award (2008)]; *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award of 2 August 2006, 2006 [Inceysa v. El Salvador, Award (2006)]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award of 16 August 2007, 2007 [Fraport v. Philippines (1), Award (2007)].

⁴⁸ “Key Note Presentation: Everything You Always Wanted to Know About Foreign Bribery and Corruption but Were Afraid to Ask, by Nicola Bonucci, With Commentary by Professor W. Michael Reisman” (2015) 9:3 *World Arbitration & Mediation Review* 239–247 at 247.

Commentators have argued that the host State is a third, innocent party to a typical corrupt act between a public official and an investor;⁴⁹ this argument is, however, arguably contrary to our general understanding of international law on State responsibility. While corruption is defined as an abuse of public office for private gain,⁵⁰ it is nonetheless possible – albeit highly debated – that an act of a governmental official’s extortion and/or acceptance of a bribe from an investor should be properly attributed to the host State. Customary international law establishes that official acts, even those that exceed an official’s authority and are in fact prohibited, are nonetheless attributable to the State. This rule is codified in Article 7 (Excess of authority or contravention of instructions) of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) and is applicable in investor-State relations.⁵¹ But it is challenging to distinguish between an *ultra vires* act and a purely private act, the former being attributable while the latter not.⁵²

Some, relying on the ‘reasonable foreign investor’ standard, note that such acts should seldom be attributed.⁵³ Many argue that such behavior is attributable only when the investors *do not freely participate* in corruption; in other cases where an investor has *actual knowledge* of the corruption, and especially the official’s purpose of securing personal benefits, the behavior is more accurately described as purely private conduct and cannot be attributed.⁵⁴ Opposite opinions note that the ILC Articles’ attribution rules encompass an objective approach and has nothing to do with the state of

⁴⁹ The *Niko* tribunal and the *World Duty Free* tribunal seem to support that the host State as an innocent party has the right to preserve or invalidate the contract obtained through corruption. See *Niko Resources v. Bangladesh, Decision on Jurisdiction* (2013), *supra* note 19 at paras 440–452; *World Duty Free v. Kenya, Award* (2006), *supra* note 9 at para 185.

⁵⁰ The World Bank Group, “Helping Countries Combat Corruption: The Role of the World Bank”, online: <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>>.

⁵¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission, in the Yearbook of the International Law Commission, 2001, Volume II, Part Two, 2001 at 87–88 [Commentary to the ILC Articles]*.

⁵² *Ibid* at 46.

⁵³ Tim Wood, “State Responsibility for the Acts of Corrupt Officials: Applying the ‘Reasonable Foreign Investor’ Standard” (2018) 35:1 *Journal of International Arbitration*.

⁵⁴ Isuru C Devendra, “State Responsibility for Corruption in International Investment Arbitration” (2019) 10:2 *Journal of International Dispute Settlement* 248–287; Aloysius Llamzon, “State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration” (2013) 10:3 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1958>>.

knowledge of the party who files the claims; as such, '[t]he identity of the entity alleging a State's internationally wrongful act should be immaterial'.⁵⁵

The Commentary to Article 7 of the ILC Articles notes that the key factor is the determination of whether or not the alleged acts were 'cloaked with authority', or put differently, 'in an apparently official capacity' or 'under color of authority'.⁵⁶ In the oft-cited case of *Caire*, the French-Mexican Claims Commission ruled that the alleged acts of murder were cloaked with authority and 'used means placed at their disposal on account of that status'.⁵⁷ Likewise, in corruption cases, an official is normally using its privileged position to extort or accept a bribe from an investor; it is exactly this authority entrusted to advance and secure investment that drives an investor to bribe a specific public official, without which a reasonable investor is unlikely to make a substantial payment to the concerned official. For existing and prospective investors, the public official is authorized by the government to decide whether or not to approve the investment. The public official and the government are thus considered a single unit, rather than two separate parties. Even in circumstances where, for instance, a president asked for a bribe to get the concession and clearly mentioned that this request was made in a private capacity, such an act, as conceived by Judge James Crawford, would be attributable to the State.⁵⁸ This is because this president, though acting for private gain, would have acted by virtue of his status, under the color of authority, and in an apparently official capacity.

Further to international law on State responsibility, this thesis delves into the international obligations, both in terms of actions and omissions, breached by an act of corruption on the host State side, which are viewed as a matter of primary rules. As far as international investment law is concerned, soliciting a bribe may give rise to a violation of substantive treatment standards. The tribunal in *EDF (Services) v. Romania* sustained that "a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that 'exercising a State's discretion on the

⁵⁵ James Richard Crawford & Paul Mertenskötter, "The Use of the ILC's Attribution Rules in Investment Arbitration" in Meg Kinnear et al, eds, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2016) 27 at 40.

⁵⁶ *Commentary to the ILC Articles*, *supra* note 51 at 46.

⁵⁷ *Estate of Jean-Baptiste Caire (France) v United Mexican States (1929)*, 5 UNRIAA vol V, 516–534 at 531 [*Caire Case*].

⁵⁸ Crawford & Mertenskötter, *supra* note 55 at 41.

bias of corruption is a [...] fundamental breach of transparency and legitimate expectations.”⁵⁹ Omissions by the host State, on the other hand, may also constitute a breach of international obligations, such as the failure to prevent its public officials from engaging in corruption, to ensure government integrity, or to increase transparency. This is especially the case when an investment treaty has clearly inserted an anti-corruption provision directed at State commitments.

Indeed, one can notice an increasing number of anti-corruption provisions that contain State commitments as well as investor obligations on anti-corruption. However, a comprehensive and typological analysis of such clauses is still missing.⁶⁰ This thesis contributes to filling this gap through an empirical study on the core anti-corruption provisions along with a qualitative and quantitative assessment. Overall, incorporating anti-corruption provisions is a recent but significant development and is driven by numerous factors. First of all, traditional BITs rarely consider corrupt acts and have few provisions targeting anti-corruption, a fact which has been criticized as ‘giving comparatively little guidance to arbitrators about how corruption should be treated vis-à-vis the protections provided to investors under these treaties.’⁶¹ Arguably, this weakness results in the highly skeptical binary approach outlined above and leads to doubt regarding the competence of arbitrators. The increase in the number of anti-corruption provisions is thus viewed as providing practical tools for investment arbitration to tackle prospective allegations of corruption.

Moreover, anti-corruption provisions are actual outcomes of the ongoing, structural IIA reform. Policymakers have historically concentrated on general treaty protection of foreign investments by conferring a great number of rights on them as well as conditioning the State’s regulatory powers to prevent their undue interference with these rights.⁶² But this practice is gradually proving to be a significant challenge when increasing investments are established at the cost of

⁵⁹ *EDF (Services) v. Romania, Award (2009)*, *supra* note 27 at para 221.

⁶⁰ There are very few studies on anti-corruption provisions, see, e.g., Charles N Brower & Jawad Ahmad, “The State’s Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration” in Katia Yannaca-Small, ed, *Arbitration under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford University Press, 2018) 455; Yan, *supra* note 32; Stefan Mbiyavanga, “Improving Domestic Governance through International Investment Law: Should Bilateral Investment Treaties Learn from International Anti-Corruption Conventions?” (2017) 2017 OECD Global Anti-Corruption & Integrity Forum 17; Kathryn Gordon, “International Investment Agreements: A survey of Environmental, Labour and Anti-Corruption Issues” in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008) 135.

⁶¹ Llamzon, *supra* note 14 at 62.

⁶² M Sornarajah, *The International Law on Foreign Investment*, 4th ed (Cambridge University Press, 2017); Rudolf Dolzer & Margret Stevens, *Bilateral Investment Treaty* (The Hague: Martinus Nijhoff Publishers, 1995).

other interests such as the environment, human rights and other social values. A reform of IIAs by inserting non-investment concerns and preserving some regulatory space then becomes increasingly important.⁶³ Corruption has long been recognized as a threat to human rights, the quality of life, as well as the integrity of the public and private sectors. Anti-corruption provisions are then expected to enforce the sustainable development dimension of international investment activities and strike a balance of interests between foreign investors and host States.

More importantly, a State with an increased level of transparency through the implementation of anti-corruption provisions is viewed as a more favorable investment environment and is more likely to attract quality foreign direct investment (FDI) flows. Attracting foreign investment is one initial motivation for establishing the regime of investment treaties in order to promote international economic development; and the need for international investment never ceases, especially in the post-COVID-19 era.⁶⁴ Many empirical studies have revealed that corrupt acts discourage international economic development and would be detrimental to FDI attractiveness.⁶⁵ It is foreseeable that the highest quality investor would prefer a destination of good governance with abundant anti-corruption measures.

Nevertheless, these intended objectives are not fully accomplished through the current core anti-corruption provisions. An assessment in terms of quantity suggests that less than 2% of the total investment treaties have inserted anti-corruption provisions.⁶⁶ These treaties are mainly concluded by a handful of countries, among them the US, Canada, Japan and Brazil, as well as the EU.⁶⁷ This means that the system of IIAs is overall incompatible with the sustainable development goal in

⁶³ For studies on sustainable development and international investment law, see, e.g., Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Paul Newcombe, eds, *Sustainable Development in World Investment Law*, Global trade law series (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2011); Steffen Hindelang & Markus Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016).

⁶⁴ According to the United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2020, the COVID-19 crisis is about to dramatically and fundamentally impact the global direct investment (FDI) flows, giving rise to a 'decrease by up to 40 per cent in 2020, from their 2019 value of \$1.54 trillion'. This fall off is projected to continue by 'a further 5 to 10 per cent in 2021 and to initiate a recovery in 2022'. See *UNCTAD World Investment Report 2020: International Production Beyond the Pandemic*.

⁶⁵ See, e.g., *Foreign Direct Investment, Corruption and the OECD Anti-Bribery Convention*, OECD Working Papers on International Investment, by Adrian Blundell-Wignall & Caroline Roulet, OECD Working Papers on International Investment 2017/01 (2017) at 21–22; Andrzej Cieřlik & Łukasz Goczek, "Control of Corruption, International Investment, and Economic Growth – Evidence from Panel Data" (2018) 103 *World Development* 323–335 at 330.

⁶⁶ *UNCTAD, International Investment Agreements Navigator, Mapping of IIA Content*, [UNCTAD Mapping of IIA Content].

⁶⁷ *Ibid.*

terms of corruption deterrence. This said, a clear trend to include anti-corruption provisions can be shown from the current practice and one can reasonably conclude that States (not only developed but also developing countries) are attaching increasing importance to anti-corruption issues through IIAs.

The concentration of anti-corruption provisions further indicates an imbalance of obligations between investors and host States in a large majority of the identified investment treaties. The current anti-corruption provisions can be roughly divided into two large groups: one which aims to impose obligations on investors, and the other which contains State commitments. Anti-corruption provisions that include investor obligations are addressed either within the clause containing CSR standards or through ‘carve-out’ statements. In particular, the CSR-based anti-corruption provisions heavily rely on the investors’ voluntary regulation and make at best limited contribution to sustainable development. In treaties where a ‘carve-out’ statement has expressly excluded investments secured through corrupt acts from accessing arbitration, few responsibilities are imposed on the demand side, ultimately tilting the balance in favor of the host State.

On the other hand, provisions directed at host States come in varied forms: they may include a simple commitment to taking anti-corruption measures, or briefly indicate their adherence to establishing cooperation and improving domestic anti-corruption standards by referring to internationally recognized standards. In some IIAs, States are required to establish corruption as a criminal offense, carry out prosecution and investigation, and impose proper sanctions according to the severity of the offense. However, they are not subject to arbitration for doing or failing to do these things and it remains to be seen how a host State will be rendered internationally responsible for any non-compliance with such obligations through international investment law.⁶⁸ It is understandable that host States, as parties with vested interests in the binary approach, intend to sustain this pattern in drafting anti-corruption provisions by imposing strong obligations on investors and weak duties on themselves. This thesis argues that, from a long-term perspective, a balanced treaty with anti-corruption obligations on both the demand side and supply side would be more beneficial in terms of corruption elimination, attractiveness of FDI, the rule of law and

⁶⁸ Before concluding these IIAs, many States already have these obligations by means of other international instruments (like the UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) but the enforcement of the obligations in those areas is also deficient.

the development of international investment law. States who have more powers under the principle of sovereignty must undertake a higher degree of responsibility in combating corruption.

Likewise, in investment arbitration, an ISA tribunal should take a more balanced approach to responsibility for corrupt acts. A uniform application of the binary approach, regardless of the bilateralism and severity of the corrupt act, has led host States to self-immunize from liability and to a distortion of process and integrity of investment arbitration. The maximization of the satisfaction of the parties at hand is admittedly one pursuit of ISA, but *not the only pursuit*. The system of international dispute settlement is also expected to have an essential law-making function,⁶⁹ to further the rule of law and to implement substantive societal values inscribed in legal rules.⁷⁰

Under the global governance theory, international arbitration ‘goes beyond the fact-finding and lawmaking/law-ascertainment functions insofar as it accepts that judges and arbitrators, or some of them, can and do engage in autonomous normative action while still adhering to the rule of law’.⁷¹ This governance function requires an investment tribunal to ‘consider the impact of their rulings on states, persons, or entities not directly represented in the case before them’, especially when one sees a trend towards the constitutionalization of international law.⁷² According to acclaimed international arbitrator Sophie Nappert, the paramount role of arbitration in global governance is ‘the exercise of this substantive discretion in the decision-making process, including the process of deciding certain questions that test the limits of arbitration as a dispute settlement mechanism’; one such example is the allegation of corruption.⁷³

To this end, whenever there exists a lack of specific rules on anti-corruption in the provided investment treaty, this thesis proposes that arbitrators should apply a *dual-track approach* to address prospective allegations of corruption within the discretion of the investment tribunal. The

⁶⁹ Geir Ulfstein, “The International Judiciary” in Jan Klabbers, Anne Peters & Geir Ulfstein, eds, *The Constitutionalization of International Law* (Oxford University Press, 2009) at 127.

⁷⁰ Thomas Schultz, “The Three Pursuits of Dispute Settlement” in Alexander J Bělohlávek & Naděžda Rozehnalová, eds, *Czech (& Central Europe) Yearbook of Arbitration: The Relationship between Constitutional Values, Human Rights and Arbitration* (JurisNet, LLC, 2011) 227.

⁷¹ José E Alvarez, “What are International Judges for? The Main Functions of International Adjudication” in Cesare P R Romano, Karen J Alter & Yuval Shany, eds, *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 158 at 171.

⁷² *Ibid.*

⁷³ Sophie Nappert, “International Arbitration as a Tool of Global Governance” in Eric Brousseau, Jean-Michel Glachant & Jérôme Sgard, eds, *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (2019) at 2.

dual-track approach suggests that a positive finding of corruption should not be the sole ground for dismissal of investors' claims; it demands the tribunal to examine both alleged illegalities in the typical scenario: alleged corruption and alleged treaty violations (i.e., the investor's claims). In particular, if corruption is proven, the bribe payment should be confiscated to ACIs and the host State should prosecute the involved individual officials or make compensation. The host State should make full reparation (like compensation) for any breach of the investment treaty. But only a portion of the compensation should go to the investor depending on the factual findings, which is aimed at penalizing the investor's participation in the corrupt act; the remaining amount should be donated to ACIs.

In short, the dual-track approach takes two parallel routes and ensures that both illegalities lead to legal consequences. On one hand, a State will no longer be able to take advantage of its position to benefit from its own wrongdoing of corruption or to arbitrarily take regulatory measures forbidden by the investment treaties. On the other, the partial compensation approach to the investor's claims will serve as a warning to investors that any participation in any corrupt act will prevent them from being fully compensated for their loss in investment.

E. The Methodology

The thesis constructs a synthesis study by employing various methods: historical, interpretative, and quantitative and qualitative empirical analyses. It also includes a case analysis of the investor-State disputes where the parties have alleged a typical corrupt act occurring between the public official of the host State and the investor for the purposes of establishing the investment. The three cases in which corruption was outcome-determinative are given more focus in this thesis, given that the outcomes in these cases are heavily criticized and that they are likely to have a profound impact on how people understand the role of investment arbitration in the worldwide anti-corruption movement. Special emphasis has also been placed on certain recent cases whose decisions were rendered post-2013. This is because they were seldom discussed in legal scholarship, yet they reveal important elements of the current jurisprudence on some related issues (such as evidentiary problems).

In reviewing the question of whether ISA tribunals have properly addressed allegations of corruption, this thesis takes a historical but also evolving perspective and employs problem-solving

skills like deductive logic, inductive reasoning and analogy, to examine the legal rules that have been applied to determine the legal consequences of investor wrongdoings and host State's misconduct. It scrutinizes the origins, practical applications, and recent development of these legal principles and norms in international investment law. By doing so, we can gain a more accurate understanding of their content and scope, allowing us to glean a clear conception of the underlying interests they are intended to protect. A complete understanding of the object and purpose of a legal norm is essential for international courts and tribunals to tackle complex legal issues. The use of this methodology runs through the first part of this thesis to answer whether the binary approach is justifiable, whether the investor claims should be entirely dismissed, and whether the host State should be responsible for its public officials' corrupt acts.

However, a purely doctrinal approach has its limitations since it mainly focuses on rules of law without systematic or regulatory considerations of context, the expected results they are intended to achieve, and the effects they ultimately have. In this thesis, policies of combating corruption at transnational, regional and international levels have been taken into account. Considerations of roles that arbitrators have played or should play in contributing to this global campaign are crucial to the newly proposed *dual-track* method.

With respect to the analysis of anti-corruption provisions in investment treaties, the second part of this thesis mainly takes an empirical examination of all the existing IIAs and model investment treaties. It focuses on treaty clauses that have explicitly mentioned anti-corruption with the aim of assigning certain duties and obligations to investors, home States, and host States. This empirical study not only presents the content and implications of the identified anti-corruption provisions by category, but also analyzes their quantitative and qualitative features. The quantitative assessment has been undertaken from four different angles: number, concentration, geographical scatter and generational distribution,⁷⁴ which provides an overall picture of the States' practice in inserting anti-corruption matters in IIAs and assists in the prediction of future trends. A qualitative assessment is equally vital in order to recognize the real impacts of the provisions on the global

⁷⁴ This analysis framework was established by Professor Manjiao Chi in his paper published in Oxford's Journal of International Economic Law in 2015, where Professor Chi conducted an empirical study of the environmental protection provisions in Chinese BITs. The assessment in that article was carried out from number, concentration, generational, and geographical distribution perspectives, which encompass all the elements necessary to examine the environmental friendliness of Chinese BITs. See Manjiao Chi, "The 'Greenization' of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making" (2015) 18:3 Journal of International Economic Law 511–542 at 525–533.

fight against corruption. To do so, this thesis focuses on examining the effectiveness of anti-corruption provisions in achieving their intended objectives.

F. The Structure

In addition to an introductory chapter and concluding remarks, this thesis is structured in two parts: a case study on allegations of corruption in international investment arbitration (Part One) and an empirical analysis focusing on the anti-corruption provisions found in investment treaties (Part Two). The discussions from the two pillars of international investment law, namely the mechanism of ISA and the obligations contained in the IIAs themselves, are indispensable and complementary to one another for the purpose of understanding the current anti-corruption obligations owed by host States and investors, along with the legal consequences in cases of non-compliance, within the broad context of international investment law. This introduction section presents the thesis topic and the research question, introduces the theoretical approaches that guide the development of this thesis, and provides a brief overview of each part and key findings in each chapter.

Part One intends to re-examine the caselaw on corruption in ISA. It is observed that host States are increasingly bringing allegations of corruption to investment arbitration proceedings; the related disputes and the tribunals' discussions on corruption have also been extensively reviewed in the literature. The chief scholarly works that closely examine the subject at hand commonly focus on *World Duty Free v. Kenya* (2006) and *Metal-Tech v. Uzbekistan* (2013), as well as earlier disputes. Chapter 1 begins by presenting several significant attributes of the corruption claims with an emphasis on decisions and awards in the latest cases that are not fully addressed in earlier academic works. It additionally underlines the three cases where allegations of corruption were supported by tribunals and which have profoundly influenced the current jurisprudence.

The bilateral nature of corruption is undeniable as each corrupt act involves two sides: the supply side and the demand side. Both sides in a situation of corruption are subject to liability determined according to the severity of the acts in question. Chapters 2 and 3 respectively explore the legal rules and liabilities governing both sides of corruption in international investment law. Chapter 2 scrutinizes the three legal rules governing investor misconduct (i.e., the legality requirement, the 'clean hands' doctrine, and transnational public policy), on which ISA tribunals have relied to dismiss investors' claims for lack of jurisdiction or as inadmissible. Chapter 2, however, argues

that these three concepts are not properly applicable to deal with corruption because tribunals have failed to give effect to the bilateral nature of corruption and have failed to consider the high risk that host States may abuse their power (such as taking arbitrary measures on investment and inducing more corrupt acts) without fear of being charged.

Chapter 3 explores the other end of the spectrum, namely the supply side of corruption. It focuses on the consideration of liability for corrupt acts committed by the public officials of the host States and aims to propose a novel and justifiable approach to balance the responsibility for the two sides of corruption whilst preserving the rule of law and contributing to anti-corruption in international investment. It clarifies that a public official's acts of corruption, whether in the form of extortion or merely acceptance of bribes, should be deemed conduct *ultra vires* of the State and should thus be attributable to the host State. This action and/or the related omission (e.g., the host State failing to prevent acts of corruption by a high-ranking official) may constitute a breach of treaty obligations (such as the fair and equitable treatment), depending on the precise standards enshrined in a particular treaty. More importantly, Chapter 3 calls for a repudiation of the binary approach and proposes a dual-track approach which specifically suggests examining both allegations of corruption and claims of investors.

Part Two presents an empirical analysis of the broader expansion of anti-corruption provisions that can be found in the current over 3,000 IIAs and in the newest model investment agreements. Chapter 4 proceeds by introducing the interrelation between the IIA reforms underway and anti-corruption provisions, as well as discussing the driving forces and realistic expectations that inspire and support the proliferation of anti-corruption provisions in IIA practices. It uncovers that States taking a 'normative' strategy to anti-corruption attempt to attain functionally differentiated objectives from multiple angles, including, *inter alia*, offering practical tools for investment arbitration, enhancing the sustainable development dimension of international investment policy, striking a balance between investment protection and the right to regulate, and attracting FDI flows.

Chapter 5 focuses on a typology analysis of the core anti-corruption provisions directed at investors and States, which can be further divided in terms of varied wordings and implications. Provisions that make demands of foreign investors can be roughly categorized into two groups: (1) CSR-based anti-corruption provisions and (2) 'carve-out' anti-corruption provisions. The former, which encourage investors to voluntarily comply with CSR standards, impose a weak obligation

on investors, while the latter seem to impose a stronger one, depriving investors of treaty protection if the investment is established by any corrupt measures. The other facet of anti-corruption provisions lies in State commitments, which similarly exist in multiple forms. For the most part, these provisions involve (1) demonstrating a rough commitment to eliminating corruption, (2) aiming at establishing transnational cooperation and improving anti-corruption standards, as well as (3) requiring concrete action by States at the legislative, juridical, and administrative levels.

For an empirical study, a presentation of the main anti-corruption provisions would be incomplete without both quantitative and qualitative assessments. Chapter 6 carries out the quantitative assessment by surveying the number, concentration, geographical scatter and generational distribution of anti-corruption provisions in the context of vast investment treaties. It suggests that the current integration of anti-corruption provisions is still fragmented and requires more engaged practice in curbing corruption through investment agreements. We must also accelerate this practice to meet the growing need for corruption deterrence at the international level. Besides, the quality assessment undertaken in Chapter 6 focuses on examining whether the existing anti-corruption provisions have an effective impact on realizing their objectives (explored in Chapter 4). Given that the practice of incorporating anti-corruption provisions has grown from a blank slate, it should be acknowledged that incorporating anti-corruption issues in investment treaties is a big step towards corruption prevention in international investment law. However, different types of anti-corruption provisions have varying weaknesses. In particular, the identified provisions directed at investor obligations are rather weak in enhancing sustainable development and safeguarding an equilibrium between investors and host States. Finally, the concluding chapter highlights the key results from each chapter and summarizes the main arguments of this thesis.

PART ONE ALLEGATIONS OF CORRUPTION IN INVESTMENT ARBITRATION

CHAPTER 1 SIGNIFICANT ATTRIBUTES OF ALLEGATIONS OF CORRUPTION IN INVESTMENT ARBITRATION

When thinking about corruption in the context of investor-State arbitration (ISA), cases like *World Duty Free v. Kenya* (2006)¹ and *Metal-Tech v. Uzbekistan* (2013)² come to mind first. These two cases have been intensively discussed in academic works, mostly because of the *decisive* but *controversial* approaches adopted by the arbitrators therein. In fact, there exists another investment case – *Spentex v. Uzbekistan* (2016)³ – where the tribunal adopted a similar approach with that in *World Duty Free* and that in *Metal-Tech*, namely dismissing the investor’s claims in their entirety upon a positive finding of corruption.⁴

Besides, there are a number of cases where the parties failed to substantiate the alleged corrupt activities. In his book *Corruption in International Investment Arbitration* (Oxford University Press, 2014), Dr. Aloysius Llamzon discussed approximately 20 of such cases in which awards were granted from 1992 to 2013.⁵ In many post-2013 ISA cases, tribunals have also held significant discussions on corruption (though unproven) from different facets. Yet, these new cases have seldom been analyzed or examined in academic literature discussing corruption and international investment law.

¹ *World Duty Free Company v. Republic of Kenya*, ICSID Case No Arb/00/7, Award of 4 October 2006, 2006 [*World Duty Free v. Kenya*, Award (2006)].

² *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award of 4 October 2013, 2013 [*Metal-Tech v. Uzbekistan*, Award (2013)].

³ *Spentex Netherlands, BV v. Republic of Uzbekistan*, ICSID Case No ARB/13/26, 2016 [*Spentex Netherlands v. Uzbekistan*].

⁴ In *Unión Fenosa Gas v. Egypt*, the majority of arbitrators did not support the allegation of corruption due to insufficient evidence. But Mr. El Komy has expressed his dissenting opinion that the adduced circumstantial evidence was sufficient to establish that corruption had been conducted and thus the claims should be dismissed. See *Unión Fenosa Gas, SA v. Arab Republic of Egypt*, ICSID Case No ARB/14/4, *Dissenting Opinion of Arbitrator Mark Clodfelter* (31 August 2018), 2018 at paras 2–19 [*Unión Fenosa Gas v. Egypt, Dissenting Opinion of Arbitrator Mark Clodfelter* (2018)].

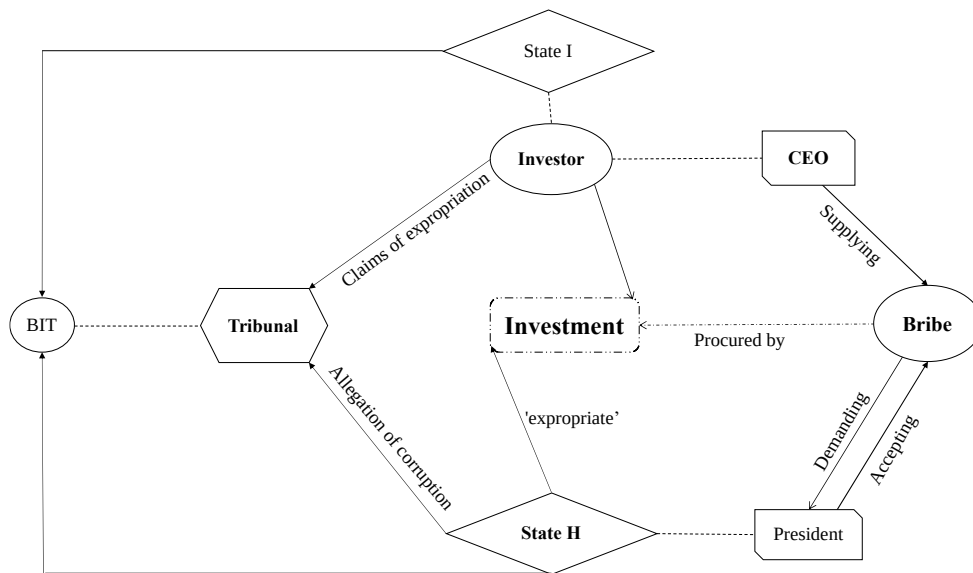
⁵ Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014) at 102–192, 305–320.

The existing investment arbitration awards and decisions on allegations of corruption have demonstrated both divergence and convergence. To obtain a basic understanding of the current case law on this issue, this chapter attempts to demonstrate certain important attributes of these disputes, including, *inter alia*, the typical scenario of allegations of corruption, the obscure evidentiary standards applied in the fact-finding process, the binary approach used to address the corruption claims, and other observations. Special attention is given to three determinative cases (i.e., *World Duty Free*, *Metal-Tech*, and *Spentex*) and to selected recent cases whose decisions were rendered post-2013. These attributes are essential for the discussion in the following chapters about how corruption should be approached.

A. The Typical Scenario of Allegations of Corruption

Diverse modes of corrupt acts may occur in both domestic and transnational business transactions. Both investors and host States may bring forth an allegation of corruption to defend their claims before ISA tribunals.⁶ However, in most investment arbitration cases that involve discussions on corruption issues, it is the host State party that raises corruption as one of the jurisdictional objections against investors' claims. It argues that the investment was obtained through corrupt acts between the investor and the public official of the host State; such an investment is deprived of treaty protection or access to investor-State dispute settlement. This relationship is briefly illustrated in the following diagram.

⁶ Yueming Yan, "A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?" in Yuwen Li, Tong Qi & Cheng Bian, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 227 at 228–229.



(Typical scenario of corrupt acts and allegations of corruption in ISA)

We can observe the allegation of corruption as outlined above in a large portion of investment disputes where corruption is involved. Host States normally submit typical allegations of corruption as objections against the claims raised by investors in accordance with an investment treaty, an investment contract, or other sources. The legal rules addressing the allegations of corruption and its immediate outcomes (at the jurisdictional or merits stages) may differ between treaty-based cases and contract-based cases.

1. Treaty-Based

Investors' claims may be based on *an investment treaty* such as a bilateral investment treaty (BIT) concluded between the host State and the home State of the investor. In such a treaty-based case, an allegation of corruption is to counter the investor's submissions such as unlawful expropriation without compensation or failure to accord fair and equitable treatment (FET).

For instance, in *Metal-Tech v. Uzbekistan*, the claimant – Metal-Tech – filed a request for arbitration at the International Centre for Settlement of Investment Disputes (ICSID) under the Israel-Uzbekistan BIT. It claimed that the Respondent – the government of Uzbekistan – had violated its obligations under the investment treaty, including, *inter alia*, unlawful expropriation without compensation, failure to accord FET, unreasonable and discriminatory measures, and failure to accord full protection and security to Metal-Tech's investment.⁷ The government of

⁷ *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at para 108.

Uzbekistan raised several jurisdictional objections, one of which was the allegation of corruption. It contested that the tribunal lacked jurisdiction over this dispute because the claimant's engagement in corrupt practices constituted a breach of Uzbek law and thus a violation of the legality requirement enshrined in Article 1(1) of the Israel-Uzbekistan BIT.⁸

Glencore v. Colombia (1) that refers to *Glencore International A.G. and C.I. Prodeco S.A. v. Colombia* is another treaty-based arbitration case involving corruption.⁹ C.I. Prodeco S.A. (Prodeco), a wholly-owned subsidiary of Glencore International A.G. (Glencore),¹⁰ signed a coal mining contract with a State-owned company – Carbocol – which was granted by the Colombian Ministry of Mines and Energy in 1989 for a period of 30 years.¹¹ The parties to this contract signed several amendments, including the Eighth Amendment that proved controversial in this case. The claimants requested that the tribunal declare Colombia's breaches of the non-impairment provision, the FET provision, and the umbrella clause of the Colombia-Switzerland BIT, as well as that it order Colombia to 'continue to perform and observe the Eighth Amendment'.¹² The allegation of corruption in this case was raised by the respondent in the form of a 'legality objection' to jurisdiction. The investor, as alleged by the respondents, procured this Eighth Amendment through acts of corruption, misconduct which is prohibited under international and Colombian law. Accordingly, the tribunal did not have jurisdiction over the claims raised.¹³

A similar allegation of corruption was raised in some other treaty-based investment arbitration cases, including *Vladislav Kim v. Uzbekistan*,¹⁴ *Unión Fenosa Gas v. Egypt*,¹⁵ *Karkey v.*

⁸ *Ibid* at para 110.

⁹ See *Glencore International AG and CI Prodeco SA v Republic of Colombia*, ICSID Case No ARB/16/6, Award of 27 August 2019, 2019 at paras 1, 9 [*Glencore v. Colombia (1)*, Award (2019)]. The two claimants, together with another Colombian subsidiary of Glencore International A.G., have recently filed a second ICSID arbitration against Colombia, also based on the Colombia-Switzerland BIT (2006). This newly initiated case has now been recognized as 'Glencore v. Colombia (2)'. See *Glencore International AG, C I Prodeco SA, and Sociedad Portuaria Puerto Nuevo SA v Republic of Colombia*, ICSID Case No ARB/19/22, [*Glencore v. Colombia (2)*]; "Glencore initiates second investment treaty arbitration against Colombia", (11 July 2019), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/glencore-initiates-second-investment-treaty-arbitration-against-colombia/>>.

¹⁰ *Glencore v. Colombia (1)*, Award (2019), *supra* note 9 at para 2.

¹¹ *Ibid* at paras 141, 145. In the award, the tribunal noted that the Colombian Ministry of Mines and Energy later designated other entities to replace Carbocol acting as a party to the mining contract.

¹² *Ibid* at para 547.

¹³ *Ibid* at paras 570–571.

¹⁴ *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction of 8 March 2017, 2017 [*Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017)].

¹⁵ *Unión Fenosa Gas, SA v Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award of 31 August 2018, 2018 [*Unión Fenosa Gas v. Egypt*, Award (2018)].

Pakistan,¹⁶ *Georg Gavrilovic v. Croatia*,¹⁷ *Cortec Mining v. Kenya*,¹⁸ *Krederi v. Ukraine*,¹⁹ *Tethyan Copper Company v. Pakistan*,²⁰ *Fraport v. Philippines (2)*,²¹ *Lao Holdings v. Laos (1)* and *Sanum Investments v. Laos (1)*.²²

2. Contract-Based

An investor may submit its claims in accordance with an *investment contract* signed directly with the government of the host State. Those making an allegation of corruption against the investor's claims on the basis of an investment contract would normally argue that this contract is voidable and has no legal effects, such as in cases of *Croatia v. MOL Hungarian Oil and Gas*²³ and *Niko*

¹⁶ *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1, Award of 22 August 2017, 2017 [Karkey v. Pakistan, Award (2017)].

¹⁷ *Georg Gavrilovic and Gavrilovic d.o.o v Republic of Croatia*, ICSID Case No ARB/12/39, Award of 25 July 2018, 2018 [Georg Gavrilovic v. Croatia, Award (2018)].

¹⁸ *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No ARB/15/29, Award of 22 October 2018, 2018 [Corte Mining v. Kenya].

¹⁹ *Krederi Ltd v Ukraine*, ICSID Case No ARB/14/17, Award of 2 July 2018 (Excerpts), 2018 [Krederi v. Ukraine, Award (Excerpts) (2018)].

²⁰ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Jurisdiction and Liability of 10 November 2017, 2017 [Tethyan Cooper v. Pakistan, Decision on Jurisdiction and Liability (2017)].

²¹ *Fraport v. Philippines (2)* refers to the second ICSID arbitration proceeding initiated by Fraport AG Frankfurt Airport Services Worldwide, a German company, against the government of the Philippines, according to the provisions of the Germany-Philippines BIT (1997) where corruption allegations were invoked by the respondent. Prior to that, Fraport initiated its first ICSID arbitration for the same dispute concerning an international terminal concession but its claim was dismissed by the majority of the then-composed tribunal (the first tribunal) for lack of jurisdiction in its 2007 Award; the 2007 Award was later annulled by a newly established *ad hoc* Committee in the 2010 Annulment Decision. Fraport immediately re-raised its claims in this second ICSID arbitration proceeding in 2011. But again, the second tribunal declined to hear the merits after a finding of lack of jurisdiction over the dispute in the 2014 Award. See *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12, Award of 10 December 2014, 2014 at paras 1, 6, 20, 530 [Fraport v. Philippines (2), Award (2014)]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award of 16 August 2007, 2007 [Fraport v. Philippines (1), Award (2007)]; *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide of 23 December 2010, 2010 [Fraport v. Philippines (1), Decision on the Application for Annulment (2010)].

²² *Sanum Investments v. Laos (1)* and *Lao Holdings v. Laos (1)* refer to the first pair of arbitration proceedings raised against the government of Laos under the China-Laos BIT (1993) and the Netherlands-Laos BIT (2003), respectively. Although these two cases were initiated before different arbitration institutions applying different arbitration rules and each issued several decisions before the final awards, the two cases were heard jointly from 2017 by two tribunals who were similarly composed but for different presidents. The two awards reached many identical holdings; in particular, they share *verbatim* language on discussions about and decisions regarding the corruption allegations. See *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB (AF)/12/6, Award of 6 August 2019, 2019 [Lao Holdings v. Laos (1), Award (2019)]. *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No 2013-13, Award of 6 August 2019, 2019 [Sanum v. Laos (1), Award (2019)].

²³ See *Republic of Croatia v MOL Hungarian Oil and Gas Company Plc*, PCA CASE No 2014-15, Final Award of 23 December 2016, 2016 [Croatia v. MOL Hungarian Oil and Gas, Final Award (2016)]. MOL has actually brought another arbitration case against the Republic of Croatia at the ICSID pursuant to the Energy Chapter Treaty (ECT)

Resources v. Bangladesh.²⁴ The most notable one, however, is *World Duty Free v. Kenya*. In this case, World Duty Free launched arbitration proceedings against the Republic of Kenya in accordance with the arbitration agreement under the 1989 Agreement (‘the Contract’) effective between the claimant and the host State,²⁵ claiming that ‘the Government of Kenya expropriated the Claimant’s property and destroyed its rights under the 1989 Agreement in using its executive, judiciary, and agents like Kamlesh Pattni and his hand-picked purported receivers’.²⁶ Among other preliminary objections, Kenya raised an allegation of corruption, contending that ‘the Contract upon which its [the claimant’s] claims in these proceedings are based was procured by paying a bribe of US\$2 million to the then President of Kenya, Daniel arap Moi’ and that ‘[a]s a matter of Kenyan, English and International ordre public, the resulting Contract does not have the force of law’.²⁷ Kenya thus submitted that the 1989 Agreement is unenforceable and requested the dismissal of the investor’s claims.²⁸

3. Other Sources

Domestic laws may be another type of legal authority that enables an investor to launch arbitration proceedings against the host State. In *Getma International and others v. Guinea (2)*,²⁹ the claimant alleged that the host State’s termination of the concession contract constituted dispossession of the claimants’ investment in a discriminatory manner without compensation and was in breach of the

which is still ongoing. See *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No ARB/13/32, [MOL Hungarian Oil and Gas v. Croatia].

²⁴ *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No ARB/10/11 and No ARB/10/18, Decision on Jurisdiction of 19 August 2013, 2013 at para 377 [*Niko Resources v. Bangladesh*, Decision on Jurisdiction (2013)]; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No ARB/10/11 and No ARB/10/18, Decision on the Corruption Claim of 25 February 2019, 2019 at para 379 [*Niko Resources v. Bangladesh*, Decision on the Corruption Claim (2019)].

²⁵ The arbitration agreement in the 1989 Agreement entitles the parties to submit investment disputes arising out of the contract to the jurisdiction of the ICSID for settlement by arbitration. See *World Duty Free v. Kenya*, Award (2006), *supra* note 1 at paras 4–6.

²⁶ *Ibid* at para 74.

²⁷ *Ibid* at para 105.

²⁸ *Ibid*.

²⁹ *Getma International and others v. Guinea (2)* refers to the second arbitration case initiated by Getma International (and its three affiliates) for the same dispute with that in *Getma International v. Guinea (1)* (namely dispute of termination of the concession contract). *Getma International v. Guinea (1)* was raised by Getma International against the government of Guinea at the Common Court of Justice Arbitration (CCJA) of the Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA) in May 2011 in the application of CCJA Arbitration Rules. *Getma International and others v. Guinea (2)* was brought before the ICSID.

Guinean Investment Code and customary international law (CIL).³⁰ The host State submitted an allegation of corruption that this concession contract was obtained by fraud and by corruption and that the illegality of investments barred the tribunal to exercise jurisdiction over this dispute.³¹

Spentex v. Uzbekistan is a ‘hybrid’ case where the investor invoked the protection of several documents, including an investment treaty (i.e., the Netherlands-Uzbekistan BIT), Uzbek foreign investment laws, and a separate investment agreement concluded between Spentex and Uzbek authorities.³² Spentex is a Dutch subsidiary of an Indian textile company that acquired three Uzbek cotton processing plans in 2006.³³ It alleged that the government of Uzbekistan peremptorily removed the value-added tax subsidy applied to cotton input purchases, which constituted a breach of provisions of indirect expropriation, FET/minimum standard of treatment and most-favored-nation (MFN) treatment.³⁴ The respondent State later argued that the investment on which the claims were based in this case had been acquired through corruption and that these claims are contrary to the requirements under international public policy and the ‘unclean hands’ doctrine.³⁵ Uzbekistan then requested that the tribunal declare investor’s claims inadmissible.³⁶

B. A Corrupt Relationship

An alleged corrupt relationship is central to a corruption claim. In investment arbitration, corrupt acts are allegedly conducted between the representative of the investor (the supply side) and the public official of the host State (the demand side) for the purpose of securing the investment.

³⁰ *Getma International and others v Republic of Guinea (2)*, ICSID Case No ARB/11/29, Award (French) of 16 August 2016, 2016 at paras 104–107 [*Getma International and others v. Guinea (2)*, Award (2016)].

³¹ *Ibid* at paras 111–112.

³² Luke Eric Peterson, “Indian company invokes Dutch BIT – rather than Indian treaty – in new arbitration over withdrawn subsidies in Uzbekistan”, (30 September 2013), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/indian-company-invokes-dutch-bit-rather-than-indian-treaty-in-new-arbitration-over-withdrawn-subsidies-in-uzbekistan/>>.

³³ *Ibid*.

³⁴ See “*Spentex v. Uzbekistan*, Investment Dispute Settlement Navigator, UNCTAD Investment Policy Hub”, online: <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/545/spentex-v-uzbekistan>>.

³⁵ Vladislav Djanic, “In newly unearthed Uzbekistan ruling, exorbitant fees promised to consultants on eve of tender process are viewed by tribunal as evidence of corruption, leading to dismissal of all claims under Dutch BIT”, (22 June 2017), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/>>.

³⁶ *Ibid*.

1. Between Representatives of the Investor and Public Officials of the Host State

In some cases, the Chief Executive Officer (CEO) or Chairman of the investor supplies the bribe, and the President or Prime Minister receives the payment, such as in *World Duty Free v. Kenya*. In that case, the substantiated corrupt act was committed between the CEO and shareholder of World Duty Free (Mr. Nasir Ibrahim Ali) and the then President of Kenya (Mr. Daniel arap Moi) to secure the 1989 Agreement.³⁷ The involved public official may also work in other positions (who nonetheless have the legal power to approve or secure foreign investments). In *Cortec Mining v. Kenya*, the respondent alleged that the then Mining Commissioner of Kenya (Mr. Moses Masibo) worked corruptly with a shareholder of the investor (Mr. Jacob Juma) when Mr. Masibo *issuing* the investment.³⁸

Sometimes, the accused public official did not engage in the alleged corruption in a direct manner but through intermediaries like relatives of the public official or ‘consultants’. In such a situation, the respondent is required to establish connections between the intermediary and the government of the host State. In *Vladislav Kim v. Uzbekistan*, the respondent submitted that the claimants made their investments through a corrupt payment in the amount of US \$ 33.98 million to Ms. Gulnara Karimov, the daughter of the then President, Islam Karimov, and an overpayment to Mr. Bizakov (a consultant), an alleged ‘conduit’ between the claimants and Ms. Karimov. However, the tribunal concluded that ‘Respondent offers no evidence that Mr. Bizakov had or has any relationship to the Government of Uzbekistan. Respondent also offers no evidence that Mr. Bizakov had any contact with the Government of Uzbekistan’.³⁹

In *Metal-Tech v. Uzbekistan*, the bribery was primarily conducted between Mr. Rosenberg (the Chairman and CEO of Metal-Tech) and the entities controlled by the alleged ‘consultants’⁴⁰—Mr. Chijenok and Mr. Sultanov. The tribunal confirmed that both of them had ‘significant connections with Uzbek Government officials responsible for the approval, establishment and operation of the Claimant’s investment.’⁴¹ Mr. Chijenok was a government official working in the Office of the

³⁷ *World Duty Free v. Kenya*, Award (2006), *supra* note 1 at para 130.

³⁸ *Corte Mining v. Kenya*, *supra* note 18 at para 183.

³⁹ *Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017), *supra* note 14 at para 605.

⁴⁰ Mr. Rosenberg conceded that he had concluded several consulting agreements with three individuals—Messrs Victor Mikhailov, Uygur Sultanov and Igor Chijenok – which totaled approximately US \$4 million. See *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at para 197.

⁴¹ *Ibid* at para 225.

President of Uzbekistan and Mr. Sultanov was the brother of the then Uzbek Prime Minister who ‘had the delegated authority to monitor and oversee the Claimant’s investment’.⁴²

Interestingly, in *Spentex v. Uzbekistan*, the respondent raised an allegation of corruption but refused to provide the name of the involved government official. Despite a lack of direct evidence that Uzbek officials had received bribes, the tribunal believed that “where corruption is concerned, ‘it takes two to tango’” and that ‘any allegation of corruption [raised by the host State] necessarily implies that the respondent’s own officials were also implicated’.⁴³ The tribunal found an exorbitant amount of US \$6 million paid to a ‘consultant’, which ‘could only have plausibly been used to pay off Uzbek officials’.⁴⁴

2. A Causal Link between the Investment and the Alleged Corrupt Acts

The need for a causal link between the investment and the alleged corrupt acts has been emphasized in several investment arbitration cases. In *Niko Resources v. Bangladesh*, the investor initiated the arbitration proceedings based on a Joint Venture Agreement (JVA) and a Gas Purchase and Sale Agreement (GSPA) signed with the respondents.⁴⁵ The respondents then invoked an allegation of corruption, contending that the very agreement on which the tribunal’s jurisdiction would be based was procured through bribery.⁴⁶ The alleged corrupt acts were raised in reliance upon a criminal investigation and conviction of the claimant’s parent company (i.e., Niko Canada) held by Canadian institutions and a number of other investigations and proceedings conducted in Bangladesh as indications of acts of corruption by the claimant, including, *inter alia*, an investigation by the Bangladesh Anti-Corruption Commission.⁴⁷ The tribunal concluded that the claimant committed corruption which was sanctioned in the Canadian proceedings;⁴⁸ however, no influence as to the conclusion of the JVA and the GSPA was proved to have been obtained through this corruption.⁴⁹ The tribunal was also aware that no other investigations referred to by the respondents led to ‘any trial, let alone conviction for acts of corruption that may be attributed to

⁴² *Ibid* at paras 225–226.

⁴³ Djanic, *supra* note 35.

⁴⁴ *Ibid*.

⁴⁵ *Niko Resources v. Bangladesh, Decision on Jurisdiction (2013)*, *supra* note 24 at para 3.

⁴⁶ *Ibid* at para 377.

⁴⁷ *Ibid* at paras 393–413.

⁴⁸ *Ibid* at para 423.

⁴⁹ *Ibid* at para 429.

the Claimant and its group’.⁵⁰ As a result, given that there exists ‘no link of causation between the established acts of corruption and the conclusion of the agreements’, the allegation of corruption was dismissed.⁵¹ The tribunal re-stressed the necessity of establishing such causation in a later stage where a second examination of allegations of corruption was held.⁵²

In *Tethyan v. Pakistan*, the tribunal concurred with the need for the causal link but held that there is no need to establish strict ‘*but-for*’ causation, taking into consideration the evidentiary difficulties associated with corruption allegations.⁵³ In this sense, a causal link that ‘the act of corruption must have contributed to obtaining a right or benefit related to the investment’ is necessary; however, it ‘need not be the only cause and the right or benefit need to be one to which the investor would not be entitled or that it would not have been able to obtain by legitimate means.’⁵⁴

3. Timing of Corruption

The timing of corruption has been occasionally highlighted by investment tribunals. This requirement is sometimes associated with the legal rules applicable in a certain case and may consequently affect the outcome of the allegation. For instance, the allegation of corruption raised in *Metal-Tech* was based on the legality requirement contained in Article 1(1) of the Israel-Uzbekistan BIT. This clause provides that “[t]he term ‘investment’ shall comprise any kind of assets, *implemented* in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, including.....” (emphasis added).⁵⁵ Given that ‘implemented’ was applied to ‘assets’, the tribunal concluded that the wording of the legality requirement under this particular treaty refers to ‘the time when the investment was made’.⁵⁶ To put it another way, the BIT requires that the investment is *initially* established legally.⁵⁷

⁵⁰ *Ibid* at para 426.

⁵¹ *Ibid* at paras 456–457, 485.

⁵² *Niko Resources v. Bangladesh, Decision on the Corruption Claim* (2019), *supra* note 24 at para 734.

⁵³ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan, ICSID Case No ARB/12/1, Decision on Respondent’s Application to Dismiss the Claims (With Reasons) of 10 November 2017*, 2017 at para 335 [*Tethyan Copper v. Pakistan, Decision on Respondent’s Application to Dismiss the Claims* (2017)].

⁵⁴ *Ibid* at para 336.

⁵⁵ Article 1(1), *Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Reciprocal Promotion and Protection of Investments*, 1994.

⁵⁶ *Metal-Tech v. Uzbekistan, Award* (2013), *supra* note 2 at para 193.

⁵⁷ *Ibid*.

Moreover, in *Fraport v. Philippines (2) (2014)*, the concerned legality clause provides that “the term ‘investment’ shall mean any kind of asset *accepted* in accordance with the respective laws and regulations of either Contracting States...” (*emphasis added*). The word ‘accepted’ was interpreted by the tribunal as referring to the time when the host State received the investment (i.e., at the time the investment is made).⁵⁸ Therefore, when addressing the allegation of corruption premised on the legality requirement contained in the applied BIT, the tribunal made it clear that this examination is conducted to investigate whether or not the alleged corrupt act was conducted ‘when making its Initial Investment’.⁵⁹ The tribunal finally dismissed this jurisdictional objection because, firstly, there did not exist sufficient evidence to substantiate the alleged corrupt acts, and secondly, even if proven, they were ‘intervened after the time of Fraport’s Initial Investment’.⁶⁰

The tribunal in *Vladislav Kim v. Uzbekistan* also emphasized that only corruption that occurred at the time when the investment was initiated could be a bar to ICSID tribunals exercising jurisdiction. It also stated that Uzbekistan’s counterclaims on the continuing bribery of Uzbek officials after the admission of investment would be discussed in the merits award, which had not yet been issued.⁶¹

C. Substantive Standards of Proof

While corruption claims have been increasingly raised by host States, most of them have not prospered. Failure to substantiate the claims has been the main reason for dismissing these corruption submissions. Corruption is difficult to prove, and related evidentiary standards (the standard of proof, in particular) has formed one of the most controversial topics.

Ever since the emergence of the corruption defense, ISA tribunals have had distinct and variable holdings on the standard of proof that should be applied in proving corruption, embracing both lower standards like ‘balance of probabilities’ in *Georg Gavrilovic v. Croatia*⁶² and higher

⁵⁸ *Fraport v. Philippines (2)*, Award (2014), *supra* note 21 at para 329.

⁵⁹ *Ibid* at para 469.

⁶⁰ *Ibid* at paras 469–481.

⁶¹ *Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017), *supra* note 14 at para 553.

⁶² In the process of examining the alleged illegalities, the tribunal had occasionally mentioned the standard of the balance of probabilities, such statements as ‘...have led the Tribunal to conclude, on a balance of probabilities that the bankruptcy was orchestrated by the government...’ and ‘it is likely on a balance of probabilities that the State orchestrated the potentially illegal scheme’. See *Georg Gavrilovic v. Croatia*, Award (2018), *supra* note 17 at paras 350, 398. See also Bohmer, Lisa, “In jurisdictional ruling, arbitrators view improprieties surrounding claimant’s

standards such as ‘clear and convincing’ in *Fraport v. Philippines (2)*⁶³ or ‘reasonable certainty’ in *Metal-Tech v. Uzbekistan*.⁶⁴ According to *Lao Holdings v. Laos (1)*, the ‘balance of probabilities’ standard requires ‘the trier of fact to stand back and make an overall assessment’ while the ‘clear and convincing’ standard ‘puts the focus more closely on the building blocks of the evidence to ensure a rigorous testing’.⁶⁵ Besides, there are several cases in which tribunals have refused to apply any of these standards, but have assessed whether or not it was persuaded that the evidence adduced was sufficiently ‘solid’ and ‘persuasive’, such as in *Tethyan v. Pakistan*.⁶⁶ When making a decision on the standard of proof, ISA tribunals have taken different concerns into consideration, such as the applicable rules, the nature of the proceeding, and the seriousness of the allegation.

1. Rules in the Investment Treaty or Domestic Laws

The standard of proof regulated in the applicable legal rules (a BIT or the domestic laws) may be referred to by ISA tribunals. The tribunal in *Glencore v. Colombia (1)* first wanted to use the standard of proof enshrined (if any) in the BIT or the arbitration rules (i.e., the ICSID Convention Arbitration Rules (The Rules of Procedure for Arbitration Proceedings of ICSID) in this case). However, an absence of such provisions in these applicable norms led the tribunal to finally adopt the ‘preponderance of the evidence’ standard which it deemed the traditional standard to deal with allegations of corruption.⁶⁷

The *Vladislav Kim* tribunal briefly recognized that in cases where the alleged violation is directed at domestic law of the host States, ‘the standard of proof to be employed is that provided for in that law’.⁶⁸ In this respect, the standard of proof used before Uzbekistan courts to adjudicate an alleged violation of Article 211 (Bribe-giving) of the Uzbekistan Criminal Code should apply.⁶⁹

acquisition of assets as part of a quid pro quo where he transported ‘suitcases of cash’ out of country so as to assist his country in eluding an international embargo”, (13 August 2018), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/in-newly-surfaced-ruling-arbitrators-view-improprieties-surrounding-claimants-acquisition-of-assets-as-part-of-a-quid-pro-quo-where-he-transported-suitcases-of-cash-out-of-country-so-as-to-assi/>>.

⁶³ *Fraport v. Philippines (2)*, Award (2014), *supra* note 21 at para 479.

⁶⁴ *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at para 243.

⁶⁵ *Lao Holdings v. Laos (1)*, Award (2019), *supra* note 22 at para 109.

⁶⁶ *Tethyan Copper v. Pakistan*, Decision on Respondent’s Application to Dismiss the Claims (2017), *supra* note 53 at para 308.

⁶⁷ *Glencore v. Colombia (1)*, Award (2019), *supra* note 9 at para 669.

⁶⁸ *Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017), *supra* note 14 at para 545.

⁶⁹ *Ibid.*

2. Seriousness of the Accusation

Some ISA tribunals have pointed out that allegations of corruption are ‘particularly serious’.⁷⁰ Tribunals holding such opinions usually use a relatively higher standard, like in *Karkey v. Pakistan*. The two parties in this case held diverging opinions on the standard of proof – Karkey submitting the ‘clear and convincing’ standard and Pakistan arguing for the application of the balance of probabilities standard.⁷¹ The tribunal finally supported Karkey’s submission on the ground of the seriousness of the accusation of corruption,⁷² taking into account the involvement of officials at the highest level of the Pakistani Government.⁷³

Remarkably, the *Croatia v. MOL Hungarian Oil and Gas* tribunal explained why a higher standard is generally required for serious allegations and explained that it took the corruption claims ‘extremely seriously’.⁷⁴ It firstly endorsed the standard of ‘balance of probabilities’ as an appropriate standard of proof in civil cases and then drew the attention to consider that ‘although an adverse finding against MOL in relation to the corruption allegation would have severe financial and reputational consequences, it would not lead to the incarceration or fine of any individual.’⁷⁵ It invoked the principle of the ‘legal presumption of good faith’ in this context, which might explain “why it is often said that proof of ‘serious’ allegations require something more than a preponderance of the evidence.”⁷⁶

The difficulty of the subject is likely to be related to the general legal presumption of good faith. In civil actions for negligence or breach of contract, there is no presumption that a defendant has complied with an agreement or has conducted himself with due care. True enough, the plaintiff has the burden of proof, but a mere preponderance of the evidence, meaning only “*more likely than not*”, will suffice. But if the particular claim being made involves an accusation of bad faith -- such as misrepresentation or wilful endangerment -- the presumption of good faith means that the starting point is, in effect, a presumed preponderance *against* the claim. How could evidence that shows that an allegation is more likely true than false overcome a presumption that the allegation is *not true*, unless one is prepared to take the unacceptable step of disregarding the presumption of good faith? (A defendant does not have to prove the absence of breach or the absence of negligence, so if the presumption of good faith is to mean anything it must surely put the defendant in an *even better* position.)

⁷⁰ See *Getma International v Republic of Guinea (1)*, CCJA Case No 001/2011/ARB, Tribunal Award (French) of 29 April 2014, 2014 at para 76 [*Getma International v. Guinea (1)*, Award (2014)].

⁷¹ *Karkey v. Pakistan*, Award (2017), *supra* note 16 at para 490.

⁷² *Ibid* at para 492.

⁷³ *Ibid*.

⁷⁴ *Croatia v. MOL Hungarian Oil and Gas*, Final Award (2016), *supra* note 23 at paras 92–94.

⁷⁵ *Ibid* at para 115.

⁷⁶ *Ibid* at paras 118–119.

More particularly with regard to the standard, the tribunal seemingly agreed that it should not be ‘mere suspicions’, nor need it to be ‘absolute certainty’.⁷⁷ Rather, the tribunal considered the issue ‘a matter of persuasion’, i.e., whether it is convinced on the evidence it has examined that the alleged bribe indeed took place.⁷⁸

This is a matter of persuasion, and it may well be that for most minds becoming persuaded of something requires more than accepting that it is more likely than not. In any event, if the test of reasonable certainty is not satisfied, no “heightened” standard, however understood, would have been met either. To adapt the common French expression: *qui ne peut pas le moins, ne peut pas le plus* (‘if you can’t do the easier thing, you can’t do the harder’).

Likewise, in view of the tribunals in *Lao Holdings v. Laos (1)* and *Sanum Investments v. Laos (1)*,⁷⁹ the seriousness and severity of the allegation of corruption requires that ‘there be proof rather than conjecture.’⁸⁰ While the tribunals have overall adopted the ‘clear and convincing evidence’ standard, they have offered a relatively different approach in applying this standard:⁸¹

...there need not be “clear and convincing evidence” of every element of every allegation of corruption, but such “clear and convincing evidence” as exists must point clearly to corruption. An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although of course proof beyond a reasonable doubt would be conclusive. This approach reflects the general proposition that the graver the charge, the more confidence there must be in the evidence relied on.

In brief, the standard should not be as rigorous as that applied in criminal proceedings; neither should it be achieved easily for such a grave offence. The proposition of ‘the graver, the more confidence’ was also offered by the tribunal in *Spentex v. Uzbekistan*. While this rationale ran through the fact-finding process, the tribunal in the end applied a liberal standard of proof. It held that a strict rule on proving corruption would ‘run the risk of making either proving or disproving corruption almost impossible. A relatively flexible approach taking a holistic view of all the relevant evidence and circumstances associated with the corruption allegation – ‘connecting the dots’ – was thus adopted by the tribunal as appropriate.⁸²

3. No Higher Standard

⁷⁷ *Ibid* at paras 123–125.

⁷⁸ *Ibid* at para 125.

⁷⁹ *Lao Holdings v. Laos (1)*, Award (2019), *supra* note 22; *Sanum v. Laos (1)*, Award (2019), *supra* note 22.

⁸⁰ *Lao Holdings v. Laos (1)*, Award (2019), *supra* note 22 at para 109.

⁸¹ *Ibid* at para 110.

⁸² Djanic, *supra* note 35.

Nevertheless, in *Getma International and others v. Guinea (2)*, the tribunal considers that ‘the issue of determining whether the nature of the allegation demands a higher level of proof is the same for all serious allegations involving a State, whether they concern corruption or another offense.’⁸³ Careful scrutiny of the precedent cases and legal reasoning on this issue made by other international tribunals and courts forced the *Getma International and others v. Guinea (2)* tribunal to deny the claimants’ argument of ‘irrefutable’ standard⁸⁴ or that ‘must be higher for corruption than for other deeds’; instead, the tribunal verified the adduced evidence relying on ‘clear and convincing’ and ‘reasonable certainty’ standards.⁸⁵

Similarly, in *Unión Fenosa Gas v. Egypt*, the tribunal stated that a corruption hearing was not a criminal proceeding and that, therefore, there was no reason to impose a higher standard of proof.⁸⁶ The tribunal ended up using an even lower standard – ‘balance of probabilities’ – on the corruption claims.⁸⁷ The *Niko Resources* tribunals emphasized as well that ‘they are not a criminal court; their findings on corruption thus do not necessarily require application of the exacting standards of proof that justify criminal sanction.’ They did, however, articulate their awareness that civil sanctions may be also ‘serious and likely to have far reaching effects for all concerned’.⁸⁸ The tribunals then concurred with Dr. Llamzon that “[t]ribunals are given the freedom and burden of choice, which

⁸³ *Getma International and others v. Guinea (2)*, Award (2016), *supra* note 30 at para 183.

⁸⁴ *Ibid* at para 181.

⁸⁵ *Ibid* at para 184.

⁸⁶ The tribunal cited the statement in the *Libananco* award when in the decision-making process. The *Libananco* award provides that:

... the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that “*the graver the charge, the more confidence there must be in the evidence relied on*”, this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.

See *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Award of 2 September 2011, 2011 at para 125 [*Libananco v. Turkey*, Award (2011)].

⁸⁷ *Unión Fenosa Gas v. Egypt*, Award (2018), *supra* note 15 at para 7.52.

⁸⁸ *Niko Resources v. Bangladesh*, Decision on the Corruption Claim (2019), *supra* note 24 at para 804.

they should not abdicate by rote reference to an abstract ‘heightened’ standard of proof’.⁸⁹ Eventually, the tribunals concluded that the core issue is whether or not they were persuaded.⁹⁰

D. Other Evidentiary Issues

There are several other evidentiary issues that necessitate further discussion, including shifting the burden of proof, the value of circumstantial evidence, and roles of the (non)existence of domestic proceedings with regard to the alleged corrupt acts.

1. Burden of Proof

It has been a well-established principle that the party making an allegation bears the burden to prove it.⁹¹ The fact that corruption is hard to prove has given rise to the question of whether the burden of proof should shift from the host State to the investor. In *Georg Gavrilovic v. Croatia*, the tribunal noted that the burden may shift to rebut the allegation, but ‘only once the alleging party supplies sufficient evidence to support its allegation’.⁹² Similarly in *Fraport v. Philippines* (2), the tribunal held that the respondent has the ultimate burden to prove its assertion of corruption; meanwhile, the claimant ‘must produce rebuttal evidence’ when the evidence adduced by the respondent is ‘sufficient to present a *prima facie* case’.⁹³

While the tribunals in the two above-mentioned cases stated that the evidence needs to be ‘sufficient’, in *Karkey*, the tribunal additionally noted that the evidence could be ‘circumstantial evidence’. The tribunal in *Karkey* noted that it accepted the general and well-established principle of *onus probandi incumbit actori* (the party that asserts must prove). But it also found that in the

⁸⁹ The complete cited paragraph from Dr. Llamzon’s book is stated below:

... the less formalistic sensibility of Rompetrol and Metal-Tech towards the evidentiary rules to be applied to corruption issues is helpful. Because corruption is a serious charge with serious consequences attached, the degree of confidence a tribunal should have in the evidence of that corruption must be high. However, this does not mean that the standard of proof itself should necessarily be higher, or that circumstantial evidence, inferences, or presumptions and indicators of possible corruption (such as ‘red flags’) cannot come to the aid of the fact-finder. Tribunals are given the freedom and burden of choice, which they should not abdicate by rote reference to an abstract ‘heightened’ standard of proof.

See Llamzon, *supra* note 5 at 237.

⁹⁰ *Niko Resources v. Bangladesh*, *Decision on the Corruption Claim* (2019), *supra* note 24 at para 806.

⁹¹ *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, *Final Award* of 27 June 1990, 1990 at para 56; *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, *Decision on Jurisdiction* of 29 April 2004, 2004 at para 121 [*Tokio Tokelés v. Ukraine*, *Decision on Jurisdiction* (2004)].

⁹² *Georg Gavrilovic v. Croatia*, *Award* (2018), *supra* note 17 at para 231.

⁹³ *Fraport v. Philippines* (2), *Award* (2014), *supra* note 21 at para 229.

event that the respondent provides ‘unequivocal (or unambiguous) *prima facie* evidence’, the burden of proof with respect to corruption and fraud can be shifted to the claimant.⁹⁴ Such *prima facie* evidence may be presented in the form of circumstantial evidence or, in particular in cases of corruption, ‘red flags’.⁹⁵

However, the *Tethyan* tribunal held a different understanding of the burden of adducing rebutting evidence:⁹⁶

To say that a party bears the burden of proof means that if, after considering all the evidence, a tribunal is left in doubt as to whether the party has proved its case to the necessary standard, that party loses. In that sense, the burden of proof never shifts. The references to “shifting” are to the process of reasoning by which the tribunal decided whether the case has been proved or not. A tribunal may take into account that a party has not adduced rebutting evidence in circumstances in which that party would have been expected to be able to do so. In this sense the tribunal may be said to have imposed upon the party a “burden” to adduce evidence. But the burden of proof as such has not shifted. It is only that the opposing party’s failure to adduce evidence is part of the material which has enabled the tribunal to conclude that the first party has proved its case.

It advocated that the investor may be required to produce rebuttal evidence, but this is *not* a shifting of the evidentiary burden. Rather, the failure to adduce evidence may support that the allegation is *proved*.

2. Circumstantial Evidence

The ICSID Convention Arbitration Rules leave ISA tribunals discretion to determine the probative value of evidence.⁹⁷ In corruption cases, it has been exceptionally hard to obtain direct evidence and the available evidence is mostly circumstantial. It has been argued that ICSID tribunals faced with allegations of corruption have “largely refrained from examining the kinds of ‘red flags’”.⁹⁸ In contrast, many recently-established tribunals, such as those in *Glencore v. Colombia*⁹⁹ and in *Tethyan v. Pakistan*,¹⁰⁰ have indeed recognized the applicability of circumstantial evidence, or, as they are known in corruption context, ‘red flags’.

⁹⁴ *Karkey v. Pakistan*, Award (2017), *supra* note 16 at para 497.

⁹⁵ *Ibid* at para 521.

⁹⁶ *Tethyan Copper v. Pakistan*, Decision on Respondent’s Application to Dismiss the Claims (2017), *supra* note 53 at para 318.

⁹⁷ *Georg Gavrilovic v. Croatia*, Award (2018), *supra* note 17 at para 229. Rule 34 of the ICSID Convention Arbitration Rules regulates that ‘[t]he tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value’. See Rule 34(1), *The Rules of Procedure for Arbitration Proceedings of ICSID*.

⁹⁸ Cecily Rose, “Circumstantial Evidence, Adverse Influences, and Findings of Corruption: Metal-Tech Ltd. v. The Republic of Uzbekistan” (2014) 15:3–4 *The Journal of World Investment & Trade* 747–756 at 754.

⁹⁹ *Glencore v. Colombia (1)*, Award (2019), *supra* note 9 at paras 723–731.

¹⁰⁰ *Tethyan Copper v. Pakistan*, Decision on Respondent’s Application to Dismiss the Claims (2017), *supra* note 53 at para 307.

The *Unión Fenosa Gas* tribunal has regarded circumstantial evidence ‘as good as direct evidence in proving corruption’.¹⁰¹ The tribunal in *Pan African Minerals and others v. Burkina Faso* further noted that to use ‘indicia’ to prove corruption, the evidence must be ‘sufficiently serious, precise and concordant’.¹⁰² The *Vladislav Kim* tribunal held that ‘an examination of circumstances that give rise to red flags must take the surrounding context into consideration’.¹⁰³

Most notably, *Metal-Tech* was the first case that applied only circumstantial evidence to find the corrupt act. *Spentex* was the second.¹⁰⁴ In the former case, the tribunal noted that “the international community has established lists of indicators, sometimes called ‘red flags’. Several red flag lists exist, which, although worded differently, have essentially the same content.”¹⁰⁵ It examined a series of indicators like the striking size of the payments, no service or proof of service, lack of qualifications of the ‘consultants’, sham consulting contracts, lack of transparency of payee, and connections with public officials in charge of claimant’s investment.¹⁰⁶

Similar red flags were evaluated in *Spentex*. A dispositive finding of corruption was made after considering ‘the suspiciously high amounts that the two consultant firms had been paid for their services’, ‘the claimant’s failure to disclose the existence of the consulting contracts to the tribunal’, ‘the consultants’ lack of qualifications in the business sector in which they had supposedly provided advice’, ‘the lack of clarity about the services that were supposedly provided’ and ‘the lack of transparency’.¹⁰⁷

It is also worth noting that there are two cases in which tribunals have discussed the role that a general climate of corruption may play in proving alleged corrupt acts. In *Getma International and others v. Guinea (2)*, the respondent insisted heavily on the ‘endemic nature’ (or in French

¹⁰¹ *Unión Fenosa Gas v. Egypt, Award (2018)*, *supra* note 15 at para 7.52.

¹⁰² Damien Charlotin, “Analysis: Aynes-chaired ICC tribunal finds that state validly terminated public-private partnership, and rejects corruption allegations”, (18 March 2020), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/analysis-aynes-chaired-icc-tribunal-finds-that-state-validly-terminated-public-private-partnership-and-rejects-corruption-allegations/>>.

¹⁰³ *Vladislav Kim v. Uzbekistan, Decision on Jurisdiction (2017)*, *supra* note 14 at paras 548–549.

¹⁰⁴ It is worth noting that the evidence proving the alleged corrupt acts in *World Duty Free* was ‘adduced’ by the investor itself. Mr. Ali presented a statement describing when, how, and why he made payments to President Moi. The payment fact was not denied by the host State. Although the investor regarded the payments as a ‘Harambee’ practice (a routine practice to make donations so as to conduct business in Kenya), the tribunal has considered this payment as a bribe rather than a personal donation for public purposes. See *World Duty Free v. Kenya, Award (2006)*, *supra* note 1 at paras 130–136.

¹⁰⁵ *Metal-Tech v. Uzbekistan, Award (2013)*, *supra* note 2 at para 293.

¹⁰⁶ *Ibid* at paras 326–352.

¹⁰⁷ See Djanic, *supra* note 35.

‘caractère endémique’) of the corruption context in Guinea, but the tribunal considered that ‘this context changes nothing in the value as evidence of each of the individual elements of proof submitted to it, which must be ruled on independently.’ More accurately, the fact that corruption is widespread in a particular jurisdiction does not necessarily, or automatically, suffice to prove a specific corrupt act alleged in arbitration proceedings, and *vice versa*.¹⁰⁸ The tribunal in *Pan African Minerals and others v. Burkina Faso* also noted that ‘a country’s reputation for corruption could only corroborate additional evidence’.¹⁰⁹

3. Domestic Proceedings against Corruption

The existence or non-existence of domestic proceedings that relate to the alleged corrupt acts in the dispute at hand may be given certain weight by ISA tribunals.

(1) Judicial or Administrative Decisions

ISA tribunals have confronted some special ‘evidence’ that host States adduced to support their corruption claims—judicial or administrative decisions made by domestic institutions, in order to give validity to the alleged corrupt acts. While tribunals may take these outcomes into consideration in the fact-finding process, they are not bound by these decisions. In other words, ISA tribunals do not automatically follow the results of domestic investigations or the decisions of domestic courts.

In *Karkey v. Pakistan*, the host State submitted a judgment from a domestic court to support its corruption claims. This judgement, rendered by the Supreme Court of Pakistan, had declared the investment contract between Karkey and the government of Pakistan void *ab initio* after operating a wide-ranging anti-corruption investigation and proceedings related to Karkey’s investment in Pakistan.¹¹⁰ The Supreme Court additionally ordered an investigation into possible corruption by the investment and by various public officials.¹¹¹ The tribunal, however, held that ‘the Supreme Court made no explicit finding of corruption anywhere in the Judgment, nor any specific finding of corruption against, or involving, Karkey’.¹¹² Besides, it reviewed the procedure and substance of the Supreme Court proceeding in the realm of international law, as opposed to automatically

¹⁰⁸ *Getma International and others v. Guinea (2)*, Award (2016), *supra* note 30 at paras 228–229.

¹⁰⁹ Charlotin, *supra* note 102.

¹¹⁰ *Karkey v. Pakistan*, Award (2017), *supra* note 16 at para 126.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

deferring to this domestic judgement. As explained by the tribunal, in the reference to the *Diallo* case of the International Court of Justice (ICJ) and the ICSID case of *Helnan v. Egypt*, findings of domestic courts are not necessarily binding upon the present arbitration proceeding and the tribunal ‘must analyse whether the Judgement presents deficiencies which are unacceptable from the viewpoint of international law’.¹¹³ After scrutiny in this judgment, the tribunal found it irrational and arbitrary¹¹⁴ and did not consider itself to be bound.¹¹⁵

Similarly, in *Niko Resources v. Bangladesh*, the respondents submitted a judgment from the High Court Division of the Supreme Court of Bangladesh. This was the *Alam* Judgment, where the JVA and the GPSA were declared ‘without lawful authority and of no legal effect and thus void ab initio’.¹¹⁶ The tribunal found the decisions in the *Alam* judgment to be ‘in violation of the Tribunal’s exclusive subject matter jurisdiction and of the ICSID Convention.’¹¹⁷ In particular, while the High Court Division stated in its judgment that there is no need to show actual influence between the bribe to the minister and the actual influences on the minister’s decision in approving the contracts,¹¹⁸ the tribunal stressed again the necessity of establishing ‘causation’ between corruption and the contracts.¹¹⁹

The tribunal in *Glencore v. Colombia (1)* also articulated its standpoint on the ‘value’ of the decisions made by domestic courts and institutions on the same corruption issues:¹²⁰

The Criminal Complaint and this procedure operate in different legal spheres, are subject to diverging standards of proof, and may reach conflicting results. The fact that the Colombian criminal system has not punished (in fact, in accordance with the available record, has not even investigated) the alleged corrupt practices surrounding the Eighth Amendment, does not preclude a hypothetical finding by this Tribunal that corruption has occurred. And *vice-versa*.

That is to say, even if domestic institutions have made an explicit and clear finding on the alleged corrupt acts, this finding may be ‘overturned’ by ISA tribunals. Despite that, the tribunal further noted that ‘the conclusions of the justice system at the municipal level, or absence thereof, which

¹¹³ *Ibid* at paras 549–552.

¹¹⁴ *Ibid* at paras 553–556.

¹¹⁵ *Ibid* at para 561.

¹¹⁶ *Niko Resources v. Bangladesh, Decision on the Corruption Claim (2019)*, *supra* note 24 at para 666.

¹¹⁷ *Ibid* at para 683.

¹¹⁸ *Ibid* at para 727.

¹¹⁹ *Ibid* at para 734.

¹²⁰ *Glencore v. Colombia (1), Award (2019)*, *supra* note 9 at paras 673–674.

have a much higher capacity of investigation than this Arbitral Tribunal, is one of the various elements that must be considered when evaluating the available evidence.’¹²¹

Interestingly, after the tribunal came to a conclusion on the inexistence of corruption in this investment, it referred again to the domestic investigation, noting that its decision ‘conforms with’ decisions made by domestic institutions:¹²²

The Tribunal’s conclusion is confirmed by the fact that the Colombian criminal prosecutor and the Colombian criminal courts, which have a much higher capacity for investigation than this Arbitral Tribunal, have not initiated an investigation into the alleged corrupt practices surrounding the Eighth Amendment either *in tempore insuspecto* or even after the start of this arbitration.

(2) A Lack of Domestic Investigations

On one hand, any domestic investigations of alleged corruption may be challenged by the tribunals; on the other, the non-existence of such investigations may also be weighed in the fact-finding process.¹²³ In *Georg Gavrilovic v. Croatia*, when addressing the alleged bribe payments between the investor and the liquidator (Mr. Boras) in the process of the acquisition of the investment, the tribunal emphasized that it ‘has seen no evidence that Croatia has prosecuted the Liquidator for any alleged impropriety specifically regarding those payments’.¹²⁴

Some tribunals have considered the absence of such proceedings ‘relevant to the credibility of the Government’s allegations’, like in *Laos Holdings v. Laos (1)* and *Sanum Investments v. Laos (1)*.¹²⁵ In these two cases, the tribunals attributed a great deal of weight to whether or not there existed any investigation or prosecution against any government officials alleged to have accepted bribes in relation to the claimant’s investments. The tribunals found such omissions problematic and repeatedly noted that ‘no one was prosecuted in this affair’,¹²⁶ ‘there is no evidence that Madam Manivone (the presumed recipient) or anyone else was prosecuted’,¹²⁷ and ‘the Government has apparently not identified any bribe-takers’¹²⁸ in the decision-making process of the first three corruption allegations.

¹²¹ *Ibid.*

¹²² *Ibid* at para 738.

¹²³ These are also cases where the fact that no criminal proceedings had been initiated was given limited value by the arbitrators, such as in *Pan African Minerals and others v. Burkina Faso*. See Charlotin, *supra* note 102.

¹²⁴ *Georg Gavrilovic v. Croatia, Award (2018)*, *supra* note 17 at para 345.

¹²⁵ *Lao Holdings v. Laos (1), Award (2019)*, *supra* note 22 at para 112.

¹²⁶ *Ibid* at para 123.

¹²⁷ *Ibid* at para 127.

¹²⁸ *Ibid* at para 137.

In *Getma International and others v. Guinea (2)*, the tribunal noted that the host State ‘gave priority to the grounds of defense which corruption constitutes, rather than to the prosecution of the corrupted parties’, given the fact that Guinea had not investigated or prosecuted any individuals for the alleged corruption, nor did Guinea fire them from working in public office or issue any other demotion decisions.¹²⁹ The tribunal believed that the respondent State was in a better position and therefore had the obligation to gather evidence of alleged corruption, but ‘itself did not attach sufficient importance’ and ‘failure to use its powers’ to launch an investigation to adduce evidence.¹³⁰

Tribunals have also emphasized the importance of the respondent investigating/getting evidence of the alleged corrupt acts as soon as possible. Such was the case in *Getma International v. Guinea (1)*, during the last hearing regarding the investigation of corruption issues, the respondent requested more time (i.e., four months) to gather related evidence and the permission to modify its request, all of which was denied by the tribunal in the award. The tribunal thought that the evidence adduced in the last hearing ‘could have been produced before’ and ‘delaying the production of evidence deemed important...constitutes a breach of the proper administration of justice and the adversarial principle’. For this reason, the tribunal rejected the four-month period request out of respect for the right to a fair trial; otherwise, it would ‘amount to leaving the proceedings to the whims of one of the parties and depriving the other party of its legitimate right of access to justice’.¹³¹

E. Tribunals’ Reaction to Corruption Suspects

Another important observation of allegations of corruption in ISA concerns tribunals’ ‘active’ reactions to corruption suspects.¹³²

¹²⁹ *Getma International and others v. Guinea (2)*, Award (2016), *supra* note 30 at para 221.

¹³⁰ *Ibid* at paras 223–226.

¹³¹ *Getma International v. Guinea (1)*, Award (2014), *supra* note 70 at paras 79–80. Notably, this decision was later one of grounds based on which Guinea requested the CCJA to set aside this arbitral award. But the CCJA did not address this corruption issue but annulled the award for other reasons. See *Getma International v Republic of Guinea (1)*, CCJA Case No 001/2011/ARB, Judgment of the Common Court of Justice and Arbitration of OHADA of 19 November 2015, 2015 [*Getma International v. Guinea (1)*, Judgment of the CCJA (2015)].

¹³² It is also reported that arbitration proceedings against a government may be launched based on corruption grounds alone. See, e.g., Thomas Kendra & Anna Bonini, “Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus” (2014) 31:4 Journal of International Arbitration 439–453.

1. *Sua Sponte* Investigations

Some tribunals have taken the initiative and conducted investigations of suspected corrupt acts before host States had formally submitted corruption claims. In *Metal-Tech*, the alleged facts of corruption were not initially raised by the host State. They were instead suspected by the tribunal which observed certain suspicious incidents from the facts as they emerged in the course of the arbitration and thus required further explanation as well as additional testimony and evidence.¹³³

Even if the host State never raised an allegation of corruption, an ISA tribunal may initiate *sua sponte* investigation of corruption upon its power or duty. The *Securiport* tribunal has indeed developed such investigations under the principle of transnational public policy against corruption. It noted that ‘all allegations of corruption are [...] extremely serious and deserve an appropriate treatment.’¹³⁴

It is worth noting that in *Infinito v. Costa Rica*, the respondent State did not argue the claimant’s investment was tainted by corruption. But a Costa Rican environmental non-governmental organization (NGO)—Asociación Preservacionista de Flora y Fauna Silvestre (APREFLOFAS)—in its Non-Disputing Party Submission has submitted that the contract, based on which the investment was established, was ‘granted through an evident and intentional disregard of the applicable laws, and, as alleged by Prosecutors in cases before the Costa Rica Courts, likely through corruption and graft’. The respondent State, interestingly, disagreed with APREFLOFAS on bringing this corruption issue to the tribunal, expressly stating and acknowledging that the evidence adduced at this stage could not substantiate any corrupt measures by the investor.¹³⁵ Having said that, the tribunal felt it vital to assess corruption allegations *ex officio*, as required by the legality requirement under the BIT, Rule 41(2) of the ICSID Convention Arbitration Rules, and the principle of international public policy.¹³⁶

¹³³ The award reveals that the tribunal was exercising its *ex officio* powers under Article 43 of the ICSID Convention to conduct this *sua sponte* investigation on corruption. See *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at paras 239–241.

¹³⁴ So far, the award of 28 January 2019 is not public. For an analysis of this case, see Damien Charlotin, “Revealed: In *Securiport v. Benin*, an ICC tribunal finds that the underlying contract does not contravene data privacy laws, and awards 95 million USD in compensation”, (22 April 2020), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/revealed-in-securiport-v-benin-an-icc-tribunal-finds-that-the-underlying-contract-does-not-contravene-data-privacy-laws-and-awards-95-million-usd-in-compensation/>>.

¹³⁵ See *Infinito Gold Ltd v Costa Rica*, ICSID Case No ARB/14/5, *Decision on Jurisdiction of 4 December 2017*, 2017 at paras 122, 136 [*Infinito Gold v. Costa Rica*, *Decision on Jurisdiction* (2017)].

¹³⁶ *Ibid* at para 137.

The Tribunal has noted the Parties' positions. However, the legality requirement contained in the BIT impacts the Tribunal's jurisdiction, which the Tribunal has a duty to assess ex officio, in accordance with ICSID Arbitration Rule 41(2). As a result, the Tribunal cannot merely rely on the Parties' assessment and must engage in its own inquiry on the basis of the evidence in the record. This is particularly true when there are allegations of corruption, which is a matter of international public policy.

Given that the illegality of the involved contract is 'intertwined with the merits' and to offer the proceeding parties an opportunity to address this issue in depth, the tribunal decided to reserve this issue until the merits phase from a standpoint of procedural efficiency.¹³⁷

2. Re-Examination of Allegations of Corruption

Even when a tribunal has made a decision on given corruption claims, it may still allow new evidence and start a new round of examination of these claims, which was the case in *Niko Resources v. Bangladesh*. After the allegation of corruption was dismissed by the tribunals in the jurisdictional phase, the respondents once again raised the corruption claims with alleged new, expanded, and extensive evidence. The tribunals held that they have the 'responsibility for upholding international public policy' and thus re-examined these new claims.¹³⁸

The above concern based on the principle of international public policy was also upheld in *Getma International and others v. Guinea (2)*. In this case, Guinea's corruption allegations were submitted in the respondent's counter-memorial on the merits, after the tribunal issued the Decision on Jurisdiction of December 2012.¹³⁹ Since the submission had been analyzed and rejected by the CCJA tribunal in *Getma International v. Guinea (1)* and was 'belated' in the present proceedings, the claimants requested that the ICSID tribunal refrain from examining the allegation of corruption.¹⁴⁰ This request, however, was not supported by the tribunal.

First of all, the tribunal noted that some evidence (in particular, two witnesses' testimony) was 'never produced nor analyzed' in the CCJA arbitration and such 'new evidence' necessitated

¹³⁷ *Ibid* at para 140.

¹³⁸ *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No ARB/10/11 and No ARB/10/18, Third Decision on the Payment Claim of 26 May 2016, 2016 at para 93 [*Niko Resources v. Bangladesh, Third Decision on the Payment Claim (2016)*]; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No ARB/10/11 and No ARB/10/18, Procedural Order No 13 of 26 May 2016, 2016 at para 7 [*Niko Resources v. Bangladesh, Procedural Order No. 13 (2016)*].

¹³⁹ *Getma International and others v. Guinea (2)*, Award (2016), *supra* note 30 at para 175. See also *Getma International and others v Republic of Guinea (2)*, ICSID Case No ARB/11/29, Decision on Jurisdiction (French) of 29 December 2012, [*Getma International and others v. Guinea (2)*, Decision on Jurisdiction (2012)].

¹⁴⁰ *Getma International and others v. Guinea (2)*, Award (2016), *supra* note 30 at para 176.

reconsidering the corruption allegation, as required by the principle of international public policy. The tribunal insisted on its duty to investigate corruption allegations in spite of anticipating *res judicata* possibilities:¹⁴¹

These exhibits therefore constitute new exhibits which require that the issue of whether the investment was the subject matter of corruption be reconsidered. International public policy requires that this Arbitral Tribunal express an opinion on the serious allegation of corruption, even if another Tribunal has already considered the issue, when new evidence any analyzed by the first tribunal is produced. The obligation of this Arbitral Tribunal to verify the allegation of corruption prevails over its respect of the award of the CCJA Tribunal and even over the possible *res judicata* effect of this award. This is the case *a fortiori* after the annulment of the CCJA award (even if it was decided on grounds which have nothing to do with the decision of the CCJA Tribunal on corruption).

The tribunal also accepted that the respondent raised its corruption allegation at such a late stage, because, according to the tribunal, ‘it was not until November 4, 2013 that the Respondent believed it could prove them’ and ‘it was not until this ICSID arbitration was resumed after its suspension pending the CCJA award that the Respondent put forth the defense of corruption and produced the [new evidence]’.¹⁴² Even if jurisdictional objections must be raised *in limine litis*, the tribunal still has the duty to ‘verify its jurisdiction’ and to consider ‘the public policy nature of the grounds based on corruption and fraud’. In the further alternative that the discussions on *jurisdiction* had been closed by the previously issued Decision on Jurisdiction (2012), the tribunal felt obliged to re-examine corruption allegations because the *inadmissibility* issue of the investment was further raised by the respondent, based on the same corruption allegations.¹⁴³

In other cases, ISA tribunals have considered new evidence and allegations of corruption as *special circumstances* that necessitate a re-examination of corruption. This was the case in *Tethyan v. Pakistan*, where the tribunal noted that the newly raised application and evidence in relation to the serious corruption and bribe allegations gave rise to ‘special circumstances’ regulated under the ICSID Convention Arbitration Rules. This special circumstance justifies an additional proceeding¹⁴⁴ and the evidence was thus considered admissible.¹⁴⁵

¹⁴¹ *Ibid* at para 178.

¹⁴² *Ibid* at para 179.

¹⁴³ *Ibid* at para 180.

¹⁴⁴ *Tethyan Copper v. Pakistan, Decision on Respondent’s Application to Dismiss the Claims* (2017), *supra* note 53 at paras 227–234. Rule 26(3) of the ICSID Convention Arbitration Rules provides that ‘[a]ny step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in *special circumstances* and after giving the other party an opportunity of stating its views, decides otherwise (emphasis added).’ See Rule 26(3), *ICSID Convention Arbitration Rules*, *supra* note 97.

¹⁴⁵ *Tethyan Copper v. Pakistan, Decision on Respondent’s Application to Dismiss the Claims* (2017), *supra* note 53 at paras 241–242.

It is also worth noting that in *Getma International v. Guinea (1)*, the respondent did not raise corruption allegations until the main hearings were held, contending that *Getma International* obtained the concession contract in a corrupt manner. Prior to that, however, even in its latest written submission, the government of Guinea never raised this corruption concern, nor did it seek to invalidate the contract.¹⁴⁶ Although opposed by the claimant, the tribunal decided to arrange another hearing to investigate the newly-invoked corruption allegations, but no specific reasoning for this decision was given by the tribunal.¹⁴⁷

F. A Defense against the Investor's Claims

Besides the above procedural issues, some observations of the substantive elements in corruption allegations should be highlighted, especially in cases in which the alleged corrupt acts are substantiated. These include the legal authorities relied upon and the result of a successful corruption claim.

A careful review of all the investment cases reveals a lack of any express mention of (anti-)corruption in the investment treaties on which these case proceedings were based. However, innumerable norms outlawing corruption and impugning individuals or entities who engage in corrupt behavior are at one's disposal at the domestic, regional, and international levels.¹⁴⁸ In practice, legal principles or doctrines in line with which host States have formulated allegations of corruption encompass a great variety, ranging from domestic rules, to treaty obligations, to CIL and to general principles of international law. While host States have relied upon various rules to defend against an investor's claims, investment tribunals have mainly confirmed three legal authorities in the decision-making process to deal with the allegations of corruption upon a positive finding of corruption: the legality requirement, the 'clean hands' doctrine, and transnational public policy. The introduction of these legal authorities is necessary and forms the basis for my critique in the following chapters in Part One of this thesis.

1. The Legality Requirement

¹⁴⁶ *Getma International v. Guinea (1)*, Award (2014), *supra* note 70 at para 63.

¹⁴⁷ *Ibid* at paras 65–73.

¹⁴⁸ Most countries have outlawed corruption in domestic criminal laws and for international and regional anti-corruption norms, see Chapter 2 and Part Two of this thesis.

A legality requirement refers to the ‘in accordance with host State laws’ clause in an international investment treaty, such as Article 2(1) of the Colombia-the United Arab Emirates BIT.¹⁴⁹

Investment means any kind of asset invested or reinvested, directly or indirectly, by an investor of one Contracting Party in the territory of the other Contracting Party, in accordance with the laws and regulations of the latter, and in particular, though not exclusively, shall include...

Arguably, this clause requires investors to make their investments in accordance with the host State’s laws and regulations and limits the scope of treaty protection to only legal investment.¹⁵⁰

In ISA, the legality clause has been frequently invoked by the host State party as a jurisdictional objection against the investor’s claims.¹⁵¹ In treaty-based arbitration, the legality requirement has become one of the most ‘popular’ references invoked by host States to support their corruption claims.¹⁵²

The most notable case that connects the legality requirement with allegations of corruption is *Metal-Tech v. Uzbekistan*. In this case, based on a positive finding of the alleged corrupt activity and the fact that corruption is prohibited in Uzbek domestic laws, the tribunal finally relied on this legality requirement and upheld the respondent’s corruption allegations; as a result, jurisdiction was denied, and all the investor’s claims were accordingly rejected.¹⁵³

Even in cases where corruption was unproven, tribunals have, on many occasions, expressed that, if corruption had been substantiated, it would have constituted a non-fulfilment of legality requirement which would exclude the investment from the scope of treaty protection. Such was the case in *Vladislav Kim v. Uzbekistan*, in which the tribunal presented a test that to place an investment outside the protection of the BIT, the alleged act of noncompliance with the legality

¹⁴⁹ Art.2(1), *Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates*, 2017.

¹⁵⁰ *Getma International and others v. Guinea (2)*, Award (2016), *supra* note 30 at para 174.

¹⁵¹ See, e.g., *Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction of 31 July 2001, 42 ILM 609 (2003), 2001 [*Salini v. Morocco*, Decision on Jurisdiction (2001)]; *Alasdair Ross Anderson et al v Republic of Costa Rica*, ICSID Case No ARB(AF)/07/3, Award of 19 May 2010, 2010 [*Anderson v. Costa Rica*, Award (2010)]; *Metalpar SA and Buen Aire SA v The Argentine Republic*, ICSID Case No ARB/03/5, Decision on Jurisdiction of 27 April 2006, 2006 [*Metalpar v. Argentina*, Decision on Jurisdiction (2006)]; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award of 27 August 2008, 2008 [*Plama v. Bulgaria*, Award (2008)]; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award of 18 June 2010, 2010 [*Hamester v. Ghana*, Award (2010)]; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction of 21 December 2012, 2012 [*Teinver v. Argentina*, Decision on Jurisdiction (2012)].

¹⁵² *Glencore v. Colombia (1)*, Award (2019), *supra* note 9 at paras 570–571; *Karkey v. Pakistan*, Award (2017), *supra* note 16 at para 277; *Georg Gavrilovic v. Croatia*, Award (2018), *supra* note 17 at para 221; *Getma International and others v. Guinea (2)*, Award (2016), *supra* note 30 at paras 111–112.

¹⁵³ *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at para 389.

requirement as well as ‘the circumstances of the investor’s act in concert with the seriousness of the obligation in the law’ should be examined.¹⁵⁴ In this case, an act in violation of Uzbek legislation prohibiting bribe-giving was sufficient to meet this test in that the host State has placed great importance on combating bribery or corruption of governmental officials.¹⁵⁵ The tribunal in *Unión Fenosa Gas v. Egypt* (2018) also recognized that ‘an investment made corruptly by a Spanish investor under the law of Egypt does not qualify for protection under the Treaty’ after confirming that a legality requirement is enshrined under the applicable Egypt-Spain BIT¹⁵⁶ and that corrupt acts in procuring a contract in Egypt are criminal offences under Egypt’s domestic laws.¹⁵⁷ Similar propositions were held by many other tribunals in cases like *Glencore v. Colombia* (1) (2019),¹⁵⁸ *Georg Gavrilovic v. Croatia* (2018),¹⁵⁹ *Krederi Ltd. v. Ukraine* (2018),¹⁶⁰ and *Infinito Gold Ltd. v. Costa Rica* (2017).¹⁶¹

2. The ‘Clean Hands’ Doctrine

The ‘clean hands’ doctrine, or ‘unclean hands’ doctrine, is another frequently referred-to authority within the framework of allegations of corruption raised by the respondent State. The party invoking the ‘clean hands’ doctrine would generally argue that the plaintiff’s claims should be dismissed because its hands are unclean due to its own illicit acts or improper conduct in connection with the dispute at hand.¹⁶²

In practice, the ‘clean hands’ doctrine has been submitted separately or in combination with other references, for instance, in *Metal-Tech v. Uzbekistan* (2013) where the Uzbek government relied on both the ‘unclean hands’ doctrine and the legality clause to request the tribunal to declare investor’s claims inadmissible.¹⁶³ Similar submissions were raised in recent arbitration cases as

¹⁵⁴ *Vladislav Kim v. Uzbekistan, Decision on Jurisdiction* (2017), *supra* note 14 at para 555.

¹⁵⁵ *Ibid* at paras 555–556.

¹⁵⁶ *Unión Fenosa Gas v. Egypt, Award* (2018), *supra* note 15 at para 7.46.

¹⁵⁷ *Ibid* at para 7.47.

¹⁵⁸ *Glencore v. Colombia* (1), *Award* (2019), *supra* note 9 at para 665.

¹⁵⁹ *Georg Gavrilovic v. Croatia, Award* (2018), *supra* note 17 at para 324.

¹⁶⁰ *Krederi v. Ukraine, Award (Excerpts)* (2018), *supra* note 19 at para 385.

¹⁶¹ *Infinito Gold v. Costa Rica, Decision on Jurisdiction* (2017), *supra* note 135 at para 137.

¹⁶² See, e.g., Aloysius Llamzon, “Yukos Universal Limited (Isle of Man) v The Russian Federation: The State of the ‘Unclean Hands’ Doctrine in International Investment Law: Yukos as both Omega and Alpha” (2015) 30:2 ICSID Review 315–325 at 316; *Diversion of Water from the Meuse (The Netherlands v Belgium)*, PCIJ Series A/B, No 70, Judgment of June 28th, 1937, Individual Opinion by Mr Hudson, at 77 [*Diversion of Water from the Meuse, Individual Opinion by Mr. Hudson*].

¹⁶³ *Metal-Tech v. Uzbekistan, Award* (2013), *supra* note 2 at para 110.

well:¹⁶⁴ notably in *Tethyan Copper v. Islamic Republic* (2017), the respondent submitted that “Claimant’s claims are inadmissible because Claimant comes to this Tribunal with ‘unclean hands’, referring to the doctrine of ‘clean hands’ as a general principle regarding claims tainted by corruption;”¹⁶⁵ in *Glencore International v. Colombia (1)* (2019), the government of Colombia insisted that ‘Claimants’ unclean hands [alleged act of corruption] rendered their claims inadmissible.’¹⁶⁶

The allegations of corruption premised on the ‘clean hands’ doctrine have been supported by several ISA tribunals which have completely denied the claims of the investor. Notably, in *Spentex v. Uzbekistan* (2016), the ‘unclean hands’ doctrine was one of the grounds on which the tribunal completely ruled out Spentex’s claims, though the underlying legal reasoning for the application of this doctrine remains unpublished.¹⁶⁷ The *World Duty Free* tribunal also briefly mentioned that ‘the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio*’¹⁶⁸ while the tribunal did not expand on this reasoning.

It should be noted that many tribunals in other corruption-related cases have refused to consider the ‘unclean hands’ doctrine as applicable to address investor misconduct in the establishment of investments. For instance, the tribunal in *Lao Holdings v. Laos (1)* (2019) provided that ‘[i]ncorporation of such a general doctrine into investor-State law without careful boundaries

¹⁶⁴ See, e.g., *Lao Holdings v. Laos (1)*, Award (2019), *supra* note 22; *Sanum v. Laos (1)*, Award (2019), *supra* note 22; *Krederi v. Ukraine*, Award (Excerpts) (2018), *supra* note 19.

¹⁶⁵ *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability (2017), *supra* note 20 at para 671.

¹⁶⁶ *Glencore v. Colombia (1)*, Award (2019), *supra* note 9 at para 571.

¹⁶⁷ The Award of this case remains unveiled and the legal analysis and reasoning in the application of this doctrine are unknown to the public. Purportedly, the tribunal’s decision was made by ‘rel[ying] heavily on previous case-law’. See Djanic, *supra* note 35.

¹⁶⁸ ‘*Ex turpi causa non oritur actio*’ is an alternative way of referring to the ‘unclean hands’ doctrine. With regards to the above-cited decision in *World Duty Free v. Kenya* (2006), it is widely believed that the tribunal has accepted the legitimacy of applying the ‘unclean hands’ doctrine to deal with corruption allegations. See *World Duty Free v. Kenya*, Award (2006), *supra* note 1 at para 179; Aloysius Llamzon & Anthony C Sinclair, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct” in Albert Jan van den Berg, ed, *Legitimacy; Myths, Realities, Challenges* ICCA Congress Series 18 (Kluwer Law International, 2015) 451 at 509; Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in Kaj Hobér et al, eds, *Between East and West: Essays in honour of Ulf Franke* (Huntington, N.Y.: Juris, 2010) 309 at 319. In fact, this notion (either the ‘clean hands’ doctrine or ‘*ex turpi causa non oritur actio*’) is briefly mentioned in *World Duty Free v. Kenya* (2006) and is mostly understood by the tribunal under the context of transnational public policy, the latter concept constituting the main legal reasoning why the tribunal denied the case.

would risk opening investment disputes to an open-ended, vague and ultimately unmanageable principle.’¹⁶⁹

3. Transnational Public Policy

As discussed earlier, transnational public policy has been an important concern among ISA tribunals for a second round of examination or *sua sponte* investigation of corruption suspects. More importantly, this principle has also been frequently invoked as part of the host State’s corruption allegations incorporating a request that the tribunal dismiss the investor’s claims.¹⁷⁰ ISA tribunals in *World Duty Free* and in *Spentex* both relied on international public policy to support the allegations of corruption of the respondent States. While the (limited) published news release of the *Spentex* case briefly introduced the tribunal’s view on this issue that ‘an investment that was obtained through corruption went against international public policy’,¹⁷¹ the *World Duty Free* tribunal went into great depth explaining why ‘claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld’.¹⁷²

The *World Duty Free* tribunal noted that ‘bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries.’¹⁷³ To consolidate its conclusion, the tribunal referred to a number of international and regional conventions outlawing and condemning corruption, including the Inter-American Convention against Corruption (IACAC) adopted within the framework of the Organization of American States (OAS), the Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) concluded within the Organisation for Economic Cooperation and Development (OECD), the Council of Europe Criminal Law Convention on Corruption, the Council of European Civil Law Convention on Corruption, the Convention on Preventing and Combating Corruption approved by the African Union, and the United Nations Convention against Corruption (UNCAC) adopted by the General Assembly of the United Nations.¹⁷⁴ These treaties reflect a consensus in the international community and their ‘common

¹⁶⁹ *Lao Holdings v. Laos (1)*, Award (2019), *supra* note 22 at para 106.

¹⁷⁰ *Niko Resources v. Bangladesh*, Decision on Jurisdiction (2013), *supra* note 24 at para 337; *Unión Fenosa Gas v. Egypt*, Award (2018), *supra* note 15 at para 2.6; *Tethyan Cooper v. Pakistan*, Decision on Jurisdiction and Liability (2017), *supra* note 20 at para 674.

¹⁷¹ Djanic, *supra* note 35.

¹⁷² *World Duty Free v. Kenya*, Award (2006), *supra* note 1 at para 157.

¹⁷³ *Ibid* at para 142.

¹⁷⁴ *Ibid* at paras 143–146.

will to fight corruption, not only through national legislation, as they did before, but also through international cooperation.’¹⁷⁵ The tribunal finally ruled that ‘claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld’¹⁷⁶ and concluded that ‘[t]he Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international*...’.¹⁷⁷

In *Unión Fenosa Gas v. Arab Republic of Egypt* and in *Glencore v. Colombia* where the alleged corrupt acts were unsubstantiated, the tribunals also acknowledged the violation of international public policy, if corruption had been proven.¹⁷⁸

All in all, while it is hard to prove corruption, the current case law has indicated that once the alleged corrupt acts are proven, tribunals will uphold host States’ corruption claims. For that reason, it is now accepted that investor corruption has become a State defense in investment arbitration.¹⁷⁹

G. Binary Approach and Asymmetry

The application of any among the legality requirement, the ‘clean hands’ doctrine, or transnational public policy, has led to one same result: the entire dismissal of the investor’s claims. This is evident in the three determinative cases on corruption, *World Duty Free*, *Metal-Tech*, and *Spentex*. Despite differences in the applicable rules on corruption, the evidence relied upon, and the legal reasoning provided, three tribunals have rendered the same dismissal decision. This method of dealing with allegations of corruption is properly characterized as a binary, all-or-nothing approach.¹⁸⁰ It denotes that ‘[i]f corruption by the claimant is found, the claim is out. Otherwise, the proceedings continue.’¹⁸¹ In many cases in which allegations of corruption did not prosper for

¹⁷⁵ See *Ibid* at para 146.

¹⁷⁶ *Ibid* at para 157.

¹⁷⁷ *Ibid* at para 188.

¹⁷⁸ *Unión Fenosa Gas v. Egypt*, Award (2018), *supra* note 15 at para 7.48; *Glencore v. Colombia (1)*, Award (2019), *supra* note 9 at para 665.

¹⁷⁹ Jason Webb Yackee, “Investment Treaties and Investor Corruption: An Emerging Defense for Host States” (2012) 3 Virginia Journal of International Law 723–746.

¹⁸⁰ Jason N Summerfield, “The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions” (2009) 6:1 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1357>> at 10; John R Crook, “Remedies for Corruption” (2015) 9:3 World Arbitration & Mediation Review 303–316 at 305.

¹⁸¹ Crook, *supra* note 180 at 305.

lack of evidence, tribunals have also approved the use of the binary approach, should corruption be substantiated.¹⁸²

The use of the binary approach to deal with the corruption claims has generated numerous discussions¹⁸³ as well as mounting criticism.¹⁸⁴ Most criticism rests on the asymmetric liabilities for the supply side of corruption (i.e., investors) and the demand side of corruption (i.e., host States).¹⁸⁵ This asymmetry is precisely mirrored by the current jurisprudence, which penalized investor wrongdoing (giving bribes) by rejecting all its claims without due consideration of the host State's improper conduct (soliciting/accepting bribes), whose seriousness is heavier or at least tantamount to offering bribes. Such a bilateralism of corruption has been reflected in criminal laws in most, if not all, countries¹⁸⁶ and in regional and international conventions codifying anti-corruption such as the UNCAC.¹⁸⁷

More importantly, the demand side is always the 'crucial' component to corruption, without whose acceptance an accomplished offense of corruption will never emerge. In some jurisdictions, the criminal laws have ruled that bribees (such as government officials) have the same responsibilities as bribers, such as in the Canadian Criminal Code. In others, however, a more serious penalty is meted out to the demand side of a bribe, and the threshold for prosecuting bribees is lower than that of bribers, like China.¹⁸⁸ A relation can thus be established as follows:

¹⁸² See, e.g., *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), 2000 at para 111 [*Wena Hotels v. Egypt*, Award (2000)]; *Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017), *supra* note 14 at para 593; *Glencore v. Colombia (1)*, Award (2019), *supra* note 9 at para 665.

¹⁸³ One can observe some viewpoints upholding the binary approach, see, e.g., Andrea J Menaker, "The Determinative Impact of Fraud and Corruption on Investment Arbitrations" (2010) 25:1 ICSID Review 67–75.

¹⁸⁴ Opponents to the binary approach may propose novel solutions or just concede the current ISA mechanism as flawed. See, e.g., Aloysius Llamzon, "The Control of Corruption through International Investment Arbitration: Potential and Limitations" (2008) 102 Proceedings of the Annual Meeting (American Society of International Law) 208–212; Tamar Meshel, "The Use and Misuse of the Corruption Defence in International Investment Arbitration" (2013) 30:3 Journal of International Arbitration 267–281.

¹⁸⁵ See, e.g., Lucinda A Low, "Dealing with Allegations of Corruption in International Arbitration" (2019) 113 AJIL Unbound 341–345; Aloysius Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration" (2013) 10:3 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1958>>; Bruce W Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities" (2015) 33:1 Berkeley Journal of International Law 60–113.

¹⁸⁶ *World Duty Free v. Kenya*, Award (2006), *supra* note 1 at para 142.

¹⁸⁷ See Chapter III (Criminalization and law enforcement) of the *United Nations Convention against Corruption*, 2005, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, U.N. GAOR, 58th Sess., 51st Plen Mtg., UN Doc. A/RES/58/4.

¹⁸⁸ In China's criminal law, *accepting* bribes of (a) less than 30,000 yuan but less than 200,000 yuan constitutes the circumstance where 'the amount is *relatively large*' (the individual shall be sentenced to fixed term imprisonment of

$$S_d \geq S_g,$$

where S_d and S_g denote the corruption seriousness of the demander side and the giver side, respectively. The logic behind this legislation is as follows: the impact of the public officials' engagement in corruption is often existential to its domestic good governance and the overall 'corruption culture' further undermines good governance at the regional and international levels.

In this sense, the binary approach allows the host State to withdraw from the corrupt acts at no cost. The unbalanced liability for corrupt acts is shown in the diagram below.

Cases	Applied Legal principles	Consequences of the supply side	Consequences of the demand side
World Duty Free v. Kenya (2006)	'Clean hands' doctrine	All claims denied	Not attributable to host State
	Transnational public policy		
Metal-Tech v. Uzbekistan (2013)	Legality requirement	All claims denied	Attributable & 50% arbitration costs
Spentex v. Uzbekistan (2016)	'Clean hands' doctrine	All claims denied	Attributable, 50% arbitration costs & \$8 million donation
	Transnational public policy		

To specify, the *World Duty Free* tribunal believed that the act of payment by Mr. Ali constituted a bribe *made by the investor with the President of Kenya* whose acts of solicitation and acceptance of briber were, however, *not attributable* to the host State. It provided that:¹⁸⁹

Moreover, there can be no affirmation or waiver in this case based on the knowledge of the Kenyan President attributable to Kenya. The President was here acting corruptly, to the detriment of Kenya and in violation of Kenyan law (including the 1956 Act). There is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principle) of a state officer engaged as its agent in bribery.

not more than three years or criminal detention); (b) less than 200,000 yuan but less than 3 million yuan constitutes the circumstance where 'the amount is *large*' (the individual shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years); (c) no less than 3 million constitutes the circumstance where 'the amount is especially large' (the individual shall be sentenced to fixed-term imprisonment of not less than ten years, or life imprisonment, or death penalty). However, *offering* bribes of (a) not less than 30,000 yuan shall be subject to criminal liability (the individual shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention); (b) not less than 1 million yuan but less than 5 million yuan constitutes a 'serious circumstance' (the individual shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years); (c) not less than 5 million yuan constitutes an 'especially serious circumstance' (the individual shall be sentenced to not less than ten years, or life imprisonment, or death penalty). See Arts.382, 389, *Criminal Law of the People's Republic of China (2020 Amendment)*, 2021. See also *Amendment (IX) to the Criminal Law of the People's Republic of China*, 2015; *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Embezzlement and Bribery*, 2016.

¹⁸⁹ *World Duty Free v. Kenya, Award (2006)*, *supra* note 1 at para 185.

However, the *Metal-Tech* tribunal seemed to have attributed the acts of accepting bribes to the host State, though it did not put much effort to explain why. It simply noted that the State *has participated in creating the situation* that leads to the dismissal of the claims due to a violation of the legality requirement in the treaty and that this participation is ‘implicit in the very nature of corruption’.¹⁹⁰ The tribunal further seemed to qualify this participation as ‘an internationally wrongful act’ because it has made the host State take certain State responsibility due to this participation.¹⁹¹ It demanded that the parties bear their own legal fees and share half of the proceeding costs, which, according to the tribunal, ‘appear fair’.¹⁹² However, the tribunal did not mention which international norm on State responsibility it had relied upon to attribute the corrupt acts of public officials to the host State.

Besides, in *Spentex v. Uzbekistan*, the tribunal acknowledged that the act of receiving bribes (though the precise names of the involved public officials are undisclosed to the tribunal) is attributable to the host State.¹⁹³ It also realized that the current investment arbitration system made it difficult to ‘sanction states that took part in corrupt activities’, ‘unable to remedy this imbalance’ of the liabilities for the investor and the host State whose officials were ‘as equally implicated in the corruption as the claimant was’.¹⁹⁴ But again, the legal basis, along with the legal reasoning based on which the tribunal made this decision on attribution, is so far lacking. Remarkably, the tribunal made a creative decision on the costs of the proceeding. The majority of arbitrators decided to allocate the costs equally to both parties and ‘urged’ Uzbekistan to donate to a United Nations anti-corruption initiative in the amount of US\$8 million, otherwise Uzbekistan would be ‘liable for the costs of the proceedings, as well as reimbursing the claimant for 75% of more than \$17 million in legal fees and expenses’ if the Uzbek government failed to make this contribution.¹⁹⁵ This decision is supported by the majority of the tribunal (the President, Professor August Reinisch, and the arbitrator appointed by the claimant, Professor Stanimir Alexandrov) but is objected by

¹⁹⁰ *Metal-Tech v. Uzbekistan, Award* (2013), *supra* note 2 at para 422.

¹⁹¹ *Ibid* at 422.

¹⁹² *Ibid*.

¹⁹³ Luke Eric Peterson & Vladislav Djanic, “In an innovative award, arbitrators pressure Uzbekistan – under threat of adverse cost order – to donate to UN anti-corruption initiative; also propose future treaty-drafting changes that would penalize states for corruption”, (22 June 2017), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/in-an-innovative-award-arbitrators-pressure-uzbekistan-under-threat-of-adverse-cost-order-to-donate-to-un-anti-corruption-initiative-also-propose-future-treaty-drafting-changes-that-would/>>.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

the arbitrator appointed by the respondent, Professor Brigitte Stern. Professor Stern is of the opinion that ‘the conditioning of the cost order on the respondent’s fulfilment of the recommendation essentially equates the recommendation to an order, which falls outside of the tribunal’s competence,’ although she concurred the recommendation to make a contribution to anti-corruption initiatives.¹⁹⁶ She additionally noted that ordering Uzbekistan to bear a large majority of the claimant’s legal fees if the respondent failed to ‘donate’ such a substantial amount is putting the respondent in an unfair position because the two sides of corruption are equally fault and play an equal role in corrupt activities and thus shall ‘equally bearing the consequences’, namely both parties losing their claims.¹⁹⁷ Professor Stern is further concerned about the negative effects this approach might have on the investment arbitration mechanism: ‘claimants engaged in corruption would then be able to free-ride in their pursuit of damages without the risk of shouldering additional costs of the procedure.’¹⁹⁸

On the other hand, this decision is purportedly ‘justified by the respondent condoning the initial corruption and its failure to investigate and prosecute the responsible parties’ and is said to remedy the imbalance of the liability for the host State and the investor caused by the existing system,¹⁹⁹ to ensure that neither party could reap the benefits of its corrupt activities as had occurred in *World Duty Free v. Kenya* and *Metal-Tech v. Uzbekistan*. Arguably, this novel effort to adjudicate corruption issues and combat corruption is unprecedented and may be of significance on future investment treaty drafting.²⁰⁰

In sum, the asymmetric liability for both parties of a corrupt act has rendered the jurisprudence unsatisfactory and problematic, especially taking into account the inherent bilateral nature of corruption. Given the foregoing, the following chapters attempt to re-examine the legal rules governing misconduct of the supply side (i.e., investors) and the demand side (i.e., host States) and to explore a proper approach to allegations of corruption.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

CHAPTER 2 LEGAL RULES IN INVESTMENT ARBITRATION

GOVERNING INVESTORS' CORRUPTION

Nowadays, there exists significant consensus on the immoral nature and corrosive effects that corruption has on economic development and the rule of law. Efforts to deter corruption are increasing all over the world. Investor-State arbitration (ISA) tribunals can condemn transnational corruption emerged in investment activities and any investment obtained through such corrupt practices without any criticism. However, the way to punish corruption has been the subject of immense controversy. Questions arise in terms of the application of basic legal standards set for punishing investors who engage in corrupt activities without necessarily punishing any State official or entity involved in a corruption transaction. This chapter seeks to re-evaluate the legal rules through which ISA tribunals have analyzed the cases involving corruption and the corresponding consequences for investors. It attempts to demonstrate that these standards have been wrongly or improperly applied by tribunals to address corruption issues.

In particular, this chapter scrutinizes three legal rules (as briefly presented in Chapter 1): the legality requirement, the 'clean hands' doctrine, and transnational public policy. It proceeds as follows: Section A analyzes the concept of the legality requirement and its interplay with allegations of corruption. This thesis argues that using the legality requirement to dismiss an investor's claims entirely is likely to result in an abuse of power by the host State, which is contrary to what this concept is intended to achieve. Section B delves into the 'clean hands' doctrine, a nebulous concept without clear boundaries. It agrees with the standpoint prevailing in international courts and tribunals that this doctrine should not qualify as a source of international law, and, alternatively, suggests also that the prerequisites for invoking the 'clean hands' doctrine are not met in the case of corruption. Section C reviews the concept of transnational public policy in the context of corruption. The consequence of being deprived from accessing arbitration upon non-compliance with this notion is problematic. This thesis argues that both the policy of condemning corruption and the objective of preventing potential abuse of power need to be given due consideration in a tribunal's decision-making process.

Before delving into the details, I want to highlight from the outset that this thesis recognizes the devastating effects of corruption and the importance of condemning corruption, as ISA tribunals

have done.¹ While I argue that ISA tribunals should not adopt a binary approach to the corruption claims, this argument is not making ‘excuses’ for corruption. The idea that this thesis advances is that ISA tribunals should address allegations of corruption through *other* approaches (like the *dual-track approach* presented in Chapter 3 of this thesis) as opposed to excluding investors’ claims due to a lack of jurisdiction or inadmissibility. One should in no way construe this approach as suggesting that investment arbitration is compatible with illicit acts, especially corruption; neither should it be understood that tribunals are shielding ‘tainted’ investors.

A. The Legality Requirement in Investment Treaties

As demonstrated in Chapter 1, the legality clause has been endorsed by ISA tribunals (such as in *Metal-Tech v. Uzbekistan*² and in *Unión Fenosa Gas v. Egypt*³) as applicable to assessing and giving effect to corruption claims. However, the immediate result of this use of the legality requirement seems to have engendered a moral plight: it punishes the supply side of corruption whilst ignoring the demand side. Admittedly, the legality requirement, or ‘in accordance with host State laws’ clause, is normally found in the investment definition provision of an international investment agreement (IIA);⁴ hence, an investment that is not in compliance with this clause is deemed beyond the scope of ‘covered investment’ and is deprived of the right to access to international arbitration and other treaty protections. While it is written to exclude investments that

¹ The arbitrators in *Vladislav Kim v. Uzbekistan* observed that ‘[c]orruption is antithetical to the rule of law in its broadest sense,’ and reaffirmed the fact that the importance of combating corruption has been repeatedly stressed by the international community, many nations, as well as many investors. *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, *Decision on Jurisdiction of 8 March 2017*, 2017 at para 543 [*Vladislav Kim v. Uzbekistan*, *Decision on Jurisdiction* (2017)].

² *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, *Award of 4 October 2013*, 2013 at paras 351–352 [*Metal-Tech v. Uzbekistan*, *Award* (2013)].

³ *Unión Fenosa Gas, SA v Arab Republic of Egypt*, ICSID Case No ARB/14/4, *Award of 31 August 2018*, 2018 at para 7.47 [*Unión Fenosa Gas v. Egypt*, *Award* (2018)].

⁴ One may also find the statement of ‘in accordance with host State laws’ in other clauses, like the admission provisions of an investment treaty. For instance, in the bilateral investment treaty (BIT) between Australia and Turkey, Art.3(1) (Promotion and Protection of Investments) states that ‘[e]ach Party shall in its territory promote as far as possible investments by investors of the other Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments’. Instead of conditioning actions of the foreign investors, the ‘in accordance with host State laws’ clause in the Australia-Turkey BIT is aimed at limiting States’ duty to *admit* investments and has nothing to do with the legality of the concerned investments. (See, e.g., *SAUR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, *Decision on Jurisdiction and Liability of 6 June 2012*, 2012 at para 307 [*SAUR International v. Argentina*, *Decision on Jurisdiction and Liability* (2012)]; August Reinisch, “How to Distinguish ‘In Accordance with Host State Law’ Clauses from Similar International Investment Agreement Provisions?” (2018) 2:1 *Indian Journal of Arbitration Law* 70–83 at 71–73.) Such type of ‘in accordance with host State laws’ clause is, however, beyond the scope of this chapter.

are not made in accordance with the host State laws, however, this does not mean that *any* illegality will automatically trigger the application of this clause.

The caselaw shows that ISA tribunals have adopted a *narrow* interpretation of the scope of the legality requirement. Arguably, the category of investors' wrongdoings that do *not* provoke a jurisdictional infirmity is still expanding;⁵ to put it differently, more and more types of illegalities of investments do not trigger the application of the legality requirement. This trend is particularly reflected from the establishment of the *de minimis* threshold⁶ and the application of the principle of estoppel.⁷ The above observations have demanded that we re-evaluate the legality concept, especially to ascertain the *rationale* that supports the emerging exceptions and what the legality requirement is actually *intended to do*. A more accurate understanding of the purpose of the legality requirement will assist in explaining why an ISA tribunal should not respond to a host State's allegations of corruption by excluding the investor's claims at the jurisdictional stage solely based on the legality requirement.

1. A Narrow Scope of the Legality Requirement

Diverging propositions on the scope and effect of a legality requirement are held by investors and by host States. On one hand, the argument that *any* violation of *any* domestic laws and regulations constitutes noncompliance with the legality requirement has been proposed; on the other hand, some advocate that only *serious* violations of *particular* domestic laws are excluded from treaty protection under the legality requirement.⁸ These are two significant aspects of the subject-matter of this concept, i.e., the applicable domestic laws and the seriousness of the violation.⁹

⁵ Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration" (2014) 29:1 ICSID Review 155–186 at 176.

⁶ Aloysius Llamzon & Anthony C Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in Albert Jan van den Berg, ed, *Legitimacy; Myths, Realities, Challenges* ICCA Congress Series 18 (Kluwer Law International, 2015) 451 at 506–507; Richard Kreindler, *Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements* (Hague Academy of International Law, 2013) at 218–220.

⁷ J Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration" (2014) 5:3 Journal of International Dispute Settlement 531–559; Thomas Obersteiner, "In Accordance with Domestic Law' Clause: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors" (2014) 31:2 Journal of International Arbitration 265–288.

⁸ Ursula Kriebaum, "Investment Arbitration - Illegal Investments" in Christina Klausegger et al, eds, *Austrian Yearbook on International Arbitration 2010* (Beck, Stämpfli & Manz, 2010) 307 at 319; C Knahr, "Investments 'in accordance with host state law'" (2007) 4:5 Transnational Dispute Management 1–28 at 24.

⁹ It should be noted that an investment undoubtedly forfeits treaty protection if the investment *per se* is illegal. In other words, if the business activity of an investment is to conduct illegal affairs, that investment would in no way enjoy any protection, regardless of the seriousness or the applicable domestic laws. (See Stephan W Schill, "Illegal

(1) Applicable Domestic Laws

In ISA, a host State may insist on a broader interpretation of the legality clause by arguing that *all types of domestic laws and regulations* are covered while tribunals have generally preferred to endorse a narrow reading of this notion. For instance, in the two *LESI* cases (2005, 2006), the tribunal affirmed that the applicable law within the framework of the legality clause shall be the *fundamental principles in force*.¹⁰ This interpretation was concurred in by the tribunals in other cases.¹¹ In *Saba Fakes v. Turkey* (2010), the tribunal considered that ‘it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation.’¹² More specifically, the tribunal believed that Turkey’s legislation in relation to *the encouragement of foreign investment* was covered by the legality requirement, but regulations of the telecommunication sector or competition law do not fall within the scope of this clause.¹³ The *Phoenix Action* tribunal further held that the applicable laws shall be the ones *in force* at the time when the investment was established.¹⁴

A ‘dual approach’ has also been proposed, namely compliance with both domestic law and fundamental principles of law.¹⁵ In *Inceysa v. El Salvador* (2006), as there exists a legality requirement in the bilateral investment treaty (BIT) between El Salvador and Spain,¹⁶ the tribunal

Investments in Investment Treaty Arbitration” (2012) 11:2 The Law & Practice of International Courts and Tribunals 281–323. See also Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010) at 130–131.) In practice, one may find an investment whose *major business activity* is to engage in corrupt activities, such as money laundering; but the most common and typical scenario of corruption in ISA is said to be conducted between the investor and the host State for the purpose of establishing investments. The following analysis is based on the hypotheses of the latter type that an investment *itself* being legal but involving some illegality in its obtainment or at other stages.

¹⁰ *Consortium Groupement LESI- DIPENTA v République algérienne démocratique et populaire*, ICSID Case No ARB/03/08, Award of 10 January 2005, 2005 at para 24 [*LESI-DIPENTA v. Algeria*, Award (2005)]; *LESI S.p.A and ASTALDI S.p.A v République Algérienne Démocratique et Populaire*, ICSID Case No ARB/05/3, Decision of 12 July 2006, 2006 at para 83 [*LESI & ASTALDI v. Algeria*, Decision (2006)].

¹¹ See, e.g., *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award of 29 July 2008, 2008 [*Rumeli v. Kazakhstan*, Award (2008)]; *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No ARB/05/17, Award of 06 February 2008, 2008 [*Desert Line v. Yemen*, Award (2008)].

¹² *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award of 14 July 2010, 2010 at para 119 [*Saba Fakes v. Turkey*, Award (2010)].

¹³ *Ibid* at para 120.

¹⁴ *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award of 15 April 2009, 2009 at para 103 [*Phoenix Action v. Czech Republic*, Award (2009)].

¹⁵ Hepburn, *supra* note 7 at 533.

¹⁶ Art.1(1), *Agreement for the Reciprocal Promotion and Protection of Investments between the Republic of El Salvador and the Kingdom of Spain*, 1995, signed on 14 February 1995, entered into force on 20 February 1996.

was obliged to examine whether the investment was executed in accordance with the laws of El Salvador. Interestingly, as explained by the tribunal, this BIT itself ‘constitutes, according to Article 144 of the Political Constitution of El Salvador, a law of the Republic’.¹⁷ The tribunal continued that the BIT contains ‘substantive rules that permit a determination as to whether Inceysa’s investment was made in accordance with the law of El Salvador’ and thus it ‘must analyze other legal instruments to decide this issue’.¹⁸ In this regard, a number of *general principles of law* were subsequently examined, including the principle of good faith,¹⁹ the principle of *nemo auditor propiam turpitudinem allegans*,²⁰ international public policy,²¹ and the principle that prohibits unlawful enrichment.²² In addition, the tribunal also addressed that fact that the requirement of legality also existed in the Investment Law of El Salvador, or, more accurately, the Constitution of El Salvador (Article 96) and the Foreigners Law of the Republic of El Salvador (Article 4).²³

(2) Seriousness of the Violation

The gravity of the violation is another aspect pertinent to the scope of the legality clause; in other words, is the violation serious enough to fall within the scope of ‘in accordance with host State laws’? This is not a completely separate question from the applicable domestic laws issue, and considerable overlap exists between them. The seriousness of the violation, in most situations, depends on the applicable laws. Violations of the fundamental principle of domestic laws, if applied, are most likely to be severe infringements. Violations of important domestic statutes might also be minor, such as bureaucratic formalities.

In investment arbitration, State parties have always advocated for a relatively lower and ‘easy-to-reach’ standard. In *Quiborax v. Bolivia* (2012), the respondent State submitted that ‘the legality

¹⁷ *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award of 2 August 2006, 2006 at para 219 [*Inceysa v. El Salvador*, Award (2006)].

¹⁸ *Ibid* at para 223.

¹⁹ *Ibid* at paras 230–239.

²⁰ According to the tribunal, this principle is closely associated with some various maxims that ‘clearly apply to the present case’. These maxims include ‘*ex dolo malo non oritur actio* (an action does not arise from fraud)’, ‘*malitiis nos est indulgendum* (there must be no indulgence for malicious conduct)’, ‘*dolos suos neminem relevat* (no one is exonerated from his own fraud)’, ‘*in universum autum haec in ea re regula sequenda est, ut dolos omnimodo puniatur* (in general, the rule must be that fraud shall be always punished)’, ‘*unusquisque doli sui poenam sufferat* (each person must bear the penalty for his fraud)’, and ‘*nemini dolos suosprodesse debet* (nobody must profit from his own fraud)’. See *Ibid* at paras 240–244.

²¹ *Ibid* at paras 245–252.

²² *Ibid* at paras 253–257.

²³ *Ibid* at paras 260–262.

requirement covers any breach of Bolivian law regardless of its seriousness.’²⁴ However, it is widely recognized that minor errors and infractions of host States’ laws are not accepted as a departure from the legality requirement.²⁵

The exclusion of trivial breaches is sometimes referred as the *de minimis* threshold.²⁶ This issue was first discussed in *Tokios Tokelés v. Ukraine (2004)* where the respondent argued that the registration materials of the investor’s enterprise contained ‘defects of various types’ and some of them concern the domestic law of Ukraine.²⁷ The tribunal, however, was reluctant to conduct a ‘searching examination of minute details of administrative procedures in Ukrainian law’; instead, it proposed that ‘to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the [BIT]’²⁸ which was to ‘provide broad protection for investors and their investments’.²⁹ This articulation of the legality clause was totally endorsed by the tribunal in the *Alpha Projektholding v. Ukraine (2010)* case.³⁰

Similarly, in *Desert Line v. Yemen (2008)*, the tribunal confirmed that the threshold inquiry of the legality requirement corresponds to ‘some material objective’.³¹ It additionally explained that a mere formalism requirement brings ‘no real interest’ to the implementation of the investment treaty but constitutes ‘an artificial trap depriving investor of the very protection the BIT was intended to provide’.³²

All in all, the applicable laws and the seriousness of the violation could be said to be two simultaneously ‘easy and complicated’ problems. There is no uniform standard for each case, as this is a literally case-by-case issue. However, tribunals are inclined to exclude minor breaches

²⁴ *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, *Decision on Jurisdiction* of 27 September 2012, 2012 at paras 239–240 [*Quiborax v Bolivia*, *Decision on Jurisdiction* (2012)].

²⁵ *Metalpar SA and Buen Aire SA v The Argentine Republic*, ICSID Case No ARB/03/5, *Decision on Jurisdiction* of 27 April 2006, 2006 at para 84 [*Metalpar v. Argentina*, *Decision on Jurisdiction* (2006)].

²⁶ Llamzon & Sinclair, *supra* note 6 at 506–507.

²⁷ *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, *Decision on Jurisdiction* of 29 April 2004, 2004 at para 86 [*Tokio Tokelés v. Ukraine*, *Decision on Jurisdiction* (2004)].

²⁸ *Ibid.*

²⁹ *Ibid* at para 85.

³⁰ *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, *Award* of 8 November 2010, 2010 at para 297 [*Alpha Projektholding v. Ukraine*, *Award* (2010)].

³¹ *Desert Line v. Yemen*, *Award* (2008), *supra* note 11 at para 106.

³² *Ibid.*

from the scope of the legality requirement, unless the investment treaty has explicitly regulated to the contrary.

(3) Timing of the Illegality

The timing of the illegal act is also an important factor that affects the application of the legality requirement. ISA tribunals have made a distinction between the legality of an investment at the initiation stage and the legality of an investment during the performance stage.³³ While the tribunals draw conclusions on the temporal scope of this requirement in accordance with the wording of the clause,³⁴ it has been commonly recognized that the legality clause using ‘made’, ‘implemented’, or ‘accepted’ refers to the moment of its establishment as a jurisdictional issue³⁵ and the subsequent lawfulness or unlawfulness of the investment might be relevant in the merits phase but will not preclude the claim itself.³⁶ Denying an investor access to international arbitration simply based on one illegal act in the performance of the investment arguably runs against the purpose of the investment arbitration mechanism as well as investment treaties themselves. As stated in *Yukos v. Russia (2014)*, when the respondent State requested that the tribunal consider the illegality in the course of the investment as grounds to deny substantive treaty protection over an investor, the tribunal refused to do so for the reason that:³⁷

There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law, as the Russian Federation indeed purports to have done by reassessing taxes and imposing fines. However, if the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment

³³ See generally Michael Polkinghorne & Sven-Michael Volkmer, “The Legality Requirement in Investment Arbitration” (2017) 34:2 *Journal of International Arbitration* 149–168; Stephan W Schill, “Illegal Investments in International Arbitration” (2012) SSRN Electronic Journal, online: <<http://www.ssrn.com/abstract=1979734>>; Rahim Moloo & Alex Khachaturian, “The Compliance with the Law Requirement in International Investment Law” (2011) 34:6 *Fordham International Law Journal* 1473–1501.

³⁴ For more details on this matter, see Thomas Obersteiner, “‘In Accordance with Domestic Law’ Clause: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors” (2014) 31:2 *Journal of International Arbitration* 265.

³⁵ *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award of 16 August 2007, 2007 at para 344 [*Fraport v. Philippines (1)*, Award (2007)]; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award of 18 June 2010, 2010 at para 127 [*Hamester v. Ghana*, Award (2010)]; *Quiborax v Bolivia*, Decision on Jurisdiction (2012), *supra* note 24 at para 266; *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at para 193. *Ibid* at paras 185–193. *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12, Award of 10 December 2014, 2014 at para 329 [*Fraport v. Philippines (2)*, Award (2014)].

³⁶ *Hamester v. Ghana*, Award (2010), *supra* note 35 at para 127; *Fraport v. Philippines (1)*, Award (2007), *supra* note 35 at para 345.

³⁷ *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No 2005-04/AA227, Final Award of 18 July 2014, 2014 at para 1355 [*Yukos v. Russia*, Final Award (2014)].

treaty. It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.

In brief, the temporal scope of the legality requirement is a subject that relates to the exact wording chosen by the parties when drafting the ‘in accordance with host State laws’ clause, but a common exercise in the IIA-making practice, as understood by many tribunals, is to form the boundary at an earlier stage, i.e., at the acquisition of an investment.

2. Allegations of Corruption: Outside the Scope of the Legality Requirement

There is no denying that significant corruption³⁸ constitutes a *serious*, or at least *non-trivial*, breach of domestic law proscribing corruption or a breach of fundamental principles and values of a State. Tribunals that acknowledge the *de minimis* threshold standard have explicitly confirmed that corruption falls within the categories caught by the legality requirement.³⁹ Acts of corruption for the purpose of securing investment at the initial stage have seemingly satisfied both the substantive and temporal conditions of the legality requirement. However, there truly exists an apparent difference between corruption and other categories of investor wrongdoings impugned under the legality requirement.

(1) Host State Knowledge of Corruption

In ISA practice, the investor’s wrongdoing, which triggers the application of the legality requirement, has come in various forms. A typology of these illicit acts reveals that the most common mode of investor wrongdoing is the act of fraud, either in the form of deceit or misrepresentation, the former involving the deliberate intention of investors while no such motivation is required for the latter.⁴⁰ Fraud has been discussed in many cases, like *Plama v. Bulgaria* (2008),⁴¹ *Inceysa v. El Salvador* (2006),⁴² and *Fraport v. Philippines (1)* (2007).⁴³ Another general category of ‘a lack of good faith’ is also frequently addressed in investment

³⁸ Corruption or bribery may come in different forms. They may involve substantial payments (to obtain opportunities of doing business) or smaller payments (like facilitation fees to speed up government processes). In typical corrupt relationships (such as those discussed in Chapter 1 of this thesis), the involved corruption was allegedly *significant* as opposed to tiny payments.

³⁹ *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at para 165. *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Liability of 29 December 2014, 2014 at para 199 [*Hochtief v. Argentina*, Decision on Liability (2014)].

⁴⁰ Llamzon & Sinclair, *supra* note 6 at 453.

⁴¹ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award of 27 August 2008, 2008 at para 135 [*Plama v. Bulgaria*, Award (2008)].

⁴² *Inceysa v. El Salvador*, Award (2006), *supra* note 17 at para 236.

⁴³ *Fraport v. Philippines (1)*, Award (2007), *supra* note 35 at para 401.

arbitration, as can be seen in *Hamester v. Ghana* (2010),⁴⁴ *Phoenix Action v. Czech Republic* (2009),⁴⁵ and *SAUR International v. Argentina* (2012).⁴⁶

Unilateralism (without any participation from the side of the host State) is a common trait among these examples of investor misbehavior, which is apparently different from the bilateral nature of corruption in which both parties contribute to a corrupt act. Regardless of whether the host State is the party who initially solicits a bribe or who freely accepts a bribe, bilateralism implies that the host State, or its representative, has full knowledge of corruption.⁴⁷ The host State's knowledge of corruption corresponds to the idea of the principle of estoppel and prevents dismissal of investors' claims under the legality requirement.

The principle of estoppel, as a recognized general principle of law,⁴⁸ has been frequently invoked by parties and discussed by arbitrators in ISA.⁴⁹ In the realm of the legality clause, the application of this principle means that if the host State has full knowledge of the illegal conduct of the investors and still accepts or endorses the admission and establishment of this investment, the State can no longer claim that the investment was illegal or exclude the treaty protection on the ground of it has not satisfied with the legality requirement.⁵⁰ The way that a host State accepts or endorses an 'illegal investment' could be variously direct or indirect. They may simply grant a clear approval on the illegal aspect of the investment such as in the case of *Alpha Projektholding v. Ukraine* (2010).⁵¹ In *Desert Line v. Yemen* (2008),⁵² where the required certificate was alleged to be missing in the investor's investment, the tribunal noted that there was a 'general endorsement of the investment at the highest level of the State' and a 'mass of uncontradicted written and oral

⁴⁴ *Hamester v. Ghana*, Award (2010), *supra* note 35 at para 123.

⁴⁵ *Phoenix Action v. Czech Republic*, Award (2009), *supra* note 14 at para 106.

⁴⁶ *SAUR International v. Argentina*, Decision on Jurisdiction and Liability (2012), *supra* note 4 at para 308.

⁴⁷ Llamzon & Sinclair, *supra* note 6 at 460–463.

⁴⁸ *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections of 27 July 2006, at para 159.

⁴⁹ See Andreas Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals" (2016) 27:1 European Journal of International Law 107–128; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford University Press, 2012) at 18.

⁵⁰ The Arif tribunal has regarded the application of the principle of estoppel as part of 'timing' limitations. *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No ARB/11/23, Award of 8 April 2013, 2013 at para 376 [*Arif v. Moldova*, Award (2013)].

⁵¹ In this case, the tribunal did not treat investor's prolongation of the contract as inconsistent with the domestic rules, in the reason that 'the extension had received the explicit approval of the State Tourist Administration'. See *Alpha Projektholding v. Ukraine*, Award (2010), *supra* note 30 at para 302.

⁵² *Desert Line v. Yemen*, Award (2008), *supra* note 11 at para 120.

evidence’ and thus, Yemen was considered to have ‘waived the certificate requirement, and is estopped from relying on it to defeat jurisdiction.’⁵³

Besides, a State who never protested or raised their concerns about illegality over a period of time may also be barred from raising the legality submission because it has created a legitimate expectation for investors.⁵⁴ In *SwemBalt v. Latvia (2000)*, a period of four months was considered long enough to activate the application of the principle of estoppel. The tribunal noted that the State should have informed SwemBalt of the illegality at an earlier stage but ‘the authorities waited for more than four months before taking any measures in that regard.’⁵⁵ As a result, the tribunal deemed this investment as having fulfilled the legality requirements.⁵⁶ In many cases discussed in Chapter 1, there was an absence of domestic proceedings regarding the alleged corrupt acts. In other words, the host States apparently never raised any illegality concern related to the investment before invoking the allegations of corruption. This might constitute one of the reasons why some tribunals challenge the credibility of the corruption claims, especially in the absence of domestic investigations.

It is worth noting that applying the principle of estoppel requires that the host State be aware of the illegal nature of the investment. In this regard, investments with concealed illegalities (such as false misrepresentation in *Fraport v. Philippines (1)*) are excluded from applying estoppel.⁵⁷ That being said, corruption is not a case of concealed illegality because a proven corrupt act in investment arbitration has always involved the endorsement of the investment *at the highest level* of the State, such as the president in *World Duty Free* and the prime minister in *Metal-Tech*.⁵⁸

⁵³ *Ibid* at paras 117–118.

⁵⁴ In *Ioannis Kardassopoulos v. Georgia (2007)*, the concession agreement involved was alleged by Georgia as void *ab initio* under the Georgian laws; however, the tribunal observed that ‘[t]he assurances given to Claimant regarding to the validity of the [concession agreement] were endorsed by the Government itself’ and that ‘Georgia never protested nor claimed that these agreements were illegal under Georgian law.’ Consequently, the tribunal noted that Georgia had ‘created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of a breach, would be entitled to treaty protections.’ See *Ioannis Kardassopoulos v The Republic of Georgia, ICSID Case No ARB/05/18, Decision on Jurisdiction of 6 July 2007*, 2007 at paras 191–192 [*Kardassopoulos v. Georgia, Decision on Jurisdiction (2007)*].

⁵⁵ *SwemBalt AB, Sweden v The Republic of Latvia, UNCITRAL, Decision by the Court of Arbitration of 23 October 2000*, 2000 at para 34 [*SwemBalt v. Latvia, Decision by the Court of Arbitration (2000)*].

⁵⁶ *Ibid* at para 35.

⁵⁷ *Fraport v. Philippines (1), Award (2007)*, *supra* note 35 at para 347.

⁵⁸ See Chapter 3 of this thesis for an in-depth discussion on the attribution issues of public officials’ corrupt acts.

Moreover, the legality clause is meant to deprive an investment of treaty protection when there is illegal conduct *by investors* rather than *by host States*. In *Kardassopoulos v. Georgia* (2007), the tribunal believed that the legality clause did not ‘allow a State to preclude an investor from seeking protection under the BIT on the ground that its own actions are illegal under its own laws.’⁵⁹ In *Inmaris v. Ukraine* (2010), the tribunal noted that ‘it would be incongruous to declare Claimants’ investments to be inconsistent with Ukrainian law based not on defaults by the foreign investors, but by a Ukrainian counterparty that was not under their control.’⁶⁰ This means if a State failed to comply with its own domestic law during the establishment of foreign investments, which then leads to the illegality of the foreign investment, the State can by no means raise a legality defense against investors. In corruption cases, the demand side is always the ‘crucial’ component, because an offence could not take place without their complicity. The case of *World Duty Free v. Kenya* (2006) is a good example where the host State, as an active demander, solicited the bribe from the investor. Even under circumstances where a host State ‘passively’ accepts a bribe offered by an investor, such acceptance destroys good governance. Although the two cases (*Kardassopoulos* and *Inmaris*) are different from a typical corruption scenario,⁶¹ the rationale of denying the application of the legality clause when the *illegality is caused by faults of host States* helps to address issues of corrupt acts in international investment disputes when host States have played a pivotal role in the formation of corrupt acts.

(2) Potential Abuse of Power

More importantly, if a tribunal’s focal point is an investor’s misconduct but it neglects the host State’s participation in corruption, it is likely to ‘incentivize’ an abuse of power on the host State side. This potential outcome is, in effect, contrary to the purpose of the legality requirement and of the investment treaty system. One should be aware that exceptional rules (both the *de minimis* threshold and the principle of estoppel) to the legality requirement do not arise abruptly. Many tribunals have indeed recognized that excluding an investment based on minor errors is

⁵⁹ *Kardassopoulos v. Georgia, Decision on Jurisdiction* (2007), *supra* note 54 at para 182.

⁶⁰ *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine, ICSID Case No ARB/08/8, Decision on Jurisdiction of 8 March 2010*, 2010 at para 139 [*Inmaris v. Ukraine, Decision on Jurisdiction* (2010)].

⁶¹ In *Kardassopoulos v. Georgia* (2007), it was the respondent who raised the argument that ‘State-owned enterprises violated Georgian law by exceeding their authority’. In *Inmaris*, it was a counterparty of the respondent who acted above the control of the State. See *Kardassopoulos v. Georgia, Decision on Jurisdiction* (2007), *supra* note 54 at para 183; *Inmaris v. Ukraine, Decision on Jurisdiction* (2010), *supra* note 60 at para 139.

inconsistent with the object and purpose of the BIT. Others have also delivered their understandings of the purpose of the legality requirement when establishing these exception rules.

The most commonly accepted explanation is that a requirement on legality is aimed at ‘excluding illegal investment from treaty protection’, including the deprivation of the right to access to international dispute settlement.⁶² For instance, in *Salini v. Morocco (2001)*, the tribunal verified that the legality requirement ‘seeks to prevent the BIT from protecting investments that should not be protected, particularly because they would be illegal.’⁶³ This explanation is, however, problematic. It simply stated in a paradigm that “‘A’ is regulated in order to exclude ‘not A’”. This statement is still abstract and does not offer an explanation as to why the legality requirement is important or beneficial, nor does it describe why the *de minimis* threshold does or does not conform to the purpose of the legality requirement.

A much more concrete and comprehensible analysis was outlined in another case – *Phoenix Action v. Czech Republic (2009)* – where the tribunal, on multiple occasions, referred to the purpose of the system of the bilateral or multilateral investment agreement and the investor-State dispute settlement (ISDS) regime to facilitate its interpretation of the legality clause. The deepest concern surrounding the legality requirement is avoidance of an abuse of the investment protection system.⁶⁴

The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.

Furthermore, in *Anderson v. Costa Rica (2010)*, the tribunal believed that ‘[t]he assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country.’⁶⁵ This is because, as explained by the tribunal, ‘indeed any country, has a fundamental interest in securing respect for its law’ and the legality requirement is a reflection of both ‘sound public policy and sound investment practice’.⁶⁶ It is

⁶² Kriebaum, *supra* note 8 at 307; Katharina Diel-Gligor & Rudolf Hennecke, “Investment in Accordance with the Law” in Marc Bungenberg et al, eds, *International Investment Law: A Handbook* (C.H.BECK, Hart, Nomos, 2015) 566 at 566.

⁶³ *Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction of 31 July 2001*, 42 ILM 609 (2003), 2001 at para 46 [*Salini v. Morocco, Decision on Jurisdiction (2001)*].

⁶⁴ *Phoenix Action v. Czech Republic, Award (2009)*, *supra* note 14 at paras 110, 113.

⁶⁵ *Alasdair Ross Anderson et al v Republic of Costa Rica, ICSID Case No ARB(AF)/07/3, Award of 19 May 2010*, 2010 at para 53 [*Anderson v. Costa Rica, Award (2010)*].

⁶⁶ *Ibid* at para 58.

further argued that ‘on the assumption that the host country’s investment laws will be written and applied to further its development policy, this limitation also is intended to ensure that investment is covered only if it is consistent with the host country’s development policy, and other policies, such as immigration or internal security, that impact on investment.’⁶⁷ The words from the *Phoenix* tribunal and the *Anderson* tribunal allow one to conclude that two parallel purposes of the legality requirement are: (1) to prevent an abuse of the ICSID arbitration system and (2) to secure the fundamental values and interests of a nation.

In fact, the legality requirement *itself* has been considered a risk for investors because a State may abuse its power by ‘manipulating’ their domestic laws, as demonstrated by Professor Vandevelde:⁶⁸

This type of clause, however, raises important potential concerns. Foreign investments operate in an environment that is, by definition, alien to them. Especially in developing countries, local laws can be notoriously nontransparent. Even in a country where the text of laws is easily obtainable, the wide range of national, regional, and local laws applicable to a major enterprise creates numerous opportunities for a foreign investment to violate unwittingly some applicable requirement. The danger, then, is that the failure of an investment to comply with an obscure or poorly understood regulation could result in a forfeiture of treaty protection, on the ground that the investment was not established in accordance with host-state law. These clauses never provide for repose of any kind and thus an investment that was in place for decades in theory could be denied treaty protection based on an infraction that occurred at the investment’s inception. Indeed, such a clause creates an incentive to limit transparency so as to provide opportunities for legal errors by foreign investments that can supply a basis for a denial of treaty protection, should the host state wish in its discretion to deny protection later. This is precisely the kind of investment climate the BITs are intended to prevent.

Professor Vandevelde’s comments demonstrate why the United States (US) has, from its earliest IIA practice, deliberately omitted a legality clause from US BITs and has maintained that practice to the present day.⁶⁹ The intention of the US practice is to prevent an investment climate which

⁶⁷ *Scope and Definition: A Sequel*, UNCTAD/DIAE/IA/2010/2 (New York, NY: United Nations, 2011) at 38 UNCTAD/DIAE/IA/2010/2.

⁶⁸ Vandevelde, *supra* note 9 at 130–131.

⁶⁹ According to the IIA Mapping Project initiated by the United Nations Conference on Trade and Development (UNCTAD), among 2577 mapped IIAs, 1648 of them contain the ‘in accordance with host State laws’ requirement in the section of the scope and definitions; a large majority (1637) of them are in the forms of BITs and only nine are categorized as treaties including investment provisions (TIPs); 1246 out of 1642 are in force, 210 remain signed (not in force), and 192 have been terminated. While it seems to be a common practice to include a legality requirement in traditional BITs, there is a tendency of States to remove the legality requirement as a restriction under the definition of investment. This novel development can be envisaged by filtering these mapped treaties by countries and by years: while a large majority of 1642 IIAs were concluded before 2009, only 146 IIAs (out of 1642) were signed in 2009 and onwards and the annual increase of this type of IIAs is falling of year by year. More importantly, States like Canada, China, Japan, Russia, Singapore, the United Kingdom (UK) indeed conclude the legality clause in some BITs since 2009, but the number is quite limited. Some recently signed significant IIAs and model BITs have omitted this clause, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States-Mexico-Canada Agreement (USMCA), the Canada 2014 Model Foreign Investment Protection Agreement, the US Model BIT 2012, the UK Model BIT 2008, the Germany Model BIT 2008, and the Canada Model BIT 2004.

enables a host State to abuse the use of international investment arbitration system by availing itself of complicated, obscure, and inconstant domestic rules and policies.⁷⁰ One of the primary purposes of international investment law and the whole system of investment arbitration is ‘the ability of host States to misuse sovereign powers and harm foreign investment’.⁷¹

This potential risk of abuse of power can be easily envisioned in cases in which the wrongfulness of accepting and soliciting corruption has been ignored by ISA tribunals, especially when the most direct result of precluding foreign investments in its entirety not only becomes the responsibility of the investor but also means NO responsibility for the government. The binary approach currently adopted may further *incentivize* corruption and other regulatory measures prohibited by investment treaties on the host State side, given that host States will no longer worry about being held responsible for these acts. Theoretically, a State should never use corruption as a defense to, for instance, illegally expropriate an investment; however, the current jurisprudence of addressing corruption cases through the legality requirement will incentivize a host State to do so.

It is also problematic when a corruption allegation *raised by an investor* claiming that public officials solicited or extorted bribes from them is addressed at the merits phrase, while those allegations *raised by host States* are deemed to be jurisdictional issues.⁷² Remarkably, the arbitrator, Mr. Bernardo M. Cremades, in his dissenting opinion in *Fraport v. Philippines (1) (2007)*, pointed out that it was not the host State’s intention to escape responsibility for unfair or expropriatory acts through invoking the legality clause.⁷³ Instead, he called upon the application of good faith to both parties, which means that investors should not be the only party to be restrained by this principle, but that host States must also act in good faith in international investment transactions.⁷⁴ When an arbitrator treats the acts of investors as jurisdictional issues and treats their legality as a prerequisite to the consideration of host States’ actions in the merits

⁷⁰ See also Kenneth J Vandeveld, *U.S. International Investment Agreements* (Oxford University Press, 2009) at 118.

⁷¹ Andrew Newcombe, “Investor misconduct: Jurisdiction, admissibility or merits?” in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 187 at 188.

⁷² Llamzon & Sinclair, *supra* note 6 at 464.

⁷³ *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines, ICSID Case No ARB/03/25, Dissenting Opinion of Mr Bernardo M Cremades (19 July 2007)*, 2007 at para 36 [*Fraport v. Philippines (1), Dissenting Opinion of Mr. Bernardo M. Cremades (2007)*].

⁷⁴ *Ibid.*

phase, does this not then place host States in an unfairly privileged position? Mr. Bernardo M. Cremades considers it a departure from the fundamental principles of procedure.⁷⁵

The legality of the investment in investment arbitration has its analogy in international commercial arbitration in the validity of the contract. If the applicable law does not insist on the separability of the arbitration agreement from the main contract, then respondents quickly seek to subvert the arbitral process by challenging the validity of the main contract. Similarly, the phrase ‘according to the laws and regulations of the Host State’ might provide the Achilles Heel of investment arbitration if jurisdiction depends on the Claimant passing a full legal compliance audit.

If the legality of the Claimant’s conduct is a jurisdictional issue, and the legality of the Respondent’s conduct a merits issue, then the Respondent Host State is placed in a powerful position. In the Biblical phrase, the Tribunal must first examine the speck in the eye of the investor and defer, and maybe never address, a beam in the eye of the Host State. Such an approach does not respect fundamental principles of procedure.

Again, this thesis is not criticizing tribunals’ condemnation of corruption, but rather is challenging *how* they condemn. I argue that dismissing a case at the jurisdictional phase based on the legality requirement is not the proper channel to address corruption issues, as it presents a high risk of an abuse of power when alternative ways are available. Chapter 3 introduces a novel approach for addressing allegations of corruption. Other ways, which involve a host State’s domestic proceedings, have also been proposed by Professor Vandeveld.⁷⁶

Host states have the power to prescribe and enforce civil and criminal penalties on foreign investments an investor who operates contrary to domestic laws. Bribery, for example, can be prosecuted as a criminal offense. Thus, host states even without this clause have the means to prevent or discourage the unlawful establishment of investments. Further, assuming that a BIT applies to investments regardless of their compliance with local law, the fact that an investment was established contrary to local law would undercut some claims to BIT protections on the merits. (In *International Thunderbird v. Mexico*, Mexico’s prosecution of an investment that conducted illegal gaming activities was held not to violate the investment chapter of the NAFTA.) The better policy is to rely on penalties under local law to enforce local legal restrictions on investment, rather than to threaten forfeiture of all BIT protections.

In conclusion, Lauterpacht presciently noted that ‘[t]here is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.’⁷⁷ To avoid the abuse of power of host States and to guarantee both substantive and procedural fairness of ISA, it is improper, by referring to the legality clause, to deny all claims of investors whose investments were procured through corruption.

3. An Implied Legality Requirement?

⁷⁵ *Ibid* at para 37.

⁷⁶ Vandeveld, *supra* note 9 at 130–131.

⁷⁷ Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press, 1982) at 164.

In the absence of an express requirement on legality, it remains controversial whether or not there exists an implied legality requirement that has a similar effect on illegal investments⁷⁸ and that can equally apply to corruption claims. It has been argued that a requirement on legality is implied in investment treaties,⁷⁹ such as the Energy Charter Treaty (ECT). In *Plama v. Bulgaria (2008)*, the tribunal confirmed the legality requirement, though specific language is absent therein. It explained that this interpretation is in line with ‘the aim of encouraging respect for the rule of law’.⁸⁰

Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.

...

In accordance with the introductory note to the ECT “[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [...]”. Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.

Domestic laws, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and other norms, based on which the investors initiated the arbitration proceedings, have also arguably instituted the condition that only investments made in legal ways have the right to access international arbitration. Notably, in *Phoenix Action v. Czech Republic (2009)*, the tribunal considered that the legality requirement is one element that should be taken into account if an investment is asking for benefits from international protection of the ICSID. The purpose of the international arbitration mechanism and the conclusion of the ICSID Convention, according to this tribunal, is to ‘protect legal and *bona fide* investments’ and requiring the investment made in legal ways is ‘implicit even when not expressly stated in the relevant BIT’.⁸¹ In *Getma International v. Guinea (2) (2016)*, where the arbitration was raised in the application of the Guinean Investment Code, the tribunal also recognized that ‘only legal investments, carried out in good faith, are to be protected by the ICSID

⁷⁸ See, e.g., Obersteiner, *supra* note 7 at 287; Rumiana Yotova, “Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?” in Joseph Klingler, Yuri Parkhomenko & Constantinos Salonidis, eds, *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International, 2018) 307.

⁷⁹ *Fraport v. Philippines (2)*, Award (2014), *supra* note 35 at para 332.

⁸⁰ *Plama v. Bulgaria*, Award (2008), *supra* note 41 at paras 138–139.

⁸¹ *Phoenix Action v. Czech Republic*, Award (2009), *supra* note 14 at paras 100–116.

arbitration...’;⁸² however, it did not clarify whether or not this conclusion was driven in a manner consistent with the content of its domestic Investment Code or as required by the ICSID Convention.

Opposing opinions, on the other hand, have been held by many other tribunals who believe that the ICSID Convention does not include a legality requirement on the investment. In *Joy Mining Machinery Limited v. Arab Republic of Egypt (2004)*, the tribunal believed that the ‘ICSID Convention did not define an investment and that this was left to the consent of the parties, expressed by means of contracts, national legislation or bilateral investment treaties, among other features’⁸³ and that ‘the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention.’⁸⁴ By referring to a number of other ICSID cases and the commentary available at that time, five elements of an investment project were consequently recognized by the *Joy Mining* tribunal, a requirement of lawfulness by implication not included.⁸⁵ The tribunal in *Saba Fakes v. Turkey (2010)* concurred this position in a more direct way, stating that:⁸⁶

[T]he principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be ‘legal’ or ‘illegal’, made in ‘good faith’ or not, it nonetheless remains an investment. The expressions ‘legal investment’ or ‘investment made in good faith’ are not pleonasm, and the expression ‘illegal investment’ or ‘investment made in bad faith’ are not oxymorons.

A similar conclusion was reached in *Metal-Tech v. Uzbekistan (2013)* where the tribunal unequivocally demonstrated that it ‘does not share the view expressed for instance in *Phoenix* pursuant to which compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25(1) of the ICSID Convention.’⁸⁷ Despite

⁸² *Getma International and others v Republic of Guinea (2)*, ICSID Case No ARB/11/29, Award (French) of 16 August 2016, 2016 at para 174 [*Getma International and others v. Guinea (2)*, Award (2016)].

⁸³ *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction of 6 August 2004, at para 42 [*Joy Mining v. Egypt (2004)*].

⁸⁴ *Ibid* at para 49.

⁸⁵ These elements consist of (a) a certain duration, (b) a regularity of profit and return, (c) an element of risk, (d) a substantial commitment, and (e) that it should constitute a significant contribution to the host State’s development. To reach this conclusion, the tribunal had also cited the work of Mr. Christoph H. Schreuer—*The ICSID Convention: A Commentary* (Cambridge University Press, 2001), see *Ibid* at para 53. It is worth to note that these elements, in whole or in part, have been endorsed in other tribunals. In *LESI-Dipenta v. Algeria (2005)*, the tribunal defined the term ‘investment’ through three elements: duration, risk, and contribution, see *LESI-DIPENTA v. Algeria, Award (2005)*, *supra* note 10 at para 13. The *Saba Fakes* tribunal also recognized ‘duration, risk, and contribution’ are also ‘necessary and sufficient to define an investment within the framework of the ICSID Convention’, see *Saba Fakes v. Turkey, Award (2010)*, *supra* note 12 at para 110.

⁸⁶ *Saba Fakes v. Turkey, Award (2010)*, *supra* note 12 at para 112.

⁸⁷ *Metal-Tech v. Uzbekistan, Award (2013)*, *supra* note 2 at para 127.

the foregoing, it is still within the discretion of States to require investments to be made in conformity with the domestic laws of the host State through investment treaties.⁸⁸ To determine whether a legality requirement is implied in a particular treaty is thus a case-by-case issue and a rigorous and holistic examination of the treaty context and preamble is necessary to gain an accurate understanding of the intentions of the State parties to the treaty at hand. ISA tribunals should also pay due regard to the subsequent and consistent practice of this particular State. For instance, the US has invariably and ‘deliberately chose[n] to omit such a [legality] clause from the US BITs’.⁸⁹ Given that, arguing that a legality requirement is implied in US investment treaties then runs counter to the fundamental investment policy developed by the US as well as to the interpretation rules under the Vienna Convention on the Law of Treaties (VCLT).⁹⁰

Whenever a tribunal confirms an implied legality requirement in a treaty, the scope of application and any exceptional principles to an express ‘in accordance with host State law’ clause should be equally applied. But the impact of an express legality requirement is arguably different from that of an implicit one; more specifically, a breach of the former generally triggers a lack of jurisdiction, while the latter is more related to the admissibility of the investors’ claims or a defense at the merits phase.⁹¹

B. The ‘Clean Hands’ Doctrine

The ‘clean hands’ doctrine is another popular source that host States have referred to as part of their allegations of corruption.⁹² It is generally claimed that an investor that had offered a bribe to the public official of the host State comes to the tribunal with ‘unclean hands’ and thus investors’

⁸⁸ *Saba Fakes v. Turkey*, Award (2010), *supra* note 12 at para 114; *Metal-Tech v. Uzbekistan*, Award (2013), *supra* note 2 at para 127.

⁸⁹ Vandeveld, *supra* note 70 at 118.

⁹⁰ Articles 31-33, *Vienna Convention on the Law of Treaties*, 1969 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969).

⁹¹ Llamzon & Sinclair, *supra* note 6 at 499. Jurisdiction refers to the competence of the tribunal to give rulings on the investors’ claims. Admissibility is an issue ‘only arises after’ the tribunal has established jurisdiction over the dispute. More specifically, admissibility examines the ‘nature of the claim and whether there are impediments to a properly constituted tribunal hearing the claim’. See Newcombe, *supra* note 71 at 192–193. See also Jan Paulsson, “Jurisdiction and Admissibility” in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* Publication 693 (Rochester, NY: ICC Publishing, 2005) 601.

⁹² *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, *Decision on Jurisdiction and Liability* of 10 November 2017, 2017 at para 671 [*Tethyan Copper v. Pakistan*, *Decision on Jurisdiction and Liability* (2017)]; *Glencore International AG and CI Prodeco SA v Republic of Colombia*, ICSID Case No ARB/16/6, *Award of 27 August 2019*, 2019 at para 571 [*Glencore v. Colombia* (1), *Award* (2019)].

claims should be dismissed. ISA tribunals have delivered diverging propositions regarding the ‘clean hands’ doctrine. Some have endorsed the doctrine as applicable to address corruption issues and, in consequence, have excluded investors’ claims entirely (*Spentex v. Uzbekistan*). However, given the bilateral nature of corruption, one may inquire as to why the demand side of corruption (i.e., host State) is allowed to benefit from its own unclean hands (i.e., accepting and/or soliciting a bribe) by arguing that the supply side (i.e., the investor) of this corruption has ‘unclean hands’ (i.e., offering a bribe). Why is an investor not allowed to do the same, namely arguing that the host State’s allegation of corruption is raised with ‘unclean hands’ and should be dismissed? A further question then arises: is the ‘clean hands’ doctrine truly a legitimate and proper approach to adequately address the complicated nature of corruption issues?

For example, the *Lao Holdings v. Laos (1)* tribunal has refused to apply the doctrine, providing that ‘[i]ncorporation of such a general doctrine into investor-State law without careful boundaries would risk opening investment disputes to an open-ended, vague and ultimately unmanageable principle.’⁹³ This thesis agrees with this latter viewpoint. In particular, I argue that the ‘clean hands’ doctrine is an ill-defined notion which does not qualify as one source of international law. Even if this doctrine is applicable in investment arbitration, the conditions for applicability are not met in the corruption context.

1. An Ill-Defined Notion

What is the ‘clean hands’ doctrine? While it is generally understood as ‘he who comes to equity for relief must come with clean hands’, there is so far a lack of a consensus on the definition and scope of this notion.⁹⁴ Does it suggest that any illegality of the claimant would render the claims inadmissible, or does it refer to a specific scope of wrongdoings? In practice, the ‘clean hands’ doctrine has become a shorthand reference to a host of related but distinct Latin maxims.

(1) Principle of Equity

⁹³ *Lao Holdings NV v Lao People’s Democratic Republic*, ICSID Case No ARB (AF)/12/6, Award of 6 August 2019, 2019 at para 106 [*Lao Holdings v. Laos (1)*, Award (2019)].

⁹⁴ In *Guyana v. Suriname* (2007), the tribunal expressly noted that ‘[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law [...] the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent’. See *Guyana v Suriname*, Award of the Arbitral Tribunal of 17 September 2007, PCA Case No 2004-04, (2013) XXX RIAA 1, Permanent Court of Arbitration (PCA), at para 418 [*Guyana v. Suriname*, Award (2007)].

The ‘clean hands’ doctrine has been frequently encapsulated in the Latin maxim ‘he who seeks equity must do equity’, or the principle of equity. A number of Judges of the International Court of Justice (ICJ, or the Court) and the Permanent Court of International Justice (PCIJ) have positioned this doctrine within the context of the equity principle through their individual, separate, and dissenting opinions.

In *Military and Paramilitary Activities* between Nicaragua and the US, Judge Schwebel noted that it was Nicaragua who ‘first intervened with the use of force in the affairs of another State’, whose status was as the ‘prima facie aggressor’ and who had failed to come to the Court with clean hands, which is a ‘fundamental general principle of law’.⁹⁵ To support this conclusion, Judge Schwebel referred to Judge Hudson’s opinion about the principle of equity delivered in *Diversion of Water from the Meuse*:⁹⁶

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, “Equality is equity”; “He who seeks equity must do equity”. “It is in line with such maxims that “a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper.” [...] A very similar principle was received into Roman Law. The obligation of a vendor and a vendee being concurrent, “neither could compel the other to perform unless he had done, or tendered, his own part”. [...]

To strengthen his argument that the ‘clean hands’ doctrine had become a general principle of law understood under Article 38 of the Statute of the International Court of Justice (ICJ Statute), Judge Schwebel further cited words from Sir Gerald Fitzmaurice regarding the principle of equity:⁹⁷

Certain English principles of equity find an application in the international field [...], such as that “He who comes to equity for relief must do equity” and that “He who comes to equity for relief must come with clean hands”. Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it.

⁹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, Dissenting Opinion of Judge Schwebel, 1986 at para 75 [*Military and Paramilitary Activities in and against Nicaragua*, Merits, Dissenting Opinion of Judge Schwebel].

⁹⁶ *Diversion of Water from the Meuse (The Netherlands v Belgium)*, PCIJ Series A/B, No 70, Judgment of June 28th, 1937, Individual Opinion by Mr Hudson, at 77 [*Diversion of Water from the Meuse*, Individual Opinion by Mr. Hudson].

⁹⁷ Gerald Fitzmaurice, “The General Principles Of International Law Considered from the Standpoint Of the Rule of Law” (1957) 92:1 *Recueil des Cours* at 119.

Judge Schwebel subsequently applied the substance and scope of the equity principle in making his decisions on the ‘clean hands’ doctrine submissions.

In the case of *Arrest Warrant of 11 April 2000* between the Democratic Republic of the Congo (DRC) and Belgium, Judge Van den Wyngaert also equated the ‘clean hands’ doctrine with the principle of equity. By referring to Judge Schwebel’s legal reasoning and again to Sir Gerald Fitzmaurice’s statements,⁹⁸ she noted that the DRC ‘did not come to the International Court with clean hands, and its application should be rejected’. It is worth noting that the above-mentioned observations from Judge Hudson, Judge Schwebel, and Sir Gerald Fitzmaurice have often been used to introduce the meaning of the ‘clean hands’ doctrine.⁹⁹

(2) Other Latin Maxims

Aside from the principle of equity, the ‘clean hands’ doctrine has been used to stand for a number of other maxims, proposed in both international disputes¹⁰⁰ and academic literature,¹⁰¹ including *ex injuria jus non oritur*, *ex delicto non oritur actio*, *ex turpi causa non oritur*, *nullus commodum capere potest de injuria sua propria*, and *nemo ex suo delicto meliorem suam conditionem facit*.

⁹⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, Dissenting Opinion of Judge ad hoc Van den Wyngaert, at paras 35, 84 [*Arrest Warrant of 11 April 2000, Dissenting Opinion of Judge ad hoc Van den Wyngaert*].

⁹⁹ R Moloo, “A Comment on the Clean Hands Doctrine in International Law” (2011) 8:1 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1646>> at 1; Stephen M Schwebel, “Clean Hands, Principle” in Rüdiger Wolfrum, ed, *Max Planck Encyclopedias of Public International Law* (Oxford University Press, 2012) 232; Ori Pomson & Yonatan Horowitz, “Humanitarian Intervention and the Clean Hands Doctrine in International Law” (2015) 48:2 Israel Law Review 219–251 at 228–231; Marcin Kałduński, “Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration” (2015) 4:2 Polish Review of International and European Law 69–101 at 70–72.

¹⁰⁰ In *Military and Paramilitary Activities*, Judge Schwebel also cited Judge Anzilotti’s proposition on the principle of *inadimplenti non est adimplendum* (one has no need to respect his obligation if the counter-party has not respected its own) to support this conclusion on the ‘clean hands’ doctrine. Judge Anzilotti noted that the principle of *inadimplenti non est adimplendum* that ‘is so just, so equitable, so universally recognized that it must be applied in international relations...’ See *Diversion of Water from the Meuse (The Netherlands v Belgium)*, PCIJ Series A/B, No 70, Judgment of June 28th, 1937, Dissenting Opinion of M Anzilotti, at 50 [*Diversion of Water from the Meuse, Dissenting Opinion of M. Anzilotti*]. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Israel invoked the maxim *nullus commodum capere potest de sua injuria propria* as part of its ‘clean hand’s doctrine argument. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports, 2004, 136 at para 63.

¹⁰¹ See, e.g., Patrick Dumberry, “State of Confusion: The Doctrine of ‘Clean Hands’ in Investment Arbitration After the Yukos Award” (2016) 17:2 The Journal of World Investment & Trade 229–259 at 230; Pomson & Horowitz, *supra* note 99 at 231–235; Lodovico Amianto, “The Role of ‘Unclean Hands’ Defences in International Investment Law” (2019) 6:1 McGill Journal of Dispute Resolution 37 at 16; Kałduński, *supra* note 99 at 70.

These Latin maxims are arguably ‘different forms’¹⁰² or ‘closely related to’¹⁰³ the ‘clean hands’ doctrine. The principle of *ex injuria jus non oritur* stands for ‘the proposition that unlawful conduct cannot modify the law applicable in the relations between the parties.’¹⁰⁴ The principle of *nullus commodum capere de sua injuria propria* means that ‘[a] State may not invoke its own illegal act to diminish its own liability’ or ‘[n]o one should be allowed to reap advantages from his own wrong’.¹⁰⁵ The maxim *ex delicto non oritur actio* has been considered a manifestation of *nullus commodum capere de sua injuria propria*;¹⁰⁶ however, the former is more relevant in cases where claims are tainted in illegality and the latter focuses on ‘reliance on an illegality’.¹⁰⁷ The principle of *ex turpi causa non oritur* denotes that an action cannot arise from a dishonorable cause, but the ICJ has required the party who invokes this principle against the other to demonstrate that the former party has been prevented from fulfilling its obligation due to the wrongful acts allegedly committed by the latter party.¹⁰⁸

While certain overlaps exist among these Latin expressions, they do not hold the same meaning and have intrinsic differences from one another. The practice of roughly referring to these maxims within the ‘clean hands’ doctrine without careful boundaries or clarification reinforces the lack of a uniform understanding of the scope and substance of the ‘clean hands’ doctrine.

(3) A Standalone Doctrine

¹⁰² Ori Pomson, “The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry” (2017) *The Journal of World Investment & Trade* 712–734 at 719.

¹⁰³ Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in Kaj Hobér et al, eds, *Between East and West: Essays in honour of Ulf Franke* (Huntington, N.Y.: Juris, 2010) 309 at 318–319.

¹⁰⁴ *Jadhav case (India v Pakistan)*, Judgment of 17 July 2019, at para 64 [*Jadhav case, Judgment (2019)*]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 1997 at para 133 [*Gabčíkovo-Nagymaros Project, Judgement (1997)*].

¹⁰⁵ Bin Cheng, *General Principles Of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953) at 149–150.

¹⁰⁶ *Ibid* at 155.

¹⁰⁷ See, e.g., Pomson, “The Clean Hands Doctrine in the Yukos Awards”, *supra* note 102 at 719–721; Amianto, *supra* note 101 at 14–16.

¹⁰⁸ See *Jadhav case, Judgment (2019)*, *supra* note 104 at para 63. To reach this conclusion in the *Jadhav* case, the ICJ cited the following statement in the *Factory at Chorzów* case:

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

See *Factory at Chorzów (Germany v Poland)*, Judgment No8, PCIJ, Series A, Jurisdiction of 26 July 1927, at 31 [*Factory at Chorzów, Jurisdiction (1927)*].

At other times, the ‘clean hands’ doctrine is differentiated from these Latin maxims and considered a standalone doctrine. Such was the case in *Jadhav*, the ICJ differentiated the ‘clean hands’ doctrine, the principle of *ex turpi causa non oritur actio*, and the principle of *ex injuria jus non oritur* by addressing these concepts separately. The Court has further addressed arguments based on the ‘clean hands’ doctrine in many other cases, without referring to the Latin expressions, such as in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Certain Iranian Assets (Islamic Republic of Iran v. the United States of America)*, etc. Even so, the Court has never explicated what the doctrine stands for, nor has it expressly recognized the status of the doctrine in international law.

By contrast, a careful review of these cases suggests that the ICJ has been consistently reluctant to apply the ‘clean hands’ doctrine to dismiss applications. In *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Somalia initiated the proceedings against Kenya concerning a dispute about the single maritime boundary between these two States. One preliminary objection raised by Kenya was that Somalia’s application was inadmissible because it has breached a Memorandum of Understanding (MoU) signed between them. The Court refused to apply the ‘clean hands’ doctrine, reasoning that ‘the fact that an applicant may have breached a treaty at issue in the case does not *per se* affect the admissibility of its application’.¹⁰⁹

In *Certain Iranian Assets (Islamic Republic of Iran v. the United States of America)*, Iran launched ICJ proceedings alleging that the US has violated the Treaty of Amity, Economic Relations and Consular Rights effective between them since 1957; as a response, the US initiated an objection, among others, to the admissibility of Iran’s claims, stating that Iran had come to the proceeding with unclean hands which precluded the Court from hearing the case.¹¹⁰ The Court reiterated its proposition regarding the ‘clean hands’ doctrine that “even if it were shown that the Applicant’s conduct was not beyond reproach, this would not be sufficient *per se* to uphold the objection to admissibility raised by the Respondent on the basis of the ‘clean hands’ doctrine.”¹¹¹

¹⁰⁹ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Preliminary Objections, Judgment, ICJ Reports 2017, at para 142 [*Maritime Delimitation in the Indian Ocean, Preliminary Objections, Judgment (2017)*].

¹¹⁰ *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Preliminary Objections, Judgment, ICJ Reports 2019, at para 116 [*Certain Iranian Assets, Preliminary Objections, Judgment (2019)*].

¹¹¹ *Ibid* at paras 122–123.

The ICJ maintained this approach in the *Jadhav* case, where India filed an application against Pakistan and requested that the ICJ declare that Pakistan's arrest and detention of an Indian national (Mr. Kulbhushan Sudhir Jadhav) violated the Vienna Convention on Consular Relations. One of Pakistan's preliminary objections to the admissibility was made in reference to the 'clean hands' doctrine, and stated that India's unlawful conduct precluded this Court from hearing the dispute.¹¹² The Court clearly expressed that it *cannot* support the opinion that "an objection based on the 'clean hands' doctrine may itself render an application based on a valid title of jurisdiction inadmissible."¹¹³

(4) Unsettled Status in International Law

The want for a well-accepted definition and scope of the 'clean hands' doctrine has resulted in diverging opinions on the status of the doctrine. According to some, this doctrine qualifies as a general principle of law, because it is 'encountered in the domestic legal orders of many States' and 'can be found in the laws of many jurisdictions, civil- and common-law alike.'¹¹⁴ Opponents propose that 'in light of ...the different versions of the doctrine in municipal legal systems, ... no form of the clean hands doctrine can be considered a general principle of law'.¹¹⁵ Those who have different understandings of the scope and the origin of the 'clean hands' doctrine likely come to their own distinct conclusions.

Those who have associated the 'clean hands' doctrine with the principle of equity most likely argue that this doctrine is applicable in international courts and tribunals. This is because the principle of equity has been widely recognized and endorsed as a general principle of law.¹¹⁶ On the other hand, advocates who consider the 'clean hands' doctrine to be a standalone notion or an

¹¹² *Jadhav case, Judgment (2019)*, *supra* note 104 at para 59.

¹¹³ *Ibid* at para 61.

¹¹⁴ Kreindler, *supra* note 103 at 318.

¹¹⁵ Pomson, "The Clean Hands Doctrine in the Yukos Awards", *supra* note 102 at 733.

¹¹⁶ Judge Hudson has concluded the principle of equity as part of the international law that the Court must apply: The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.

See *Diversion of Water from the Meuse, Individual Opinion by Mr. Hudson*, *supra* note 96 at 77.

assembling of several related doctrines may hold the opinion that this doctrine does not qualify as one source of international law.¹¹⁷

Moreover, in international investment law, the ‘clean hands’ doctrine is sometimes deemed a/an (implied) treaty obligation¹¹⁸ and an issue related to the admissibility of investor claims.¹¹⁹ More specifically, the ‘in accordance with host State laws’ clause is arguably ‘a manifestation of the doctrine of clean hands’.¹²⁰ The legality clause is mostly invoked in treaty-based arbitration, while the ‘clean hands’ doctrine is more favored in contract-based investment disputes or when the investment treaty and arbitration rules under consideration do not contain an unequivocal requirement of ‘in accordance with host State laws’. However, in *Yukos*, while the tribunal did accept an implied legality requirement in the ECT from the good faith viewpoint, it indeed differentiated it from the ‘clean hands’ doctrine. In particular, it explicitly concluded that the ‘clean hands’ doctrine is not a general principle of international law.¹²¹

In light of the above, it is hard to refine an accurate definition of the ‘clean hands’ doctrine, whose legal status in international law has generated significant controversy and whose application in international courts and tribunals is inconsistent. For this reason, this currently ill-defined notion cannot be used as a source of international law that would bar an investor from making claims before an arbitral tribunal.

2. Alternatively, the Conditions to Apply the Doctrine Are Not Met

¹¹⁷ Pomson, “The Clean Hands Doctrine in the Yukos Awards”, *supra* note 102; Charles Rousseau, *Droit International Public. Tome V: Les rapports conflictuels* (Paris: Editions Sirey, 1983) at 177. See also *Yukos v. Russia, Final Award (2014)*, *supra* note 37 at para 1363.

¹¹⁸ The ‘unclean hands’ doctrine is sometimes considered to be a requirement of conformity with laws *implied* in investment treaties, like the *Fraport v. Philippines (2)* tribunal provided:

Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international law, such as the “clean hands” doctrine or doctrines to the same effect.

See *Fraport v. Philippines (2)*, *Award (2014)*, *supra* note 35 at para 328.

¹¹⁹ Andrea K Bjorklund & Lukas Vanhonnaeker, “Yukos: The Clean Hands Doctrine Revisited” (2015) 9:2 *Diritti umani e diritto internazionale* 365 at 369–373; Jean-Michel Marcoux & Andrea K Bjorklund, “Foreign Investors’ Responsibilities and Contributory Fault in Investment Arbitration” (2020) 69:4 *International & Comparative Law Quarterly* 877–905 at 892.

¹²⁰ P Dumberry & G Dumas-Aubin, “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law” (2013) 10:1 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1933>> at 4; Moloo, *supra* note 99 at 6; Dumberry, *supra* note 101 at 232.

¹²¹ *Yukos v. Russia, Final Award (2014)*, *supra* note 37 at para 1361.

Assuming the existence of such a source of international law, either as CIL, a general principle of law, or an implied treaty obligation on legality, a typical allegation of corruption does not automatically invite the application of the ‘clean hands’ doctrine. We recall that when interpreting the legality clause or an implied one in an investment treaty, investment tribunals have strictly construed such provisions by, for example, establishing the *de minimis* threshold and the principle of estoppel to avoid an abuse of the investment protection system. This method of interpretation should likewise apply to the ‘clean hands’ doctrine to avoid the arbitrary use of any illegal act (irrespective of its severity) to exclude investors from accessing investment dispute settlement.

In the investment law context, if the ‘clean hands’ doctrine is understood as another manifestation of the ‘in accordance with the host State laws’ clause, the preceding part of this chapter has demonstrated why an allegation of corruption does not fit the application of the legality requirement. If it is more generally understood as ‘he who seeks equity must do equity’, its scope is more limited. More specifically, the condition of *reciprocity* enshrined within this expression is not met in corruption cases. On the contrary, a State should be *barred* from raising allegations of corruption because such submission impairs the spirit that the ‘clean hands’ doctrine functions to protect.

(1) Reciprocal Obligations

Whenever the ‘clean hands’ doctrine is treated as a standalone notion or a reference for a number of related Latin maxims, it is aimed at ‘prevent[ing] equitable relief to a complainant who has injured the defendant by the same delinquency of which he complains.’¹²² In this sense, the doctrine is meant to bar an applicant from raising claims against the respondent for its non-performance of an obligation when the applicant itself did not fulfil a related and *reciprocal* obligation.¹²³ The reciprocal obligation is also known as the ‘precisely similar action, similar in fact, and similar in law’ standard, which was first confirmed by Judge Hudson in the *Diversion of Water from the Meuse* case between the Netherlands and Belgium.

On August 1st, 1936, the Netherlands filed an application against Belgium before the PICJ with regard to the diversion of water from the river Meuse.¹²⁴ The Applicant claimed that ‘various

¹²² Quincy Wright, “The Goa Incident” (1962) 56:3 American Journal of International Law 617–632 at 628.

¹²³ Pomson & Horowitz, *supra* note 99 at 228.

¹²⁴ *Diversion of Water from the Meuse (The Netherlands v Belgium)*, PCIJ Series A/B, No 70, Judgment of June 28th, 1937, 61 at 5 [*Diversion of Water from the Meuse, Judgement (1937)*].

works in connection with the construction of the Albert Canal’ and Belgian measures of ‘supply[ing] with water existing or projected canals in the north of her territory’ were in violation of the 1863 Treaty governing diversion from the Meuse.¹²⁵ In particular, the Netherlands argued the alimentation of canals by Belgian *Neerhaeren Lock* is contrary to the 1836 Treaty.¹²⁶ The Belgian government denied the above allegations on the ground that ‘if the Court should decide that the functioning of the Belgian lock at Neerhaeren is in opposition to the Treaty of 1836, it ought to admit *a fortiori* that the functioning of the Netherlands lock of *Bosscheveld* is not more regular.’¹²⁷ Belgium raised the so-called ‘clean hands’ doctrine to ask the Court to declare that ‘by the construction of works contrary to the provisions of the Treaty the Netherlands has lost the right to invoke the Treaty against Belgium.’¹²⁸

Judge Hudson (while concurring in the main judgement) made certain individual observations, including a careful and thorough examination of both Dutch *Bosscheveld Lock* and Belgian *Neerhaeren Lock*, which allowed him to draw a conclusion that these two locks are, *in law and in fact, in the same position* and no one is more favorable or more unfavorable than the other.¹²⁹ In this situation, Judge Hudson raised some concerns (including that of the ‘clean hands’ doctrine) that needed to be addressed before making any decision on the Netherlands’ claims:¹³⁰

The question arises, therefore, whether in this case the Court must pronounce upon the legality or the illegality of the alimentation which results from the operation of either the Neerhaeren Lock or the Bosscheveld Lock. If the operation of both locks were thought to be in conformity with the Treaty of 1863, the submissions of the Netherlands Government as to the Neerhaeren Lock would of course be rejected. It remains to be considered whether that result would be reached if the operation of both locks were thought to be in violation of the Treaty of 1863.

There can be no question here as to the good faith of either Party. Each Party has proceeded on its own view of the Treaty of 1836. Each has taken action which has led to the same result, in fact and in law. If the Court were called upon to give judgment on the action of both the Parties, it could do so with due regard to the equal positions of the Parties; but here it is asked by one Party to condemn the action taken by the other. Aside from the fact that the moving Party is the one whose action preceded that of the other, that the Bosscheveld Lock was put into service in 1931 and the Neerhaeren Lock only in 1934, is this a case in which affirmative relief should be given by the Court? Or should it be said, in the terms of the alternative Belgian submission, that the Netherlands has in some measure *perdu le droit d’invoquer* the Treaty against Belgium?

¹²⁵ *Ibid.*

¹²⁶ *Diversion of Water from the Meuse, Individual Opinion by Mr. Hudson, supra* note 96 at 73.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid* at 75.

¹³⁰ *Ibid.*

In brief, Judge Hudson noticed that *both* parties were thought to have violated the same treaty and the Court could have given decisions on the actions of both parties. But here, when one of the parties initiated the proceeding as the applicant, against the other, he questioned whether the Court should still deliver affirmative relief in such a situation. Judge Hudson believed that the equity principle (or sometimes referred as the ‘clean hands’ doctrine) should have applied in this case, when two parties have assumed ‘an identical or a reciprocal obligation’. In particular, when the Netherlands complained about the operation of the Bosscheveld Lock, the Netherlands itself was also engaging in exactly the same measures, or, to use Judge Hudson’s words – ‘taking precisely similar action, similar in fact and similar in law’:¹³¹

On the assumption that the alimentation of canals by the functioning of the Neerhaeren Lock and the Bosscheveld Lock is contrary to the Treaty of 1863, is this a case in which the Court ought to apply the principle referred to? Here the Parties are not before the Court under a special agreement in which they have mutually agreed to seek the Court’s interpretation of the Treaty of 1863. This proceeding was instituted by the Netherlands. The jurisdiction of the Court rests on the declarations made by the Parties under paragraph 2 of Article 36 of the Statute. It is the Court’s obligatory jurisdiction which is invoked, without challenge by Belgium. If it is important that this jurisdiction should not be attenuated by the action of the Court itself, it is no less important that it be exercised within the limitations which equity imposes. As the moving Party, the Netherlands asks that the Belgian action with respect to the operation of the Neerhaeren Lock be declared contrary to the Treaty of 1863, and that Belgium be ordered to discontinue that action. Yet, in its operation of the Bosscheveld Lock, the Netherlands itself is now engaged in taking precisely similar action, similar in fact and similar in law. This seems to call for an application of the principle of equity stated above.

The application of this principle would have resulted in a rejection of the Netherlands’ submission, which would have prevented the Netherlands from taking advantage of its Applicant position in this international court system to impugn Belgian measures, even when the Court found the operation of Neerhaeren Lock was indeed in violation of the Treaty of 1863. Judge Hudson explained that by virtue of equity, ‘the Netherlands is not in a position to have such relief decreed to her. Belgium cannot be ordered to discontinue the operation of the Neerhaeren Lock when the Netherlands is left free to continue the operation of the Bosscheveld Lock.’¹³²

The above holdings from Judge Hudson have been regarded as ‘the most notable exposition and application of the [‘clean hands’] principle’¹³³ and are arguably ‘shared by the majority of the Court’.¹³⁴ The ICJ seems to have recognized this *reciprocity* standard as reflected in the recent jurisprudence. For example, in *Certain Iranian Assets*, while the ICJ refused to endorse the ‘clean

¹³¹ *Ibid* at 78.

¹³² *Ibid*.

¹³³ Schwebel, *supra* note 99 at para 2.

¹³⁴ *Ibid*.

hands' doctrine (raised by the US), it indeed responded to Iran's argument that the 'clean hands' doctrine applies only when the claimant is engaged in a *precisely similar action, similar in fact and similar in law* as that of which it complains.¹³⁵ In the end, it noted that 'the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based.'¹³⁶

Judge Schwebel's decision on the 'clean hands' submission in *Military and Paramilitary Activity* was also made after recognizing reciprocity as the precondition for the application of the doctrine. He noted that the alleged illegalities on the part of the US "were consequential on were embarked upon in order to counter Nicaragua's own illegality – 'in short were provoked by it'."¹³⁷ Given that Nicaragua was guilty of illegal conduct, Nicaragua should be thus deprived of the locus standi to claim against the US.¹³⁸

In *Jadhav*, Judge Iwasawa additionally noted in his Declaration that the alleged wrongful acts of India raised under the 'clean hands' doctrine 'do not relate to the Vienna Convention on Consular Relations upon which India's Application is based', which thus failed to meet the 'precise similar' criteria as established in *Maritime Delimitation in the Indian Ocean* and in *Certain Iranian Assets*.¹³⁹

Given the foregoing, if the 'clean hands' doctrine is yet applicable as one source of international law, then the party who invokes this principle against another party must demonstrate that the latter party is engaging in 'taking precisely similar action, similar in fact and similar in law'.

(2) Allegations of Corruption

In corruption cases, if a host State submits the application of the 'clean hands' doctrine as part of the corruption allegations as an objection to an investor's claims, this State must demonstrate that the illegal action of the investor (A_i) is 'precisely similar action, similar in fact and similar in law' or 'reciprocal' with the alleged illegal action of this host State (A_s) claimed by this investor:¹⁴⁰

¹³⁵ *Certain Iranian Assets, Preliminary Objections, Judgment* (2019), *supra* note 110 at para 121.

¹³⁶ *Ibid* at para 122.

¹³⁷ *Military and Paramilitary Activities in and against Nicaragua, Merits, Dissenting Opinion of Judge Schwebel*, *supra* note 95 at para 272.

¹³⁸ *Ibid*.

¹³⁹ *Jadhav case (India v Pakistan), Judgment (Merits) of 17 July 2019, Declaration of Judge Iwasawa*, at para 3.

¹⁴⁰ This attribute is also named 'tu quoque (you too!)', see generally Ori J Herstein, "A Normative Theory of the Clean Hands Defense" (2011) 17:3 Legal Theory 171–208.

$$A_i \approx A_s.$$

Investment tribunals have confirmed the applicability of this standard in investment arbitration. In *Niko Resources v. Bangladesh*, the tribunals concurred with what had been argued by Judge Hudson as to the content of the ‘clean hands’ doctrine and refined three criteria: “(i) the breach must concern a continuing violation, (ii) the remedy sought must be ‘*protection against continuance of that violation in the future*’, not damages for past violations and (iii) there must be a relationship of reciprocity between the obligations considered”.¹⁴¹

Although acts of corruption, either giving or demanding, are unlike the operation of the Neerhaeren Lock or the Bosscheveld Lock in the *Diversion of Water from the Meuse* case, which were instances of continuing non-performance, the rationale behind this principle is similarly applicable to corruption cases: international dispute settlement prevents a party (Party A), whichever the applicant or the respondent, from taking advantage of its position in this proceeding to blame the other party (Party B) of certain measures while Party A itself is engaged in similar measures.

However, the allegation of corruption does not conform with this relationship because in such cases,

$$A_{i=corruption} \not\approx A_{s=(e.g.) expropriation}.$$

In a typical allegation of corruption, the investor requests that the tribunal declare the host State’s measures contrary to the treaty obligation (such as illegal expropriation, failure to accord fair and equitable treatment, etc.). These regulatory measures by the host State were normally not direct responses to the investor’s corrupt acts, but rose out of other concerns. This is the case in almost all the investment disputes (so far identified) that involve corruption. In this sense, the ‘illegality’ on which the ‘clean hands’ submission raised by this host State is neither a similar action with

¹⁴¹ *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No ARB/10/11 and No ARB/10/18, *Decision on Jurisdiction* of 19 August 2013, 2013 at para 481 [*Niko Resources v. Bangladesh, Decision on Jurisdiction* (2013)]. See also Aloysius Llamzon, “Yukos Universal Limited (Isle of Man) v The Russian Federation: The State of the ‘Unclean Hands’ Doctrine in International Investment Law: Yukos as both Omega and Alpha” (2015) 30:2 ICSID Review 315–325 at 323. (‘Rather, as discussed in *Niko*, one of its key attributed is reciprocity—that is, the investor’s wrongdoing and the alleged treaty or contract breaches of the host State arise from the same or substantially similar facts.’)

expropriation, nor a reciprocal one.¹⁴² Consequently, host States' corruption claims based on the 'clean hands' doctrine are without merit.

That being said, there is no denying that a host State may take certain regulatory actions *right against* the corrupt acts found in the establishment of investments; in such particular situations, it is still doubtful whether these two kinds of illegalities are 'similar in law and in fact'. To this point, we have not observed any such case in the investment dispute context.

This thesis further argues that an investor could raise a new 'clean hands' submission to defend the host State's 'clean hands' doctrine submission. The 'unclean hands' concern of the host State's submission is based on the investor's misconduct of corruption (as the supply side), which is truly 'similar action, similar in fact and similar law' with host State's own illegally act of corruption (as the demand side):

$$A_{i=giving\ a\ bribe} \approx A_{s=accepting\ a\ bribe}.$$

More specifically, when a host State asks the tribunal to dismiss an investor's submissions because of the investor's engagement in a corrupt act, this host State, *per se*, is engaged in the same corrupt act by taking precisely similar action, similar in fact and similar in law: namely, demanding a bribe or accepting a bribe. This is exactly what the equity principle or the 'clean hands' doctrine (if considered to exist) prohibits. Or, to apply another doctrine, *in pari delicto* ("in equal fault")¹⁴³ – a sister doctrine in law to the 'clean hands' doctrine, under which an international court or tribunal should deny 'a legal remedy because both parties – plaintiff and defendant – stand in equal fault in relation to the wrong or unlawful transaction complained about'.¹⁴⁴ If a tribunal weighs comparative wrongs committed in cases of corruption, the claims that a host State seeks based on its acts of solicitation should thus be denied because it and the investor stand *in equal fault* in relation to the illegal investment the host States complained about. In some situations, the host

¹⁴² See also Llamzon, "The State of the 'Unclean Hands' Doctrine in International Investment Law", *supra* note 141 at 323. ('Instances of investor wrongdoing such as corruption or fraud at the inception of the investment usually do not concern exactly the same set of facts on which the investor relies in making its claims against the host State.')

¹⁴³ James Richard Crawford & Paul Mertenskötter, "The Use of the ILC's Attribution Rules in Investment Arbitration" in Meg Kinnear et al, eds, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2016) 27 at 37. (Crawford and Mertenskötter have acknowledged that both parties to corruption are in equal fault: 'The issue [in *World Duty Free v. Kenya*] was rather one of the enforceability of a corrupt transaction in a situation where the parties were, or were to be treated as, *in pari delicto*.')

¹⁴⁴ Herstein, *supra* note 140 at 176; Llamzon, "The State of the 'Unclean Hands' Doctrine in International Investment Law", *supra* note 141 at 316.

State may even hold more fault than the investor (as demonstrated in Chapter 1), depending on the facts and the legal norms applied in that particular case.

In sum, the conditions for the application of the ‘clean hands’ doctrine are not met in a typical scenario with a corrupt relationship, because the alleged illegalities on the two sides are not in violation of reciprocal obligations. By contrast, the host State’s ‘clean hands’ submission should be dismissed because of its own ‘unclean hands’.

C. Transnational Public Policy

Besides the legality requirement and the ‘clean hands’ doctrine, States have raised the transnational public policy concerns in both treaty-based (*Tethyan v. Pakistan*)¹⁴⁵ and contract-based (*World Duty Free v. Kenya*)¹⁴⁶ investment arbitration, requesting that the tribunal decline jurisdiction (*Niko Resources v. Bangladesh*)¹⁴⁷ or declare investors’ claims inadmissible (*Vladislav Kim v. Uzbekistan*).¹⁴⁸ Tribunals in *World Duty Free* and in *Spentex*, after a positive finding of the alleged corrupt acts, relied on this concept to support the corruption claims and consequently dismiss claims of the investors. While ISA tribunals recognize the existence of a transnational public policy against corruption and its applicability in investment arbitration, the reasoning why the outcome must be *a complete denial of claims* is absent. And again, how should an ISA tribunal deal with the demand side of corruption under the concept of transnational public policy and resolve any abuse of power potentially then engendered by the use of the binary approach? This section attempts to solve the above concerns. Before offering a determinative answer, the contour of the transnational public policy prohibiting corruption and its practice in international relations will first be scrutinized.

1. The Scope of Transnational Public Policy Prohibiting Corruption

To introduce transnational public policy, the *World Duty Free* tribunal first recognized the concept of *public policy* which ‘is rooted in most, if not all, legal systems’ and highlighted the significance of public policy international arbitration. Most remarkably, the United Nations Convention on the

¹⁴⁵ *Tethyan Cooper v. Pakistan, Decision on Jurisdiction and Liability (2017)*, *supra* note 92 at para 674.

¹⁴⁶ *World Duty Free Company v Republic of Kenya, ICSID Case No Arb/00/7, Award of 4 October 2006*, 2006 at para 188 [*World Duty Free v. Kenya, Award (2006)*].

¹⁴⁷ *Niko Resources v. Bangladesh, Decision on Jurisdiction (2013)*, *supra* note 141 at para 377.

¹⁴⁸ *Vladislav Kim v. Uzbekistan, Decision on Jurisdiction (2017)*, *supra* note 1 at para 172.

Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) establishes public policy as a lawful ground for refusing to recognize and enforce an arbitral award.¹⁴⁹ A similar provision is incorporated in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.¹⁵⁰ A narrow concept of public policy that applies to *foreign awards* is thus regarded as ‘international public policy’. While public policy or domestic public policy comprises the ‘fundamental notions of a particular legal system’,¹⁵¹ transnational public policy signifies ‘an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora’.¹⁵² As for the content, it may comprise ‘fundamental rules of nature law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality’.¹⁵³

Despite the wide recognition of the above understanding, it remains ‘notoriously difficult’ to give a precise definition of public policy¹⁵⁴ because it truly depends on the context within which this notion is being interpreted according to the national laws of that particular jurisdiction. The fact that ‘the principles that a State considers to be fundamental to its legal and social framework evolve’ further complicates the process of conceptualizing public policy.¹⁵⁵

¹⁴⁹ See Article V.2, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted on 10 June, 1958, entered into force on 7 June, 1959, 330 UNTS 3, [1975] ATS 25, 4 ILM 532 (1965), UKTS 26 (1976). This provision provides that:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

...

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

¹⁵⁰ See Article 36 (Grounds for refusing recognition or enforcement), *UNCITRAL Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006, 2010.

¹⁵¹ B Hanotiau & O Caprasse, “Public Policy in International Commercial Arbitration” in E Gaillard & D di Pietro, eds, *Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention in Practice* (London: Cameron May Ltd., 2008) 787 at 789; Kreindler, *supra* note 6 at 116.

¹⁵² *World Duty Free v. Kenya, Award* (2006), *supra* note 146 at para 139. See also Inan Uluc, *Corruption in International Arbitration* (London, England: Wildy, Simmonds & Hill Publishing, 2018) at 282. For discussions on the interrelationships between *domestic/internal* public policy, *international* public policy, and *transnational* public policy, see Jean-Michel Marcoux, “Transnational Public Policy as an International Practice in Investment Arbitration” (2019) 10:3 *Journal of International Dispute Settlement* 496–515 at 497–498.

¹⁵³ *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, by Committee on International Commercial Arbitration (London Conference: International Law Association, 2000) at 6–7. This type of transnational public policy that embraces substantive legal issues should be differentiated from procedural transnational public policy comprising fundamental procedural rights. See Richard Kreindler, “Standards of Procedural International Public Policy” (2008) 2 *Stockholm International Arbitration Review*, online: <<https://arbitrationlaw.com/library/standards-procedural-international-public-policy-stockholm-international-arbitration-review>> at 143–144.

¹⁵⁴ Hanotiau & Caprasse, *supra* note 151 at 788.

¹⁵⁵ Kreindler, *supra* note 6 at 117.

In this respect, it is hard to ascertain a precise boundary of transnational public policy or the existence of a violation of transnational public policy. It is argued that ISA tribunals must identify the existence of a particular transnational public policy ‘through international conventions, comparative law and arbitral awards’.¹⁵⁶ On the other hand, the existence of international conventions, resolutions and the like where a particular practice is condemned arguably ‘does not necessarily translate into a broad consensus’ that can be applied by arbitrators to ascertain a violation of transnational public policy.¹⁵⁷ Be that as it may, there truly exists an overwhelming consensus that acts of corruption or bribery are contrary to transnational public policy, if one looks at various domestic laws, international conventions, arbitral case law, and scholarly opinions,¹⁵⁸ as has been done by the *World Duty Free* tribunal.¹⁵⁹

First of all, there is a convergence in national laws that bribery of government officials is prohibited and is sanctioned as illegal conduct.¹⁶⁰ This is also reflected in the United Nations Convention against Corruption (UNCAC) which currently has 187 State parties¹⁶¹ and where bribery of *national* public officials and bribery of *foreign* public officials and officials of public *international organizations* are forbidden and must be established as criminal offenses through domestic legislation.¹⁶² The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OCED Anti-Bribery Convention) has also stressed the importance of criminalizing the offense of bribery of *foreign* public officials.¹⁶³ Secondly,

¹⁵⁶ *World Duty Free v. Kenya, Award (2006)*, *supra* note 146 at para 141.

¹⁵⁷ Richard H Kreindler, “Approaches to the Application of Transnational Public Policy by Arbitrators” (2003) 4:2 *The Journal of World Investment & Trade* 239–250 at 246.

¹⁵⁸ See also Emmanuel Gaillard, “The emergence of transnational responses to corruption in international arbitration” (2019) 35:1 *Arbitration International* 1–19 at 13–14; R Moloo, C B Lamm & H T Pham, “Fraud and Corruption in International Arbitration” (2013) 10:3 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1952>> at 711–714; Donald Francis Donovan, “Investment Treaty Arbitration” in *Mandatory Rules in International Arbitration* (JurisNet, LLC, 2011) 275 at 283. See also Committee on International Commercial Arbitration, *supra* note 153 at 7. (‘And a number of cases have recognised certain activities, such as corruption, drug trafficking, smuggling and terrorism, to be illicit virtually the worldover.’)

¹⁵⁹ The tribunal expressly noted that ‘bribery is contrary to the international public policy of most, if not all, States, or use another formula, to transnational public policy’. See *World Duty Free v. Kenya, Award (2006)*, *supra* note 146 at para 157.

¹⁶⁰ Moloo, Lamm & Pham, *supra* note 158 at 712.

¹⁶¹ For updated information with regard to this convention, see the official webpage of the UNCAC operated by the United Nations: <https://www.unodc.org/unodc/en/corruption/uncac.html>.

¹⁶² See respectively Article 15 and Article 16 of the *United Nations Convention against Corruption*, 2005, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, U.N. GAOR, 58th Sess., 51st Plen Mtg., UN Doc. A/RES/58/4.

¹⁶³ See Article 1 of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed on 17 December 1997, entered into force on 15 February 1999.

transnational public policy against corruption embraces both the supply side and the demand side of corruption, or, in other words, both active and passive corruption.¹⁶⁴ The bilateralism of corruption has been confirmed and sanctioned in most countries and presented in the UNCAC (i.e., Article 15(2) and Article 16(2)). Understanding the demand side of corruption is important in order for one to understand transnational public policy against corruption, since this aspect has rarely been the subject of many arbitral awards. The bilateral nature of corruption is also one important finding in *World Duty Free v. Kenya* where the tribunal noted that ‘bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries’;¹⁶⁵ even so, the tribunal nonetheless decreed only the supply side responsible for the breach of transnational public policy.

In addition, both the UNCAC and the OECD Anti-Bribery Convention regulate bribery in private sectors and requested that the State parties impose liability on legal persons for their acts of bribery,¹⁶⁶ which signifies that both government officials and private entities could be subject to corruption crimes. That said, this does not necessarily mean that the content of international public policy against corruption includes these two aspects. Instead, as was stated by the *Vladislav Kim* tribunal, the current international public policy against corruption only covers ‘corruption of government officials.’ This tribunal has acknowledged that ‘the effort to combat corruption is an evolving area’ but the existing international conventions and treaties on corruption only ‘suggest[] a lower level of consensus amongst the parties to the [UN] Convention as to corruption within the private sector, a sector governed by a broad range of criminal statutes.’¹⁶⁷ The tribunal thus held that ‘there is no clear consensus that the scope of the prohibition on bribery in international public policy at present extends beyond those circumstances that aim at the corruption of government officials.’¹⁶⁸

2. Legal Consequences of a Violation of Transnational Public Policy

In international investment arbitration, investor misconduct may be an issue of jurisdiction, admissibility, and merits. In the corruption context, the *World Duty Free* tribunal concluded that

¹⁶⁴ *World Duty Free v. Kenya, Award (2006)*, *supra* note 146 at para 142.

¹⁶⁵ *Ibid.*

¹⁶⁶ The UNCAC has regulated ‘Bribery in private sector’ (Article 21) and ‘Liability of legal persons’ (Article 26) and the OECD Anti-Bribery Convention has incorporated ‘Responsibility of Legal Persons’ in Article 2 and ‘Sanctions’ to legal persons in Article 3.

¹⁶⁷ *Vladislav Kim v. Uzbekistan, Decision on Jurisdiction (2017)*, *supra* note 1 at para 596.

¹⁶⁸ *Ibid* at para 598.

‘[t]he Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international*’, it did not specify whether this is a merits issue or a jurisdictional one. Two interpretations have been offered by commentators: one has read ‘not legally entitled to maintain any of its pleaded claims’ as ‘there being no legal cause of action or claim’, which relates to the merits; the other considers the claims inadmissible due to a violation of transnational public policy.¹⁶⁹

In another case – *Niko Resources v. Bangladesh* – which was also a contract-based investment dispute and in which allegations of corruption were submitted by the respondents (though corruption was not proved), the tribunal put significant effort into illustrating what should be the outcome in cases of non-consistency with transnational public policy. In the Decision of Jurisdiction, the *Niko* tribunals distinguished scenarios of (i) ‘contracts of corruption’ and (ii) ‘contracts obtained by corruption’ and delivered a clear opinion as to the legal consequences in the respective two situations.

(1) ‘Contracts of Corruption’

First of all, the *Niko* tribunals, in the reference to the well-known ICC Case No. 1110 of 1963, agreed that a contract which has corruption or bribery *as its objectives* should be denied effect:¹⁷⁰

The consequence of this conclusion is that, as a principle of international public policy, the prohibition of bribery overrides the general principle of party autonomy which is widely recognised in international and comparative law. Normally, arbitral tribunals respect and give effect to contracts concluded by the parties which agreed on the arbitration clause from which they derive their powers. However, party autonomy is not without limits. In international transactions the most important of such limits is that of international public policy. A contract in conflict with international public policy cannot be given effect by arbitrators.

Thus, contracts which have as their object the corruption of civil servants have been denied effect by international arbitrators. One of the earliest and best known examples is the award by Judge Gunnar Lagergren in ICC Case 1110 of 1963. Judge Lagergren found that the agreement on which the claims before him were based “contemplated the bribing of Argentinian officials”. He relied on “the general principles denying arbitrators the power to entertain disputes of this nature”. Parties to such contracts “have forfeited the right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”

The conclusion that contracts *having corruption as their object* are void or unenforceable has, according to the tribunals, been supported in many countries, by arbitral tribunals, and in legal scholarship.¹⁷¹ This chapter has, in an earlier section, noted that an investment undoubtedly forfeits

¹⁶⁹ Newcombe, *supra* note 71 at 196–197.

¹⁷⁰ *Niko Resources v. Bangladesh, Decision on Jurisdiction* (2013), *supra* note 141 at paras 434–435.

¹⁷¹ *Ibid* at para 436. See also Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration*, International arbitration law library (The Hague: Kluwer Law International, 2004); Angeliki Rousaki, “Corruption in

treaty protection if the investment *per se* is illegal. However, contract of corruption is not a common scenario in investment arbitration. This being said, the *World Duty Free* tribunal made a direct reference to the ICC Case No. 1110, though the contract under consideration in *World Duty Free* is the second scenario – ‘contract obtained by corruption’, which is more common in investment arbitration.

(2) ‘Contracts Obtained by Corruption’

The *Niko* tribunals recognized a significant attribute of the second scenario – ‘contract obtained by corruption’: ‘one of the parties normally is aware of the corruption and intends to obtain the contract by these means. But this is not necessarily the case for the other side.’¹⁷² This inspection is vital for the *Niko* tribunals to conclude that ‘[i]n the case of covert bribes the other side, innocent of the corruption, may have a justified interest in preserving the contract’¹⁷³ or ‘to avoid it’,¹⁷⁴ which is considered as ‘a fundamental principle of fairness’.¹⁷⁵ The tribunals noted that this principle can be reflected from Article 50 of the VCLT,¹⁷⁶ Article 34 of the UNCAC¹⁷⁷ and in domestic law of various countries.¹⁷⁸ It seems to be a widely recognized principle that contracts obtained by corruption are *voidable*, at the discretion of the ‘innocent’ party.¹⁷⁹ In *World Duty*

International Commercial Arbitration”, (1 January 2015), online: <<https://papers.ssrn.com/abstract=2531044>>; Vladimir Pavic, “Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy” (2012) 43 Victoria University Wellington Law Review 661–686.

¹⁷² *Niko Resources v. Bangladesh, Decision on Jurisdiction* (2013), *supra* note 141 at para 443.

¹⁷³ *Ibid* at para 444.

¹⁷⁴ *Ibid* at para 451.

¹⁷⁵ *Ibid*.

¹⁷⁶ Article 50 (Corruption of a representative of a State) of the VCLT provides:

If the expression of a State’s consent to be bound by a treaty has been procured through corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

See Art.50, VCLT (1969), *supra* note 90.

¹⁷⁷ Article 34 (Consequences of acts of corruption) of the UNCAC regulates:

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

See Art.34, UNCAC, *supra* note 162.

¹⁷⁸ *Niko Resources v. Bangladesh, Decision on Jurisdiction* (2013), *supra* note 141 at paras 445–448.

¹⁷⁹ See Richard Kreindler & Jean-Yves Garaud, “The Impact of Public Policy Considerations” in *Arbitration of International Intellectual Property Disputes*, 2nd ed (JurisNet, LLC, 2021) 505 at 505; Pierre Lalive, “Transnational (or Truly International) Public Policy and International Arbitration” in Pieter Sanders, ed, *Comparative Arbitration Practice and Public Policy in Arbitration ICCA Congress Series* (Kluwer Law International, 1987) 258 at para 111; Emmanuel Gaillard, *Legal Theory of International Arbitration* (Brill Nijhoff, 2010) at para 117; *Plama v. Bulgaria, Award* (2008), *supra* note 41 at para 143; Crawford & Mertenskötter, *supra* note 143 at 37; Eric De Brabandere, “The

Free, the tribunal entirely embraced this general principle,¹⁸⁰ recognizing Kenya as an innocent party¹⁸¹ who was entitled and who had indeed formally, unequivocally, timeously, and validly avoided the contract by its Counter-Memorial.¹⁸²

However, this thesis questions the host State being an ‘innocent party’, especially when the involved public officials are high-ranking, like ‘the President’ in *World Duty Free*.¹⁸³ Even assuming that this principle empowers a host State (in the typical scenario of allegations of corruption in ISA) to invalidate a contract, this does not mean that this State can leave the proceedings *freely*. The legal consequences following the avoidance of the contract have been overlooked. Generally speaking, when a contract is invalidated due to significant corruption, the following step is to investigate whether the contractual obligations have been performed or not. If one party has ‘fulfilled’ some contractual duties, the other party needs to make restitution to re-establish the situation which existed before the contract is signed, while evidently excluding the return of the bribe. This restitution obligation has become a well-established remedy for ‘an unenforceable, void, or avoided contract’¹⁸⁴ and has been endorsed in *World Duty Free*.¹⁸⁵

In a typical scenario of corruption, at the time the contract is invalidated by the tribunal, the investor might have executed the contract for a long time by establishing and performing the investment; the host State might even have implemented regulatory measures (purportedly illegal), such as expropriation without payment. This means that the host State whose allegations of corruption were upheld by ISA tribunals cannot freely leave the proceedings. The restitution obligations demand that the host State re-establish the situation before any regulatory measure was taken and before the investment was established. However, to implement this obligation seems to be unfeasible and impractical. The tribunal of *World Duty Free* was also reluctant to demonstrate how the parties (both the investor and the host State) should perform this restitutionary remedy, but

(Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux” (2020) 21:6 The Journal of World Investment & Trade 847–866 at 850.

¹⁸⁰ *World Duty Free v. Kenya, Award (2006)*, *supra* note 146 at paras 163–165.

¹⁸¹ *Ibid* at para 185.

¹⁸² *Ibid* at paras 182–183.

¹⁸³ See Chapter 3 for discussions on the attribution issues of the public officials.

¹⁸⁴ See generally, Joseph Perillo, “Restitution in a Contractual Context” (1973) 68 Columbia Law Review 1208.

¹⁸⁵ *World Duty Free v. Kenya, Award (2006)*, *supra* note 146 at para 186.

simply stated that ‘[t]hese legal consequences are not pleaded claims by the Claimant in this proceeding and they do not form part of this Award.’¹⁸⁶

One can anticipate that Kenya would most likely ‘possess’ the investment obtained through its previous expropriation measures and would *not* return or re-establish the situation which existed before the contract was signed. In this sense, one must challenge the appropriateness of the binary approach adopted after a finding of a violation of transnational public policy, especially when the restitution obligation is unforeseeable and when the host State does not demonstrate its intention to make any remedies (if the contract is avoided).

(3) In Treaty-Based Arbitration

The status of transnational public policy in treaty-based arbitration is also controversial. It has been argued that transnational public policy is ‘irrelevant in investment treaty arbitration’;¹⁸⁷ by contrast, it is sometimes regarded as a treaty obligation (such as an obligation on legality) as a matter of international law¹⁸⁸ or implicated in BITs;¹⁸⁹ it has also been argued that the doctrine of ‘clean hands’ is derived from transnational public policy.¹⁹⁰ In a treaty-based investment case, *Wena Hotels v. Arab Republic of Egypt* (2000), the tribunal ruled that ‘international tribunals have often held that corruption of the type alleged by Egypt is contrary to international *bonos mores*’ and then concluded that, if corruption was proven, ‘these allegations are disturbing and ground for dismissal of this claim.’¹⁹¹ But again, the *Wena Hotels* tribunal did not mention when or on what basis the claim would have been dismissed, not in the jurisdiction nor in the merits phase.

In scholarly papers, the proposition that illegal acts contrary to international public policy do not constitute jurisdictional issues but instead ‘must result in a declaration of inadmissibility’ has received a great deal of support. As Professor Douglas has explained:¹⁹²

The concept of international public policy vests a tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether

¹⁸⁶ *Ibid.*

¹⁸⁷ Brabandere, *supra* note 179. For opposite opinions, see, e.g., Jean-Michel Marcoux, “Transnational Public Policy as a Vehicle to Impose Human Rights Obligations in International Investment Arbitration” (2020) 21:6 The Journal of World Investment & Trade 809–846; Jean-Michel Marcoux, “The Need to Make Sense of a Practice in Investment Arbitration: A Response to Eric De Brabandere” (2020) 21:6 The Journal of World Investment & Trade 867–879.

¹⁸⁸ *Unión Fenosa Gas v. Egypt, Award* (2018), *supra* note 3 at para 7.48.

¹⁸⁹ *Vladislav Kim v. Uzbekistan, Decision on Jurisdiction* (2017), *supra* note 1 at para 593.

¹⁹⁰ Bjorklund & Vanhonnaeker, *supra* note 119 at 373–377.

¹⁹¹ *Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No ARB/98/4, Award of 8 December 2000*, 41 ILM 896 (2002), 2000 at para 111 [*Wena Hotels v. Egypt, Award* (2000)].

¹⁹² Douglas, *supra* note 5 at 180–181.

it is specifically raised by one of the parties. That condemnation must entail that a party that has engaged in a violation of international public policy is not assisted in any way by the arbitral process in the vindication of any rights that are asserted by that party under any law. If the host State's law provides a restitutionary remedy to allow a bribe to be recovered from a State official, for example, the international process cannot be invoked in aid of the party who has paid the bribe.

It also follows from the concept of international public policy that the other party's conduct is irrelevant to the tribunal's adjudication of a violation of international public policy. If the host State violates international law in its response to the discovery of the investor's payment of a bribe (such as by expropriating the investment), then the tribunal cannot adjudicate upon this violation. This would not be tantamount to coming to the assistance of a party that has violated international public policy. That is not to say that the violation of international law by the host State is somehow excused. The investor is simply unable to assert a claim in investment treaty arbitration by reason of its own misconduct.

I agree that international arbitration has an inherent right and obligation to stand up for international public policy which concerns core values applicable to all States. In the context of corruption, the arbitration system is accordingly obliged to defend international public policy prohibiting corruption and should not protect 'illegal investment' to preserve the integrity of arbitration. It should, on one hand, never let any corrupt act be tolerated, and, on the other hand, never encourage any corruption. However, the scenario analyzed in Professor Douglas's words is not a common situation in investment disputes. More frequently, the alleged illegal acts of host States claimed by investors are not responses to the 'discovery of the investor's payment of a bribe'. By contrast, in many cases, the host States never made any investigation or took prosecution measures against the public officials involved in the corrupt acts, not before they were sued by investors nor after the case was closed. Host States raised the issue '*nicely*' in the arbitration proceedings to defend against the investor's claims. In this sense, it is blameless to challenge the host State's motivation for raising corruption allegations.

Additionally, it is not hard for one to discover that considerable overlap exists between the three concepts discussed in this chapter: the legality requirement, the 'clean hands' doctrine and transnational public policy, all of which share an essential purpose of protecting 'good and legal' investments with an ultimate goal of promoting economic development in a legal and healthy way.

In an attempt to differentiate the legality doctrine and the 'clean hands' doctrine, Dr. Llamzon has posed a significant concern: 'what is the unclean hands principle *for*?' He continued to question '[i]f these doctrines similarly target investor wrongdoing, and the outcomes are the same, does unclean hands merit a separate existence from the legality doctrine because of certain policy objectives that the latter does not cover?'. One should ask oneself a similar question here: what is the principle of transnational public policy *for* or what is its *raison d'être*? In particular, what are

the policy objectives underlying transnational public policy that are, in part, different from those underpinning the legality requirement?

Arguably, one difference might concern procedural issues: non-compliance with the host State laws is an issue that needs to be dealt with in the jurisdictional phase while investments procured by means contravening international public policy should be rendered inadmissible.¹⁹³ The ‘clean hands’ doctrine has been considered to incorporate policy goals ‘not only to protect court or arbitral integrity but also to bring principles of proportionality and reciprocity to bear in an area where, too often, all parties have engaged in illicit conduct.’¹⁹⁴ International arbitration, likewise, is faced with challenges when there is a need to make a tough decision between two options when it comes to cases of corruption: one is to condemn investors for their acts of offering bribes but leaving potential risks of abuse of powers and possible prospective corruption of host States led by such decisions, and the other is to give greater consideration of proportionality by evaluating both sides of corruption.

In fact, this is not the first time that investment tribunals have had to make a tough decision in ‘supporting’ one significant value with the concurrence of ‘giving up’ another significant value. Seeking a balance between two significant values is exemplified by the principle of separability in commercial law; a concept which, according to Professor Douglas, results from a balance between the goals of the protection of tribunals’ integrity and the impugning of party misconduct:¹⁹⁵

National courts and tribunals have given more weight to the preservation of arbitration as the mechanism chosen to resolve any disputes arising out of the commercial bargain than to the principle that no party should be able to benefit from its own wrongdoing. If the latter principle were to be given more prominence, the reality that the commercial bargain and the arbitration agreement are de facto inseparable in the pursuit of a single enterprise that may be tainted by illegality would have to militate against their de jure separation. For in circumstances where the tribunal upholds its jurisdiction but finds that the commercial bargain is void for illegality, the doctrine of separability has the effect of enforcing one aspect of that enterprise—the arbitration agreement.

In brief, the principle of separability is established because tribunals are reluctant to exclude arbitration as a viable alternative to national court litigation simply by pleading illegality.¹⁹⁶ The *World Duty Free* tribunal actually used the separability doctrine in treating the main contract and

¹⁹³ *Ibid* at 186.

¹⁹⁴ Llamzon, “The State of the ‘Unclean Hands’ Doctrine in International Investment Law”, *supra* note 141 at 325. See also Herstein, *supra* note 140.

¹⁹⁵ Douglas, *supra* note 5 at 162.

¹⁹⁶ *Ibid*.

the arbitration agreement. It held that to invalidate an arbitration agreement because of significant corruption, it required evidence adduced to the effect that the bribe *specifically* procured this arbitration agreement.¹⁹⁷ Accordingly, the tribunal assumed the arbitration agreement to be valid and effective for the purpose of the proceedings.¹⁹⁸

In the same vein, in corruption cases, ISA tribunals must reconcile ‘conflicting’ interests and find a balance between curbing corruption and maintaining the integrity of the tribunal.¹⁹⁹ International investment arbitration is expected to ‘promote the values that society has collectively agreed to embody in authoritative legal texts’.²⁰⁰ This dispute resolution mechanism has the potential to become a significant forum for enhancing transparency and knowledge of incidents of corruption. It is thus undeniable that impugning the supply side of corruption conforms with the global anti-corruption campaign and with the pursuit of safeguarding societal values of investment arbitration. Having said that, to blame the supply side shall in no way come at the cost of ‘tolerating or indulging’ the demand side of corruption (that is equally forbidden). An ultimate effect of encouraging the demand side of corruption likewise jeopardizes the mechanism’s initial goals of promoting societal values.

In any case, completely denying investors’ claims without any consideration of host States’ misbehavior at the jurisdictional stage is an improper approach to dealing with disputes concerning corruption of the bilateral type, due to the binary feature of jurisdiction (which means that the tribunal either has or has no jurisdiction over the dispute in question). In particular, this binary function has made jurisdiction ‘a blunt tool for dealing with the complexity and variety of issues that arise in investor misconduct cases, particularly where State misconduct is also a live issue.’²⁰¹

¹⁹⁷ *World Duty Free v. Kenya, Award (2006)*, *supra* note 146 at para 187.

¹⁹⁸ *Ibid.*

¹⁹⁹ It is recognized that the binary approach may ‘lead to unhappy distortions of the arbitration process’. See John R Crook, “Remedies for Corruption” (2015) 9:3 World Arbitration & Mediation Review 303–316 at 308.

²⁰⁰ See generally, Thomas Schultz, “The Three Pursuits of Dispute Settlement” in Alexander J Bělohlávek & Naděžda Rozehnalová, eds, *Czech (& Central Europe) Yearbook of Arbitration: The Relationship between Constitutional Values, Human Rights and Arbitration* (JurisNet, LLC, 2011) 227.

²⁰¹ Newcombe, *supra* note 71 at 199.

CHAPTER 3 LIABILITY FOR CORRUPTION ON THE DEMAND SIDE

In the limited ISA cases where corruption was outcome-determinative, the case law diverges considerably on responsibility for investors and for host States. The former commonly suffer the consequences of dismissal of its claims in their entirety, while the latter is sometimes ‘blamed’ for bearing certain arbitration fees or sometimes receives no sanction at all. This approach to corruption issues (especially in *World Duty Free v. Kenya* and in *Metal-Tech v. Uzbekistan*) has been considered as imposing asymmetric liabilities on equally culpable parties¹ or as ‘lop-sided’,² and has received extensive criticism on other grounds as well:³ for instance, that such a holding has the effect of incentivizing the involvement of the demand side of corruption (i.e., that practiced public officials and host States), thereby actually worsening global anti-corruption enforcement.⁴

This thesis aligns itself with this widespread denouncement of the current approach to corruption and seeks to inspect what went ‘wrong’ with these awards. While Chapter 2 challenged the legal rules that currently govern the supply side of corruption, this chapter aims to investigate the demand side of corruption. The most salient issue provoking skepticism where the demand side of corruption is concerned surrounds whether or not acts of corruption engaged in by public officials are attributable to the host State for whom said public official works. If that is the case, more disagreement hovers around the question of what forms of legal consequences there should be.

A number of academic papers have attempted to re-assess the attribution and State responsibility issues from distinct perspectives. Some have argued that acts of soliciting or accepting bribes by

¹ Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014) at 275–281.

² Ayodeji Akindeire, “Corruption in Investor-State Arbitration: Balancing the Scale of Culpability” (2019), online: <<https://papers.ssrn.com/abstract=3464618>> at 12.

³ See generally R Zachary Torres-Fowler, “Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration” (2012) 52:4 *Virginia Journal of International Law* 995–1040; “Key Note Presentation: Everything You Always Wanted to Know About Foreign Bribery and Corruption but Were Afraid to Ask, by Nicola Bonucci, With Commentary by Professor W. Michael Reisman” (2015) 9:3 *World Arbitration & Mediation Review* 239–247; Andrew T Bulovsky, “Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development” (2019) 118:1 *Michigan Law Review* 117–147; Leo O’Toole, “Investment Arbitration: A Poor Forum for the International Fight Against Corruption”, (1 December 2016), online: *Yale Journal of International Law* <<https://www.yjil.yale.edu/investment-arbitration-a-poor-forum-for-the-international-fight-against-corruption/>>.

⁴ Andrew Brady Spalding, “Deconstructing Duty-Free: Investor-State Arbitration as Private Anti-Bribery Enforcement” (2016) 49:2 *UC Davis Law Review* 443–495 at 491; Michaela Halpern, “Corruption as a Complete Defense in Investment Arbitration or Part of a Balance” (2015) 23:2 *Willamette Journal of International Law and Dispute Resolution* 297–318 at 316–317.

public officials ‘should seldom, if ever be attributed to the host State’;⁵ some hold that the acts are attributable on the condition that investors do not ‘freely participate in corruption’.⁶ Many have accordingly put forward concrete proposals in order to remedy the current jurisprudence representing the asymmetric balance as to liability. Most notably, Dr. Aloysius Llamzon appealed to host States (the demand side) to demonstrate that ‘they have engaged in a genuine effort to prosecute and punish those public officials’ before allowing them to invoke corruption as a defense against investor claims.⁷ By contrast, some observers comment that the decision not to prosecute should not be deemed as a State’s acquiescence in the corrupt behavior and the bribing investor should not be able to rely on this lack of prosecution,⁸ which would thereby not preclude the host State from raising a corruption defense.⁹ Alternatively, some propose to dismiss host States’ counter-claims (if raised), in the same way of excluding investors’ claims, based on the identical ground of a positive finding of corruption.¹⁰ One author has also suggested offering an opportunity for the investor to cure its investment obtained through corruption ‘upon payment of damages to the host State for all actual harm incurred as a result of the corruption’.¹¹

⁵ Tim Wood, “State Responsibility for the Acts of Corrupt Officials: Applying the ‘Reasonable Foreign Investor’ Standard” (2018) 35:1 *Journal of International Arbitration* at 117.

⁶ Isuru C Devendra, “State Responsibility for Corruption in International Investment Arbitration” (2019) 10:2 *Journal of International Dispute Settlement* 248–287 at 287; Aloysius Llamzon, “State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration” (2013) 10:3 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1958>> at 87.

⁷ Llamzon, “State Responsibility for Corruption”, *supra* note 6 at 81; Aloysius Llamzon, “On Corruption’s Peremptory Treatment in International Arbitration: State Responsibility, Unclean Hands, and the Return of Corruption as a Jurisdictional Issue” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* Dossiers of the ICC Institute of World Business Law (Kluwer Law International, 2015) 32 at 37. See also Mohamed Abdel Raouf, “How Should International Arbitrators Tackle Corruption Issues?” (2009) 24:1 *ICSID Review* 116–136 at 135; Nassib Ziadé, “Accountability for Corruption in Investment Arbitration: Equitable Remedies for Findings of Illegality” (2016) 3:2 *BCDR International Arbitration Review* 423–440 at 437.

⁸ Brody K Greenwald & Jennifer A Ivers, *Addressing Corruption Allegations in International Arbitration*, Brill Research Perspectives (Leiden: Brill, 2019) at 80. See also Kathrin Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence* (Cambridge University Press, 2017) at 302. (‘Domestic corruption investigations and prosecutions should not be a prerequisite for a state to invoke the bribery defence.’)

⁹ Greenwald & Ivers, *supra* note 8 at 83.

¹⁰ This approach of dismissing the host State’s counterclaims is arguably ‘as perfectly straightforward as the State raising a defense against its own counter-claim the moment it raises such defense against the investor’s principal claim’. In other words, the use of this approach will lead to dismissal of the investor’s claims (against the host State) and the host State’s counterclaims (against the investor). See Akindeire, “Corruption in Investor-State Arbitration”, *supra* note 2 at 13.

¹¹ Michael A Losco, “Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction” (2014) 63:5 *Duke Law Journal* 1201–1242 at 1238.

In light of the above, this chapter is intended to carefully review how arbitral tribunals address liability for corruption on the demand side and offer an understanding of attribution of public officials' acts of solicitation through an examination of the international law on State responsibility. To do this, Section A first identifies which legal norms may be applied in investor-State arbitration (ISA) to address State responsibility issues. Section B then finds that under general international law on State responsibility, typical corrupt activities by public officials are *not* private acts; these acts are attributable to their host States (whether they are *ultra vires* or not). This section also suggests that acts of corruption may constitute a breach of the concerned investment treaty, such as a failure to accord fair and equitable treatment (FET). Section C explores the legal consequences host States should face in a case of positive attribution, an issue that has been under-examined so far. The current case law on the result of corruption has been described as “binary – ‘A’ or ‘not A’” which signifies the concept that whether to continue with the proceedings or not depends on the final finding of corruption.¹² Section C, however, upholds a non-binary rule in cases of corruption and calls for a *dual-track* approach of examining not only corruption but also investors' claims.

A. The Applicable International Law on State Responsibility in ISA

Before examining whether a State should be responsible for the corrupt acts of its public officials, one should first decide on the applicable international rules governing responsibility of States. This section identifies the *general* as well as *specific* international laws on State responsibility that may apply in cases of corruption.

1. Investment Treaties

So far, there is no international convention on State responsibility and it is, according to Judge James Crawford, unlikely that we will see the rapid emergence of such a comprehensive treaty.¹³ But some other international resources on State responsibility are still available to investment tribunals, such as the International Law Commission's Draft Articles on Responsibility of States

¹² John R Crook, “Remedies for Corruption” (2015) 9:3 World Arbitration & Mediation Review 303–316 at 305.

¹³ James Crawford, “Investment Arbitration and the ILC Articles on State Responsibility” (2010) 25:1 ICSID Review 127–199 at 129.

for Internationally Wrongful Acts (ILC Articles on State Responsibility or ILC Articles).¹⁴ The ILC Articles, in particular its rules of attribution, have been widely recognized as customary international law (CIL).¹⁵ In addition to the ILC Articles, special rules that condition the *existence* of an internationally wrongful act or its *legal consequence* are of equal significance for international courts and tribunals to determine State responsibility. These provisions are generally considered as *lex specialis*, compared to the ‘residual articles’ of the ILC Articles on State Responsibility.¹⁶

In the context of international investment law, special rules may be found in bilateral investment treaties (BITs) or other forms of economic treaties with investment provisions which are paramount for tribunals in rendering a legal decision. Thus, an ISA tribunal ‘must first look at the treaty under review and see what it says on the subject’.¹⁷ The residual character is evident from Article 55 (*Lex specialis*) of the ILC Articles on State Responsibility that ‘[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law’,¹⁸ which is a reflection of the maxim *lex specialis derogate legi generali*.¹⁹ Accordingly, in cases in which ‘the treaty (such as a BIT) covers the field of the issue at stake, the ILC Articles have no role to play’;²⁰ but whenever there is an absence of specific treaty provisions, the ILC Articles may come in.

¹⁴ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001. The IL’s draft articles on State responsibility have been annexed to Resolution 56/83 adopted by the United Nations General Assembly. See *UN General Assembly, Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly, 28 January 2002, A/RES/56/83*.

¹⁵ Kaj Hobér, “State Responsibility and Attribution” in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 549 at 550. See also *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award of 27 August 2009, 2009 at para 113 [*Bayindir v. Pakistan*, Award (2009)]; *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award of 10 March 2014, at para 281 [*Tulip v. Turkey*, Award (2014)].

¹⁶ *United Parcel Service of America Inc v Government of Canada*, ICSID Case No UNCT/02/1, Award on the Merits of 24 May 2007, 2007 at para 55 [*United Parcel Service of America v. Canada*, Award on the Merits (2007)].

¹⁷ Crawford, *supra* note 13 at 131.

¹⁸ Art.55, ILC Articles on State Responsibility, *supra* note 14.

¹⁹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission, in the Yearbook of the International Law Commission, 2001, Volume II, Part Two, 2001 at 140 [Commentary to the ILC Articles]*.

²⁰ Crawford, *supra* note 13 at 131. In *Sempra v. Argentina*, the Annulment Committee found that the tribunal had ‘made a fundamental error in identifying and applying the applicable law’ because it had applied the ILC Articles as primary law when the applicable BIT has included the relevant provisions as *lex specialis* and shall prevail over the ILC Articles. See *Sempra Energy International v The Argentine Republic*, ICSID Case No ARB/02/16, Decision on

A mistake was made by the *World Duty Free* tribunal in interpreting the applicable law agreed upon by the two parties. The tribunal held that ‘there is no warrant at English or Kenya law for attributing knowledge to the state of a state officer engaged as its agent in bribery’.²¹ No rules on attribution issues in Kenyan law or English law does not mean that the acts are *non-attributable* but signifies *an absence of special rules*. In such circumstances, *the general rules*, such as the ILC Articles, still apply.²²

In practice, most BITs do not address matters that are also regulated by the ILC Articles, but there indeed exists a number of investment treaties limiting the *remedies* a tribunal may render in an investor-State dispute,²³ such as the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada.²⁴ Special rules on *attribution* are also present in some investment treaties;²⁵ most notably, the North American Free Trade Agreement (NAFTA).²⁶

the Argentine Republic’s Application for Annulment of the Award of 9 June 2010, at para 208 [*Sempra v. Argentina, Decision on the Argentine Republic’s Application for Annulment of the Award (2010)*].

²¹ *World Duty Free Company v Republic of Kenya*, ICSID Case No Arb/00/7, Award of 4 October 2006, 2006 at para 185 [*World Duty Free v. Kenya, Award (2006)*].

²² It has been controversial whether ISA tribunals are allowed to apply rules other than the governing law agreed by the parties in a contract-based investment arbitration. In *World Duty Free*, the fact that the tribunal applied international public policy suggests that international law had a role to play.

²³ At least 114 investment treaties limit the remedy categories that a tribunal may award, see UNCTAD, *International Investment Agreements Navigator, Mapping of IIA Content*, [UNCTAD Mapping of IIA Content]. Among these 114 investment treaties, 94 have entered into force, 14 remain signed (not in force), and 6 are terminated.

²⁴ Art.8.39 (Final award), *Comprehensive Trade and Economic Agreement between Canada and the European Union*, 2016, signed on 30 October 2016. Paragraph 1 of this article provides that:

1. If the Tribunal makes a final award against the respondent, the Tribunal may only award, separately or in combination:
 - (a) monetary damages and any applicable interest;
 - (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 8.12 [Expropriation].

²⁵ For instance, in *Al Tamimi v. Oman*, the tribunal noted that the applicable treaty – the US-Oman Free Trade Agreement (FTA) – had limited the circumstances under which an act of an entity is attributable to the State. This has been recognized by the tribunal as *les specialis* and thus other principles of attribution under the ILC Articles cannot be directly relevant but can provide ‘a useful guide’. See *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award of 3 November 2015, 2015 at paras 321, 324 [*Al Tamimi v. Oman, Award (2015)*].

²⁶ An example of a special rule was addressed by the tribunal in *United Parcel Service v. Canada (2007)* where the United Parcel Service (UPS) contended that the actions of Canada Post, attributable to Canada, were in breach of the investment Chapter 11 of the NAFTA, by, among others, ‘not allowing the [UPS] similar access to Canada’s monopoly infrastructure and network that is provided to Canada’s non-monopoly business...’ (See *United Parcel Service of America v. Canada, Award on the Merits (2007)*, *supra* note 16 at para 45.) In determining the attribution issue, the tribunal was of the opinion that the features of Chapter 15 on competition policy, monopolies and State enterprises of the NAFTA provide for a ‘*lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation.’ (See *Ibid* at para 62.) As a result, the tribunal concluded that ‘the general residual law reflected in article 4 of the ILC text does not apply in the current circumstances.’ (See *Ibid* at paras 59, 62.)

States have also inserted special rules on anti-corruption and connected them to substantive standards, such as Article 9 of the Netherlands Model BIT 2019:²⁷

1. A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes:
 - (e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct; ...

This provision expressly confirms that corrupt practices of the host State must be recognized in breach of the FET standards set out in that particular treaty. The tribunal in *EDF (Services) v. Romania* delivered a similar ruling; but the Netherlands, for the very first time codified it into a model investment treaty. This provision should be treated as *lex specialis* from the State responsibility perspective, because the ILC Articles (while providing general rules to guide international courts and tribunals in determining the existence or non-existence of a breach of international obligation) say nothing specific about corruption. In recent years, treaties incorporating anti-corruption provisions have emerged,²⁸ but they seldom regulate issues pertinent to State responsibility for the misconduct of corruption.

Albeit that States may articulate the specific circumstances of treaty breaches and make restrictions on remedies to repair a particular breach, nothing regarding liability for corruption is provided in the international investment treaties (IIAs) that have governed decided cases. In particular, in *Metal-Tech* and *Spentex*, no special rules on State responsibility were available. Accordingly, to determine whether a State should be held responsible and what level of responsibility it should have, the tribunal needs to turn to general rules on State responsibility, such as the ILC Articles.

2. Part One of the ILC Articles on State Responsibility

The Commentary to the ILC Articles has provided that ‘[t]hese articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts’.²⁹ One can hardly doubt that the ILC Articles have been extensively applied in investment tribunals.³⁰ However, as argued by Crawford, ‘[t]he fact that the Articles have been so widely used does not mean that they necessarily

²⁷ Art.9 (Treatment of investors and of covered investments), “The Netherlands Model BIT 2019”, (2019), online: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>>.

²⁸ See Part Two of this thesis for a detailed discussion on the core anti-corruption provisions found in the existing IIAs.

²⁹ *Commentary to the ILC Articles*, *supra* note 19 at 31.

³⁰ Crawford, *supra* note 13 at 128. See also Kaj Hobér, “State Responsibility and Investment Arbitration” (2008) 25:5 *Journal of International Arbitration* 545–568.

constitute general international law’.³¹ A debate on the lawfulness of the widespread application of the ILC Articles in investor-State disputes (the full reparation principle, in particular) remains ongoing.³²

Article 1 of the ILC Articles establishes the most fundamental rule that ‘[e]very internationally wrongful act of a State entails the international responsibility of that State’³³ and such responsibility, continued in Article 28, ‘involves legal consequences’.³⁴ Admittedly, the ILC Articles were originally and primarily drafted for inter-State relations;³⁵ the ILC has explained in a clear manner in the Commentary to the ILC Articles that to entail State responsibility, the obligation breached does not necessarily need to be owed to a State.³⁶

Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

This commentary conveys several important messages. First of all, international obligations whose non-compliance entails international responsibility of a State under the ILC Articles include those owed to another State or States, to (an) individual(s), and to (an) entity(ies). In fact, the investor-State relationship is a typical form of private-public relations, in contrast to public-public relations (such as State-to-State) and has constituted an integral part of international investment law. Accordingly, if a State breaches an international obligation it owes to an investor or investors, Article 1 (Responsibility of a State for its internationally wrongful acts) of the ILC Articles demands that this State bear certain international responsibilities.

³¹ Crawford, *supra* note 13 at 128.

³² Danilo Ruggero Di Bella, “A Debate About the Not So Straightforward Applicability of the Articles on State Responsibility to Investor-State Arbitrations”, (10 October 2018), online: *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2018/10/10/a-debate-about-the-not-so-straightforward-applicability-of-the-articles-on-state-responsibility-to-investor-state-arbitrations/>>.

³³ Art.1, *ILC Articles on State Responsibility*, *supra* note 14.

³⁴ Art.28, *Ibid.*

³⁵ Irmgard Marboe, “State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests” in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) at 377–378 container-title: International Investment Law and Comparative Public Law.

³⁶ *Commentary to the ILC Articles*, *supra* note 19 at 87–88.

Secondly, in addition to Article 1 of the ILC Articles, other norms enshrined in *Part One* of the ILC Articles are also applicable to investor-State relationships. In other words, an ISA tribunal is permitted to determine whether there exists an internationally wrongful act of a State by deploying the standards regulated in Part One of the ILC Articles in an investment arbitration case, including rules regulating the basic elements and characterization of an internationally wrongful act of a State (Articles 2-3) and establishing attribution of conduct to a State (Articles 4-11).

Thirdly, international responsibility incurred in investor-State relations ‘may involve legal consequences’ but the content of the international responsibility of a State regulated in Part Two of the ILC Articles does *not* apply to the legal relationships between investors and States (even though this part has been widely used by investor-State tribunals).³⁷ That being said, how a culpable host State should concretize its responsibility for its misbehavior may be governed by other international norms, like *lex specialis* in investment treaties.³⁸ It is also provided by Article 33(2) of the ILC Articles that ‘[t]his part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State’.³⁹

In sum, while the entirety of the ILC Articles were initially formulated to govern inter-State relations, Part One of the ILC Articles also applies to relations between State and non-State sectors, including investor-State relations. In the corruption context, ISA tribunals may rely on the rules in Part One of the ILC Articles to determine whether or not the corrupt acts of public officials are attributable to the host States and consequently constitute an internationally wrongful act, thereby entailing international State responsibility.

B. The Existence of an Internationally Wrongful Act

³⁷ Article 33(1) of the ILC Articles also makes this clear that ‘[t]he obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole...’ See Art.33(1), *ILC Articles on State Responsibility*, *supra* note 14. See also D Gaukrodger & K Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Law (OECD Publishing, 2012) at 27; James Crawford, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect” (2002) 96:4 *American Journal of International Law* 874–890 at 881.

³⁸ Crawford, *supra* note 13 at 130. While an investment treaty is concluded by States, the host State owes obligations not only to the home State but also to the investor.

³⁹ Art.33(2), *ILC Articles on State Responsibility*, *supra* note 14.

Although the forms of legal consequences established in the ILC Articles are (at least theoretically) limited to State-to-State relationships, it is certain that we can still rely on Part One of the ILC Articles to determine whether or not a State should take international responsibility towards an investor in an investment dispute. This section scrutinizes, more accurately, whether an internationally wrongful act exists when the public officials of a State engage in corrupt practices with foreign investors. Article 2 of the ILC Articles explicitly regulates the conditions necessary to establish an internationally wrongful act of a State which includes two elements – attribution and breach:⁴⁰

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

Before proceeding to the first element (i.e., attribution), Article 2 of the ILC Articles makes it clear that an internationally wrongful act may also be in the form of ‘omissions’ in addition to ‘actions’, or the combination of actions and omissions.⁴¹ International courts and tribunals have endorsed this rule in many cases. For instance, the International Court of Justice (ICJ) held Albania and the Islamic Republic of Iran responsible for the ‘grave omissions’ and ‘inaction’ respectively in the *Corfu Channel* case⁴² and in the *United States Diplomatic and Consular Staff in Tehran* case.⁴³

⁴⁰ Art.2, *Ibid*.

⁴¹ *Commentary to the ILC Articles*, *supra* note 19 at 35.

⁴² *Corfu Channel case, Judgment of April 9th, 1949, ICJ Reports 1949*, 4 at 22–23 [*Corfu Channel case, Merits Judgment (1949)*]. On October 22, 1946, after entering the North Corfu Strait and passing into Albanian waters, two British destroyers struck mines and exploded causing grave damage and loss of many lives. This channel was regarded as safe because it was swept twice respectively in 1944 and 1945. The ICJ first noted that ‘the laying of minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government.’ (p.22) The Court subsequently affirmed the existence of obligations resulting from this knowledge, consisting in ‘notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them’. (p.22) These obligations were based on a series of general principles, including ‘elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’ (p.20) Given that Albania failed to carry out the notification and warning obligations, the Court, as a result, held Albania responsible under international law for the explosion and the damages caused by this explosion. (p.23)

⁴³ *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, 3 at 63–68 [*United States Diplomatic and Consular Staff in Tehran, Judgment (1980)*]. On 4th November 1979, approximately 3,000 demonstrators (also referred as ‘the militants’) launched an armed attack on the United States Embassy in Tehran. (para.17) They overrun the Embassy’s premise, seized other buildings, detained consular personnel and other persons as hostages. (para.17) The Court denoted that the militants did not act on behalf of Iran and should not be imputable to Iran. (para.58) However, Iran had international obligations to ‘take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs’ under the Vienna Conventions of 1961 and 1963. (para.61) Meanwhile, the

In this sense, the scope of this section further extends to examine whether or not there is any omission associated with the corrupt act typically observed in investment arbitration and whether that omission constitutes an internationally wrongful act within the meaning of Article 2 of the ILC Articles. The analysis in this section is thus carried out from two sides: (1) whether or not the *act* of corruption is attributable to the host State, and, if yes, whether or not this act breaches any international obligation of this State; (2) whether or not there is any *omission* underlying the corrupt practices that constitutes a violation of an international obligation of the host State.

1. Attribution of Corruption by Public Officials

Attribution is one of the two essential conditions for an internationally wrongful act of a State and Chapter II of Part One of the ILC Articles illustrates the circumstances in which an act should be attributable to a sovereign State. In the context of transnational investment, corruption most typically occurs between an investor and a public official of the host State for the purposes of securing contracts or other investment opportunities. The position of this public official and the roles he/she plays in advancing the investment may vary.

(1) Article 4 and Article 7 of the ILC Articles on State Responsibility

A public official that has the authority to advance an investment may receive bribe payments directly from the investor (such as in the *World Duty Free* case) or indirectly through an intermediary (like in the *Metal-Tech* case). Article 4 of the ILC Articles that regulates the attribution rule concerning State organs would usually apply here:⁴⁴

Article 4 (Conduct of organs of a State)

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

The term ‘State organ’ in Article 4 covers, as clarified in the Commentary to the ILC Articles, ‘organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level’.⁴⁵ From this standpoint, the Head of a nation (such as the Kenyan President, Mr. Moi, in *World Duty Free*),

Court believed the Iranian authorities were fully aware of such obligations, had appropriate means to perform these obligations, but ‘completely failed to comply with these obligations.’ (para.68)

⁴⁴ Art.4, *ILC Articles on State Responsibility*, *supra* note 14.

⁴⁵ *Commentary to the ILC Articles*, *supra* note 19 at 40.

which is an organ of the central government, legally falls within the scope of ‘State organ’ established in Article 4. However, the difficulty here is ‘to determine whether a person who is a State organ acts in that capacity’,⁴⁶ particularly in the context of corruption.

It might be quite easy for a State to argue that the act in question is *beyond* the official capacity and is *prohibited* by its internal laws and thus is *not* attributable. The Commentary to the ILC Articles, however, clarified that ‘[i]t is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.’⁴⁷ The rule of attributing acts beyond the official power to a State is thus implicated in Article 4 of the ILC Articles but is clearly codified in Article 7:⁴⁸

Article 7 (Excess of authority or contravention of instructions)

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the government authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 7 prevents a State from escaping international responsibilities by simply arguing that the person or entity acted in an unauthorized or *ultra vires* way; on the contrary, it clearly rules that even though the acts of the organ, person, or entity have exceeded its authority or contravened instructions, those acts will be attributable to the State. The *ultra vires* attribution rule is ‘[t]he rule evolved in response to the need for clarity and security in international relations.’⁴⁹ Before the codification of this principle, it has been said that ‘international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority’ and that ‘[w]here the question was expressly examined, tribunals did not consistently apply any single principle.’⁵⁰

Nonetheless, the spirit of the *ultra vires* attribution rule can be found in many international cases⁵¹ and Article 7 of the ILC Articles, which embodies this principle, has now received extensive

⁴⁶ *Ibid* at 42.

⁴⁷ *Ibid*.

⁴⁸ Art.7, *ILC Articles on State Responsibility*, *supra* note 14.

⁴⁹ *Commentary to the ILC Articles*, *supra* note 19 at 45.

⁵⁰ *Ibid*.

⁵¹ In the Commentary to the ILC Articles on State Responsibility, the ILC has referred to a number of cases where the *ultra vires* attribution principle has been applied, including *Estate of Jean-Baptiste Caire (France) v. United Mexican States* (1929), 5 UNRIAA vol. V (Sales No. 1952.V.3) 516, *Maal Case* (1903), UNRIAA, vol. X (Sales No. 60.V.4), 730-733, *La Masica Case (Great Britain, Honduras)* (1916), UNRIAA, vol. XI (Sales No. 61.V.4), 549-561, *Thomas H. Youmans (U.S.A.) v. United Mexican States* (1926), UNRIAA, vol. IV, 110-117, *Francisco Mallén (United*

recognition and has been widely applied in practice. In investment arbitration, a number of tribunals have endorsed the applicability of Article 7 in investor-State disputes. In *Southern Pacific Properties (Middle East) Limited v. Egypt*, the tribunal found that even though acts of Egyptian officials were considered ‘legally non-existent or null and void or susceptible to invalidation’, these acts were ‘cloaked with the mantle of Government authority’ and the *ultra vires* attribution rule under the international law thus applies here.⁵²

The principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or *ultra vires* acts of officials have been performed by State agents under cover of their official character. If such unauthorized or *ultra vires* acts could not be ascribed to the State, all State responsibility would be rendered illusory.

The tribunal in *Ioannis Kardassopoulos v. Georgia* concurred with the legal reasoning in *Southern Pacific Properties*. It held that it is immaterial whether or not the State agents were given the authority to conclude the concerned concession or to grant rights in the conclusion. It is also irrelevant whether or not they were acting beyond the authority, if any authority is given. This is because the principle of attribution under Article 7 of the ILC Articles provides that ‘even in cases where an entity empowered to exercise governmental authority acts *ultra vires* of it, the conduct in question is nevertheless attributable to State.’⁵³

Despite the foregoing, we must be careful when examining the alleged wrongful act and distinguish acts *ultra vires* from purely private conduct, because the latter is non-attributable and does not entail international State responsibility.⁵⁴

Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.

This distinction is essential in the transnational corruption context because the essential question for the purposes of State responsibility in investment disputes where a public official solicits or accepts a bribe from an investor is to decide whether or not the act of solicitation or acceptance of

Mexican States) v. U.S.A. (1927), UNRIAA, vol. IV, 173-190, *Charles S. Stephens and Bowman Stephens (U.S.A.) v. United Mexican States* (1927), UNRIAA, vol. IV (Sales No. 1951.V.1), 265-268.

⁵² *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award of 20 May 1992, 1992 at paras 81–85 [*SPP v. Egypt*, Award (1992)].

⁵³ *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction of 6 July 2007, 2007 at paras 190–149 [*Kardassopoulos v. Georgia*, Decision on Jurisdiction (2007)].

⁵⁴ *Commentary to the ILC Articles*, *supra* note 19 at 46.

a bribe is authorized official conduct, *ultra vires* official conduct, or purely private conduct, each of which will trigger distinct legal consequences. If a State organ initially, *on the supply side*, bribes an entity, it will probably be undisputed that Article 4 of the ILC Articles will apply in order to address the attribution issue. But if the State is *on the demand side* and the decision of accepting bribes is made by its public official, a complicated situation has arisen: this State may argue that it is an innocent party of the corrupt act or that receiving bribes is private conduct rather than official conduct, whether authorized or *ultra vires*, in order to avoid attribution.

(2) Corruption: *Ultra Vires* Public Conduct or Purely Private Conduct?

Which category corruption belongs to, *ultra vires* public conduct or purely private conduct, is highly controversial. The World Bank has defined corruption ‘the abuse of public office for private gain’,⁵⁵ which conceptually involves features of both ‘public’ office and ‘private’ gain. The Commentary to the ILC Articles has briefly commented on it and supports that acceptance of a bribe can be one form of *ultra vires* public conduct.⁵⁶

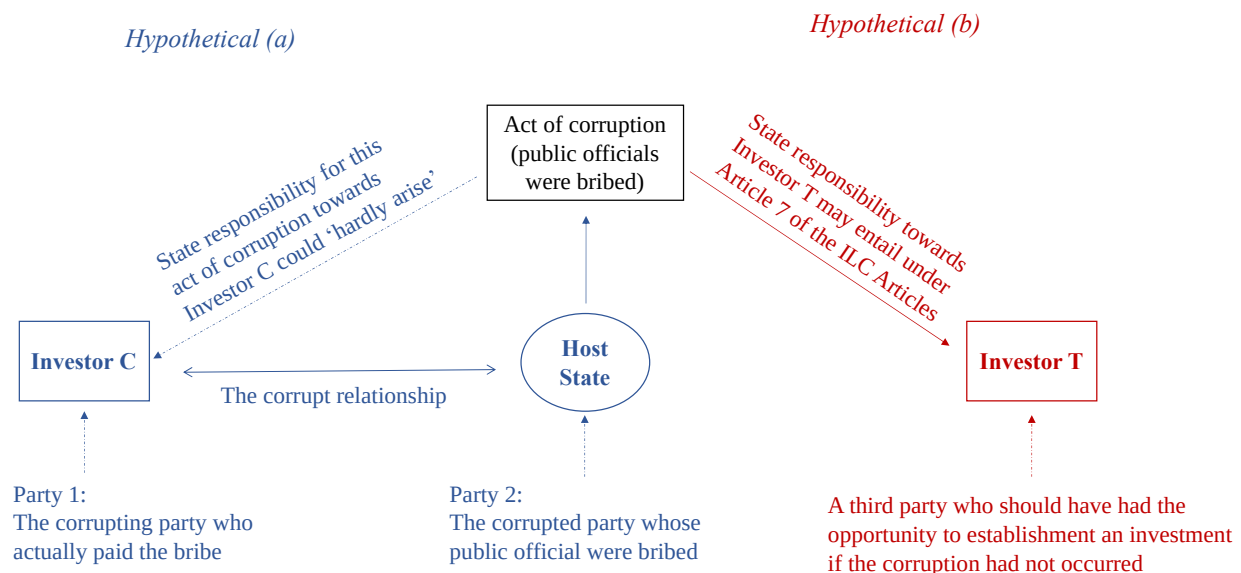
One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

The first sentence of this paragraph states clearly that a State official accepting a bribe constitutes an act of *ultra vires* official conduct and the fourth sentence confirms that an act of giving bribes by a State is attributable and engages State responsibility under international law. But the two hypotheticals illustrated in the last sentence are not clear and have generated some diverging views. Hypothetical (a) concerns State responsibility (of the corrupted State) *towards the corrupting State* (i.e., the supply side) which, according to the ILC, should ‘hardly arise’. Hypothetical (b) relates to State responsibility (of the corrupted State) *towards a third party*, which ‘would be properly resolved under article 7’.

⁵⁵ See, e.g., The World Bank Group, “Helping Countries Combat Corruption: The Role of the World Bank”, online: <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>>.

⁵⁶ *Commentary to the ILC Articles*, *supra* note 19 at 46.

Commentators have addressed the issue of whether or not the corrupted host State (whose public officials were bribed) should undertake international responsibility for this corrupt act by referring to these two hypotheticals. In investment arbitration cases involving corrupt relationships, hypothetical (a) is understood concerning the host State's responsibility towards the corrupting investor (**Investor C**) (who actually paid the bribe to the public official of the host State and who ultimately secured the investment because of this corrupt practice). Hypothetical (b) then relates to the host State's responsibility towards a third party (**Investor T**) (who is not Investor C but an investor who should have had the opportunity to establish an investment if the corruption had not occurred). The relationship of these two hypotheticals is shown in the chart below.



i. Two Hypotheticals

The ILC's statement on these two hypotheticals is opaque and different understandings of these two hypotheticals appear. According to Dr. Llamzon, the ILC's view of international responsibility for corruption is 'both situational and relational'⁵⁷ and determined by the state of knowledge of the party asserting that the State is responsible. He believes that *Hypothetical (a)* is 'more essential in investment arbitration decision-making (and an analogue to the *World Duty Free* fact pattern)'. In such a case, "the question of the responsibility of the host State whose official had been bribed

⁵⁷ Llamzon, *supra* note 1 at 264.

‘could hardly arise’”,⁵⁸ because the acceptance of corruption ‘amounted to purely private conduct and was known to be so by the investor and thus cannot be attributed to the host State.’⁵⁹ By contrast, a third party in *Hypothetical (b)* is ‘presumably not aware of the corruption’ and the *ultra vires* attribution rule applies, thereby triggering State responsibility.⁶⁰ Llamzon summarizes his viewpoints towards these two hypotheticals as follows:⁶¹

For the State whose public official received the bribe and performed public acts pursuant to it, the trigger for responsibility lies in whether the party invoking State responsibility had participated in the corrupt act. The corrupt official’s acts are *not* attributable to the State if the entity invoking such responsibility had participated in the corrupt conduct; for third parties, however, the State’s international responsibility can be triggered.

Judge James Crawford and Mr. Paul Mertenskötter, however, disagree with the above ‘relational relativity’ approach but sustain the ‘objective approach’ that runs through the ILC Articles attribution rules.⁶² As to Hypothetical (a), they state that the ‘*hardly arise*’ comment does *not* exclude attributing a public official’s acts to his own State, but lies in ‘the lack of a legal obligation that the bribing entity can rely on that produces the legal result of the bribed State’s responsibility’.⁶³ They explained this further by referring to *World Duty Free v. Kenya*: ‘due to the rule voiding bribe-induced contracts it is unlikely that the bribing actor could hold the bribed State responsible’,⁶⁴ especially when the governing laws in *World Duty Free* are domestic rules and when the claimant submitted ‘a contractual claim pure and simple’ under a contract rather than a BIT. But State responsibility may arise if the corrupt acts turn out to be ‘small facilitation payments’ or grease payments’ which are intended to speed up routine governmental processes and are unlikely to void the contract.⁶⁵

Moreover, Crawford and Mertenskötter disagree about determining attribution by relying on ‘the actual knowledge of the investor and the third party’ for the reason that ‘introducing elements of

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 277. See also Greenwald & Ivers, *supra* note 8 at 76. (‘In corruption cases, however, the bribing party would have no basis to contend that the corrupt official’s acceptance of the bribe was done with apparent authority or cloaked with government authority, but instead would know that the official was subverting the State’s interests for his or her own personal and illicit benefit.’)

⁶⁰ Llamzon, *supra* note 1 at 264.

⁶¹ *Ibid.*

⁶² James Richard Crawford & Paul Mertenskötter, “The Use of the ILC’s Attribution Rules in Investment Arbitration” in Meg Kinnear et al, eds, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2016) 27 at 39–40.

⁶³ *Ibid* at 40.

⁶⁴ *Ibid* at 39.

⁶⁵ *Ibid.*

relational relativity into international law's attribution rules for State conduct is to be resisted.'⁶⁶ In other words, '[t]he identity of the entity alleging a State's internationally wrongful act should be immaterial for the question of whether a certain act can be attributed to the State under international law.'⁶⁷ By contrast, they insist on the 'objective inquiry of what a reasonable investor in that position should have known', which should and has been used through the attribution rules in the ILC Articles. Under this objective inquiry, 'the corrupt official's acts are *still* attributable to the State in both situations', namely towards the corrupting entity (**Investor C** in *Hypothetical (a)*) and towards a third party (**Investor T** in *Hypothetical (b)*).⁶⁸

I agree with Crawford and Mertenskötter's holding that the determination of attribution is an objective one and can be done irrespective of the knowledge of the party invoking State responsibility under international law. If a State authorizes a public official to bribe or to accept bribes, it is a matter of fact, to the entity on the other side of the bribery *and* to the public, that this corrupt act is an authorized one. Likewise, if a State organ does not authorize a public official to conduct corrupt acts but this public official still does so, it is also *a matter of fact* that this corrupt act is an excessive official act. The investigation on these facts must focus on the concerned act and arbitrators must understand clearly what the official's initial capacity is and whether or not the actual act exceeds this initial capacity. Even in discussions about separate issues (outside of the States' responsibility under international law), we cannot deny the *fact* that this unauthorized corrupt act is an excessive official act. In a word, the feature of an official act (excessive or authorized) is an objective inquiry and is independent of the knowledge of the party who brings this issue up. In fact, this objective inquiry requires us to see whether the official act at issue is performed 'under the cover of capacity' rather than by reference to the knowledge of the party.

ii. 'under the cover of capacity'

The Commentary to the ILC Articles has consistently referred to the 'under the cover of capacity' standard in differentiating between private acts and *ultra vires* acts. Article 7 of the ILC Articles applies 'where such a person acts in an apparently official capacity, or under colour of authority,'⁶⁹ 'even where the organ or entity in question has overtly committed unlawful acts under the cover

⁶⁶ *Ibid* at 40.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Commentary to the ILC Articles*, *supra* note 19 at 42.

of its official status or has manifestly exceeded its competence.’⁷⁰ Two investment cases discussed earlier, namely *Ioannis Kardassopoulos v. Georgia* and *Southern Pacific Properties*, have both applied this standard.

In other words, an *ultra vires* act which is conducted for private gain does not necessarily constitute purely private conduct. The most essential element to question is whether this official has used his capacity, cloaked with government authority, or taken advantage of his official status, to perform this act.⁷¹ In the *Caire* case heard by the French-Mexican Claims Commission, two Mexican officers had twice attempted to extort \$ 5,000 from a French national, Caire, with threats to shoot him.⁷² Caire refused to pay this sum of money but offered to give them \$ 200 because this was all he had.⁷³ Later, the two officers took Caire to their barracks, stripped off his clothes, and then killed him.⁷⁴ The acts of murder, though outside the powers of the officials, were deemed attributable to Mexico since ‘they acted under cover of their status of officers and used means placed at their disposal on account of that status’.⁷⁵ Although the Commission did not comment on whether the acts of extortion were attributable to Mexico or not, the approach to consider whether the concerned official *uses the means at its disposition by virtue of the capacity* likewise applies in the corruption context.

In a typical corruption scenario in international investment transactions, an official uses its privileged position to accept a bribe or to extort a bribe from investors. The *authority entrusted to advance and secure investment* is also the driving force for investors to bribe a specific public official. Without this privileged position, a reasonable investor is unlikely to make a substantive payment to this official for the purposes of making an investment in this host State.

In the *Mallén* case, a Mexican national, Mallén, who was also the then-consul of Mexico, suffered two assaults by an American deputy.⁷⁶ The Mexico-United States General Claims Commission

⁷⁰ *Ibid* at 45.

⁷¹ *Ibid* at 46.

⁷² *Estate of Jean-Baptiste Caire (France) v United Mexican States (1929)*, 5 UNRIAA vol V, 516–534 at 517–518 [Caire Case].

⁷³ *Ibid*.

⁷⁴ *Ibid* at 518.

⁷⁵ *Ibid* at 531. The original version is in French: ‘...il ne reste aucun doute que les deux officiers, même s’ils doivent être censés avoir agi en dehors de leur compétence ... et même si leurs supérieurs ont lancé un contrordre, ont engagé la responsabilité de l’Etat, comme s’étant couverts de leur qualité d’officiers et servis des moyens mis, à ce titre, à leur disposition.’ (The cited English version is provided by the ILC, see *Commentary to the ILC Articles*, *supra* note 19 at 46.)

⁷⁶ “Francisco Mallén (United Mexican States) v. U.S.A. (1927), UNRIAA, vol. IV” 173–190 at 173.

noted that the first assault was a private act and the second was an abuse of official capacity.⁷⁷ In concluding the first assault, the Commission stated that ‘[t]he evidence as to the first assault on Consul Mallén by Deputy ... clearly indicates a malevolent and unlawful act of a private individual who *happened to be an official*; not the act of an official (*emphasis added*).’⁷⁸ Similarly, if arbitrators find that the alleged payment is a private deal between two parties (one of them happened to be an official) and has nothing to do with the official’s capacity, this payment should be counted as a purely private act. In fact, such payments are beyond the scope of corruption and cannot be called ‘corruption’. Whenever an act is firmly established by a tribunal as a corrupt act, the tribunal has conceptually suggested that the official individual was acting under the cover of its capacity. In a case of corruption, no one can argue that this individual happened to be an official or that this act is not associated with its capacity. From this perspective, it is more of a conceptual and fact-finding issue.

Furthermore, it is worth noting that CEO is to a company what President is to a country. As we view a President as a representative for his/her country, we tend to attribute CEOs’ actions to their companies. In both situations, an individual has held itself out as acting on behalf of its company or country. Investment tribunals tend to automatically attribute the act of giving bribes conducted by the CEO (like in *World Duty Free v. Kenya*) to the investor company. We may then ask, why is the same not done when it comes to public officials? If a State is allowed to claim that the acts of corruption conducted by its incumbent President at that time are individual acts, then so should the investor. This investor can equally raise an identical allegation that the acts of corruption conducted by the CEO of this investor company are ‘private acts’ and that it had no knowledge of this corruption. An analysis deconstructing the case of *World Duty Free* supports that ‘just as a corporation will be held liable for the bribery of its head officer, so too should a state be liable for the bribery of its chief officer’.⁷⁹ In fact, the attribution issue of a public official for the purpose of State responsibility is regulated by international law, which applies to every State. But whether a natural person’s acts are attributable to a legal person is a concern for domestic law, which may

⁷⁷ *Ibid* at 174–175.

⁷⁸ *Ibid* at 174. Professor Kaj Hobér also used a similar expression to distinguish acts of *ultra vires* and private conduct: ‘[s]uch *ultra vires* conduct must not, however, be confused with the *private* actions or omissions of individual who happen to be representatives of the state.’ See Hobér, *supra* note 15 at 555.

⁷⁹ Spalding, “Deconstructing Duty-Free”, *supra* note 4 at 494.

vary considerably:⁸⁰ some countries have set up higher conditions to be met for establishing attribution and, in those countries, it is not as easy as it is in others to find a legal person liable for the conduct of its employees. Investment tribunals, however, seem to have taken it for granted that a company investor is responsible for the corrupt acts of its employees and have overlooked these domestic rules. It would be fair to adopt an identical and coherent approach to attributing conduct on the demand side, especially when the ILC Articles have ruled so.

In short, this thesis argues that no matter whether the official is receiving or giving bribes, and no matter whether they are authorized or unauthorized, a public official's corrupt acts should be attributable to its host State under the ILC Articles. Particularly, investment tribunals must attribute a public official's acts of solicitation and acceptance of a bribe (from an investor for the purpose of establishment an investment) to its host State, under the *ultra vires* attribution rule (Article 7) of the ILC Articles and under Article 4 (in the event of authorized activities).

2. A Breach of an International Obligation of the State

The second element of an internationally wrongful act of a State that leads to international responsibility is the existence of a breach of an international obligation of the State. Now that the act of extorting and receiving bribes by a public official is attributable to the host State, the next step is to examine the *legality* of this action. Normally, no one will challenge the illegality of corruption, bribery, or extortion. A broad consensus of imposing sanctions on anyone (like an individual investor and a public official) engaging in corruption is indeed well-established. But it becomes complicated when it comes to a non-individual party (i.e., the *host State* in the case) and responsibility at an *international* level. To impugn a host State for corruption of its public officials for the purpose of State responsibility, one should establish the non-conformity of this State with a particular *international* obligation rather than relying on *domestic legislation* condemning public officials receiving bribes.

As the ILC commented, to determine whether given conduct that is attributable to a State amounts to a failure of State to comply with a particular international obligation, 'the principal focus will be on the primary obligation concerned'.⁸¹ In the typical scenario of corruption in investor-State disputes, the question of the State responsibility is sometimes "viewed as matter of *renvoi* to the

⁸⁰ "Liability of Legal Persons for Foreign Bribery: A Stocktaking Report - OECD", online: <<https://www.oecd.org/corruption/liability-of-legal-persons-for-foreign-bribery-stocktaking-report.htm>> at 53.

⁸¹ *Commentary to the ILC Articles*, *supra* note 19 at 54.

content of the substantive, ‘primary rule’ itself’.⁸² International obligations to combat corruption imposed on a sovereign State may be found in a large number of international conventions, general principles, or CIL; however, non-compliance with these obligations may not necessarily entail State responsibilities in an investor-State dispute. In treaty-based investment arbitration, tribunals must be bound by the investment treaty ‘as the instrument that provides the parties’ rights and obligations and the treaty standards against which they will have to determine whether the international responsibility of the host State must be engaged.’⁸³ The treaty or the contract based on which an arbitral proceeding is launched may also include a choice of law provision, indicating the applicable law or rules; in the absence of such provision, investment tribunals should determine such law or rules of law as applicable in accordance with the arbitration rules. Any identified international law or rules will be the rules for arbitrators to use to determine whether there exists a breach of international obligation.

(1) Treaty Obligations Embodied in Anti-Corruption Provisions

One can barely observe any explicit anti-corruption obligation in traditional investment treaties because anti-corruption provisions were seldom incorporated into the old generation of BITs or investment chapters of free trade agreements (FTAs). However, along with the ongoing IIA reform, States are now increasingly addressing sustainable development issues in the new era of IIAs, including anti-corruption. While a comprehensive typology and quantitative analysis of the core anti-corruption provisions present in the existing IIAs is provided as Part Two of this thesis, the category of anti-corruption commitments made by States is also of relevance to the question of State responsibility for corruption of its public officials. Given that Part Two of this thesis undertakes a detailed empirical study of anti-corruption provisions (including those directed at States),⁸⁴ this subsection briefly illustrates the implication of these provisions for State responsibility.

A State’s promise to deter corruption as made through anti-corruption provisions varies from one treaty to the next, and, accordingly, gives rise to distinct treaty obligations expected to be fulfilled by the host State. For instance, an anti-corruption provision demonstrating a rough commitment to

⁸² Llamzon, *supra* note 1 at 265.

⁸³ Yas Banifatemi, “The Law Applicable in Investment Treaty Arbitration” in Katia Yannaca-Small, ed, *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 191 at 204.

⁸⁴ See Chapter 5 of this thesis.

anti-corruption, like those in Japanese BITs, requires the host State to ‘ensure that measures and efforts are undertaken to prevent and combat corruption’ in the course of implementing the investment treaties. Non-conformity of the host State with this primary obligation of anti-corruption will, normatively speaking, hold this State liable under international law of State responsibility. Likewise, a failure to discharge anti-corruption duties incurred in an anti-corruption provision that obliges the host State to establish cooperation and improve anti-corruption standards, and that demands that the host State criminalize and sanction corruption offenses, may also trigger international State responsibility.

However, whether or not this responsibility will be ultimately rendered by investment tribunals is situation-specific. Factors like the party invoking State responsibility, the interpretation of the relevant anti-corruption provision, and the State’s consent to arbitration contained in the investment treaty at hand are at play in determining State responsibility. First of all, an investor, who is, *per se*, the supply side of corruption, would seldom raise a claim to hold the demand side of the same corrupt act, i.e., the host State, responsible. But it is not unreasonable for a third party (namely **Investor T** in hypothetical (b)) to have done so. Secondly, to what extent a tribunal interprets a particular anti-corruption provision is also pertinent to a final decision on State responsibility because the language used in anti-corruption provisions of the above-mentioned types is highly abstract and obscure. It is unclear what conduct a host State ought to have performed as a result of an anti-corruption provision that contains a rough anti-corruption commitment but outlines no concrete measures. The party who invokes this allegation is additionally required to demonstrate a substantial loss due to the non-compliance of the State with a particular anti-corruption obligation. Thirdly, a State may not consent to subject an anti-corruption provision to arbitration, which means that investors are not able to rely on these provisions to argue for compensation through ISA.⁸⁵ However, State-State dispute settlement mechanisms through diplomatic protection may still be accessible to investors, if they have been expressly made so through the relevant investment treaty.

(2) Substantive Treatment Standards

In addition to a direct anti-corruption obligation, a public official’s acts of soliciting bribes may further constitute breaches of substantive treatment standards in investment treaties, like FET. The

⁸⁵ See Chapter 6 of this thesis for a detailed discussion on this issue.

Netherlands Model BIT 2019 (stated earlier) is a vivid example of a connection between FET and anti-corruption obligations.⁸⁶

Sometimes, when there is a lack of direct reference to corruption, standards of FET are also referred to. In *EDF (Services) v. Romania*, the investor asserted that it was extorted to pay a substantial bribe to Romanian government officials, but it had refused to meet such demands. EDF further alleged that such a refusal had led the respondent State to take a number of illegal measures towards EDF's investment, including, *inter alia*, a breach of the FET standard enshrined in the applied investment treaty – the Romania-United Kingdom BIT (1996). Article 2(2) of this treaty provides that '[i]nvestments of nationals or companies of each contracting party shall at all times be accorded fair and equitable treatment'.⁸⁷ Albeit there is an absence of a general understanding of the meaning of FET, the tribunal noted that 'the parties' legitimate and reasonable expectations with respect to the investment they have made' is one of the main components of the FET standard, which has actually been recognized by many other tribunals.⁸⁸ This solicitation allegation, however, did not prosper because of insufficient evidence, but the tribunal has expressly acknowledged a public official's corrupt acts as violations of BIT obligations.⁸⁹

The Tribunal shares the Claimant's view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that "exercising a State's discretion on the basis of corruption is a [...] fundamental breach of transparency and legitimate expectations."

In *F-W Oil Interests v. Trinidad and Tobago*, the investor alleged that the respondent engaged in wrongful conduct in retaliation for its refusal to make a payment of US \$1.5 million solicited by the public official.⁹⁰ At the end of the hearing, the investor withdrew the allegations of corruption and thus there was no need for the tribunal to make a decision on the corruption issue.⁹¹ Notwithstanding this withdrawal, the tribunal commented that a dispositive finding of the alleged

⁸⁶ Art.9 (Treatment of investors and of covered investments), *note 27*.

⁸⁷ Paragraph 2 of Article 2 (Promotion and Protection of Investment), *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 1996.

⁸⁸ *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award of 8 October 2009, 2009 at para 216 [*EDF (Services) v. Romania*, Award (2009)].

⁸⁹ *Ibid* at para 221.

⁹⁰ *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award of 3 March 2006, 2006 at para 36 [*F-W Oil Interests v. Trinidad and Tobago*, Award (2006)].

⁹¹ *Ibid* at para 211.

corrupt act would substantially affect the final settlement of the case, in particular on claims of substantive investment treatment:⁹²

... if allegations of corruption had been made and had proved to be well founded, it would have had a most substantial effect on the view of the case taken by the Tribunal, and most particularly so if and when it came to the point at which the actions or omissions of the State came to be measured against the standard of treatment for foreign investment laid down in the BIT.

Additionally, the solicitation of a bribe of a host State is arguably in breach of another standard – the customary international law minimum standard of treatment of foreigners and their property.⁹³ The relation between the minimum standard of treatment and the FET standard is somewhat complicated, despite a prevalent cognition that FET originated from the minimum standard of treatment.⁹⁴ In practice, a narrow point of view has equalled FET to the minimum standard of treatment, but a broader standpoint considers FET possessing an expanded scope than the minimum standard of treatment.⁹⁵ In the *Neer Claim*, a landmark case where the minimum standard of treatment in investment activities was established, this concept was commonly understood as follows:⁹⁶

The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

More accurately, it suggested that the minimum standard of treatment is aimed at protecting some ‘very basic conceptions of justice, such as the right to a fair trial, decent treatment if imprisoned, protection from mob violence, treatment during deportation, and enjoyment of property unless taken for a public purpose with fair compensation’.⁹⁷ The threshold for finding a breach of the minimum standard of treatment is relatively higher. The very essence of the minimum standards of treatment is accordingly viewed differently from the current widened understanding of the FET standard. It is thus illogical to conclude that an act of solicitation runs counter to the customary international law minimum standard of treatment solely based on its breach of FET.

⁹² *Ibid* at para 212.

⁹³ Devendra, *supra* note 6 at 272.

⁹⁴ Hussein Haeri, “A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law” (2011) 27:1 Arbitration International 27–46.

⁹⁵ OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment (OECD Publishing, 2004).

⁹⁶ *L F H Neer and Pauline Neer (USA) v United Mexican States (1926)*, 4 UNRIAA, vol IV, 8 at 60–61 [*Neer Claim (1926)*].

⁹⁷ Tolga Yalkin, “The International Minimum Standard and Investment Law: The Proof is in the Pudding”, (3 August 2009), online: *EJIL: Talk!* <<https://www.ejiltalk.org/international-minimum-standard/>>.

It is worth noting that other scenarios of corruption may also constitute a violation of the host State's obligation to accord FET. In *Chevron v. Ecuador (2)*, a domestic judgment (Lago Agrio Judgment) was proven to be issued corruptly; precisely, Judge Zambrano in this domestic dispute allowed the plaintiff's representatives to ghostwrite the Lago Agrio Judgment (Chevron was the defendant in this domestic case).⁹⁸ The tribunal determined that the misconduct of Judge Zambrano, attributable to Ecuador, 'was grossly improper by any moral, professional and legal standards; and it directly impacted, adversely, the rights of Chevron and thus 'satisfies the legal test for denial of justice under the FET standard'.⁹⁹ Given that the 'corrupt act' in this case infringes a fundamental human right to fair hearing and trial,¹⁰⁰ the tribunal further concluded that Judge Zambrano's conduct also amounted to 'a failure of the Respondent's national system as a whole to satisfy minimum standards under international law'.¹⁰¹

In *Liman v. Kazakhstan*, an investment case based on the Energy Charter Treaty (ECT), the investor also raised the claim that the Kazakh court proceedings were corrupt, but this allegation was not proved by the evidence adduced. The tribunal stressed that 'corruption is a serious allegation, especially in the context of the judiciary' and concluded that '[c]orruption, if found, would constitute a grave violation of the standard of fair and equitable treatment under ECT Article 10(1), second sentence.'¹⁰²

One may further notice that the *EDF (Services)* tribunal additionally confirmed that 'a request for a bribe by a State agency is ... a violation of international public policy'. As mentioned in Chapter 2, acts of corruption, both the demand side and the supply side, are contrary to the international public policy of most, if not all, States. But a violation of international public policy prohibiting corruption does not necessarily entail State responsibility in an investor-State investment dispute. To invoke State responsibility in ISA, arbitrators should decide whether there exists a breach of international public policy by the *host State* and associate this breach with *an international obligation* of this State, for instance, a BIT obligation, in treaty-based investment arbitration.

⁹⁸ *Chevron Corporation and Texaco Petroleum Corporation v Ecuador (2)*, PCA Case No 2009-23, Second Partial Award on Track II of 30 August 2018, 2018 at paras 8.53-8.56 [*Chevron v. Ecuador (2)*, Second Partial Award on Track II (2018)].

⁹⁹ *Ibid* at para 8.59.

¹⁰⁰ *Ibid* at para 8.57-8.58.

¹⁰¹ *Ibid* at para 8.60.

¹⁰² *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Excerpts of the Award of 22 June 2010, at para 422 [*Liman v. Kazakhstan*, Excerpts of the Award (2010)].

(3) Violations of International Obligations through Omissions

In addition to *positive actions*, one may also probe whether or not there is any related *omission* of the State that may trigger international State responsibility. An example could be an international obligation requiring the host State to prevent the acts of extortion or acceptance of bribes from happening. A State's failure to do so will then constitute an internationally wrongful act by omission. While it is widely accepted that an omission can be internationally wrongful, it is difficult to ascertain the existence of such an omission.

As presented earlier, some of the existing anti-corruption provisions on State commitments are formulated in an abstract and obscure manner. It may be interpreted as a commitment to promoting corruption deterrence in international investment transactions that proscribes a State from actively engaging in corrupt practices. It can also be understood as imposing an obligation on States to ensure government integrity, increase transparency, and promote corporate governance by deploying a series of preventive measures in accordance with domestic laws and regulations. Preventive policies and promotional measures with regard to anti-corruption have been stressed as indispensable and vital to an effective anti-corruption mechanism. The United Nations Convention against Corruption (UNCAC) has recognized the importance of prevention in terms of corruption elimination and thus put great effort into formulating preventive measures directed at both the public and private sectors.¹⁰³ But how to 'objectively' measure the fulfilment of these promotional obligations and accordingly discharge proper State responsibility is demanding. Given the complexity of organizational structures between governments, it is almost impossible to adopt a monophyletic standard suitable to all situations, but a 'sliding scale approach' may be of some help.

In fact, the 'sliding scale approach' is put forward by Judge Crawford in determining attribution of public official's acts of solicitation and acceptance:¹⁰⁴

As the ILC Commentary notes, "the attribution of conduct to the State is necessarily a normative operation." The sliding scale approach to attribution in the context of corruption is justified by an implicit normative judgment that international law makes about the reality of State authority and what can be expected of a State in controlling its representatives. The more powerful the official is in the State's internal structure, the higher international law's expectation for the State to control that official will be. The higher ranking the official, the less likely will it be that a third party seeking to deal with

¹⁰³ Chapter II (Preventive measures), *United Nations Convention against Corruption*, 2005, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, U.N. GAOR, 58th Sess., 51st Plen Mtg., UN Doc. A/RES/58/4.

¹⁰⁴ Crawford & Mertenskötter, *supra* note 62 at 42.

the State is in a position to resist the *ultra vires* act. The facts in *Yeager v. Iran* are illustrative. While the claimant in *Yeager* could have been reasonably expected to try to resist the payment of the bribe to the IranAir agent for the issuance of his prepaid ticket, it was not reasonable to expect him to resist the shakedown by the customs officers of the Revolutionary Guard who went on to take his money.

Despite the fact that it was proposed to assist in addressing attribution issues, the rationale of Crawford's proposition is also plausible in terms of determining breaches of obligations by States' omissions: 'the higher ranking the official, the higher international law's expectation for the State to control that official will be.' In this sense, in comparison to a local traffic policeman, a corrupt act conducted by a State's President or Prime Minister would normally render more responsibility on this State since it is more expected to ensure the integrity of its President or Prime Minister.

Another specific type of omission may involve obligations concerning criminal procedures. It has become a common consensus in numerous anti-corruption treaties and in some anti-corruption provisions on the necessity to impose sanctions on individuals that engage in corrupt acts.¹⁰⁵ However, a State may refuse to investigate or prosecute the public officials who conduct corrupt acts with investors or to impose the legally required sanctions on them, such as in *Spentex* case. This omission, from a normative perspective, constitutes a breach of the treaty obligation by which the State is expected to abide.¹⁰⁶

In practice, in *H&H Enterprises v. Egypt*, the investor alleged that the respondent State refused to address the issue of unlawful solicitations by officials of two State-owned companies; for instance, Egypt failed to take any proper legal measures against the bribery solicitation. Such omissions by the Egyptian government, submitted by the investor, constituted a failure to 'protect and defend H&H's legitimate expectation of a fair legal framework for its investment'.¹⁰⁷ This claim was rejected due to a lack of evidence.¹⁰⁸ The tribunal further noted that even if corruption was proven, the respondent's failure to take measures against solicitation would not constitute a breach of the applicable investment treaty (the US-Egypt BIT) because 'there does not appear to be sufficient

¹⁰⁵ Art.3 (Sanctions), *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed on 17 December 1997, entered into force on 15 February 1999. See also Art.30 (Prosecution, adjudication and sanctions), *UNCAC*, *supra* note 103.

¹⁰⁶ Other aspects of omissions, such as asset recovery, may also be relevant, see, e.g., Giorgio Sacerdoti, "Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice" (2009) 24:2 ICSID Review 565–586 at 586. These omissions may constitute a breach of the international anti-corruption conventions (such as the UNCAC), but an investor should associate that breach of international anti-corruption conventions with one or more specific *BIT treaty obligations* (if the investor intends to claim compensation through investment arbitration).

¹⁰⁷ *H&H Enterprises Investments, Inc v Arab Republic of Egypt*, ICSID Case No ARB 09/15, *Excerpts of Award of 6 May 2014*, 2014 at para 389 [*H&H Enterprises v. Egypt*, *Excerpts of Award* (2014)].

¹⁰⁸ *Ibid* at para 391.

evidence of a causal link between the bribery solicitation and the Claimant's loss of its investment'.¹⁰⁹ In *RSM v. Grenada*, the tribunal likewise stated that the acceptance of a bribe by government officials, being unlawful under domestic law and international law, does not necessarily amount to a treaty violation;¹¹⁰ the claimant must demonstrate that 'Grenada took active steps to do as it was improperly bidden (something more than simply relying on its contractual rights)'¹¹¹ and thereby caused damage to the investor.¹¹²

In sum, a host State may be held responsible for its omissions of anti-corruption obligations. But the investor who alleges the State's omissions must demonstrate concrete losses it has suffered due to the State's noncompliance.

C. A Dual-Track Approach to Allegations of Corruption

The next move that often follows a confirmation of an internationally wrongful act on the part of a State is to determine the form of the State responsibility for this particular misconduct. ISA tribunals have seldom fielded questions about the type of responsibility a State should undertake for corruption, partly because corruption was at most times unsubstantiated in ISA and partly because investors' claims were invariably dismissed.¹¹³ Even though tribunals have occasionally ordered the host States to bear half the arbitration fees (*Metal-Tech v. Uzbekistan*) or to make a substantial donation with the 'threat' of an adverse cost order in cases of non-fulfilment (*Spentex v. Uzbekistan*), it remains to be investigated whether these decisions are consistent with international law on State responsibility. More importantly, these decisions are made on the basis of the binary approach; it thus remains unsolved how a tribunal should proceed if the investor's claims were not entirely rejected.

Contrary to the binary approach, this section attempts to put forward a novel approach, a *dual-track approach*, which demands that the host State be responsible for its public officials' acts of corruption. More specifically, the dual-track approach demands that the tribunal examine both corruption and investors' claims at the merits phase and issue corresponding liability for respective

¹⁰⁹ *Ibid* at paras 392–399.

¹¹⁰ *RSM Production Corporation and others v Grenada, ICSID Case No ARB/10/6, Award 10 December 2010*, 2010 at para 7.2.6 [*RSM v. Grenada, Award (2010)*].

¹¹¹ *Ibid* at para 7.2.7.

¹¹² See also Greenwald & Ivers, *supra* note 8 at 56.

¹¹³ See Chapter 1 and Chapter 2 of this thesis. See also Llamzon, *supra* note 1 at 305–320.

wrongdoings (if proven). Before delving into the content of this novel approach, this section first introduces the forms of legal consequences for corruption that may be imposed upon a host State.

1. Host States Should Undertake Responsibility for Corruption

It is undisputed that State responsibility entailed by internationally wrongful acts involves legal consequences. A clarification of the content of legal consequences is necessary, especially when we realize that ISA tribunals cannot make an immediate application of Part Two of the ILC Articles to investor-State relations.¹¹⁴ In reality, there are some general principles on State responsibility that ISA tribunals can refer to.

(1) Duty of Reparation

To begin, a responsible State is under an obligation to ‘repair’ the wrong it has done. This principle was first established in the case of *Factory at Chorzów* by the Permanent Court of International Justice (PCIJ):¹¹⁵

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparation, which may be due by reason of failure to a convention, are consequently differences relating to its application.

In fact, the final formulation of Part Two of the ILC Articles (where Article 31 deals with the duty to make full reparation and Articles 34-39 regulate the forms of reparation) is largely derived from this well-established principle. Moreover, a historical study of State responsibility and reparation suggests that the basic philosophy of making reparation for wrongdoing derives from domestic private law and is closely tied to extra-contractual liability;¹¹⁶ it is thus fair to conclude that a

¹¹⁴ As demonstrated in earlier sections, norms enshrined in Part Two of the ILC Articles only apply to the international obligation of State responsibility ‘owed to another State, to several States, or to the international community as a whole’. Despite that, the *Yukos* tribunal turned to these rules as *guidance*, given the CIL nature of the ILC Articles, the deficiency of *les specialis* in the applicable BIT, and the absence of circumstances commanding otherwise. See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No 2005-04/AA227, Final Award of 18 July 2014, 2014 at para 113 [*Yukos v. Russia*, Final Award (2014)]. See also Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania (1), ICSID Case No ARB/05/20, Final Award of 11 December 2013, 2013 at para 916 [*Micula v. Romania* (1), Final Award (2013)]; Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award of 16 September 2015, 2015 at para 555 [*Quiborax v. Bolivia*, Award (2015)].

¹¹⁵ *Factory at Chorzów (Germany v Poland)*, Judgement No8, PCIJ, Series A, Jurisdiction of 26 July 1927, at 21 [*Factory at Chorzów*, Jurisdiction (1927)].

¹¹⁶ Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press, 2011) at 12–15.

responsible State should still make reparation to any party (who has experienced any loss due to the misconduct this State commissioned), even if it is in the private sector.

(2) Restitution and Compensation

Another principle concerns the forms of reparation, which may be carried out in the form of restitution or compensation, singly or in combination. This principle was also established in *Factory at Chorzów* by the PCIJ, which has been frequently referred to in investment arbitration and is rarely protested by responsible States.¹¹⁷ The *Chorzów Factory* approach has made restitution the main remedy and compensation as a subsidiary one, which arguably has a profound impact on the development of the modern international law on State responsibility and reparation.¹¹⁸ Despite the extensive application of the *Chorzów Factory* approach in ISA, investment tribunals have seldom granted restitution as the main form of reparation; compensation is overwhelmingly often granted to redress the loss of investors, whatever the wrongful act is an illegal expropriation or a breach of substantive treatment standards.¹¹⁹ In some circumstances where the wrongful act of the host State is rightly a failure to make a due payment to the investor, the order to compensate should be the form of restitution. More often, to render restitution is to order the host State to perform specific acts.

A question then arises: Do ISA tribunals genuinely have the competence to order specific performance (or in other words, non-pecuniary remedies)? This debate is becoming more intense confronted by the tribunals of the International Centre for Settlement of Investment Disputes (ICSID), when Article 54(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) demands that each contracting States

¹¹⁷ The PCIJ specified the *Chorzów Factory* approach as follows:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which as restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

See *Factory at Chorzów, Jurisdiction* (1927), *supra* note 115 at 47.

¹¹⁸ Sabahi, *supra* note 116 at 43.

¹¹⁹ The remedies to be granted may also be related to what the investment treaties are meant to achieve: ‘to protect foreign investors, or to act as a governance mechanism monitoring state behavior, or both.’ See *OECD Public Consultation on Investor-State Dispute Settlement with Comments*, by Andrea K Bjorklund at 54.

only enforce *pecuniary* obligations imposed in an award.¹²⁰ This issue is fairly important in corruption cases, because a frequently asked question is whether or not ISA tribunals have the capacity to order the host State to prosecute the involved public officials. The legitimacy of the order of donation in *Spentex* – another category of non-pecuniary remedies – is also questioned.

The fact that ICSID tribunals seldom grant relief in the form of non-pecuniary remedies and almost always only order pecuniary damages in awards¹²¹ does not necessarily suggest that an ICSID tribunal is incapable of rendering specific performance. On the contrary, the competence to issue non-pecuniary decisions is evident in the drafting history of the ICSID Convention and in some awards rendered by ICSID tribunals.¹²² To clarify, Article 54(1) of the ICSID Convention is directed at *other contracting States* to the ICSID Convention rather than *the State party to the arbitration proceedings at hand* (which is bound by Article 53 of the ICSID Convention where no distinctions between monetary and non-monetary remedies are made).¹²³ Moreover, the several draft versions of Article 54(1) did not exclude the obligation to enforce ‘non-pecuniary’ obligations¹²⁴ but eventually did so partly because, according to Mr. Aron Broches, ‘he could not imagine specific performance of provisions of the award, other than its pecuniary provisions, by a

¹²⁰ Art.54(1), *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1965, entered into force on 16 April 1966.

¹²¹ Christoph Schreuer, “Non-Pecuniary Remedies in ICSID Arbitration” (2004) 20:4 *Arbitration International* 325–332 at 325. Arguably, investment arbitrators are increasingly referring to ‘preliminary injunctions’ which requires the respondent State to do or to stop a particular course of action while the arbitration is taking place. See “OECD Public Consultation on Investor-State Dispute Settlement – the Scoping Paper”, online: <<http://www.oecd.org/investment/internationalinvestmentagreements/publicconsultationisds.htm>> at paras 49–50.

¹²² *ICSID, History of the ICSID Convention, Volume II-2*, 1968 at 991; Ioan Micula, Viorel Micula, *SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania (1)*, ICSID Case No ARB/05/20, *Decision on Jurisdiction and Admissibility of 24 September 2008*, 2008 at para 166 [*Ioan Micula v. Romania (1)*, *Decision on Jurisdiction and Admissibility (2008)*]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3 (also known as: *Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic*), *Decision on Jurisdiction of 14 January 2004*, 2004 at paras 79–80 [*Enron v. Argentina, Decision on Jurisdiction (2004)*].

¹²³ *ICSID, History of the ICSID Convention, Volume II-2*, *supra* note 122 at 1019. Art.53 of the ICSID Convention provides:

- (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
- (2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51, or 52.

See Art.53, *ICSID Convention*, *supra* note 120.

¹²⁴ This includes the Preliminary Draft, the First Draft and the Revised Draft, see *ICSID, History of the ICSID Convention, Volume I*, 1970 at 246, 248. Mr. Aron Broches sustained the differences between the previous drafts and the final provision would in practice be minimal. See *ICSID, History of the ICSID Convention, Volume II-2*, *supra* note 122 at 1019.

third State against the host State'¹²⁵ and partly out of the fear that non-pecuniary remedies may be 'unknown to the law of the country where enforcement is sought'.¹²⁶

In cases heard under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, non-pecuniary remedies have been occasionally rendered by the tribunals. Notably, in *Chevron v. Ecuador (2)*, to repair the investor's injuries caused by the Lago Agrio Judgment procured through judicial corruption, the tribunal rendered a series of non-pecuniary remedies, including, *inter alia*, an order of 'tak[ing] immediate steps ... to remove the status of enforceability from the Lago Agrio Judgment' and of 'abstain[ing] from collecting or receiving, directly or indirectly, any proceeds from the enforcement or recognition of any part of the Lago Agrio Judgment'.¹²⁷

In brief, investment arbitration tribunals may adopt the *Chorzów Factory* approach – restitution and/or compensation – in determining State responsibility. Particularly, ISA tribunals have an inherent right to issue non-pecuniary remedies, if the investment treaty under consideration does not so prevent.¹²⁸

(3) Tribunal's Discretion on Damages Awards

In addition, ISA tribunals have the discretion to decide upon the appropriate forms of reparation for the injuries incurred. Even in circumstances where the claimant seeks compensation, the tribunal may still order the responsible State to repair its wrongdoing through restitution. In *Arif v. Moldova*, the claimant insisted on damages, but the respondent State requested a form of restitution to redress its violation of the FET obligation.¹²⁹ The tribunal preferred restitution to compensation in the given case, because 'restitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host

¹²⁵ ICSID, *History of the ICSID Convention, Volume II-2*, *supra* note 122 at 1019.

¹²⁶ Christoph Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) at 1137.

¹²⁷ *Chevron v. Ecuador (2), Second Partial Award on Track II (2018)*, *supra* note 98 at para 10.13.

¹²⁸ See also Andrés Jana, "Reparation in Investment Treaty Arbitration" (2016) 110 *Proceedings of the Annual Meeting (American Society of International Law)* 288–292; Michelle Bradfield & J C Thomas, "Non-Pecuniary Remedies: A Missed Opportunity?" (2015) 30:3 *ICSID Review* 635–664; A De Luca, "Non-Pecuniary Remedies Under the Energy Charter Treaty" (2015) 12:3 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=2224>>. But the enforcement of non-pecuniary remedies has been a big issue, given the lack of a follow-up tribunal monitoring the implementation. See Bjorklund, *supra* note 119 at 55.

¹²⁹ *Mr Franck Charles Arif v Republic of Moldova, ICSID Case No ARB/11/23, Award of 8 April 2013*, 2013 at paras 566–568 [*Arif v. Moldova, Award (2013)*].

State’.¹³⁰ However, the tribunal was unable to confirm that restitution is possible or to supervise any restitutionary remedy; it thus ordered restitution and compensation as alternatives, a solution which is deemed ‘a final opportunity to preserve the investment, while also preserving Claimant’s right to damages if a satisfactory restitutionary solution cannot be found.’¹³¹ More accurately, the responsible State was given a period of sixty days to formulate its proposals of the exact mechanism of restitution and the two parties were expected to negotiate the restitution proposal in good faith.¹³² But if the claimant had refused to accept the restitution offered by the respondent State within ninety days from the date of the award, the respondent would have been obliged to make the payment accordingly.¹³³

In another case, *Goetz v. Burundi*, the tribunal adopted a two-stage approach to liability.¹³⁴ The claimants owed a company incorporated in Burundi and enjoyed tax and customs exemptions in the approved free trade zone, but the government of Burundi later withdrew the certificate to operate in this free trade zone. The claimants had requested the annulment of that decision and a subsidiary claim of payment of damages. Before formally rendering an award, the tribunal issued an ‘interim decision’ with two options for the host State to choose from: providing adequate compensation to the investor or to restore the certificate. If Burundi failed to perform either of the two acts within four months, the tribunal would reconvene the proceedings and make a final decision regarding the appropriate consequences.¹³⁵

Practically, there are no stringent rules on how an investment tribunal should render its decision on reparation. Instead, investment tribunals exercise greater discretion over liability. Compensation will not be appropriate in every case, and neither will restitution. Moreover,

¹³⁰ *Ibid* at para 570. See also Tomoko Ishikawa, “Restitution as a ‘Second Chance’ for Investor-State Relations: Restitution and Monetary Damages as Sequential Options” (2016) 3 McGill Journal of Dispute Resolution 154–175 at 175. (“...juridical restitution is more beneficial for the host state than merely ‘buying itself out’ of international responsibility by paying out compensation, in that it gives a final opportunity to demonstrate its willingness to keep committed to a stable investment environment in conformity with the IIA.”)

¹³¹ *Arif v. Moldova, Award (2013)*, *supra* note 129 at para 571.

¹³² *Ibid* at para 572.

¹³³ *Ibid* at 572.

¹³⁴ Brooks E Allen, “The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners” in Michael E Schneider & Joachim Knoll, eds, *Performance as A Remedy: Non-Monetary Relief in International Arbitration* ASA Special Series No. 30 (Huntington, N.Y.: JurisNet, LLC) 281 at 304–306.

¹³⁵ *Antoine Goetz et consorts v République du Burundi, ICSID Case No ARB/95/3, Award (Embodying the Parties’ Settlement Agreement) (French) of 10 February 1999*, 1999 at para 133. For the case summary in English, see Eloïse Obadia, “Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3): Introductory Note” (2000) 15:2 ICSID Review 454–456.

arbitrators are not confined to rendering the above forms of reparation but have more flexibility to render other categories of remedies so long as they can effectively resolve the dispute at hand and meet the satisfaction of the parties to the instant case. These decisions are also expected to conform with other objectives, such as the furthering of the rule of law and the implementation of substantive social values inscribed in legal rules, which are inherently engraved in the regime of international investment arbitration.¹³⁶

(4) The Need for a New Approach

Bearing the above in mind, it would not be irrational for arbitrators to request the host State to prosecute the involved individual or to take other measures as legal consequences for its public officials' acceptance or solicitation of corruption, as long as these measures are necessary and indispensable to preserving the spirit of international investment arbitration and treaty. This type of legal consequence is foreseeable if public officials' acts of solicitation and acceptance were alleged by investors as a violation of the treaty or contract under consideration. It is nonetheless far from clear how an investment tribunal should deal with issues of State responsibility in a typical scenario of corruption claims.

Given that the currently used binary approach is improper to address allegations of corruption and that the binary approach cannot reflect the liability for corruption on the demand side, we need a new approach. This thesis proposes the use of a *dual-track approach* to deal with future allegations of corruption. This new approach suggests that a positive finding of corruption should not be the sole ground for dismissing an investor's claims; by contrast, the dual-track approach requires tribunals to examine both the allegations of corruption and the investors' claims at the merits phase¹³⁷ and ensures that each party assumes responsibility for its own misconduct.

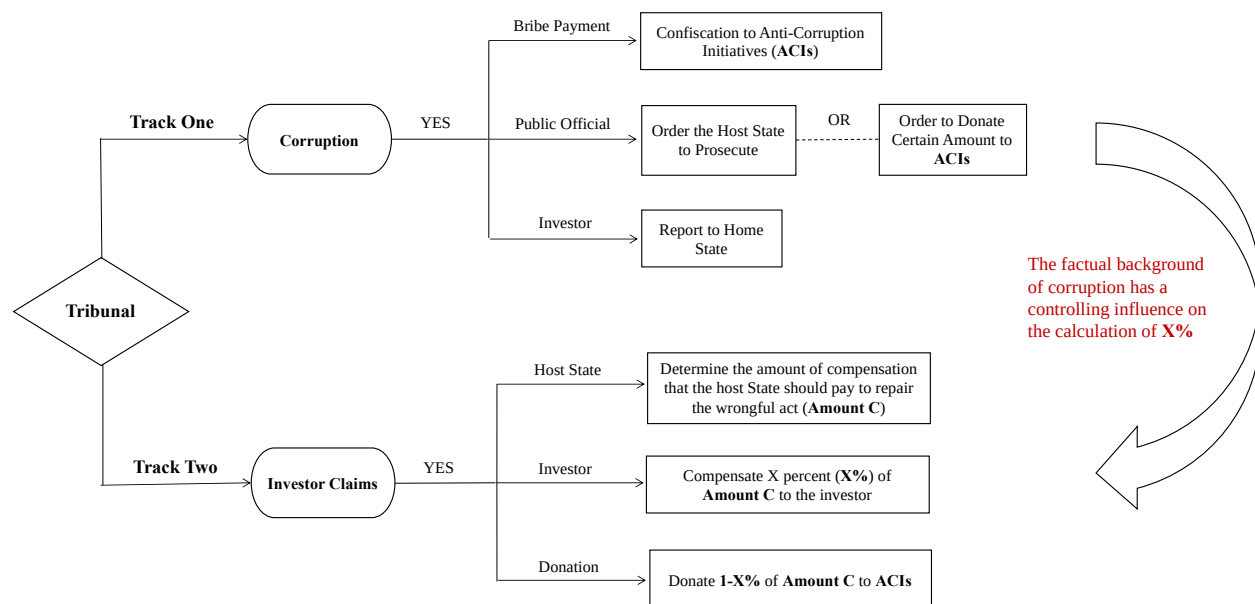
¹³⁶ See generally Thomas Schultz, "The Three Pursuits of Dispute Settlement" in Alexander J Bělohávek & Naděžda Rozehnalová, eds, *Czech (& Central Europe) Yearbook of Arbitration: The Relationship between Constitutional Values, Human Rights and Arbitration* (JurisNet, LLC, 2011) 227.

¹³⁷ It is also suggested that dealing with corruption at the merits stage is required by the principle of proportionality to prevent 'too rigid and inflexible results', but the author did not squarely demonstrate the content of this proportionality-driven approach. See Andreas Kulick, "Legal Issues of Economic Integration" (2010) 37:1 Legal Issues of Economic Integration 61–85 at 84. ("... there is not only 'black and white' in corruption, but rather an ample grey zone of different factors and circumstances. Adopting the principle of proportionality prevents too rigid and inflexible results, such as that an investor may lose a significant amount of investment on the basis of alleged behaviour that was only incidental to the investment, or which may have been carried out by agents without authorization. Another common situation is that the Host State is the driving force to the dubious conduct as seen in *World Duty Free*. Proportionality offers the appropriate means to take those factors into account.")

Admittedly, this thesis is neither the first nor the only work that demands State responsibility for its public officials' acts of corruption. But those scholars writing against the use of the binary approach in corruption cases have displayed deep interest in discussing the *attribution* issues in the public officials' corrupt acts and has devoted scant attention to the question of how the host State should legally repair this misconduct. It is still a '*mystery*' how an ISA tribunal renders its decision if (a) a corrupt act is substantiated, and, at the same time, (b) the investors' claims are not completely dismissed due to corruption.¹³⁸ In this regard, the dual-track approach advanced in this thesis contributes to filling in this gap by demonstrating the concrete legal consequences an investor *and* the host State must undertake for their involvement in corrupt acts.

2. The Content of the Dual-Track Approach

The very essence of the dual-track approach is to examine both allegations of corruption and claims of investors and impose corresponding responsibility for any wrongdoing. A brief process of the dual-track approach is shown in the diagram below.



(Dual-track approach to deal with allegations of corruption in investment arbitration)

(1) First Alleged Illegality: Corruption

¹³⁸ Crook, *supra* note 12 at 315.

The first track of the proposed new approach demands that the tribunal carefully examine the alleged corrupt acts and hold both parties responsible for corruption, if proven. It requires that the host State prosecute the involved public official as a form of restitution to repair its obligation of imposing sanctions on corruption offenses. This obligation concerns a wide range of stakeholders: the people of the host State, potential foreign investor competitors, and the whole international community. The fulfilment of this obligation will not only build a stable legal environment to attract foreign investment but will also contribute to global government governance and thus stimulate the international economy in a healthy way. In cases that the host State refused to do so, the tribunal may order the host state to ‘compensate’ for this refusal and the compensation will be donated to anti-corruption initiatives (ACIs) launched by UN, OECD, World Bank, International Transparency or other international organizations. The amount of this donation may be determined by taking many factors into consideration: the ranking of the public official, the public official’s engagement in corruption, the amount of the bribe, etc. The bribe payment received by the public official should also be subject to seizure or confiscation and then be transferred to ACIs.

To the investor, the host State may investigate investors’ acts of corruption in accordance with its domestic laws and regulations. Domestic legislation requires the investor to undertake certain liability by criminal, civil, or administrative law. The tribunal may also report the corrupt act of the investor to the home State and advise the home State to take certain measures to facilitate the investigation and to improve the corporate governance on its side. In commercial arbitration, observers have noted that arbitrators have duties of reporting, which originate from public justice and a fair and independent determination of civil rights and prevail over all their other duties, such as confidentiality obligations.¹³⁹ Likewise, in investment arbitration, arbitrators are also guardians of public policy and international justice, and therefore they have a duty to report suspicions to the home State of the corrupt acts by its nationals. In this sense, the home State plays an indispensable role in corruption deterrence and elimination in investment activities.

As for the order to donate \$8 million in *Spentex v. Uzbekistan* with the possibility of adverse results on legal fees and proceeding costs in cases of non-compliance, given the scarce facts accessed

¹³⁹ Cecilia AS Nasarre, “International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator” (2013) 10:3 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1965>>; Sara Nadeau-Séguin, “Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices?” (2013) 10:3 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1963>>.

from the public, the involved bribe amount and their participation is unknown, and thus, it is hard to offer a yes or no answer to the question of whether this donation is lawful or not. But specific acts of donation and a two-stage approach on remedies are allowed by international law and not objected to by the host State. It should then be deemed appropriate if this donation is issued under the consideration of the rule of law, the anti-corruption objectives, and the preservation of investment treaties and arbitration.

It is worth noting that the above specific forms of State responsibility may be suited to other corruption-involved investment cases. For instance, in the circumstances where the host State took retaliatory measures against the investor's refusal to pay bribes by according unfair treatment or other regulatory measures to the investment (a similar scenario with *EDF (Services) v. Romania*), investment tribunals should not only declare that the solicitation of bribes is a violation of the FET standards and order the host State to make compensation to remedy this treaty breach, but should also issue the confiscation and prosecution order for the purposes of promoting anti-corruption policies.

(2) Second Alleged Illegality (The Investor's Claims)

The second track of the proposed approach is examining the investor's claims on the alleged prohibited regulatory measures. In other words, even if there is a positive finding of corruption, investment tribunals should still look into the investor's claims, which is of central importance to the dual-track approach. The examination of the alleged treaty breaches offers the host State the chance to maintain its reputation on its adherence to the investment treaty and to guard against any rumor of its intention to profit from corrupt acts of its public official, regardless of whether the alleged regulatory measures are legal or not. In cases where the alleged measures do not constitute a breach of the investment treaty, ISA tribunals certainly must declare these measures as legal and dismiss the investor's claims accordingly. In the event of a finding of a breach of treaty obligation, the host State is obliged to make compensation (**Amount C**) determined by the tribunal to redress the damages.

But this compensation is not entirely awarded to investors. The portion (**X percent**) that an investor is awarded depends on a series of factors: the seriousness of corruption (which may be reflected from the amount of the bribe payment to some extent), the gravity of each party's contribution to

the illicit acts,¹⁴⁰ the frequency that the investor has engaged in corrupt practices, the enforcement of corporate social responsibility in the investor's legal entities, the involvement level of the host State party in this particular corrupt act, the number and ranking of government officials involved in the bribery, the corruption deterrence level in the host State,¹⁴¹ the overall anti-corruption policy (both domestically and internationally) enforced by the host State, etc.

The general principle should be that the more actively the investor has engaged in corrupt acts, the less compensation this investor should be granted. The remaining compensation should be donated to ACIs. The range of X thus follows:

$$0 \leq X < 100.$$

If the investor has acted as a leading role in initiating a substantial corrupt act which has a detrimental and lasting effect on international investment order, the tribunal may even decide to donate all the compensation to ACIs; in other words, the investor will not be awarded any compensation (which means that $X=0$). But the tribunal should still make a declaratory judgement that the regulatory measures have indeed violated the investment treaty.

In the circumstances where the investor passively engaged in corruption and the final payment of bribes was forced under the coercive solicitation of the public official, the tribunal may award a certain portion (a case-by-case issue) to the investor and donate the remaining portion to ACIs. How deeply an investor is involved in corrupt acts is an important factor affecting the amount of compensation it can be eventually awarded from the tribunal.

In a word, the factual background of corruption has a controlling influence on the calculation of X. The more active, the smaller the portion. This partial compensation mechanism can effectively discourage investors from taking a controlling or essential role in corrupt practices with public officials. At the same time, demanding that the host State make compensation (though part or all

¹⁴⁰ This element is also considered as the levels of culpability between the investor and the host State, see, e.g., Torres-Fowler, *supra* note 3 at 1031. It is also proposed to reflect 'the principle of contributory fault when the representatives of both the State and the investor are complicit in an economic crime'. See Yarik Kryvoi, "Economic Crimes in International Investment Law" (2018) 67:3 International and Comparative Law Quarterly 577–605 at 604.

¹⁴¹ This is an important factor that must be considered. It has been pointed out that offering bribes to conduct business in some countries is an 'expectation, rather than an anomaly', especially in regions such as Latin America, Asia, and Africa. In other words, to obtain or retain business in some jurisdictions, foreign investors will have to pay bribes. See, e.g., Carlos F Concepción, "Combating Corruption and Fraud from an International Arbitration Perspective" (2016) 9:1 Arbitraje Revista de arbitraje comercial y de inversiones 369–396 at 370–372.

of the money goes to ACIs rather than the investor) prevents the host State from escaping liability for its violation of treaty obligation.

Despite the foregoing, it is suggested that States establish an advanced legal system that enables an investor to seek relief when being extorted or solicited by a public official.¹⁴² For instance, States may incorporate provisions enabling investors to report any solicitation in accordance with laws, or in international-based anti-corruption institutions. Other viable solutions are also recommended to eliminate barriers to the ‘initiation of corruption arbitration’ and to ‘successful corruption arbitration’,¹⁴³ the most important one among them should be utilizing State-to-State dispute resolution mechanism, such as diplomatic protection, to deal with international corruption claims.¹⁴⁴ It alleges that ‘[b]y incentivizing investors to raise such claims to the State-to-State level, disclosure of solicitation, extortion, and bribery should rise, and the incidence of such transactions shall fall.’¹⁴⁵

(3) Legal Fees and Proceeding Costs

It is worth noting that investment tribunals may also make use of the flexible approaches to cost allocation in corruption cases to ensure procedural justice and also contribute to global anti-corruption efforts. Investment tribunals can make separate decisions on legal fees and proceeding costs for proceedings examining corruption allegations and proceedings evaluating investors’ specific claims. Given the bilateralism of corruption, the parties may be required to equally bear their legal fees and proceeding costs associated with allegations of corruption. As for proceedings associated with concrete treaty or contract claims, distinct approaches to cost allocation may be adopted, depending on the final finding of the alleged breaches. For instance, the tribunal could ask the investor to undertake all or a large majority of legal fees and proceeding costs if the

¹⁴² See Yueming Yan, “A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?” in Yuwen Li, Tong Qi & Cheng Bian, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 227 at 240–241.

¹⁴³ To ensure the initiation of corruption arbitration, it is suggested to i) ‘strengthen nonretaliation provisions in multilateral corruption-suppression treaties in order to protect the persons and property of those who make nonfrivolous allegations of official corruption’ and to ii) ‘make changes to current domestic laws...that currently create significant exposure to criminal liability for those who report making payments to foreign officials, even where such payments were made unwillingly’. As for the measures to safeguard successful corruption arbitration, they include: iii) lowering the threshold of proof, iv) stressing the principles of proper State attribution in investment treaties, and v) concluding a clarification that the solicitation or extortion of a bribe is actionable by affected foreign investors. Bruce W Klaw, “State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities” (2015) 33:1 *Berkeley Journal of International Law* 60–113 at 97–100.

¹⁴⁴ *Ibid* at 100–102.

¹⁴⁵ *Ibid* at 102.

investors' claims were not supported. But other elements should also be taken into consideration, such as whether or not the host State and investors cooperate with the tribunal in the fact-finding process of corruption. In any case, the final decision on costs allocation is determined on the general procedural conducts and the legal results of the claims and counterclaims; it should not be considered as the content of State responsibility for corruption.

3. Practical Implications of the Dual-Track Approach

It is understandable and justifiable to exclude protection for misconduct or illegal investment. But this does not necessarily mean that any illegality, no matter how grave it might be, deprives a person of all other rights. A general philosophy of law, including in criminal law and tort law, lies in a positive correlation between the severity of illegality and the substantiality of liability. The more (and/or the severer) offenses one committed, the more (and/or the graver) legal consequences (or penalties) one should undertake. This principle plausibly operates as well in investment arbitration when the legality clause is involved. As shown in Chapter 2, some claims were declined *due to certain types of illegality* but in other cases proceedings continued despite *other categories of illegality*. The central issue is how the severity of illegality precludes an investor from enjoying other fundamental rights or receiving certain privileges. Theoretically and practically speaking, this line remains vague and even dynamic.

The binary approach may function well in cases with simple legal relationships, but a stringent application of this approach to complex legal issues will give rise to great challenges and controversies. In practice, the rise of the *de minimis* standard has enabled Professor Zachary Douglas to create an expanded category of misconduct that would not provoke jurisdictional infirmity so as to 'avoid draconian effects of the plea of illegality'.¹⁴⁶ This was perceived by Mr. John Crook as an attempt to 'find ways to avoid the drastic impact of binary sanction', especially in the complicated and controversial issue of corruption.¹⁴⁷

In cases of corruption, the weaknesses of the binary approach become more evident. In particular, the inherent bilateral nature of corruption has been frequently stressed and using the binary approach has substantially led the host State to immunize itself from liability for corruption and treaty breaches (if any). International arbitration has accordingly been reduced to shelter the host

¹⁴⁶ Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration" (2014) 29:1 ICSID Review 155–186 at 176.

¹⁴⁷ Crook, *supra* note 12 at 315.

State's misconduct, which is not the purpose that this dispute settlement mechanism is intended for. But in corruption cases, the party who raises allegations of corruption is sometimes in a privileged position because the tribunal normally *first* examines the *other* party's illegal acts of corruption and *ignores* the misconduct of corruption of the alleging party (who raised the corruption claim and who *itself* has equally contributed to this act of corruption). Additionally, the concept of corruption has wide coverage, embracing facilitation fee (e.g., \$2,000), small bribe (e.g., \$20,000) and significant corruption (e.g., \$2 million). A uniform application of the binary approach, irrespective of the size of corruption, may lead to a distortion of the process and integrity of investment arbitration. As Mr. Crook commented: 'they have either ignored or accepted the collateral consequences – unfairness, unjust enrichment, possible distortions of the arbitration process – in light of the importance of combating corrupt conduct in international investment.'¹⁴⁸ The legal consequences should be tailored according to the severity of corruption, its impacts on the parties and on the economic competition order, etc.¹⁴⁹

The dual-track approach, by contrast, is proposed to avoid the above worries. It would not cause an imbalance of liability for corruption of both sides and would also prevent the host State from taking advantage of its position in a specific proceeding to win the case (and ultimately benefiting from their own wrongdoings). As introduced, the dual-track approach takes two parallel routes. Whatever the size of the involved corruption payment, the dual-track approach ensures that both illegalities (corruption & treaty breaches) were imposed legal consequences, thereby securing the integrity of investment arbitration.

In addition, the dual-track approach is sustainable, justifiable, and desirable in the sense of altering the prevailing view of the arbitration mechanism that 'a means for unsavoury regimes to obtain a legal seal of approval for their kleptocratic compulsions'.¹⁵⁰ In fact, investment arbitration remains one of the rare international tools for the international community to combat corruption so far. It is even regarded as the 'only potentially effective mechanism under the international order for the control of transnational corruption currently available'.¹⁵¹ Apart from the function of promoting

¹⁴⁸ *Ibid* at 316.

¹⁴⁹ Andreas Kulick & Carsten Wendler, "A Corruption Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption" (2010) 37:1 Legal Issues of Economic Integration 61–85 at 84.

¹⁵⁰ Lim Kevin, "Upholding Corrupt Investors' Claims against Complicit or Compliant Host States—Where Angels should not Fear to Tread" in Karl P Sauvant, ed, *Yearbook on International Investment Law and Policy* (2011-2012) (Oxford University Press, 2013) 601 at 678.

¹⁵¹ Llamzon, *supra* note 1 at 285.

the satisfaction of the parties, investment arbitration should also function as the promoter of the rule of law, as Professor Jan Paulsson stated ‘in the field of international investments, arbitral tribunals are instruments of the rule of law. Their purpose is ... to enable states to make reliable promises ... Yet, their decisions should be respected in order to achieve the long-term benefits of the rule of law.’¹⁵²

There might be some fear that adopting the dual-track approach will bar the host State from raising corruption allegations because a State who can no longer anticipate any benefits but encounter potential loss under the dual-track approach would not raise this defense before the tribunal. In this case, the tribunal still has the power to initiate an investigation on corruption, even if no allegations of corruption were invoked by the parties.¹⁵³ This thesis agrees that the governance function of the investment arbitration mechanism demands ISA that tribunals promote morally sound conduct on an international level, including deterring corruption, even if the parties did not claim corruption or request the tribunal to make any decision on corruption. It has been accepted that international arbitration not only has fact-finding and lawmaking functions but also a governance function,¹⁵⁴ requiring an investment tribunal to ‘consider the impact of their rulings on states, persons, or entities not directly represented in the case before them’.¹⁵⁵ As international law develops, the governance function becomes more evident, especially under the global governance phenomenon.

More specifically, in arbitration, one central aspect of the governance function is exercising substantive discretion in the decision-making process, including deciding on legal issues that have not been provided in the investment treaty as well as questions that ‘test limits of arbitration as a

¹⁵² Jan Paulsson, “The Power of States to Make Meaningful Promises to Foreigners” (2010) 1:2 *Journal of International Dispute Settlement* 341–352 at 349.

¹⁵³ L Yves Fortier, “Arbitrators, Corruption, and the Poetic Experience: ‘When Power Corrupts, Poetry Cleanse’” (2015) 31:3 *Arbitration International* 367–380; Domitille Baizeau & Tessa Hayes, “The Arbitral Tribunal’s Duty and Power to Address Corruption Sua Sponte” in Andrea Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity ICCA Congress Series* (Kluwer Law International, 2017) 225; *Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators*, by Mark Pieth & Kathrin Betz (Competence Centre: Arbitration and Crime; Basel Institute on Governance, 2019) at 12; Kathrin Betz, “Economic Crime in International Arbitration” (2017) 35:2 *ASA Bulletin* 281–292 at 291.

¹⁵⁴ See generally, José E Alvarez, “What are International Judges for? The Main Functions of International Adjudication” in Cesare P R Romano, Karen J Alter & Yuval Shany, eds, *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 158; Sophie Nappert, “International Arbitration as a Tool of Global Governance” in Eric Brousseau, Jean-Michel Glachant & Jérôme Sgard, eds, *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (2019).

¹⁵⁵ Alvarez, *supra* note 154 at 171.

dispute settlement mechanism'.¹⁵⁶ Deciding on corruption, regardless of whether it is alleged or not by the parties, is one such example,¹⁵⁷ which further allows arbitrators to palliate the shortcomings of the existing enforcement of anti-corruption policies.¹⁵⁸ The requirement that arbitrators must satisfy the parties to the proceeding, however, is not the only pursuit of investment arbitration. Arbitrators have been frequently put in a dilemma where there are seemingly conflicting interests and only one of them can win.¹⁵⁹ In the specific corruption context, arbitrator L. Yves Fortier has proposed, by applying Fuller's morality doctrine, that there should be a balance between loyalties to the parties and concerns for international good morals, and thus, an arbitrator should integrate '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.'¹⁶⁰

¹⁵⁶ Nappert, *supra* note 154 at 2.

¹⁵⁷ *Ibid* at 8–11.

¹⁵⁸ Fortier, *supra* note 153 at 373–374.

¹⁵⁹ In general terms, arbitrators ought to balance several considerations, including '(1) their institutional responsibilities and the limits of authority allocated to them, (2) the general morality of promoting the common good through prescriptions and legalism, (3) the specific morality of promoting the values directly at stake in an international problem, and (4) the effectiveness of their decision in controlling the actions of other decisionmakers.' See Tai-Heng Cheng, *When International Law Works: Realistic Idealism after 9/11 and the Global Recession* (Oxford: Oxford University Press, 2012) at 176.

¹⁶⁰ Fortier, *supra* note 153 at 379.

PART TWO ANTI-CORRUPTION PROVISIONS IN INVESTMENT TREATIES

CHAPTER 4 ANTI-CORRUPTION PROVISIONS: AN INTRODUCTION AND MAIN EXPECTATIONS

In Part One, this thesis has conducted a close study of cases that involve allegations of corruption in investor-State arbitration (ISA) and engaged in a comprehensive and detailed analysis of the approaches that arbitral tribunals have taken in the decision-making process. In addition to ISA, anti-corruption has come to be one of the newest topics in academic legal literature, as well as governmental and non-governmental reports on international investment agreements (IIAs). The database of the United Nations Conference on Trade and Development (UNCTAD) indicates that an increasing number of provisions that address corruption and anti-corruption issues has been observed¹ and that they mostly occur in the new generation of IIAs as part of IIA reform.²

A. IIA Reform and Anti-Corruption

Traditional bilateral investment treaties (BITs) rarely consider corrupt acts occurring between investors and public officials in the establishment and operation of an investment and thus have few provisions aimed at combating and eliminating corruption in international investment. This is understandable when one realizes that the initial objective of creating the regime of investment treaties is to protect foreign investors and investments and promote foreign direct investment (FDI) flows.³ To this end, in the making of the old-generation of IIAs, policymakers mainly concentrated

¹ See UNCTAD, *International Investment Agreements Navigator, Mapping of IIA Content*, [UNCTAD Mapping of IIA Content].

² The regime of investment agreements is now experiencing a paradigm shift such that not only economic development but also sustainability considerations have emerged as key policy objectives of an IIA. Such efforts take multiple forms, such as: reforming the existing investor-State dispute settlement (ISDS) system, refining the substantive provisions on investment treatments, preserving greater regulatory space for States, etc. Agreements that embrace economic growth and sustainable development lead to the emergence and categorization of a new generation of investment treaties and policies. See UNCTAD IIA Issues Note: *Towards a New Generational Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making*, No. 5 (2013).

³ See generally Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford University Press, 2012); M Sornarajah, *The International Law on Foreign Investment*, 4th ed (Cambridge University Press, 2017).

on guaranteeing the potential interests of foreign investors by conferring a great number of rights on them and also on conditioning the State's regulatory powers to prevent their undue interference with the rights of foreign investors. At that time, not only anti-corruption but also other non-investment aspects were seldom considered in the negotiation process and were absent in the agreements.

However, this practice is increasingly proving to be a big challenge in international investment law. One underlying reason is that more investments are established at the cost of other interests, such as environmental protection, human rights and other social values. Furthermore, investment tribunals have also, from time to time, adjudicated a State's regulatory action seeking to protect public interests as a violation of investors' BIT rights.⁴ In this sense, classical BITs drafted only for promoting economic growth without any consideration of other externalities may to some extent hinder the sustainable development in international investment law. Added to the long-lasting legitimacy crisis of the investment arbitration regime,⁵ voices calling for IIA reforms are getting powerful and stronger from all sides.

Given that the need for a comprehensive, profound and thorough reform of investment treaties is receiving increasing recognition,⁶ IIA reforms are now in process through various mechanisms. A number of States have chosen to renegotiate their BITs⁷ or issue new model agreements⁸ with

⁴ David Collins, *An Introduction to International Investment Law* (Cambridge, United Kingdom: Cambridge University Press, 2017) at 251–273; Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, 3rd ed (Hart Publishing, 2016).

⁵ For discussions of the legitimacy crisis in investment arbitration, see generally Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73:4 *Fordham Law Review* 1521–1625; Charles N Brower & Stephan W Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (2009) 9:2 *Chicago Journal of International Law* 471–498.

⁶ The UNCTAD has issued a series of investment reports and documents that aim to introduce the emerging IIA reform, identify a set of principles essential to implement the reform, and propose many options for States formulating and negotiating new investment treaties. See, e.g., *UNCTAD World Investment Report 2012: Towards A New Generation of Investment Policies*, 2012; *UNCTAD Investment Policy Framework for Sustainable Development*, 2015; *UNCTAD's Reform Package for the International Investment Regime* (2018).

⁷ Renegotiating BITs of old generations is one of the main avenues through which States are able to promote the IIA reform. Arguably 200 BITs have been renegotiated since the 1990s, see Yoram Z Haftel & Alexander Thompson, "When Do States Renegotiate Investment Agreements? The Impact of Arbitration" (2018) 13:1 *The Review of International Organizations* 25–48 at 26; Timothy Meyer & Tae Jung Park, "Renegotiating International Investment Law" (2018) 21:3 *Journal of International Economic Law* 655–679.

⁸ Amending old model agreements and issuing new model IIA is another important component in the process of the IIA reform. This allows States to have standards when drafting a new IIA and when re-negotiating previous BITs. The *World Investment Report 2015* of the UNCTAD indicates that more than 50 countries or regions 'are currently revising or having recently revised their model IIAs'. See *UNCTAD World Investment Report 2015: Reforming International Investment Governance*, 2015 at 108. In the past decade, Colombia (2011), United States (US) (2012), SADC (Southern African Development Community) (2012), Burkina Faso (2012), Guatemala (2013), Serbia (2014), Brazil

greater precision on substantive obligations.⁹ Some are engaging more in modifying or altering dispute settlement rules,¹⁰ permanently denouncing BITs or directly terminating their adherence to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).¹¹ There is also an approach of gradually abandoning bilateral investment agreements but transforming to other forms of agreement such as regional investment treaties or comprehensive economic and trade agreement with investment chapter.¹²

(2015), India (2015), Turkey (2016), Azerbaijan (2016), Slovakia (2016), Russian Federation (2016), Czech Republic (2016), the Netherlands (2019), Belgium-Luxembourg Economic Union (2019), and Morocco (2019) launched or re-issued their model BITs one after another at either bilateral, national or regional levels. See, e.g., International Institute for Sustainable Development (IISD), “Developing and Negotiating Based on a Model Investment Treaty: Background Note to the IISD Webinar Series on Investment Law and Policy” (2018), online: <<https://www.iisd.org/sites/default/files/model-investment-treaty-webinar-note.pdf>>; “UNCTAD, International Investment Agreements Navigator, Model Agreements”, online: <<https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>>.

⁹ Provisions of indirect expropriation, most-favored-nation (MFN) treatment and fair and equitable treatment (FET) are prominently subject to the ongoing modification of investment treaties reform. See *UNCTAD Reform Package (2018)*, *supra* note 6 at 33–38.

¹⁰ Innovation on the rules of ISDS are directed in multi-dimension: partially fixing existing ISDS mechanism, adding new elements to existing ISDS mechanism, and entirely replacing existing ISA regime with other possibilities. China is granting higher standards of protection and becoming more generous of giving consents to international arbitration; while some countries are repudiating traditional ISDS system by replacing it with international investment court (like Canada and the European Union), limiting to State-State dispute settlement (such as Brazil) or exclusively relying on domestic dispute resolution proceedings (e.g., Australia). See Shen Wei, “Is (In)Consistency A Problem? A Close Look at Juridical Techniques in Interpreting Jurisdiction Clauses in Chinese BIT Cases” in Li Yuwen, Qi Tong & Bian Cheng, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 156 at 168–169; Haftel & Thompson, *supra* note 7 at 30; Norah Gallagher & Wenhua Shan, *Chinese Investment Treaties: Policies and Practice*, Oxford International Arbitration Series (Oxford University Press, 2009) at 320, 328; *UNCTAD Reform Package (2018)*, *supra* note 6 at 47–59.

¹¹ Bolivia (in 2007), Ecuador (in 2009), and Venezuela (in 2012) have denounced the ICSID Convention by withdrawing their consents to the ICSID jurisdiction. See Federico M Lavopa, Lucas E Barreiros & M Victoria Bruno, “How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties” (2013) 16:4 *Journal of International Economic Law* 869–891 at 873; Christoph H Schreuer, “Denunciation of the ICSID Convention and Consent to Arbitration” in Michael Waibel et al, eds, *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 353 at 354; *UNCTAD World Investment Report 2010: Investing in a Low-Carbon Economy*, 2010 at 85–86; “UNCTAD, Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims, IIA Issues Note No.2 (December 2010)”, online: <https://unctad.org/en/docs/webdiaeia20106_en.pdf> at 1.

¹² Although the total number of regional investment treaties (RITs) or preferential trade and investment agreements (PTIAs) is much less than the current stock of BITs, one is able to observe an increase of RITs and PTIAs, notably the COMESA (Common Market for Eastern and Southern Africa) Investment Agreement, the SADC Financial and Investment Protocol, US free trade agreements, Japanese economic partnership agreements, EU association agreements and framework agreements, etc. See “OECD, Evolution of International Investment Agreements (IIAs) in the MENA Region (Paper prepared in the context of the MENA-OECD Working Group on Investment Policies and Promotion)”, (December 2010), online: <<https://www.oecd.org/mena/competitiveness/46581917.pdf>> at 4–5; Mahnaz Malik, *IISD, Recent Developments in Regional and Bilateral Investment Treaties* (Marrakech, Morocco, 2009) at 13–17. For information on ‘multilateralism in international investment agreements’, see, e.g., Stephan Schill, *The Multilateralization of International Investment Law*, International trade and economic law (Cambridge, UK; Cambridge University Press, 2009); Peter T Muchlinski, “The Rise and Fall of the Multilateral Agreement on Investment: Where Now?” (2000) 34:3 *The International Lawyer* 1033–1053; E V K FitzGerald, R Cubero-Brealey

Regardless of form, non-investment matters that relate to the establishment and operation of an investment have become one important topic of this systemic IIA reform, including the impacts on the environment and governance of the host State,¹³ the health, security and human rights of the people in that particular State,¹⁴ the labor rights of the employees working for foreign investment corporations,¹⁵ the corporate social responsibilities (CSR) that multinational corporations should undertake,¹⁶ and other externalities.¹⁷

The integrity and honesty of public and private sectors is also a vital social value and may affect an investment at every stage. Therefore, anti-corruption is also identified as an essential national and international investment policy and inserting anti-corruption provisions is now an integrated part of IIA reform. Considering that corruption in international investment activities is typically conducted between foreign investors and public officials of host States, the anti-corruption

& A Lehmann, “OECD, The Development Implications of the Multilateral Agreement on Investment”, online: <<https://www.oecd.org/investment/investment-policy/1922690.pdf>>.

¹³ See, e.g., Graham Mayeda, “Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation” (2017) 18 *The Journal of World Investment & Trade* 131–162; Manjiao Chi, “The ‘Greenization’ of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China’s Future Bit-Making” (2015) 18:3 *Journal of International Economic Law* 511–542. Investor obligations on protecting environment have presented in various forms, including the obligation to remediate environmental damages, to get environment impact assessments, to maintain an environmental management system, etc. See Barnali Choudhury, “Investor Obligations for Human Rights” (2020) *siaa002 ICSID Review - Foreign Investment Law Journal*, online: <<https://doi.org/10.1093/icsidreview/siaa002>> at 9–10.

¹⁴ See, e.g., Karsten Nowrot, “How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?” (2014) 15 *The Journal of World Investment & Trade* 612–644; Abdullah Al Faruque, “Mapping the Relationship between Investment Protection and Human Rights” (2010) 11:4 *The Journal of World Investment & Trade* 539–560.

¹⁵ See, e.g., Ulrich Mückenberger, “Can International Investment Agreements Support Labour Standards?” in Sigurt Vitols, ed, *Long-Term Investment and the Sustainable Company: A Stakeholder Perspective* (European Trade Union Institute, 2015) 177; Edward Guntrip, “Labour Standards, the Environment and US Model BIT Practice: Where to Next” (2011) 12 *Journal of World Investment & Trade* 101–126.

¹⁶ See, e.g., *Harnessing Investment for Sustainable Development: Inclusion of Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements*, by Nathalie Bernasconi-Osterwalder et al (International Institute for Sustainable Development, 2018); Jarrod Hepburn & Vuyelwa Kuuya, “Corporate Social Responsibility and Investment Treaties” in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* Global Trade Law Series (Kluwer Law International, 2011) 589; Yulia Levashova, “The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law” (2018) 14:2 *Utrecht Law Review* 40.

¹⁷ For discussions of other sustainability considerations as part of IIA reform, see, e.g., Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge, 2018); *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*, by J Anthony VanDuzer, Penelope Simons & Graham Mayeda (Commonwealth Secretariat, 2012); Markus W Gehring & Avidan Kent, “International Investment Agreements and Sustainable Development: Future Pathways” in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (Routledge, 2012) 561.

provisions that can be found in the existing IIAs are thus directed at both sides. Some provisions are intended to foster compliance by investors with anti-corruption norms and others are drafted to impose obligations of anti-corruption on States.

1. Anti-Corruption and Investor Obligations

The UNCTAD World Investment Report 2015 was the first to propose the incorporation of clauses and anti-corruption standard provisions as a key component of CSR within the realm of ‘ensuring responsible investment’.¹⁸ The last ten years have seen a rapid development of CSR standards in investment treaties drafting practices. The object and purpose of these standards is the promotion of compliance with international, regional, and national social and environmental practices by foreign investors, with a particular focus on multinational enterprises (MNEs). A wide range of options in relation to the promotion of CSR standards is available. The following are the three major modes relied upon in IIA practice: a) encouraging investors to respect and perform CSR rules in accordance with domestic laws and regulations or with reference to international and regional CSR standards;¹⁹ b) inserting a commitment of host State and/or of home State to advancing matters in relation to CSR issues for sustainable development; c) requesting that ISA tribunals evaluate and examine the foreign investor’s observation of CSR.²⁰

The first and second options are mostly used by States to deal with anti-corruption provisions within the CSR context, known as CSR-based anti-corruption provisions. This category of anti-corruption clauses indicate that States are attaching increasing importance to enhancing anti-corruption condition in MNEs, private entities, and other corporate organizations. Indeed, the anti-corruption statements here should be broadly and more accurately understood as CSR clauses as opposed to independent anti-corruption provisions. Although these CSR clauses currently exhibit features of soft law in abstract and obscure language,²¹ these clauses serve as a desirable and appropriate intermediary for States who are contemplating but hesitate to adopt a comprehensive

¹⁸ UNCTAD WIR 2015, *supra* note 8 at 159–160.

¹⁹ There are a great variety of international and regional standards on CSR. A number of international organizations have adopted and concluded many international guidelines and instruments in order to establish and improve the standards of social duties and responsibility of enterprises, such as the United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the Asia-Pacific Economic Cooperation (APEC) Anti-Corruption Code of Conduct for Business. In addition, numerous individual companies have internal codes and stakeholder initiatives that set up CSR standards for domestic and cross-border business cooperation.

²⁰ UNCTAD WIR 2015, *supra* note 8 at 159–160; UNCTAD Reform Package (2018), *supra* note 6 at 66–67.

²¹ The following chapters will illustrate how such clauses are formulated and incorporated into treaties and why they are commonly referred as ‘soft law’ with weak binding force.

and solid anti-corruption investment policy at the national and international levels, especially when the overall development of anti-corruption provisions in the regime of investment treaties is still at an initial stage.

As for the third option of the CSR clause in IIA reform, Part One of this thesis has examined many investment cases in which tribunals evaluated and examined the corrupt acts conducted by foreign investors. At that time, however, no anti-corruption provisions requiring investors' compliance with social responsibility and duty were available for arbitrators to rely upon when dealing with allegations of corruption. Currently, there are indeed certain IIAs that expressly request that tribunals dismiss any claims by claimant investors whose investments are made by way of corruption. Here, this type of anti-corruption provision is referred to as a 'carve-out' anti-corruption provision.²² 'Carve-out' statements on anti-corruption are drafted in different forms: integrated with the 'investment' definition clause, addressed within the substantive treatment clauses, and clarified under the investor-State dispute settlement (ISDS) regime.²³ Therefore, a 'carve-out' anti-corruption provision may narrow treaty protection, limit the enjoyment of rights granted in an investment treaty, and condition the access to arbitration.²⁴ By fostering responsible investment and refining ISDS,²⁵ the central point of the 'carve-out' anti-corruption provision is to 'oblige' foreign investors' compliance with anti-corruption laws and establish penalties towards corruption-contaminated foreign investments, despite in an *indirect* way.²⁶

2. Anti-Corruption and State Commitments

Promoting CSR, anti-corruption and corporate governance in *private sectors* is at one end of the anti-corruption spectrum, while inserting anti-corruption commitment and obligations of *States* is at the other end. In 2015, the UNCTAD officially launched a highly instructive document – the

²² Inserting 'carve-out' provisions is one important tool among many available to implement the IIA reform. As explained in the UNCTAD World Investment Report 2015, such statements delineate, and in most times narrow, the scope of treaty, investment protection, application of key clauses, and access to ISA. *UNCTAD WIR 2015*, *supra* note 8 at 133–134.

²³ A detailed discussion of this category of anti-corruption provisions will be offered in the following chapters.

²⁴ *UNCTAD World Investment Report 2017: Investment and the Digital Economy*, 2017 at 120, 122–123.

²⁵ *Ibid* at 122–123.

²⁶ *UNCTAD IPFSD (2015)*, *supra* note 6 at 109; *UNCTAD Reform Package (2018)*, *supra* note 6 at 67. Such provisions do not impose 'direct obligations' by demonstrating that *investors shall or shall not*, but rather insert 'indirect penalties'. These penalties will be imposed if an investor has committed or not committed certain actions. See Chapter 5 for a detailed discussion of the 'carve-out' anti-corruption provisions.

Investment Policy Framework for Sustainable Development (IPFSD)²⁷ – in which corporate responsibility, concepts of good public governance, and absence of corruption in public service system are stressed throughout the entire report.

Primarily, a favorable investment environment is a key factor in attracting FDI, which not only relies on investment policies in favor of investors but also host States' internal public governance. Freedom from corruption has long been considered a significant, necessary, and indispensable factor in creating a good public governance environment conducive to foreign investment.²⁸ Regulations on combating and deterring corruption by public officials to ensure their integrity and the establishment of good governance are important in the domestic, regional, and international anti-corruption legal frameworks.²⁹ The United Nations Conventions against Corruption (UNCAC) placed great emphasis on condemning corrupt acts conducted by public officials and on the necessity of maintaining liability and penalties in condemning officials who accept, solicit, extort a bribe or gain any advantage out of a corrupt act.³⁰ A commitment by States to prevent corruption through domestic legislation – or, more specifically, to establish a comprehensive and sound domestic legal framework on anti-corruption by setting relative rules in civil law, criminal law, and administrative law – then becomes one important policy in the making of an investment treaty.

Later on, the UNCTAD World Investment Report 2016 raised another important aspect of the anti-corruption obligation of States: cooperation and collaboration. Investment facilitation is a crucial component of the IIA reform process, aiming at 'making it easy for investors to establish or expand their investments, as well as to conduct their day-to-day business in host countries.'³¹ Distinguished from *investment promotion* which focuses more on promoting a particular location as a preferable investment destination, *facilitating investment* is directed at increasing efficiency of investment flows and ensuring the effectiveness of the host State's benefits from FDI, while the

²⁷ The report is intended to provide central principles and operational guidelines for formulating national investment policies for policymakers and promoting sustainable development in investment agreements, see "Introduction, Investment Policy Framework for Sustainable Development, Investment Policy Hub, UNCTAD", online: <<https://investmentpolicy.unctad.org/investment-policy-framework>>.

²⁸ UNCTAD IPFSD (2015), *supra* note 6 at 32.

²⁹ UNCTAD World Investment Report 2019: *Special Economic Zones*, 2019 at 198.

³⁰ Article 15(b), Article 30, *United Nations Convention against Corruption*, 2005, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, U.N. GAOR, 58th Sess., 51st Plen Mtg., UN Doc. A/RES/58/4.

³¹ UNCTAD World Investment Report 2016: *Investor Nationality - Policy Challenges*, 2016 at 117.

ultimate function and objective of attracting investment is shared by the two concepts.³² Investment facilitation is comprised of a wide range of areas³³ and international cooperation on combating corruption in investment activities has been expressly proposed as part of investment facilitation.³⁴

Among all the IIAs, some have inserted provisions of commitment, measures, and efforts of cooperating on corruption deterrence and elimination. Collaboration on anti-corruption in fields of international investment is necessary and demanding if one recognizes the *status quo* of the increasing transnational corruption. Corruption is no longer a local issue; it has become a widespread phenomenon affecting international investment and trade transactions. Contrary to being restricted to local initiatives, anti-corruption efforts now need to be deployed on the international scene and entail cross-border cooperation. As a consequence of the transnationalization of corruption, the international community has also increasingly expressed its determination to collectively eliminate corruption and States are making their best efforts to achieve this unified goal through various forms of transnational cooperation. Maximizing opportunities for the cooperation of investigating, prosecuting and punishing corruption has been a trend and a common goal among different international and regional anti-corruption

³² *Ibid.*

³³ The UNCTAD first issued the Global Action Menu for Investment Facilitation in January of 2016 and then updated it in September of 2016 in order to fill the systemic gap in investment treaties practice that the dimension of investment facilitation of IIAs has not been paid satisfactory attention but plays an indispensable role in fostering international investment, implementing national and international investment policies, and in promoting sustainable development. This Global Action Menu proposes a series of options of investment policies under 10 Action lines:

1. *Promote accessibility and transparency in investment policies and regulations and procedures relevant to investors.*
2. *Enhance predictability and consistency in the application of investment policies.*
3. *Improve the efficiency of investment administrative procedures.*
4. *Build constructive stakeholder relationships in investment policy practice.*
5. *Designate a lead agency, focal point or investment facilitator.....*
6. *Establish monitoring and review mechanisms for investment facilitation.*
7. *Enhance international cooperation on investment facilitation.*
8. *Strengthen investment facilitation efforts in developing-country partner through support and technical assistance.....*
9. *Enhance investment policy and proactive investment attraction in developing-country partners, through capacity-building.....*
10. *Complement investment facilitation by enhancing international cooperation for investment promotion for development, including through provisions in IIAs.*

See UNCTAD Global Action Menu for Investment Facilitation, 2016; UNCTAD WIR 2016, *supra* note 31 at 118–120.

³⁴ The Action line 7 presents the policy of anti-corruption collaboration mechanism as an important aspect of international cooperation on investment facilitation. See UNCTAD Global Action Menu for Investment Facilitation, *supra* note 33; UNCTAD WIR 2016, *supra* note 31 at 119.

conventions.³⁵ In international investment law, incorporating anti-corruption clauses in an investment treaty between two or more parties, *per se*, is one type of *collaboration*, no matter the content or category of the anti-corruption clause. Nonetheless, a particular anti-corruption provision that aims to establish joint work on eliminating corruption in investment counts for another form of cooperation.

Additionally, IIAs are increasingly found making reference to different international and regional anti-corruption norms.³⁶ In both the corporate responsibility section and the public governance section of the UNCTAD IPFSD, international norms are inserted as useful guidance, where the former provides that ‘[t]he OECD Principles of Corporate Governance and UNCTAD Guidance on Good Practices in Corporate Governance Disclosure may serve as guidance’³⁷ and the latter notes that ‘[g]overnment should adopt effective anti-corruption legislation and fight corruption with appropriate administrative, institutional and judicial means, for which international best practices should serve as guidance.’³⁸

International anti-corruption norms are a principal resource for States to rely upon in order to establish a well-accepted threshold and higher standard, as well as to connect and integrate domestic laws and international obligations of anti-corruption in the making of an investment treaty. The cluster of non-domestic anti-corruption laws has exhibit traits of multiplicity, multiscale, multidimension and multilevel,³⁹ which is comprised of binding universal treaties (like the UNCAC) and ‘soft law’ norms with weak enforceability (such as the G20 Anti-Corruption Work Plan). Provisions of improving anti-corruption standards by referring to international anti-corruption norms, in conjunction with other categories of anti-corruption provisions, collectively and respectively, reflect States’ determination and ambition in combating corruption in fields of international investment, serve as effective guidance in enforcing anti-corruption policies at the domestic level, and offer a practical device to investment arbitrators in the process of resolving corruption allegations.

³⁵ Alejandro Posadas, “Combating Corruption Under International Law” (2000) 10 *Duke Journal of Comparative & International Law* 345–414 at 392.

³⁶ See *UNCTAD World Investment Report 2018: Investment and New Industrial Policies*, 2018 at 100–101; *UNCTAD Reform Package (2018)*, *supra* note 6 at 86–87.

³⁷ *UNCTAD IPFSD (2015)*, *supra* note 6 at 67.

³⁸ *Ibid* at 70.

³⁹ Those referred conventions and instrument will be discussed in detail in the following chapters.

Part Two thus aims to conduct an empirical study of the anti-corruption provisions that can be found in the current 3,000+ IIAs and in the newest model investment agreements. It should be noted that an increasing number of States has realized the importance of addressing corruption in investment agreements, and mentioning anti-corruption in the preamble of an IIA is becoming an increasingly popular practice. In this thesis, however, the focus narrows to those mentioned in the main text of the treaties. Moreover, some anti-corruption provisions in IIAs are not directed at investment activities but towards matters like custom legislation and government procurement. Such provisions are also excluded from this thesis.

B. Main Expectations of Anti-Corruption Provisions

Before delving into the core anti-corruption provisions, this chapter endeavors to examine the main expectations of this expanding practice. Corruption and bribery have been widespread phenomena in international investment activities and have had a severe impact on the maintenance of order of international investment. ISA tribunals are confronting an increasing number of corruption allegations. Given these facts, the scarcity of anti-corruption provisions in the existing IIA stock has garnered considerable attention and doubt, causing significant concern. As discussed in Part One, the current legal consequence for a proven corruption forms part of a widespread debate on the legitimacy crisis of arbitration. Furthermore, as part of IIA reform, incorporating anti-corruption provisions may effectively prevent regulatory distortions or ‘regulatory chill’ and thus advance the improvement of sustainable development as well as the striking of a balance between investment protection and State commitments.

1. To Offer Practical Tools for Investment Arbitration

Investment treaties are, without a doubt, the primary sources and legal authorities that investor-State arbitrators are expected to rely on in dealing with investment disputes. Moreover, whether or not to apply BIT clauses is not a decision that can be made at the tribunal’s discretion; instead, paragraph 1 of Article 42 of the ICSID Convention requires tribunals to ‘decide a dispute in accordance with such rules of laws may be agreed by the parties’.⁴⁰ The current caselaw addressing issues of corruption in ISA suggests that none of the tribunals had referred to anti-corruption

⁴⁰ Art.42(1) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1965, entered into force on 16 April 1966.

provisions because these applicable investment treaties do not contain any clear or specific anti-corruption clauses.⁴¹ By contrast, there are indeed few provisions addressing anti-corruption issues in the old-generation of BITs. This absence, on the one hand, provides little to no substantive framework for investment tribunals to use in determining how to handle submissions or concerns of corrupt acts which occurred in the course of establishing and operating foreign investments;⁴² on the other hand, the absence likely serves the intentional goal of encouraging ‘sovereign states to insert clauses addressing corruption and anti-corruption in their future treaty-making practice aimed at providing vital guidance on prospective allegations of corruption’.⁴³

(1) A Different Voice

There are, however, dissenting voices expressing the view that anti-corruption provisions are not necessarily required. In particular, these voices opine that it brings no added value to incorporate provisions that make an explicit reference to international anti-corruption instruments like the UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).⁴⁴ Advocates of this viewpoint explain that these regional and international anti-corruption conventions contain extensive anti-corruption norms binding on a large number of States. As required by the interpretation rules enshrined in the Vienna Convention on the Law of Treaties (VCLT), arbitrators have referred to these anti-corruption instruments from time to time in the absence of anti-corruption provisions in the applicable investment treaty.⁴⁵

These viewpoints seem reasonable when considering the second sentence of Article 42(1) of the ICSID Convention, in which alternative applicable rules in the absence of such an agreement are

⁴¹ Yueming Yan, “A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?” in Yuwen Li, Tong Qi & Cheng Bian, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 227 at 231.

⁴² Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014) at 62; Kathryn Gordon, “International Investment Agreements: A survey of Environmental, Labour and Anti-Corruption Issues” in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008) 135 at 135; Despina Christofi, “The Relationship between Allegations of Economic Crimes in Foreign Investments and the Adjudicative Power of Investor – State Tribunals” (2020) siaa036 ICSID Review - Foreign Investment Law Journal 1–21 at 19.

⁴³ Yan, *supra* note 41 at 231.

⁴⁴ Charles N Brower & Jawad Ahmad, “The State’s Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration” in Katia Yannaca-Small, ed, *Arbitration under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford University Press, 2018) 455 at 480–481.

⁴⁵ *Ibid.*

unequivocally pointed out: ‘the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’⁴⁶ However, relying on ‘rules of international law as may be applicable’ alone in addressing the typical allegations of corruption is untenable, practically speaking. There are numerous legal instruments concerning anti-corruption that were concluded by various States. A broad reference to these legal norms, such as in *World Duty Free*, may still warrant criticism due to the limited guiding function they can offer to investment arbitrators as well as the intrinsic differences between these legal norms. More specific reasoning is provided in the next section.

(2) Limitations of International Anti-Corruption Conventions

First of all, as demonstrated in Part One, in the absence of an anti-corruption provision in the applicable BIT, many ISA tribunals have indeed referred to regional and international anti-corruption conventions, but the results accordingly rendered have been unsatisfactory. This dissatisfaction stems from a wide range of controversies: the undefined corrupt acts, the obscure standard of proof applicable to corruption and the current asymmetric responsibilities on the two sides of corruption. There are some other heated debates on how to treat a ‘red flag’⁴⁷ and how ISA tribunals should respond to suspicions of corrupt measures in the absence of an explicit allegation of corruption raised by the parties.⁴⁸ Indeed, the norms in some international conventions, such as Article 15 and Article 16 of the UNCAC, are of particular importance and

⁴⁶ Article 42 (1) of the ICSID Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

This rule is said to have features of flexibility in conjunction with certainty. The first sentence stands for party autonomy in choosing rules while the second sentence is a reflection of certainty purposes aiming at ‘ensuring that the tribunal will find appropriate rules even in the absence of such a choice’. See Christoph Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) at 550.

⁴⁷ Lucinda A Low, “Dealing with Allegations of Corruption in International Arbitration” (2019) 113 AJIL Unbound 341–345; Utku Cosar, “Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions” in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges* ICCA Congress Series (Kluwer Law International, 2015) 541.

⁴⁸ Domitille Baizeau & Tessa Hayes, “The Arbitral Tribunal’s Duty and Power to Address Corruption *Sua Sponte*” in Andrea Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity* ICCA Congress Series (Kluwer Law International, 2017) 225; Thomas Kendra & Matt Coleman, “How Far Do Tribunals Have a Duty to Investigate Corruption? The Kenyan High Court Has Its Word”, (4 December 2018), online: *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2018/12/04/how-far-do-tribunals-have-a-duty-to-investigate-corruption-the-kenyan-high-court-has-its-word/>>; L Yves Fortier, “Arbitrators, Corruption, and the Poetic Experience: ‘When Power Corrupts, Poetry Cleanse’” (2015) 31:3 *Arbitration International* 367–380.

play a key role in assisting tribunals to define corruption and to determine whether the concerned conduct falls within the scope of a corrupt act.⁴⁹ Other classical challenges ISA tribunals are facing are, however, scarcely addressed in international anti-corruption conventions.

Secondly, most clauses contained in regional and international anti-corruption treaties are intended to be enforced through domestic institutions or courts rather than through international investment arbitration. The primary purpose of these instruments is to promote worldwide corruption prevention and elimination by setting substantive issues, such as concluding widely agreed coverage of corrupt acts, facilitating and supporting international cooperation, and establishing particular institutions to promote domestic anti-corruption movement more effectively and efficiently.⁵⁰ Some treaties may expressly require the contracting States to impose sanctions on public officials who are involved in a corrupt act, while others do not.⁵¹ In brief, the current international conventions on anti-corruption are largely directed at domestic legislation and assume enforcement by national authorities, as opposed to guiding investment arbitration.

⁴⁹ The UNCAC is one of the most frequently mentioned anti-corruption norms in ISA that deals with allegations of corruption. These two articles are contained in Chapter III (Criminalization and law enforcement) and aim to conceptualize bribery of national public officials as well as bribery of foreign public officials and officials of public international organizations, respectively. See Arts.15-16, *UNCAC*, *supra* note 30.

Article 15. Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when 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 the exercise of his or her official duties; (b) The solicitation or acceptance by 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.

Article 16. Bribery of foreign public officials and officials of public international organizations

1. 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.

2. Each State Party 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 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.

⁵⁰ Article 1, *ibid*.

⁵¹ The OECD Anti-Bribery Convention does not explicitly regulate the liability of public officials who conduct corrupt acts with foreign investors.

Thirdly, intrinsic differences do exist between ‘the law of the Contracting State party to the dispute’ and ‘such rules of international law as may be applicable’, as well as between one international anti-corruption norm and another. A State may simply sign and ratify two or more anti-corruption treaties which, however, have different and even contradictory regulations on the scope of a corrupt act. A realistic example is the regulations on the demand side of a bribe—the solicitation or acceptance of a bribe. The UNCAC explicitly addresses the demand side of corruption, but the OECD Anti-Bribery Convention contains no rules on the legal consequence of accepting and soliciting bribes.

Last but not least, even though *ad hoc* tribunals have simultaneously and consistently referred to a broad number of international and regional norms on anti-corruption developed by the United Nations (UN), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CoE), the Organization of American States (OAS), and the African Union, various evidentiary standards of proving corruption as well as distinct types of evidence have been relied upon by arbitral tribunals in the fact-finding process. As demonstrated in Part One, tribunals have distinct and variable holdings on the standard of proof and the evidence applicable in proving corruption. To put it simply, some tribunals (like in *Metal-Tech v. Uzbekistan*⁵² and in *Vladislav Kim v. Uzbekistan*⁵³) have recognized the use of circumstantial evidence and ‘red flags’; ‘irrefutable evidence’ was required by others (such as in *African Holding v. Democratic Republic of the Congo*).⁵⁴ Some insisted on higher standard of proof given the seriousness of charges of corruption (in *Karkey v. Pakistan*⁵⁵ and in *Lao Holdings v. Laos*⁵⁶), while others disagreed with this point and ended up using relatively lower standard (in *Unión Fenosa Gas v. Egypt*⁵⁷ and in

⁵² *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award of 4 October 2013, 2013 at para 243 [*Metal-Tech v. Uzbekistan*, Award (2013)].

⁵³ *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction of 8 March 2017, 2017 at para 548 [*Vladislav Kim v. Uzbekistan*, Decision on Jurisdiction (2017)].

⁵⁴ *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v La République démocratique du Congo*, ICSID Case No ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité of 29 July 2008, 2008 at para 52 [*African Holding v. Democratic Republic of Congo*].

⁵⁵ *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1, Award of 22 August 2017, 2017 at para 492 [*Karkey v. Pakistan*, Award (2017)].

⁵⁶ *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB (AF)/12/6, Award of 6 August 2019, 2019 at para 109 [*Lao Holdings v. Laos (1)*, Award (2019)].

⁵⁷ *Unión Fenosa Gas, SA v Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award of 31 August 2018, 2018 at para 7.52 [*Unión Fenosa Gas v. Egypt*, Award (2018)].

*Getma International and others v. Guinea (2)*⁵⁸). So far, it is difficult to identify a legitimate unified standard applicable widely in ISA – and referring to international anti-corruption norms does not remedy this issue.⁵⁹

All in all, the foregoing suggests that it would be insufficient to deal with corruption issues by relying exclusively on international anti-corruption conventions. On the contrary, the irreconcilable divergence among these anti-corruption norms not only prevents the arbitration system from acting as a proper channel in combating corruption in international investment, but also renders ISA subject to an unwavering crisis of legitimacy due to the inconsistency of decisions. In this sense, standardization by incorporating agreements on anti-corruption into investment treaties that provide substantive guidance and tools for investment arbitrators plays a significant role in alleviating the above plight.

2. To Enhance Sustainable Development of International Investment Policy

Sustainable development is one of the most popular topics among scholars and non-governmental organizations and is now considered an important dimension for improving international investment treaties at both the policy-making plane and practice levels. Although the content and meaning of this concept is still ‘uncertain and heavily disputed’,⁶⁰ anti-corruption provisions have been consistently acknowledged as one element instrumental to fulfill the purposes of sustainable development in the new generation of IIAs, as indicated in a range of reports issued by the UNCTAD.⁶¹

However, these reports simply mentioned ‘anti-corruption’ as part of sustainable development requirements, but failed to introduce and explain how and why anti-corruption provisions play an impactful role in enhancing sustainable development. In fact, the relationship between anti-corruption provisions and sustainable development has received far less scrutiny in the academic community than the relationships between sustainable development and provisions addressing other areas such as environmental protection, human rights, labor rights, and public health. To

⁵⁸ *Getma International and others v Republic of Guinea (2)*, ICSID Case No ARB/11/29, Award (French) of 16 August 2016, 2016 at para 183 [*Getma International and others v. Guinea (2)*, Award (2016)].

⁵⁹ See Chapter 1 of this thesis for a detailed discussion of evidentiary issues in corruption cases.

⁶⁰ Steffen Hindelang & Markus Krajewski, “Towards a More Comprehensive Approach in International Investment Law” in Steffen Hindelang & Markus Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016) 1 at 7.

⁶¹ See, e.g., *UNCTAD Reform Package (2018)*, *supra* note 6; *UNCTAD IPFSD (2015)*, *supra* note 6; *UNCTAD WIR 2012*, *supra* note 6.

delve into the constructive, deliberated and nuanced connection between *anti-corruption provisions* and sustainable development, it is necessary to briefly examine the original linkage between *corruption* and sustainable development and to delineate the ways in which sustainable development interacts with international investment law in the first place.

(1) The Concept of Sustainable Development and (Anti-)Corruption

The concept of sustainable development did not enter into the international agenda until 1987 when the Brundtland Report, *Our common Future*, defined and – for the first time – set sustainable development as a significant goal for the international community.⁶² Five years later, the United Nations Conference on Environment and Development adopted the *Rio Declaration on Environment and Development*, affirming the pivotal commitment of poverty eradication and environmental protection, which are essential tasks of sustainable development.⁶³ Later, in 2002, the *Johannesburg Declaration on Sustainable Development* extended the framework of sustainable development to embrace multiple pillars at all levels, providing:

Accordingly, we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillar of sustainable development—economic development, social development and environmental protection—at local, national, regional and global levels.⁶⁴

Corruption was at that time recognized by this Declaration as posing a serious threat to people's quality of life as well as to worldwide sustainable development, and the fight against corruption was declared one of States' particular focuses and priorities.⁶⁵ This important work on anti-corruption was then commonly recognized by a sequence of international and regional anti-corruption norms, such as the UNCAC.⁶⁶ In particular, the UNCAC has constantly emphasized the undesired effects of corruption on sustainable development, articulating 'the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law'.⁶⁷

⁶² "Report of the World Commission on Environment and Development: Our Common Future", online: <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>>.

⁶³ United Nations Conference on Environment and Development, "Rio Declaration on Environment and Development", (June 1992), online: <<https://www.cbd.int/doc/ref/rio-declaration.shtml>>.

⁶⁴ "The Johannesburg Declaration on Sustainable Development", (4 September 2002), online: <https://ec.europa.eu/environment/archives/wssd/documents/wssd_pol_declaration.pdf>.

⁶⁵ *Ibid.*

⁶⁶ Preamble, *UNCAC*, *supra* note 30.

⁶⁷ Preamble, *ibid.*

At the same time, the UN launched the Plan of Implementation of the World Summit on Sustainable Development where good governance and anti-corruption at different levels are unequivocally reassured as key factor to safeguard sustainable development:

Good governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development.⁶⁸

.....

Engage actively and constructively in ensuring the timely completion of the negotiations on a comprehensive United Nations convention against corruption, including the question of repatriation of funds illicitly acquired to countries of origin;⁶⁹

.....

States should also fulfil their commitment to negotiate and finalize as soon as possible a United Nations convention against corruption in all its aspects, including the question of repatriation of funds illicitly acquired to countries of origin and also to promoting stronger cooperation to eliminate money laundering.⁷⁰

The principle of good governance and the necessity of taking effective measures to combat corruption was also emphasized in the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development.⁷¹ Moreover, the International Conference on Financing for Development adopted the *Monterrey Consensus* in 2002; this deliberately shed light on the

⁶⁸ UN Department of Economic and Social Affairs, Division for Sustainable Development, “Plans of Implementation of the World Summit on Sustainable Development”, (2002), online: <https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> at para 4.

⁶⁹ *Ibid* at para 140(e).

⁷⁰ *Ibid* at para 142.

⁷¹ The International Law Association (ILA)’s 2002 New Delhi Declaration developed seven principles of international law instrumental to achieve sustainable development objectives. The sixth principle is the principle of governance, where it puts forth that:

6.1. The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development. It commits States and international organizations: (a) to adopt democratic and transparent decision-making procedures and financial accountability; (b) to take effective measures to combat official or other corruption; (c) to respect the principle of due process in their procedures and to observe the rule of law and human rights; and (d) to implement a public procurement approach according to the WTO [World Trade Organization] Code on Public Procurement. 6.2. Civil society and non-governmental organizations have a right to good governance by States and international organizations. Non-state actors should be subject to internal democratic governance and to effective accountability. 6.3. Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development as well as the full participation of women in all levels of decision-making. Good governance also calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market aimed at a fair distribution of wealth among and within communities.

See “ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development” (2002) 49:2 *Netherlands International Law Review* 299–305 at 305.

negative impacts of corrupt activities on economic and sustainable development by pointing out that ‘[c]orruption is a serious barrier to effective resource mobilization and allocation, and diverts resources away from activities that are vital for poverty eradication and economic and sustainable development’, as well as expressly naming the fight against corruption as a priority at all levels.⁷²

(2) Sustainable Development and IIA Reform

As for investment law and sustainable development, a global consensus that FDI flows play an indispensable role in promoting sustainable development has been achieved.⁷³ On the other hand, increasing FDI flows, *per se*, is an integral part of the very essence of sustainable development.⁷⁴ As a reflection of globalization, FDI is now critical of the ability of developing countries to stimulate and achieve economic growth necessary to improve the welfare of their populations and to meet their basic needs in a sustainable manner. Therefore, given increasing cross-border investment and economic transactions, international investment law that governs both FDI and investment relationships between States and foreign investors is a vital avenue through which sustainable development can be enhanced.

However, investment treaties, the main component of the modern international investment law regime, have been critiqued as insufficiently compatible with sustainable development⁷⁵ due to the ‘inadequacy of the norm supply by IIAs’, ‘democratic deficit of IIA-making’ and ‘fragmentation of international law’.⁷⁶ This is understandable if one notices that the notion of sustainable development is in fact not one of the overarching objectives that IIAs are pursuing until recent years, given that sustainable development is not principally considered one of the starting purposes in the earlier negotiation of investment treaties. A number of high-profile arbitration cases also

⁷² United Nations, “Monterrey Consensus of the International Conference on Financing for Development”, (March 2002), online: <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.198_11.pdf> at para 13.

⁷³ Andrew Newcombe, “Sustainable Development and Investment Treaty Law” (2007) 8:3 *The Journal of World Investment & Trade* 357–407 at 357; Marie-Claire Cordonier Segger & Andrew Newcombe, “Chapter 6: An Integrated Agenda for Sustainable Development in International Investment Law” in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* Global Trade Law Series (Kluwer Law International, 2011) 101 at 102.

⁷⁴ Newcombe, *supra* note 73 at 358.

⁷⁵ Chi, *supra* note 17.

⁷⁶ *Ibid* at 2.

suggest IIAs' incompatibility with sustainable development, such as *Methanex v. US*⁷⁷ and *Philip Morris v. Australia*.⁷⁸

Now that States intend to enforce the sustainable development dimension of international investment activities, there is demand for a structural reform of IIAs by including social and environmental concerns but ensuring the policy investment protection at the same time. This reform, which is also called sustainable development oriented IIA reform, aims at ensuring responsible investment by containing provisions addressing three pillars of sustainable development: economic, social and environmental. These non-investment sustainable development concerns are collectively referred to as sustainable development provisions and are fragmented in the current more than 3,000 IIAs with varying content and degrees.

Mainstreaming sustainable development into IIAs can be achieved through various modes: in the preamble, adding exception clauses, making clarification on substantive provisions, inserting CSR clauses, referring to other sustainable development treaties and modifying procedural requirements.⁷⁹ This reform focuses on environmental issues at the outset, but then extends to other social pillars. So far, provisions of environmental protection,⁸⁰ labor rights,⁸¹ and human rights⁸² have been central considerations associated with sustainable development.

⁷⁷ *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, 2005 [*Methanex v. United States*].

⁷⁸ *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015, 2015 [*Philip Morris v. Australia*]. For more discussions on sustainable development-related investment disputes, see, e.g., Chester Brown & Domenico Cucinotta, "Treatment Standards in Environment-Related Investor-State Disputes" in Kate Miles, ed, *Research Handbook on Environment and Investment Law* Research Handbooks in Environmental Law Series (Edward Elgar Publishing, 2019) 175.

⁷⁹ Newcombe, *supra* note 73; Markus W Gehring & Avidan Kent, "Sustainable Development and IIAs: From Objective to Practice" in Armand De Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (Routledge, 2012) 284. It is also proposed that investment agreements can 'contribute only a limit amount to the furtherance of sustainable development goals' and that States must ensure the existence of 'robust domestic law that impose obligations on investors and on states to ensure environmental safety and accountability.' See Andrea K Bjorklund, "Sustainable Development and International Investment Law" in Kate Miles, ed, *Research Handbook on Environment and Investment Law* Research Handbooks in Environmental Law Series (Edward Elgar Publishing, 2019) 38 at 68.

⁸⁰ Gordon, *supra* note 42; Chi, "The 'Greenization' of Chinese BITs", *supra* note 13.

⁸¹ Guntrip, *supra* note 15; Mückenberger, *supra* note 15; Vid Prislan & Ruben Zandvliet, "Mainstreaming sustainable development into international investment agreements: What role for labour provisions?" in Stephan Schill, Christian Tams & Rainer Hofmann, eds, *International Investment Law and History* (Edward Elgar Publishing, 2015) 390.

⁸² Faruque, *supra* note 14; Nowrot, *supra* note 14; Wells Sheffer, "Bilateral Investment Treaties: A Friend or Foe to Human Rights" (2011) 39 *Denver Journal of International Law and Policy* 483.

(3) Sustainable Development and Anti-Corruption Provisions

Nonetheless, anti-corruption provisions do not belong to the first tier of sustainable development provisions developed in investment treaties,⁸³ although good governance and anti-corruption has, from the very beginning, been explicitly confirmed as an integral dimension of sustainable development in the above-mentioned international documents. At present, the inclusion of anti-corruption would not only benefit economic interests, but would also promote social values, two of which are normally considered ‘conflicting’ interests.

Driven by the need to promote sustainable development objectives, a provision on anti-corruption could be formulated in multiple forms, at varying levels, and from distinct dimensions. At the domestic level, an anti-corruption provision could oblige States to enact a package of anti-corruption laws through national legislation, including criminalizing corruption as an offense; establishing civil, criminal, and administrative sanctions on both individuals and legal entities who conduct corrupt acts; protecting witness persons and whistleblowers; etc. At the regional level, States may commit to working jointly in combating transnational corruption and corruption of foreign public officials. At the international level, they may raise anti-corruption standards by transplanting those internationally recognized higher standards and obligations (such as those contained in the UNCAC and the OECD Anti-Bribery Convention) into investment treaties.⁸⁴

Moreover, anti-corruption provisions may not solely require States to endeavor to combat corruption, but also to impose anti-corruption obligations on foreign investors. Given that anti-corruption is a crucial aspect of corporate governance, anti-corruption considerations could also come in the form of CSR clauses by introducing certain standards into domestic laws.⁸⁵ Home countries might equally contribute to CSR promotion as well through anti-corruption provisions.⁸⁶

Overall, anti-corruption and good governance comprise one significant component of sustainable development. Inserting anti-corruption provisions into investment treaties would foster, facilitate and enhance the sustainable development dimension of international investment law. Indeed, anti-

⁸³ Arguably, this is because the focus was given to other international-level measures like concluding multilateral anti-corruption conventions. See Newcombe, *supra* note 73 at 396. (*‘In the past ten years, significant international action has been taken to address bribery and corruption. The focus on multilateral forums to address this issue explains in part why recent IIAs have not specifically addressed bribery or corruption related to investment activities.’*)

⁸⁴ UNCTAD WIR 2018, *supra* note 36 at 100–101; UNCTAD WIR 2017, *supra* note 24 at 140.

⁸⁵ UNCTAD Reform Package (2018), *supra* note 6 at 66.

⁸⁶ *Ibid* at 67.

corruption provisions are becoming increasingly embedded into investment treaties, which would drive reform of international treaties, strengthen sustainable development dimension of investment policies, and advance growth of FDI inflows and outflows and other private capital flows.

3. To Strike a Symmetric Balance of Interests between Investors and Host States

Another expectation of anti-corruption provisions is to strike a balance of interests between foreign investors on the one hand and host States on the other. This balancing objective is one central aspect of the current IIA reform. This section will briefly discuss how this intended purpose could be accomplished through anti-corruption considerations in IIAs. To this end, an introduction of the reasons why a symmetric balance of BIT rights and obligations is vital for sustainable development and IIA reform will firstly be presented in a nutshell.

(1) The Need for Balancing, IIA Reform, and Anti-Corruption

Investment treaties were initially established to restrict the host State's regulatory measures relating to foreign investment; to this end, host States are commonly obliged to accord a number of rights to foreign investors, including offering a series of favorable treatments like the fair and equitable treatment (FET), the national treatment, the most-favored-nation treatment (MFN) and the non-discrimination treatment, giving the right to access international dispute settlement, and providing compensation for illegal expropriation, etc.⁸⁷ Under these clauses, foreign investors will accordingly obtain compensation or other remedies in cases of a State's violation of these investment disciplines and BIT rights. The remedies are normally granted by ISA tribunals or other judicial or quasi-judicial proceedings and institutions.⁸⁸

At that time, a great restriction on regulatory autonomy was imposed upon host States and few obligations were imposed on investors; later, a range of measures stemming from host States' regulatory powers were condemned as departures from the international obligations enshrined in these older generation of investment treaties, even though these measures were normally out of

⁸⁷ See Dolzer & Schreuer, *supra* note 3; Sornarajah, *supra* note 3; Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law & Business, 2009).

⁸⁸ Suzanne A Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements" (2010) 13:4 Journal of International Economic Law 1037–1075 at 1037–1038.

concern for safeguarding the environment and public health,⁸⁹ human rights,⁹⁰ and achieving other legitimate public policy objectives.⁹¹ This scenario reflects a systemic problem of the international investment law regime: ‘a structural inability to adequately or consistently address both the investment risks and the social risks involved in foreign investment’.⁹² This fact would lead to two entirely different motivations by States: on one end of the spectrum, casting a regulatory chill due to a threat of ISA,⁹³ and on the other end of the spectrum, calling for a symmetric balance between investment protection and the State’s regulatory powers in the IIA-making practice.⁹⁴ While

⁸⁹ See, e.g., *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, INC v Government of Canada, UNCITRAL, Permanent Court of Arbitration Case No 2009-04, Award of Jurisdiction and Liability of 17 March 2015*, 2015 [*Clayton/Bilcon v. Canada, Award of Jurisdiction and Liability (2015)*]; *Crystallex International Corporation v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award of 4 April 2016*, 2016 [*Crystallex International v. Bolivarian Republic of Venezuela*]; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany, ICSID Case No ARB/09/6 (formerly Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co KG v The Federal Republic of Germany)*, Award of 11 March 2011, 2011 [*Vattenfall v. Germany, Award (2011)*]; *Técnicas Medioambientales Tecmed, SA v The United Mexican States, ICSID Case No ARB (AF)/00/2, Award of 29 May 2003*, 2003 [*Técnicas Medioambientales Tecmed v. The United Mexican States, Award (2003)*]; *Philip Morris v. Australia*, *supra* note 78.

⁹⁰ See, e.g., *Bear Creek Mining Corporation v Republic of Peru, ICSID Case No ARB/14/21, Award of 30 November 2017*, 2017 [*Bear Creek Mining v. Peru (2017)*]; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No ARB/07/26, Award of 8 December 2016*, 2016 [*Urbaser v. Argentina, Award (2016)*]; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award of 24 July 2008*, 2008 [*Biwater Gauff v. Tanzania*]; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, ICSID Case No ARB/03/19 (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic)*, Award of 9 April 2015, 2015 [*Suez v. Argentina, Award (2015)*]; *Azurix Corp v The Argentine Republic, ICSID Case No ARB/01/12, Award of 14 July 2006*, 2006 [*Azurix Corp. v. Argentina*].

⁹¹ For more case resources, see Nathalie Bernasconi-Osterwalder & Lise Johnson, eds, *International Investment Law and Sustainable Development: Key Cases from 2000-2010* (Winnipeg, Man.: International Institute for Sustainable Development, 2011); Stefanie Schacherer, *International Investment Law and Sustainable Development: Key Cases from the 2010s*, Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, eds (International Institute for Sustainable Development, 2018).

⁹² Frank J Garcia et al, “Reforming the International Investment Regime: Lessons from International Trade Law” (2015) 18:4 *Journal of International Economic Law* 861–892 at 869.

⁹³ Vid Prislán & Ruben Zandvliet, “Labour Provisions in International Investment Agreements: Prospects for Sustainable Development” in Andrea Bjorklund, ed, *Yearbook on International Investment Law and Policy 2012-2013* (New York, United States: Oxford University Press, 2014) 357 at 369–370; Kyla Tienhaara, “Regulatory Chill and the Threat of Arbitration: A View from Political Science” in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606 at 607–608; Spears, *supra* note 88 at 1039. (“While the anxiety of international adjudicators and legal scholars about these cases tends to focus on abstract notions of ‘fragmentation’ and ‘lack of coherence’ in international law, the anxiety of states and political actors tends to focus on more practical concerns—such as whether these cases indicate that states have relinquished too much ‘policy space’ in signing IIAs and whether the threat of investor-state arbitration is casting a ‘regulatory chill’ over domestic measures that are needed to achieve legitimate, non-investment policy objectives”).

⁹⁴ This is not the first instance in which the imbalance of international investment law, in particular, of investment treaties, was brought to the table. Arguably, BITs were initially created in an asymmetric way between developed capital-exporting countries and developing capital-importing countries. This initial asymmetry, to some extent, results in the inequality of benefits between host States and investors, see Garcia et al, “Reforming the International Investment Regime”, *supra* note 92 at 869–871. (“Initially there was an imbalance in the overall legal regime protecting investors (diplomatic protection under weak customary international law norms, in the face of strong host

regulatory chill effects are conceived as a risk to sustainable development (although vulnerable to developing countries),⁹⁵ a reform of IIA's goal of attaining symmetry would cater to and better balance considerations of both economic pursuit and environmental and social values. By doing so, the long-lasting and ongoing legitimacy crisis may also be alleviated.

Furthermore, to effectively accommodate the paradigm shift within the regime of investment treaties, the UNCTAD IPFSD has also proposed four principles to lead this IIA evolution:

1. Incorporating concrete commitments to promote and facilitate investment for sustainable development.
2. Balancing State commitments with investor obligations and promoting responsible investment.
3. Ensuring an appropriate balance between protection commitments and regulatory space for development.
4. Reforming the ISDS system.⁹⁶

One can notice that striking a balance of conflicting interests between investors and host States is imperative and accounts for a large proportion of the whole sustainable-development-oriented IIA reform project.⁹⁷

state domestic law), that favored host states over investors. Capital-exporting states, which until recently were the Western states and former colonial powers, needed a measure of protection for their nationals which went beyond that provided by the domestic laws of the capital-importing countries (i.e., something more protective than national treatment). It was this initial asymmetry that the resulting BIT frame- work sought to balance. However, instead of equalizing the position of the investor against the host state, the recent trend of awards suggests to many that BITs have over- compensated, empowering investors to effectively override legitimate state concerns and resulting in a second asymmetry favoring investors over host states.') It is also argued that imbalance of BITs is found at different levels, see Huaqun Zeng, "Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice" (2014) 17:2 Journal of International Economic Law 299–332 at 323–325. ("First, 'balance' might be represented in the relation between contracting parties of BITs, particularly relating to the powers, rights and obligations between/among developed capital-exporting states and developing capital-importing states. Second, 'balance' might be represented in the relation between one contracting party and third party, particularly relating to the rights and obligations between host states and foreign investors. Third, 'balance' might be also represented in the relation between aims of investment policy, for example, between protection and encouragement, between protection and regulation, and also between economy and other public or social purpose of both contracting parties of BITs.") For other aspects of balancing interests of BITs and through ISDS, see, e.g., Piero Bernardini, "Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests" (2017) 32:1 ICSID Review 38–57; Alex Mills, "The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 437.

⁹⁵ Prislán & Zandvliet, *supra* note 93 at 362–363, 365.

⁹⁶ UNCTAD IPFSD (2015), *supra* note 6 at 77–79.

⁹⁷ It seems that 'sustainable development' is more demanding for developing countries while a need for balancing and preserving public policy space in investment treaties is called by both developed and developing nations. See Segger & Newcombe, *supra* note 73 at 102; Graham Mayeda, "Chapter 22: Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* Global Trade Law Series (Kluwer Law International, 2011) 539.

Anti-corruption has been considered as part of the effort to achieve such equilibrium. For instance, the World Investment Report 2019 has identified ‘parity’ as one of the features of the new generation of IIAs. One of the manifestations of this feature in the treaties is ‘balance between investor protections and investor obligations through investor’s duty to *abstain from corruption*’.⁹⁸ The World Investment Report 2016 also identified anti-corruption as one essential part of the debate on how to achieve the appropriate balance.⁹⁹

(2) Possible Ways for Balancing and Anti-Corruption Provisions

A desire for a symmetric balance in investment treaties has actually been promoted by States in multiple ways, such as providing interpretive statements that narrow interpretation of investment policies, inserting general exception clauses aimed at exempting States’ responsibilities on measures for other non-investment policy objectives, adopting novel language in the preamble indicating States’ intention of describing investment policy objectives as compatible with other social and environmental policy goals.¹⁰⁰ No matter how a State develops its BITs for this purpose, the changes could be categorized as deriving from two perspectives: (1) the investor’s perspective, imposing obligations on investors to promote responsible investment, and (2) the host State’s perspective, affording certain regulatory space with host States.¹⁰¹ Theoretically, these are also two avenues through which States could draft anti-corruption provisions to contribute to promoting the balance of BITs.

First of all, an anti-corruption provision could be directed at imposing anti-corruption obligations on foreign investors. As early as 1990, the UN had proposed the need to have transnational corporations’ behavior be in compliance with certain principles, including anti-corruption. The 2011 OECD Guidelines for Multinational Enterprises also places combating bribery, solicitation

⁹⁸ Emphasis added. See *UNCTAD WIR 2019*, *supra* note 29 at 114.

⁹⁹ The World Investment Report 2016 provides:

Egypt’s updated model BIT is awaiting release after a comprehensive review that involved all concerned stakeholders. The update aims to balance investment protection and the state’s right to regulate and includes provisions on combating corruption, SDG consideration, investors’ responsibilities and a refined ISDS mechanism.

See *UNCTAD WIR 2016*, *supra* note 31 at 110.

¹⁰⁰ See, e.g., Spears, *supra* note 88.

¹⁰¹ See Caroline Henckels, “Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference” in Andrea Bjorklund, ed, *Yearbook on International Investment Law and Policy 2012-2013* (New York, United States: Oxford University Press, 2014) 305 at 306. This is also indicated in the previously cited IPFSD context, see *UNCTAD IPFSD (2015)*, *supra* note 6 at 77–79.

and extortion necessary elements to promote responsible business.¹⁰² Prohibiting investors from committing corrupt acts with reference to these documents has been occasionally proposed by scholars.¹⁰³ In practice, provisions that foster responsible and corruption-free investments constitute a relatively large portion of the entirety of the anti-corruption provisions currently in existence.

As mentioned earlier, such provisions are presented either in the CSR-based form or through ‘carve-out’ clauses.¹⁰⁴ As for the CSR-based anti-corruption provisions, States encourage foreign investors to voluntarily comply with CSR rules, principles and practices (including those of anti-corruption) through CSR clauses; they may also regulate anti-corruption outside of CSR clauses, while still doing so in the CSR context. In terms of the ‘carve-out’ statements on anti-corruption, some States insert direct and explicit anti-corruption obligations on investors by stating that ‘investors and investment shall not ... [conduct corrupt acts]’. Some have drafted such provisions from the State’s perspective, mentioning that States should not be obliged to protect investments contained through corruption. There are some other provisions expressly denying investors’ access to ISDS if the investment concerned is made by way of corruption. It is evident that the CSR-based anti-corruption provisions are less demanding than ‘carve-out’ anti-corruption provisions. Theoretically speaking, both types have the potential to realize the intended objective of striking a balance between investment treaties; however, the actual effects and results of such provisions necessitate further scrutiny.¹⁰⁵

Secondly, safeguarding the State’s regulatory powers on anti-corruption is another available way for States to strike this balance. It enables States to take regulatory measures on foreign investments established in its jurisdiction for public interest purposes and within the principle of non-discrimination. It has been undisputed that the right to regulate originates from the principle

¹⁰² “OECD Guidelines for Multinational Enterprises”, (2011), online: <https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en> at 47–50.

¹⁰³ Zeng, *supra* note 94 at 328; Congyan Cai, “China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications” (2009) 12:2 *Journal of International Economic Law* 457–506 at 503–504. (Cai argues that the conduct of investors should be regulated in the China-US BIT which could be designed in four ways: in declaratory way, in mandatory way, in prohibited way and in persuasive way. Cai also expressly proposes that anti-corruption matters could be incorporated into the China-US BIT in a prohibited way, entirely requiring investors not engage in bribery and corruption.)

¹⁰⁴ Jean-Michel Marcoux, *International Investment Law and Globalization: Foreign Investment, Responsibilities and Intergovernmental Organizations* (Routledge, 2019) at 32–34.

¹⁰⁵ The following chapters of this thesis attempt to conduct an empirical study on these anti-corruption provisions in detail and evaluate to what extent such provisions are effective in achieving the desire of a symmetric balance.

of sovereignty.¹⁰⁶ However, the scope of the State's right to regulate out of environmental and social concern is far less clear, which leaves greater discretion to the contracting States.¹⁰⁷

The regulatory flexibility in investment treaties manifests itself in various ways. The current practices show that two approaches are normally referred to by States: refining substantive provisions (such as those addressing FET) and adding general exception clauses.¹⁰⁸ In fact, the regulatory flexibility approach is much less frequently applied by States in dealing with anti-corruption issues. One example of refining substantive provisions in the anti-corruption context is the Slovakia-Islamic Republic of Iran BIT (2016), where States expressly agreed that 'elimination of bribery and corruption' could be a 'legitimate public purpose' to 'justify' measures inconsistent with the national treatment and most-favored-nation treatment.¹⁰⁹ Some States select the device of general exception clauses to address anti-corruption, stating, for example, that nothing in the agreement shall require States to protect those investments made illegally.¹¹⁰ As demonstrated earlier, this type of statement can also be deemed as a way of 'imposing investor's obligations'.

¹⁰⁶ Spears, *supra* note 88 at 1038; Elizabeth Trujillo, "Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime" (2018) 59:8 Boston College Law Review 2735–2764 at 2737; Howard Mann, "The Right of States to Regulate and International Investment Law", (2002), online: <https://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf> at 5.

¹⁰⁷ Trujillo, *supra* note 106 at 2738.

¹⁰⁸ Spears, *supra* note 88 at 1048 et seq.

¹⁰⁹ Article 14 of the Slovakia-Islamic Republic of Iran BIT (2016) provides:

Article 14 National Treatment and Most Favored Nation Treatment

1. Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favorable than that it accords, in comparable situations, to its own investors and their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its territory.

2. Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favorable than that it accords, in comparable situations, to investors of any third State or to their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its territory.

.....

4. A measure of the Contracting Party that treats investors of the other Contracting Party of their investments less favorably than:

- a) its own investors or their investments is not inconsistent with paragraph 1 of this Article; or
 - b) investors of another State or their investments is not inconsistent with paragraph 2 of this Article;
- if it is adopted and applied by the Contracting Party in pursuit of a legitimate public purpose that is not based on the nationality of the investor or of nationality of the owner of an investment, either explicitly or factually, including the protection of health, safety, the environment, and internationally and domestically recognized labor rights, or the elimination of bribery and corruption, and it bears a reasonable connection to the stated purpose.

See *Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments*, 2016.

¹¹⁰ See Article 15 *Brazil Model BIT 2015*, 2015.

Promoting responsible investments through obligations on investors and preserving public policy cannot be entirely separated from one another. Notwithstanding the foregoing, it should be noted that a measure taken to fulfill an environmental or social objective is one thing, while not protecting an investment is another. The core difference is whether or not there is a lack of ‘legitimate purpose’. The former is considered ‘a regulatory measure’ while the latter may indicate that such an investment is not covered by the investment treaty at hand. In the same vein, in ISA, a State may contend that a regulatory measure is taken for ‘anti-corruption’ purposes; nonetheless, the typical allegations of corruption in *World Duty Free v. Kenya* or in *Mental-Tech v. Uzbekistan* should never be invoked to justify the alleged acts of expropriation. This is because corruption submissions were not raised to prove that their alleged expropriation acts were out of anti-corruption concern. All in all, provisions of the State’s right to regulate allow arbitrators to consider wider societal concerns when evaluating investors’ claims of States’ breaches of investment treaties.

4. To Attract Foreign Investment Flows

Anti-corruption provisions may also encourage more FDI flows by providing a ‘corruption intolerance’ environment for foreign investors. Attracting foreign investment is one initial motivation for establishing the regime of investment treaties, which is an important component of contemporary economic development policy. For developing countries, FDI would be critical to improve the overall domestic living conditions and welfare of the populations, as the UNCTAD World Investment Report 2001 noted:¹¹¹

Many countries, in particular the poorer and least industrialized ones, risk becoming even more marginal to the dynamics of international production because they cannot meet the new requirements for attracting high quality FDI. There is a need to develop attractive configurations of locational advantages.

An increase of foreign investment flows will bring various benefits, including both direct gains and indirect benefits, such as increasing job opportunities, tax revenues, foreign exchange, technology transfer, etc. A framework of good practices has been identified as instrumental for investment promotion activities to attract FDI, including elements of organizational strategy, inquiry handling, investment facilitation, incentives, aftercare, and monitoring and evaluation activities.¹¹² Corrupt acts that are conducted between private sectors and public officials may occur

¹¹¹ UNCTAD *World Investment Report 2001: Promoting Linkages* (2001) at 122–123.

¹¹² *Innovations in Foreign Direct Attraction*, by Henry Loewendahl (Inter-American Development Bank, 2018) at 7–10.

in each stage of an investment promotion activity, such as affecting the good governance of the investment facilitation and monitoring and evaluation process. To see how anti-corruption provisions affect countries' FDI attractiveness, it is necessary and important to first look at the relationship between (anti-)corruption and FDI.

The relation between corruption and FDI attractiveness is not a simple one for explanation. On one hand, studies discussing policies to attract FDI seldom embrace many discussions on corruption;¹¹³ on the other hand, the empirical research on this issue presents contradictory results. This section is not aimed at conducting an empirical study of the relationship between corruption and FDI attractiveness of countries, but to assemble related empirical literature and provide a theoretical analysis of why anti-corruption provisions would benefit the policy of attracting FDI.

Although corruption has been widely recognized in international conventions as an evil to good governance, human rights and economy, there are ongoing arguments about whether corruption is harmful or beneficial to the international economy. There are viewpoints suggesting that 'corruption in developing nations is not necessarily antipathetic to the development of modern economic and social systems; that corruption serves in part at least a beneficial function in developing societies.'¹¹⁴ More studies, however, especially the recent ones, illustrate that corrupt acts discourage the development of the international economy¹¹⁵ and, in particular, that corruption will be a detriment to FDI attractiveness.¹¹⁶ A recent OECD report further shows that the contracting parties to the OECD Anti-Bribery Convention will see a certain degree of FDI fall at the time the acts of corruption rise.¹¹⁷ Another recent study, which examined 142 countries from the period of 1994-2014, concluded that 'a lack of corruption was found both to have a positive

¹¹³ UT Isayev, "Foreign Investment During the Transition: How to Attract It, and How to Make the Best Use of It", online: <<https://www.imf.org/external/np/eu2/kyrgyz/pdf/isayev.pdf>> at 3. In this paper, the author simply mentioned corruption as one of main problems hindering FDI without further and detailed discussions.

¹¹⁴ David H Bayley, "The Effects of Corruption in a Developing Nation" (1966) 19:4 Political Research Quarterly 719-732.

¹¹⁵ *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?*, by Shang-Jin Wei, Policy Research Working Paper Series 2048 (The World Bank, 1999); Paolo Mauro, "Corruption and Growth" (1995) 110:3 The Quarterly Journal of Economics 681-712.

¹¹⁶ See Jung-Yeop Woo, "The Impact of Corruption on a Country's FDI Attractiveness: A Panel Data Analysis, 1984-2004" (2010) 17:2 Journal of International and Area Studies 71-91. In this article, Woo analyzed the data of 90 countries for 21 years from 1984 to 2004. It also made a comparison between OECD countries and non-OECD countries. See also Mohsin Habib & Leon Zurawicki, "Corruption and Foreign Direct Investment" (2002) 33:2 Journal of International Business Studies 291-307 at 303.

¹¹⁷ *Foreign Direct Investment, Corruption and the OECD Anti-Bribery Convention*, OECD Working Papers on International Investment, by Adrian Blundell-Wignall & Caroline Roulet, OECD Working Papers on International Investment 2017/01 (2017) at 21-22.

and statistically significant impact on the growth rate of real per capita GDP and to increase the investment ratio'.¹¹⁸ It is also argued that 'generally corruption affects the investment attractiveness of the country, but it is not the major factor affecting the FDI inflow.'¹¹⁹ Moreover, there may be a 'negative effect due to the *difference* in corruption levels between the home and host countries'.¹²⁰ An anti-corruption provision is a consensus established by both parties. Such provisions not only mandate State parties to conduct anti-corruption practices in international investment, but also ensure that the standards applied at the domestic level are consistent between one State party and another.

Moreover, investment treaties are presumably concluded by sovereign States – especially by developing countries – in order to increase investment flow and 'allow states that are hospitable to foreign capital to convince investors that they are genuine.'¹²¹ The theories of BITs have suggested that States need to demonstrate their will to 'create and maintain a stable and favorable investment climate' and offer alternative dispute settlements to investors so as to attract more investment flow.¹²² The integrity and governance of the government is also an important factor that a reasonable investor will factor in. In this sense, incorporating anti-corruption provisions as a reflection of a State's commitments of taking anti-corruption measures to ensure a preferable investment environment will contribute to the FDI attractiveness of this State.

¹¹⁸ Andrzej Cieřlik & Łukasz Goczek, "Control of Corruption, International Investment, and Economic Growth – Evidence from Panel Data" (2018) 103 *World Development* 323–335 at 330.

¹¹⁹ Ayshan Gasanova, Alexander N Medvedev & Evgeny I Komotskiy, *The Assessment of Corruption Impact on the Inflow of Foreign Direct Investment* (Rome, Italy, 2017) at 4.

¹²⁰ Habib & Zurawicki, *supra* note 116 at 303.

¹²¹ Yoram Z Haftel, "Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries" (2010) 17:2 *Review of International Political Economy* 348–377 at 349.

¹²² Rodrigo Polanco Lazo, Valentino Desilvestro & Azernoosh Bazrafkan, "Missing Investment Treaties" (2018) 21:3 *Journal of International Economic Law* 703–731 at 703–704; Jason Webb Yackee, "Do Investment Promotion Agencies Promote Bilateral Investment Treaties?" in Andrea K Bjorklund, ed, *Yearbook on International Investment Law and Policy 2013-2014* (Oxford University Press, 2015) 529 at 531–532.

CHAPTER 5 CORE ANTI-CORRUPTION PROVISIONS IN INVESTMENT TREATIES

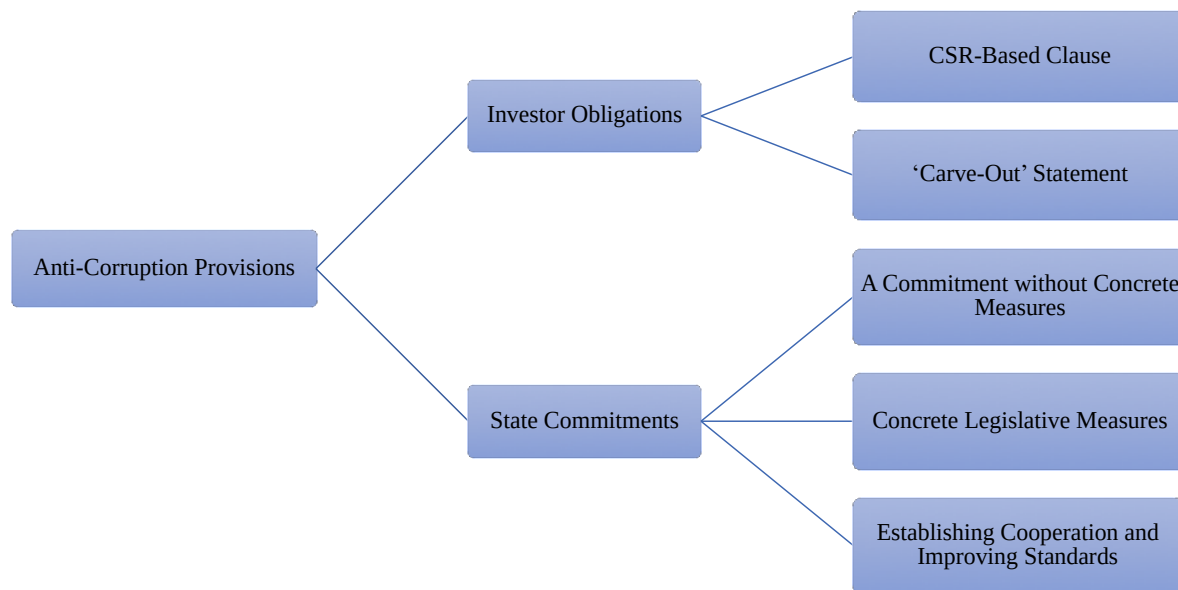
By the end of 2019, there were 3284 international investment agreements (IIAs) in existence. 2895 of them were concluded bilaterally, commonly known as bilateral investment treaties (BITs). The remaining 389 were drafted in other forms of economic treaties with investment provisions (TIPs).¹ The United Nations Conference on Trade and Development (UNCTAD) IIA Mapping Project² shows that there are 45 IIAs that include any mention of ‘corruption’ or ‘anti-corruption’ in the main texts (excluding the preambles) of investment treaties.³ Anti-corruption provisions also appear in a small number of other unmapped IIAs and model agreements. Although the total number of anti-corruption provisions is still limited in the existing IIAs when compared to other substantive treatments, the current practice on anti-corruption provisions indeed presents important features that warrant in-depth examinations. As briefly discussed in Chapter 4, these anti-corruption provisions can be divided into several categories according to their wording, content, and proclaimed objectives. This chapter thus attempts to empirically present a study of all these provisions and is drafted in accordance with the categorization framework of anti-corruption provisions (see below).

This chapter is divided into two sections: the first examines anti-corruption provisions by way of investor obligations [A] while the second evaluates anti-corruption provisions requiring a State to commit to certain actions [B]. In addition to demonstrating how these provisions regulate and present anti-corruption issues, their underlying implications for investor-State arbitration (ISA) will also be analyzed in this chapter.

¹ UNCTAD *World Investment Report 2020: International Production Beyond the Pandemic* at 106.

² This IIA Mapping Project is initiated by the UNCTAD in collaboration with the UNCTAD and universities from across the globe. The main task of the IIA Mapping Project is to identify the content of investment treaties and establish a database for scholars, State policymakers, practitioners, students, and other researchers. The results presented by the IIA Mapping Project are impressing through which we are able to observe the latest trends of IIA development, survey the preferable policies that States are approaching, and envisage the whole IIA reform practice. To date, this Project has mapped 2576 investment treaties. For more information about the University IIA Mapping Project and the applied methodology, see “UNCTAD University IIA Mapping Project”, online: <<https://worldinvestmentforum.unctad.org/programme2016/international-investment-agreements-conference-2016/unctad-ii-mapping-project/>>; UNCTAD, *International Investment Agreements Navigator, Mapping of IIA Content*, [UNCTAD Mapping of IIA Content].

³ UNCTAD *Mapping of IIA Content*, *supra* note 2.



A. Anti-Corruption Provisions Directed at Investor Conduct⁴

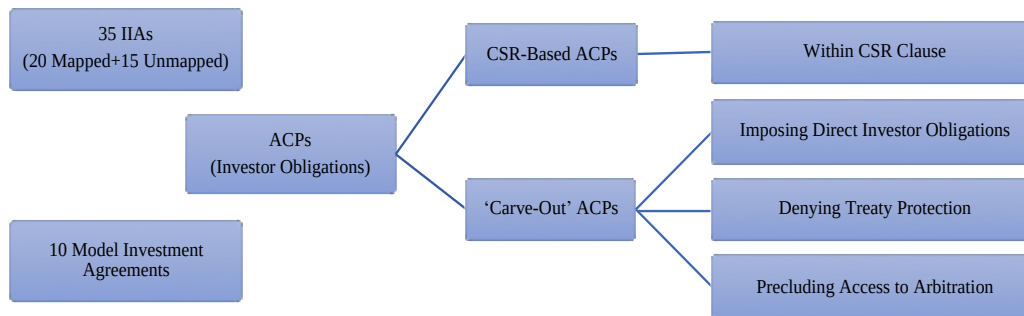
According to the UNCTAD IIA Mapping Project, 45 out of the 2,576 mapped treaties were identified as containing corruption-related clauses.⁵ Among these 45 IIAs, 20 treaties contain anti-corruption provisions that are directed at investor conduct; this type of provisions also appears in another 15 unmapped IIAs and 10 model agreements on investment.⁶ Depending on how much each anti-corruption provision ‘demands’ of foreign investors, these provisions can be roughly divided into two groups: CSR (Corporate Social Responsibility)-based anti-corruption provisions [1] and ‘carve-out’ anti-corruption provisions [2]. While group [1] mainly encourages investors to voluntarily comply with CSR, including anti-corruption commitments, group [2] typically requires investors to establish corruption-free investments in order to obtain substantive treaty protection and access to ISA. This framework is reflected here in diagrammatic format:

⁴ This section forms part of the author’s paper published in the Journal of International Economic Law. It is published with the consent of the author’s thesis committee. See Yueming Yan, “Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance” (2020) 23:4 Journal of International Economic Law 989–1013.

⁵ UNCTAD Mapping of IIA Content, *supra* note 2.

⁶ See Annex Tables. Notably, the anti-corruption provisions in some of these 35 IIAs are actually deprived from the respective model treaties, such as the CSR-based anti-corruption provisions in Canadian BITs (from the Canada Model Foreign Investment Protection and Promotion Agreement 2014) and the ‘carve-out’ anti-corruption provisions in Brazilian investment treaties (from the Brazil Model BIT 2015).

A Typology of ACPs of Investor Obligations in Investment Treaties



1. CSR-Based Anti-Corruption Provisions

Some States attach increased importance to the responsibilities of multinational enterprises (MNEs), organizations and other private entities in investment treaties and thus have included CSR clauses in these treaties. A CSR clause normally encompasses a variety of non-economic and public interest issues, and (by and large) States put great weight on specific aspects of CSR, such as labor rights, environmental protection, and public health. The specificity of State interest in aspects of CSR accounts, to some extent, for the lack of a universally accepted definition of CSR and agreement as to the purposes and scope of CSR clauses. In most IIAs, States recognize the importance of promoting CSR in international investment, but seldom produce a precise list of duties that investors are encouraged to observe. In other agreements, States clarify which standards and practice should fall within the scope of CSR clauses in a rather unequivocal manner, for instance stating that ‘[t]hese principles address issues such as labour, the environment, human rights, community relations and anti-corruption.’ This chapter focuses on those CSR clauses which explicitly mention (anti-)corruption. Among the 35 identified IIAs and 10 model agreements, CSR-based anti-corruption provisions are found in 20 of the signed IIAs, and in one model BIT.⁷ This type of provisions are primarily found in BITs, in investment chapters of agreements on trade activities, and in comprehensive anti-corruption chapters of multilateral economic cooperation agreements.

One of the major purposes of CSR-based anti-corruption provisions is to encourage enterprises to establish investments that have an impact on preserving social values and alleviating social

⁷ See Annex Table 1 and Table 2 for a full list of investment treaties where a CSR-based anti-corruption provision is included.

problems. Many BITs and free trade agreements (FTAs) signed by Canada, as well as the Canada 2014 Model Foreign Investment Protection and Promotion Agreement (FIPA), have inserted CSR-based anti-corruption provisions, which is also the preferred avenue for Canada in dealing with anti-corruption issues in international investment activities.⁸ Such provisions are also found in treaties concluded between other countries, such as the Nigeria-Singapore BIT (2016)⁹ and the Colombia-Costa Rica FTA (2013).¹⁰ The wordings of these CSR clauses are substantively similar. Art.9.17 of the Canada-Panama FTA (2010) provides that:¹¹

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

These CSR clauses generally rely on voluntary self-regulation by investors' on issues of social responsibility, labor, environment, human rights, anti-corruption and other externalities: effectively creating a set of 'soft law' norms.¹² These provisions do not impose direct obligations on investors and mainly act as 'intermediate instruments for the regulation of business conduct by foreign investors.'¹³ Methods required to achieve the purposes of promoting the social responsibilities of enterprises depend heavily on the relevant private sector's internal policies and on the domestic legal frameworks of States.

There are some other IIAs where the word 'voluntarily' does not appear,¹⁴ or where similar CSR statements (to that example given above) are followed by an additional obligation that '[t]he Parties should remind those enterprises of the importance of incorporating such corporate social responsibilities standards in their internal policies.'¹⁵ For example, in the CSR clause of the United

⁸ Art.16, *Canada 2014 Model Foreign Investment Protection and Promotion Agreement*, 2014.

⁹ Art.11, *Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore*, 2016.

¹⁰ Art.12.9, *Free Trade Agreement between the Republic of Colombia and the Republic of Costa Rica*, 2013.

¹¹ Art. 9.17 (CSR), *Chapter 9 (Investment)*, *Canada-Panama Free Trade Agreement*, 2010.

¹² Ilias Bantekas, "Corporate Social Responsibility in International Law" (2004) 22 *Boston University International Law Journal* 309; Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge, 2018) at 101.

¹³ Laurence Dubin, "Corporate Social Responsibility Clauses in Investment Treaties", (21 December 2018), online: *Investment Treaty News* <<https://www.iisd.org/itn/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/>>.

¹⁴ See Art.16, *Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments*, 2015. See also Art.15(3), *Agreement Between Canada and Mali for the Promotion and Protection of Investments*, 2014.

¹⁵ Art.14, *Agreement Between Canada and Mongolia for the Promotion and Protection of Investments*, 2016. Art.816, *Free Trade Agreement between Canada and Colombia*, 2008. Art.810, *Free Trade Agreement between Canada and*

States-Mexico-Canada Agreement (USMCA), the parties give a specific reference to the ‘OECD Guidelines for Multinational Enterprises’ and ‘recognize the importance of these principles therein’.¹⁶ However, these eliminations or additions do not profoundly affect the categorization of these provisions as ‘soft law’ norms, because they are still framed from a ‘State-leading perspective’ and include statements like ‘*states shall encourage* investors to...’.

Rather than approaching CSR from the perspective of State parties’ obligations, Art.13(2) of the Brazil-Morocco CFIA (Cooperation and Facilitation Agreement) (2019) and Art.12 (Corporate Social Responsibility) of the India Model BIT 2015 attempt to increase demands on investors’ social responsibilities: thus the provisions are formulated from an ‘investor’ perspective. For example, the India Model BIT 2015 requires that ‘*[i]nvestors* and their enterprises operating within its territory of each Party *shall* endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies...’.¹⁷ By adopting this approach, it seems that States intend to transform the CSR clause-drafting practice, moving from ‘State-leading’ towards ‘investor-dominating’: or, to put it another way, to strongly prefer ‘direct CSR clauses’ to ‘indirect CSR clauses’.

By using words like ‘*investors shall*’, States attempt to impose a direct obligation on investors. However, given that words such as ‘*endeavour to*’ and ‘*voluntarily*’ still appear in this clause, it is hard to conclude that direct investor obligations to comply with social standards are well-established. Whether this shift towards investor obligations in BIT wording has actually increased CSR demands on investors is a question that requires further examination, particularly in light of the treaty context and object and purpose of the treaty.¹⁸ How to coherently interpret terms such as ‘*investors shall*’, ‘*endeavour to*’ and ‘*voluntarily*’ will thus be a key issue for determination by investment arbitrators. The invocation of the CSR clauses in ISA and their interpretation should be managed on a case-by-case basis, with each decision depending on the exact wording employed and the specific investor conduct at issue. For instance, in addition to the direct CSR clause, the

Peru, 2008. Art.10.30(2), *Chapter 10 (Investment), Additional Protocol to the Framework Agreement of the Pacific Alliance*, 2014.

¹⁶ Art.14.17 (CSR), *United States-Mexico-Canada Agreement*, 2018, signed on November 30, 2018 with an agreement on amendments signed on December 10, 2019, effective on 1 July 2020.

¹⁷ Art.12 (CSR), “India Model BIT 2015”, (2015), online: <<https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560>>.

¹⁸ Grant Hanessian & Kabir Duggal, “The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?” (2017) 32:1 ICSID Review 216–226 at 225.

India Model BIT 2015 further includes a ‘carve-out’ statement that an investor may not submit a claim to arbitration if the investment is procured by corruption. In other words, a breach of the CSR clause in Indian Model BIT 2015 may trigger the application of such ‘carve-out’ provision and consequently bar the tribunal from exercising jurisdiction over the related disputes. In conclusion, while the development of CSR clauses, in particular those addressing anti-corruption issues, should be considered to be an innovation in international investment law, there remains to be much practical work to do in IIA decision-making to determine the purpose, scope and application of these clauses.

2. ‘Carve-Out’ Anti-Corruption Provisions

Alongside CSR-based anti-corruption provisions, a number of States are inclined to impose investor obligations against corruption through ‘carve-out’ statements, which aim to exclude investors’ enjoyment of treaty protection or access to arbitration in cases of non-compliance: that is, where an investment is obtained through corruption. 16 IIAs and 9 model investment agreements contain one or more ‘carve-out’ anti-corruption provisions.¹⁹ The various modes of ‘carve-out’ anti-corruption provisions can be divided into the following three sub-groups that reflect the perspective from which they are formulated: (1) imposing direct investor obligations, (2) denying treaty protection, and (3) precluding access to arbitration.

(1) Imposing Direct Investor Obligations

The first sub-group of ‘carve-out’ anti-corruption provisions are those provisions that impose direct obligations to *not* commit corrupt acts in general through statements beginning with ‘*investors and investment shall not...*’. For instance, Art.13 in the IISD (International Institute for Sustainable Development) Model Agreement 2005 stipulates that:²⁰

(A) Investors and their investments shall not, prior to the establishment of an investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.

¹⁹ See Annex Table 1 and Table 2 for a full list of investment treaties where a CSR-based anti-corruption provision is included.

²⁰ Art.13 (Anti-Corruption), International Institute for Sustainable Development (IISD), “IISD Model International Agreement on Investment for Sustainable Development”, (1 March 2005), online: <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf>.

(B) Investors and their investments shall not be complicit in any act described in Paragraph (A), including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

This clause incorporates an explicit obligation that investors shall neither conduct any corrupt acts nor be complicit in any corrupt activities. Within this obligation, a precise scope of the category of ‘acts of corruption’ is set out, specifying: ‘offering, promising or giving any undue pecuniary or other advantages’. However, this clause does not clearly indicate the legal consequences that will apply in cases of non-compliance.²¹ For example, what are the consequences for investors if they give a bribe to a public official of the host State in the establishment and operation of an investment?

Some States attempt to address this issue through the legality requirement. Three investment agreements, namely the SADC (South African Development Community) Model BIT 2012,²² the Morocco Model BIT 2019,²³ and the Morocco-Nigeria BIT (2016),²⁴ make it clear that a breach of the relevant anti-corruption clause shall be evaluated as ‘a breach of domestic law’. More precisely, in addition to inserting a direct obligation of anti-corruption on investors, these treaties also stipulate that ‘[a] breach of this article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.’ The effect of this provision is that any investment that is not entirely corruption-free in its establishment and during its operation shall be deemed a violation of the host State’s national legislation. That violation will then trigger the automatic application of the ‘in accordance with host State laws’ requirement within the investment treaties in ISA.

As discussed in Part One, prior to the emergence of this sub-group of anti-corruption provisions, those ‘in accordance with host State laws’ provisions have occasionally been raised by host States as a defense against investor claims when those investments were obtained through corruption. The tribunals have also taken a consistent stand against illegal investments by rejecting investor claims as the legal consequences of breaching the ‘in accordance with host State laws’ clause. For

²¹ Art.21 (Bribery) of the Draft Pan-African Investment Code 2016 also constitutes a ‘carve-out’ anti-corruption provision where direct investor obligations are imposed. See *Draft-Pan African Investment Code (Draft-PAIC)*, 2016.

²² Art.10 (Common Obligation against Corruption), paras.1-2 (Part 3 Rights and Obligations of Investors and State Parties), South African Development Community (SADC), “SADC Model BIT 2012”, (2012), online: <<https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2875>>.

²³ Art.19, “Morocco Model BIT 2019”, (1 June 2019), online: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download>>.

²⁴ Art.17 (Anti-Corruption), *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria*, 2016.

example, this action was taken in the cases of *TSA Spectrum v. Argentina*,²⁵ *Metal-Tech Uzbekistan*,²⁶ and *Vladislav Kim and others v. Uzbekistan*.²⁷

(2) Denying Treaty Protection

The second sub-group of ‘carve-out’ anti-corruption provisions exempts States from the obligation of protecting investments made in illegal ways, including through fraudulent misrepresentation, bribery and corruption. However, these anti-corruption provisions are generally drafted from State’s perspective, framed in language such as ‘*nothing shall require states to protect...*’. Notwithstanding this framing, the purposes of these provisions are substantively the same as those in the first sub-group discussed above, i.e., anti-corruption provisions requiring investors to establish corruption-free investments. Within this second sub-group, relevant anti-corruption provisions are set out in the Brazilian IIAs,²⁸ for example, Art.15 (Investment Measures and Combating Corruption and Illegality) of the Brazil BIT Model 2015 stipulating that:²⁹

1. Each Party shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Agreement, in accordance with its laws and regulations.
2. Nothing in this Agreement shall require any Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture.

The second paragraph of Art.15 of the Brazil BIT Model 2015 develops a general, catch-all approach to anti-corruption by rendering all investments flowing from ‘illegal acts’ or resulting from capital/assets of illicit origin unprotected by State parties. This is a different approach from the first sub-group of ‘carve-out’ statements, as it covers ‘investments in the establishment or operation of which illegal acts have been demonstrated to occur’. This provision appears to capture a broader category of investor misconduct in relation to corruption. First, there is no indication that the relevant laws to apply are only those within the host States’ domestic jurisdiction. Second, the provision specifies that the ‘illegal acts’ do not solely mean those acts performed by investors

²⁵ *TSA Spectrum de Argentina SA v Argentine Republic*, ICSID Case No ARB/05/5, Award of 19 December 2008, 2008 [TSA Spectrum v. Argentina, Award (2008)].

²⁶ *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award of 4 October 2013, 2013 [Metal-Tech v. Uzbekistan, Award (2013)].

²⁷ *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction of 8 March 2017, 2017 [Vladislav Kim v. Uzbekistan, Decision on Jurisdiction (2017)].

²⁸ See Annex Table 1 for the Brazilian IIAs where a ‘carve-out’ anti-corruption provision of the second sub-group is incorporated.

²⁹ Art.15(2), *Brazil Model BIT 2015*, 2015.

‘in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment’. The discovery of other corrupt activities that are not directed to ‘achieve any favour’, but that still have some relationship to the investment, may also result in the investment being excluded from treaty protection.

Another broad carve-out mechanism to deny treaty protection could be achieved by narrowing the scope of the definition of ‘investment’, specifying that an investment obtained through corruption no longer meets the definition of investment. In the Canada-Honduras FTA (2013), Art.10.1 (Definitions) of Chapter 10 (Investment) expressly provides that ‘for greater certainty, the following is not an investment: ...(iv) an investment allowed or made pursuant to fraudulent misrepresentation, bribery, or corruption...’.³⁰

There are some nuanced differences to consider when comparing Art.10.1 of the Canada-Honduras FTA (2013) to the ‘carve-out’ statements in Brazilian IIAs. The first difference is the scope of ‘illegal acts’ in both Articles. In the Canada-Honduras FTA (2013), the scope of illegal acts is limited to ‘fraudulent misrepresentation, bribery or corruption’. The second difference is that the term ‘allowed or made pursuant to’ in the Canada-Honduras FTA mainly refers to the process of ‘the establishment of an investment’ and excludes subsequent operations of an investment. Finally, an ‘illegal investment’ in the Brazilian IIAs does not equate to ‘not an investment’ in the Canada-Honduras FTA (2013). The difference between these two concepts relates to their character in investment arbitration. Arbitral tribunals have consistently confirmed that ‘in accordance with host State laws’ in the definition of investment provisions does not relate to the domestic law *definition* of investment³¹ but rather the *validity* of the investment.³² In other words, despite its illegality, an ‘illegal investment’ is generally understood to fall within the scope of ‘an investment’ as defined

³⁰ Chapter 10 (Investment), *Canada-Honduras Free Trade Agreement*, 2013.

³¹ *Saipem S.p.A v The People’s Republic of Bangladesh*, ICSID Case No ARB/05/07, *Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007*, 2007 at para 120 [*Saipem S.p.A. v. Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures (2007)*]. In this case, the tribunal noted that the term ‘investment’ in the definition clause of the applicable BIT (where the language of “in conformity with the laws and regulations” is included) was examined without reference to the domestic law of the host State; however, it did not draw any conclusion on whether this language refers to the legality of investment.

³² *Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco*, ICSID Case No ARB/00/4, *Decision on Jurisdiction of 31 July 2001*, 42 ILM 609 (2003), 2001 at para 46 [*Salini v. Morocco, Decision on Jurisdiction (2001)*]; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, *Decision on Jurisdiction of 14 November 2005*, 2005 at paras 109–110; *LESI S.p.A and ASTALDI S.p.A v République Algérienne Démocratique et Populaire*, ICSID Case No ARB/05/3, *Decision of 12 July 2006*, 2006 at para 83 [*LESI & ASTALDI v. Algeria, Decision (2006)*].

in the investment treaty. In ISA, the term ‘not an investment’ is mostly associated with jurisdictional issues, while determining the character of an ‘illegal investment’ might be relevant in the merits phase.³³

In addition to denying treaty protection in its entirety, the Slovakia-Iran BIT (2016) adopts an approach of narrowing treaty protection to ‘a certain degree’. Art.4 (National Treatment and Most Favored Nation Treatment) provides that the elimination of bribery and corruption is a legitimate public purpose, and States will not risk liability for measures taken to eliminate corruption, even where those measures result in treatment to investors that is less favorable than the prescribed ‘national treatment’ or ‘most-favored-nation treatment’.³⁴ In other words, a regulatory measure that aims to eliminate bribery and prevent corruption might also prevent an investment from enjoying the benefits of ‘national treatment and most-favored-nation treatment’, two significant benefits in a traditional investment agreement. However, in a dispute of alleged ‘illegal expropriation without compensation’, for instance, the host State cannot invoke Art.4 to contend that they are entitled to refuse to protect an investment that is linked to corruption.

(3) Precluding Access to Arbitration

The third sub-group of ‘carve-out’ statements are those provisions explicitly denying investors the right to raise claims under the investor-State dispute settlement (ISDS) mechanism, such as Art.8.18 of the Canada-European Union (EU) Comprehensive Economic Trade Agreement (CETA),³⁵ Art.19 of the Belgium-Luxembourg Economic Union (BLEU) Model BIT 2019,³⁶ Art.14 of the Norway Model BIT (draft) 2015, and Art.13 of the India Model BIT 2015.³⁷ Provisions falling within this sub-group of provisions are normally drafted in the following terms:

³³ Michael Polkinghorne & Sven-Michael Volkmer, “The Legality Requirement in Investment Arbitration” (2017) 34:2 Journal of International Arbitration 149–168; Rahim Moloo & Alex Khachaturian, “The Compliance with the Law Requirement in International Investment Law” (2011) 34:6 Fordham International Law Journal 1473–1501; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award of 18 June 2010, 2010 [Hamester v. Ghana, Award (2010)]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award of 16 August 2007, 2007 [Fraport v. Philippines (1), Award (2007)].

³⁴ Art.4(4), *Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments*, 2016.

³⁵ Art.8.18, *Comprehensive Trade and Economic Agreement between Canada and the European Union*, 2016, signed on 30 October 2016.

³⁶ Art.19, “Belgium-Luxembourg Economic Union Model BIT 2019”, (2019), online: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download>>.

³⁷ Art.14, “Norway Model BIT (draft) 2015”, (2015), online: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3350/download>>.

An investor may not submit a claim to arbitration under this Chapter (or this Article) where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

In the Netherlands Model BIT 2019, the State approaches this issue by limiting the jurisdiction of arbitral tribunals with a directive provision, as follows:³⁸

The Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.

According to these clauses, investors should not conduct any corrupt acts in establishing investments. Otherwise, they are deprived of the protective ability to submit claims in relation to the investment to arbitration; in other words, any claims raised will be dismissed by the arbitral tribunal at the jurisdictional phase. States incorporating these clauses clearly intend to exclude those investments obtained through corruption, and therefore to avoid the definitional issue of ‘not an investment’ or ‘illegal investment’ as discussed above. Notably, these directive provisions only exclude investors’ access to ISDS. This means that investors may still access other dispute settlement mechanisms established in investment treaties: this constitutes the greatest difference between this sub-group and the previous two sub-groups discussed above. In the Slovakia-Iran BIT (2016),³⁹ the State parties addressed the issue of tribunal’s adjudication in the context of the ‘legal investment’:

For avoidance of doubt, an investor may not submit a claim under this Agreement where the investor or the investment has violated the Host State law. The Tribunal shall dismiss such claim, if such violation is sufficiently serious or material. For avoidance of any doubt, the following violations shall always be considered sufficiently serious or material to require dismissal of the claim: a) Fraud; b) Tax evasion; c) Corruption and bribery; or d) Investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

As discussed in Chapter 2 of this thesis, when applying the ‘in accordance with host State laws’ clause in practice, a consistent area of uncertainty relates to the identification of the ‘illegality’ or ‘violation’. Arbitrators have proposed that not every violation of domestic rules constitutes a breach of the legality requirement, and that minor breaches of host state laws should not result in an application of the legality clause to dismiss investors’ claims.⁴⁰ These arguments were put in

³⁸ Art.16 (Scope of Application), Section 5 Settlement of Disputes between an Investor of a Contracting Party and the other Contracting Party, “The Netherlands Model BIT 2019”, (2019), online: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>>.

³⁹ Art.14 (General Provisions), Section C Investor-State Dispute Settlement, *Slovakia-Iran BIT (2016)*, *supra* note 34.

⁴⁰ Ursula Kriebaum, “Investment Arbitration - Illegal Investments” in Christina Klausegger et al, eds, *Austrian Yearbook on International Arbitration 2010* (Beck, Stämpfli & Manz, 2010) 307 at 319; C Knahr, “Investments ‘in accordance with host state law’” (2007) 4:5 Transnational Dispute Management 1–28 at 24.

Tokio Tekelés v. Ukraine (2004),⁴¹ *Desert Line v. Yemen* (2008),⁴² *Quiborax v. Bolivia* (2012),⁴³ and *Hochtief v. Argentina* (2016).⁴⁴ There are also some who advocate that a dual approach of complying with both domestic law and fundamental principles of law should be applied.⁴⁵ In this regard, the Slovakia-Iran BIT (2016) avoids any uncertainty about the seriousness of a corrupt act and instead requires a precise and full denial of claims in cases where corruption and bribery are alleged.

B. Anti-Corruption Provisions of State Commitments

Alongside anti-corruption provisions *on foreign investors*, another major category of anti-corruption provision is *directed at States*. The ways in which commitments and obligations of combating and eliminating corruption are couched vary between IIAs. Generally, provisions of State commitments can be roughly categorized into three types. [1] Provisions demonstrating a rough commitment to eliminate and deter corruption in international investment made by States. Such commitment provisions broadly require States to take effective measures to combat corruption regarding matters affecting international investment, but do not contain concrete obligations or steps that must be taken to fulfill this commitment. [2] Provisions aiming at establishing cooperation and improving anti-corruption standards. Corruption is no longer a domestic issue and requires transnational collaboration, which is also an integral part of investment promotion and facilitation. [3] Provisions with concrete anti-corruption measures. Some States have reached an agreement on how to combat corruption through domestic legislation and internal proceedings. This type of anti-corruption provision requires States to take a series of legislative measures. In this sense, some States have adopted a hybrid approach by additionally inserting

⁴¹ *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, *Decision on Jurisdiction* of 29 April 2004, 2004 at paras 85–86 [*Tokio Tokelés v. Ukraine*, *Decision on Jurisdiction* (2004)].

⁴² *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No ARB/05/17, *Award* of 06 February 2008, 2008 at paras 104–106 [*Desert Line v. Yemen*, *Award* (2008)].

⁴³ *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, *Decision on Jurisdiction* of 27 September 2012, 2012 at paras 263–266 [*Quiborax v Bolivia*, *Decision on Jurisdiction* (2012)].

⁴⁴ *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, *Decision on Liability* of 29 December 2014, 2014 at para 199 [*Hochtief v. Argentina*, *Decision on Liability* (2014)].

⁴⁵ J Hepburn, “In Accordance with Which Host State Laws? Restoring the ‘Defence’ of Investor Illegality in Investment Arbitration” (2014) 5:3 *Journal of International Dispute Settlement* 531–559 at 533.

cooperative clauses and making an explicit reference to international and regional anti-corruption conventions and instruments to improve the anti-corruption standards.

1. Provisions Demonstrating a Rough Commitment to Anti-Corruption

This type of anti-corruption provisions present States' commitment to anti-corruption in international investment. However, they fail to provide specific or operational measures in this particular domain. Japan and Brazil are the two major countries that incorporate such anti-corruption provisions into their newest investment agreements. Japan has inserted this type of provision in approximately 19 bilateral agreements on investment and 6 economic partnership agreements (EPAs).⁴⁶ The wordings of all these anti-corruption provisions are virtually identical while slight differences exist among them. In most cases, this type of anti-corruption provision is drafted in substantially the same language, for instance, Article 14 (Measures against Corruption) of the Japan-Uruguay BIT (2015) providing:⁴⁷

Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.

As for Brazil, it has also included a similar version of such an anti-corruption provision in its 2015 model BIT,⁴⁸ 8 cooperation and facilitation investment agreements (CFIAs), and 2 trade agreements signed from 2015 onwards.⁴⁹ Brazil tends to condense issues of corruption, money laundering and terrorism financing into one single provision, such as the Brazil-Ethiopia CFIA (2018), paragraph 1 of Article 15, which stipulates:⁵⁰

1. Each Party shall maintain measures to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Agreement, in accordance with its laws and regulations.

In this sense, most anti-corruption provisions of this type feature similar components. However, in spite of their commonalities, important differences exist between them. One can comprehend these provisions mainly from the following three components: 'Each Contracting Party shall ensure/maintain', 'measures and efforts are undertaken to prevent and combat corruption', and 'in

⁴⁶ See Annex Table 3 for a full list of these Japanese IIAs.

⁴⁷ Art.14, *Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment*, 2015.

⁴⁸ Art.15(1), *Brazil Model BIT 2015*, *supra* note 29.

⁴⁹ See Annex Table 3 for a full list of these Brazilian IIAs.

⁵⁰ Art.15(1), *Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation*, 2018.

accordance with its laws and regulations'. The divergence and discrepancies will also be presented respectively.

(1) 'Each Contracting Party shall ensure/maintain...'

This phrase directly imposes an obligation on the State parties. It means that they are responsible for enforcing measures and making individual efforts toward combating corruption. Taking measures to combat corruption has long been an international obligation enumerated in numerous international and regional anti-corruption instruments, including binding conventions and treaties and other non-binding initiatives and proposals.⁵¹ This statement might generate some doubt as to whether or not a failure of 'ensuring' or 'maintaining' anti-corruption measures entitles an investor to initiate claims before ISA tribunals. The words 'shall ensure' are conceived as legally binding and as obligations of result. As mentioned in Section A of this chapter, States that incorporate CSR-based anti-corruption provisions are inclined to exclude these provisions from access to arbitration; however, Japan and Brazil have adopted entirely different approaches.

First of all, the CFIA's concluded by Brazil actually contain no rules on ISDS. Since Brazil launched its new model agreement in 2015, any disputes arising from Brazilian investment treaties should be resolved through other types of dispute settlement mechanisms, including arbitration

⁵¹ For instance, *United Nations Convention against Corruption*, 2005, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, U.N. GAOR, 58th Sess., 51st Plen Mtg., UN Doc. A/RES/58/4; *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed on 17 December 1997, entered into force on 15 February 1999; *Inter-American Convention against Corruption*, adopted at the third plenary session, held on March 29, 1996, entered into force on 6 March, 1997; *Council of Europe, Civil Law Convention on Corruption*, European Treaty Series No 174, adopted on 4 November, 1999, entered into force on 1 November, 2003; *Council of Europe, Criminal Law Convention on Corruption*, European Treaty Series No 173, adopted on 27 January, 1999, entered into force on 1 July, 2002; *African Union Convention on Preventing and Combating Corruption*, adopted on 1 July, 2003, entered into force on 5 August, 2006.

between States.⁵² In spite of this, Brazil has consistently *excluded* this type of anti-corruption provisions as applicable to the dispute settlement between the contracting parties.⁵³

On the other hand, Japan has *often* consented to allowing investors to raise an allegation against the respondent State in accordance with the ISDS provisions if the host State did not comply with its anti-corruption obligations. Such consent may be expressed through the ‘investor right’ approach⁵⁴ or the ‘host State obligation’ approach,⁵⁵ the former mainly adopted in Japanese IIAs

⁵² According to the Brazil Model BIT 2015, it introduced both the dispute *prevention* mechanism and the dispute *settlement* regime. The first paragraph of Article 23 requires ‘Ombudsmen’ or ‘National Focal Points’ to coordinate with each other as well as with the Joint Committee established therein, aiming at preventing, managing and resolving any disputes between the contracting parties; while the second paragraph sets up another obligation before initiating an arbitration procedure: ‘any dispute between the Parties shall be the object of consultations and negotiations between the Parties and be previously examined by the Joint Committee’. For the State-to-State arbitration, paragraphs 1 and 2 of Article 24 (Settlement of Disputes between the Parties) offer:

1. Once the procedure under paragraph 3 of Article 23 has been exhausted and the dispute has not been resolved, either Party may submit the dispute to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the Parties decide otherwise, such institution shall apply the provisions of this Section.

2. The purpose of the arbitration is to determine the conformity with this Agreement of a measure that a Party claims to be not in conformity with the Agreement.

See Art.24(1)-(2), *Brazil Model BIT 2015*, *supra* note 29. See also Joaquim P Muniz, Kabir A N Duggal & Luis A S Peretti, “The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change” (2017) 32:2 ICSID Review 404–417; Nitish Monebhurrn, “Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model” (2017) 8:1 Journal of International Dispute Settlement 79–100.

⁵³ For instance, in the Brazil-Ethiopia CFIA (2018), paragraph 3 of Article 24 stipulates:

3. The following may not be subject to arbitration: Article 13 - Security Exception, Article 14 Corporate Social Responsibility; Paragraph 1 of Article 15 Investment Measures and Combating Corruption and Illegality; and paragraph 2 of Article 16 - Provisions on Investment and Environment, Labor Affairs and Health.

See Art.24(3), *Brazil-Ethiopia BIT (2018)*, *supra* note 50.

⁵⁴ For instance, paragraph 1 of Article 17 (Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party) in the Japan-Laos BIT (2008) regulates that:

1. For the purposes of this Article, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of *any right* conferred by this Agreement with respect to investments of investors of that other Contracting Party (*emphasis added*).

See Art.17(1), *Agreement between Japan and the Lao People’s Democratic Republic for the Liberalisation, Promotion and Protection of Investment*, 2008.

⁵⁵ For instance, paragraph 1 of Article 15 (Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party) in the Japan-Oman BIT (2015) provides that:

1. For the purposes of this Agreement, an “investment dispute” is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of *any obligation* of the former Contracting Party under this Agreement with respect to the investor of that other Contracting Party or its investments in the Area of the former Contracting Party (*emphasis added*).

See Art.15(1), *Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment*, 2015.

concluded in 2007 and 2008⁵⁶ while the latter has dominated from 2008 onwards.⁵⁷ These typical anti-corruption provisions in Japanese IIAs impose a clear *obligation* on the host State; however, this may raise concern about whether or not this obligation amounts to a *right* conferred to investors. It is argued that ‘the anti-corruption provision suggests that no right is conferred on the putative investor, and that state parties may have intended that the obligation was only to be *inter partes*’.⁵⁸

Occasionally, Japan indeed excluded an investor’s right to arbitration on the premise of noncompliance with the anti-corruption provision in some of its IIAs, such as the Japan-Colombia BIT (2011).⁵⁹ Another example is the Japan-Mongolia EPA (2015), which excludes the access to ISA solely on the basis of the anti-corruption provision. It does so because, in this investment agreement, the anti-corruption provision appears in the chapter regulating general provisions; but the ISDS rules expressly narrow the scope of application to the investment chapter, stating that ‘the alleged breach of any obligation of the former party ***under this Chapter*** with respect to the investor of that other Party or its investments in the Area of the former Party...’ (*emphasis added*).⁶⁰

Remarkably, in the Japan-United Arab Emirates BIT (2018), the State parties mitigate this obligation by replacing ‘shall ensure’ with ‘endeavour to’,⁶¹ which is formulated as an obligation of conduct.⁶² This would present further challenges because it is hard to quantify ‘endeavor’

⁵⁶ See, e.g., *Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment*, 2007; *Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment*, 2008.

⁵⁷ See, e.g., *Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment*, 2018; *Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment*, 2014.

⁵⁸ Charles N Brower & Jawad Ahmad, “The State’s Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration” in Katia Yannaca-Small, ed, *Arbitration under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford University Press, 2018) 455 at 478.

⁵⁹ See Art.27(2), *Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment*, 2011.

⁶⁰ *Agreement between Japan and Mongolia for an Economic Partnership*, 2015.

⁶¹ Article 10 (Measures against Corruption) of the Japan-United Arab Emirates BIT (2018) provides (*emphasis added*):
Each Contracting Party *shall endeavour to take appropriate measures* and make efforts to prevent and combat corruption regarding matters covered by this Agreement in accordance with its applicable laws and regulations.

See Art.10, *Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investment*, 2018.

⁶² See Vid Prislán & Ruben Zandvliet, “Labour Provisions in International Investment Agreements: Prospects for Sustainable Development” in Andrea Bjorklund, ed, *Yearbook on International Investment Law and Policy 2012-2013* (New York, United States: Oxford University Press, 2014) 357 at 380. In this paper, the authors note that the

against a specific and accurate standard. At the same time, the burden of investors would increase since it is unclear what type of evidence would be satisfactory to meet these requirements and support their claims.

(2) ‘measures and efforts are undertaken to prevent and combat corruption’

This phrase broadly demonstrates States’ commitment to take measures and efforts to prevent and combat corruption; however, it fails to specify the concrete measures that are anticipated or how to effectively implement these measures. In the Japan-Indonesia EPA (2007), States add a qualifier—*appropriate*—before outlining the measures they intend to undertake.⁶³ Would this create another obligation for States to prove that the measures taken are *appropriate*? Otherwise, for those that have ratified international anti-corruption norms, such as the UNCAC, would any measures not fully consistent with the UNCAC or other anti-corruption norms be deemed ‘inappropriate’? These questions remain to be answered in ISA practice.

At the same time, considering that corruption might come in various forms and that a corrupt act may involve several parties in an international investment, such as investors, public officials of host States, and intermediaries, there are some differences as to the scope of the measures States have endeavored to undertake. For instance, while Japan embraces comprehensive measures of anti-corruption in most of its agreements, several have indeed limited themselves to combating corruption *solely of its public officials*, which, as an example, is expressed in Article 7 (Measures against Corruption) in the Japan-India EPA (2011):

Each Party shall, in accordance with its laws and regulations, take appropriate measures to prevent and combat corruption of its public officials regarding matters covered by this Agreement.⁶⁴

Obligations to promote anti-corruption of public officials should be differentiated from those of private entities (which basically exist in CSR-based anti-corruption provisions). The provisions

commitments of ‘shall strive to ensure’ are formulated as obligations of conduct and words like ‘shall not’, ‘will not’, and ‘shall ensure’ impose obligations of result. (*‘In most cases, the commitments in questions are formulated as obligations of conduct, in that they require that the contracting parties “shall strive to ensure” that they do not waive or otherwise derogate from their domestic labour legislation....On the other hand, there are several IIAs that go a step further and impose obligations of result, by providing either that the parties “shall/not”/“will not” derogate from their labor legislation, or that they “shall ensure” that no derogations take place.’*) Although the subject of Prislán and Zandvliet’s work is about labor provisions investment treaties, the understandings of the common language used in anti-corruption provisions are shared.

⁶³ Art.8, *Agreement between Japan and the Republic of Indonesia for an Economic Partnership*, 2007.

⁶⁴ Art.7, Chapter 8 (Investment), *Comprehensive Economic Partnership Agreement between Japan and the Republic of India*, 2011.

demonstrating a rough commitment to anti-corruption only require States to be responsible for enhancing the integrity of public officials. However, it is also argued that this function to enhance the obligation to investigate and prosecute as a precondition to raise corruption allegations by host States.⁶⁵

(3) ‘in accordance with its laws and regulations’

The language of ‘in accordance with its laws and regulations’ indicates that the main sources that States are relying on to ensure such measures are their domestic laws and regulations.⁶⁶ A broader interpretation of ‘its laws and regulations’ tend to include some regional and international norms, such as the UNCAC or the OCED Anti-Bribery Convention. Another explanation would be that States seek to preserve State parties’ regulatory autonomy in corruption matters, such as the United-States-Mexico-Canada Agreement (2019)⁶⁷ where it expressly ensures its regulatory autonomy in anti-corruption matters.⁶⁸

2. Provisions Aiming at Establishing Cooperation and Improving Anti-Corruption Standards

The second type of anti-corruption provisions directed at States seeks to establish a cooperative and collaborative regime in combating corruption in international investment, such as Article 22.5 (Anti-Corruption) in the US-Australia FTA (2004):⁶⁹

The Parties shall cooperate in seeking to eliminate bribery and corruption and to promote transparency in international trade. They are committed to seeking avenues in relevant international fora to address bribery, corruption, and transparency and to build on anti-corruption efforts in these fora.

⁶⁵ Brower & Ahmad, *supra* note 58 at 478.

⁶⁶ Stefan Mbiyavanga, “Improving Domestic Governance through International Investment Law: Should Bilateral Investment Treaties Learn from International Anti-Corruption Conventions?” (2017) 2017 OECD Global Anti-Corruption & Integrity Forum 17 at 8.

⁶⁷ The USMCA was first signed in 2018 during the 2018 G20 Summit; later, in December 2019, an updated version was re-signed by the three parties. Unless otherwise specified, the provisions, chapters, or text of the USMCA mentioned and discussed here refer to the revised version.

⁶⁸ Paragraph 5 of Article 27.2 in Chapter 27 (Anticorruption) of the USMCA (2018) provides:

The Parties recognize that the description of offenses adopted or maintained in accordance with this Chapter, and of the applicable legal defenses or legal principles controlling the lawfulness of conduct, is reserved to each Party’s law, and that those offenses shall be prosecuted and punished in accordance with each Party’s law.

See Art.27.2(5), *USMCA*, *supra* note 16.

⁶⁹ Art.22.5, *Free Trade Agreement between the Government of the United States of America and the Government of Australia*, 2004.

Similar treaty provisions can be found in other FTAs concluded by the US.⁷⁰ In fact, a number of States (including the US) normally prefer to advance the threshold of anti-corruption measures associated with statements of cooperation. Hence, most of the anti-corruption provisions of this type commonly found in IIAs not only craft *cooperation* issues but also address the necessity of *improving* anti-corruption standards. By referring to international and regional anti-corruption standards, either explicitly or in a general manner, the standards of domestic and transnational movement against corruption are elevated. This type of anti-corruption provision has been utilized mainly by the US in its early FTAs, by the EU in forms of association and framework agreements concluded since 2009, and by Canada in drafting FTAs and comprehensive economic treaties.

As early as 2003, the US has concluded several anti-corruption provisions affirming the importance of deterring bribery and corruption in a cooperative manner and specifying the international anti-corruption standards with which States should conform in undertaking anti-corruption measures. These are instructive references not only for the anti-corruption measures in domestic and transnational economic activities, but also for providing powerful guidance for arbitrators in cases where corruption defense or allegations are raised. The forms and content of provisions improving anti-corruption standards are actually present in various modes.

(1) ‘appropriate international anti-corruption instruments’

States may formulate anti-corruption provisions of this type through broadly mentioning international standards with abstract wording. Most paradigmatic in this regard should be Article 21.5 (Anti-Corruption) in the US-Singapore FTA (2003) which stipulates:⁷¹

Article 21.5 Anti-Corruption

1. Each Party reaffirms its firm existing commitment to the adoption, maintenance, and enforcement of effective measures, including deterrent penalties, against bribery and corruption in international business transactions. The Parties further commit to undertake best efforts to associate themselves with appropriate international anti-corruption instruments and to encourage and support appropriate anti-corruption initiatives and activities in relevant international fora.

2. The Parties shall cooperate to strive to eliminate bribery and corruption and to promote transparency in international trade. They will look for avenues in relevant international fora to address these issues and build upon the potential anti-corruption efforts in these fora.

⁷⁰ See Annex Table 3 for these US IIAs. Notably, the anti-corruption provisions aimed at establishing cooperation in these US FTAs are combined with other types of anti-corruption provisions, such as provisions with concrete anti-corruption measures, which are addressed in the following sections.

⁷¹ Art.21.5, *United States-Singapore Free Trade Agreement*, 2003.

The US has continued with this approach in its subsequent several FTAs, including the US-Morocco FTA (2004),⁷² the US-Oman FTA (2006)⁷³ and the US-Korea FTA (2007).⁷⁴ Canada, in the same vein, recognizes ‘the importance of regional and multilateral initiatives to prevent and combat bribery and corruption in international trade and investment’ in the Canada-Colombia FTA (2008),⁷⁵ the Canada-Peru FTA (2008)⁷⁶ and the Canada-Panama FTA (2010),⁷⁷ providing that:

Article 20.10 Cooperation in International Fora

The Parties recognize the importance of regional and multilateral initiatives to prevent and combat bribery and corruption in international trade and investment. The Parties agree to work together to advance efforts in regional and multilateral fora to prevent and combat bribery and corruption in international trade and investment, and to encourage and support appropriate initiatives.

Of course, these provisions not only affirm State commitments to combat corruption in international business transactions, but, at the same time, include additional commitments to work jointly and to behave in accordance with international anti-corruption instruments. However, statements like ‘appropriate international anti-corruption instruments’ and ‘appropriate anti-corruption initiatives and activities in relevant international fora’ have actually engendered great uncertainty and ambiguity. Whether instruments should or could be deemed ‘*appropriate*’ is a question to be asked on a case-by-case basis and may be vulnerable to arbitrariness. This signifies that anti-corruption provisions as such play a limited practical role in guiding States to promote movement against corruption and to implement anti-corruption efforts both at the domestic and international levels.

(2) Specific Regional and International Anti-Corruption Standards

More importantly, States may choose to express specific anti-corruption conventions as their standards in investment treaties. This includes the UNCAC, the OECD Anti-Bribery Convention, the United Nations Convention against Transnational Organized Crime (UNTOC), the Inter-

⁷² Para.5 of Art.18.5 (Anti-Corruption) in the Chapter 18 (Transparency), *Free Trade Agreement between the United States and Morocco*, 2004.

⁷³ Para.5 of Art.18.5 (Anti-Corruption) in the Chapter 18 (Transparency), *Free Trade Agreement between the United States and Oman*, 2006.

⁷⁴ Para.5 of Art.21.6 (Anti-Corruption) in the Chapter 21 (Transparency), *Free Trade Agreement between the United States and Korea*, 2007.

⁷⁵ Art.19.09 (Cooperation in International Fora) in Chapter 19 (Transparency), *Canada-Colombia FTA (2008)*, *supra* note 15.

⁷⁶ Art.19.09 (Cooperation in International Fora) in Chapter 19 (Transparency), *Canada-Peru FTA (2008)*, *supra* note 15.

⁷⁷ Art.20.10 (Cooperation in International Fora) in Chapter 20 (Transparency), *Free Trade Agreement between Canada and Panama*, 2010.

American Convention against Corruption (IACAC), and other instruments. Among all of these internationally recognized anti-corruption standards, the UNCAC contains the most commonly invoked anti-corruption norms.⁷⁸ This treaty has been incorporated in different investment treaties through distinct modes. In the Canada-Burkina Faso BIT (2015), the preamble recognizes ‘the undertaking in the United Nations Convention against Corruption’ while, in the main text, no mention of such convention is found.⁷⁹ In another bilateral agreement—the Guatemala-Trinidad and Tobago BIT (2013), States are required to uphold the practices consistent with the UNCAC *in accordance with their respective laws and regulations*.⁸⁰

At the same time, some anti-corruption provisions of this type are found in IIAs pursuing a more forward-looking and advanced agenda, which require *a full compliance and effective implementation* of internationally recognized anti-corruption standards. For instance, the US-Peru Trade Promotion Agreement (TPA) (2006) recognizes *the existing rights and obligations* under international and regional anti-corruption norms:⁸¹

Article 19.8 Cooperation in International Fora

1. The Parties recognize the importance of regional and multilateral initiatives to prevent and combat corruption, including bribery, in international trade and investment. The Parties shall work jointly to encourage and support appropriate initiatives in relevant international fora.
2. The Parties reaffirm their existing rights and obligations under the 1996 Inter-American Convention Against Corruption and shall work toward the implementation of measures to prevent and combat corruption consistent with the 2003 United Nations Convention Against Corruption.

Besides, some IIAs concluded by the EU, like the EU-Korea Framework Agreement (2010)⁸² and the EU-Iraq Partnership and Cooperation Agreement (2012),⁸³ ask for ‘*a full compliance with their existing mutual international obligations* in this area including on effective cooperation in the recovery of assets or funds derived from acts of corruption’. Others, like the EU-Vietnam

⁷⁸ The UNCAC is the first globally recognized anti-corruption treaty and has 187 State parties as of 6 February 2020.

⁷⁹ Preamble, *Canada-Burkina Faso BIT (2015)*, *supra* note 14.

⁸⁰ Art.17 (General Provisions), *Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments*, 2013.

⁸¹ Art.19.8, *Trade Promotion Agreement between the United States and Peru*, 2006.

⁸² Art.35 (Combating organized crime and corruption), TITLE VII (Cooperation in the area of justice, freedom and security), *Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part*, 2010.

⁸³ Art.106 (Combating organized crime and corruption), TITLE IV (Justice, Freedom and Security), *Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part*, 2012.

Framework Agreement on Comprehensive Partnership and Cooperation (2012),⁸⁴ the EU-Central American Common Market (CACM) Association Agreement (2012),⁸⁵ the EU-Georgia Association Agreement (2014),⁸⁶ the EU-Ukraine Association Agreement (2014),⁸⁷ the EU-Moldova Association Agreement (2014),⁸⁸ the EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (EPCA) (2015),⁸⁹ and the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) (2017)⁹⁰ take similar approaches where the parties are committed to *effectively implementing* the relevant international standards, for instance:

The Parties are committed to implementing effectively the relevant international standards, and in particular those enshrined in the United Nations Convention against Transnational Organised Crime (UNTOC) of 2000 and its three Protocols, the United Nations Convention against Corruption of 2003, and relevant Council of Europe instruments on preventing and combating corruption.

Meanwhile, some IIAs confine their adherence to international anti-corruption standards to a certain degree; the EU-Cameroon EPA (2009), for instance, narrows the compliance with international standards to *legislative and administrative measures*, providing:⁹¹

Article 105 Collaboration in tackling illegal financial activities

The Parties undertake to prevent and tackle fraudulent and corrupt illegal activities, money laundering and the financing of terrorism, and shall take the necessary legislative and administrative measures to comply with international standards, including those set out in the United Nations Convention against Corruption, the United Nations Convention against Transnational Organised Crime and its Protocols, the United Nations Convention for the Suppression of the Financing of Terrorism and the

⁸⁴ Art.23 (Combating organized crime), TITLE V (Cooperation in the area of justice), *Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one Part, and the Socialist Republic of Vietnam, of the other Part*, 2012.

⁸⁵ Art.37 (Organised Crime and Citizen Security), Art.38 (The Fight against Corruption), TITLE II (Justice, Freedom and Security), *Agreement Establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other*, 2012.

⁸⁶ Art.37 (Fight against organized crime and corruption), TITLE III (Justice, Freedom and Security), *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part*, 2014.

⁸⁷ Art.22 (Fight against crime and corruption), TITLE III (Justice, Freedom and Security), *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Ukraine, of the Other Part*, 2014.

⁸⁸ Art.16 (Preventing and combating organized crime, corruption and other illegal activities), TITLE III (Justice, Freedom and Security), *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part*, 2014.

⁸⁹ Art.242 (Fight against organized and transnational crime and corruption), TITLE V (Cooperation in area of freedom, security and justice), *Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part*, 2015.

⁹⁰ Art.16 (Fight against organized crime and corruption), TITLE III (Justice, Freedom and Security), *Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part and the Republic of Armenia, of the other part*, 2017.

⁹¹ Art.105 (Collaboration in tackling illegal financial activities), TITLE VIII (General and Final Provisions), *Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part*, 2009.

recommendations of the Financial Action Task Force. The Parties agree to exchange information and to cooperate in these areas.

This statement, in essence, imposes an obligation to bring domestic legislation into conformity with internationally recognized anti-corruption standards, but at the same time has restrictions in fully and effectively implementing international anti-corruption norms which generally contain other aspects of anti-corruption measures beyond national legislation requirements.

Other than the UNCAC, one can easily notice that the UNCTOC and its supplementary protocols have also been referred to multiple times.⁹² Some, like the EU-Moldova Association Agreement (2014)⁹³ and the EU-Kazakhstan EPCA (2015),⁹⁴ additionally insert ‘relevant Council of Europe instruments on preventing and combating corruption’ as applicable anti-corruption standards, while the EU-Armenia CEPA (2017) makes a reference to the UNCAC and ‘the recommendations of the Group of States against Corruption and the OECD’.⁹⁵ These instruments should include the OECD Anti-Bribery Convention as well as a series of its recommendations, such as the 2009 Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. Besides, as indicated in the US-Peru TPA (2006), the IACAC is another regional anti-corruption treaty preferred by the US in drafting its cooperative anti-corruption provisions.

The objects and purposes as well as the effective coverage of these distinct international and regional anti-corruption norms vary to certain degrees. First of all, the IACAC is the first multilateral anti-corruption convention that became regionally effective in 1997.⁹⁶ The OECD Anti-Bribery Convention came into force in 1999 and has a multilateral binding effect. Although being effective among its ratification members (currently 44 signatories comprised of all OECD countries and 8 non-OECD countries), this convention is significant because these members

⁹² For example, the EU-Cameroon EPA (2009), the EU-Korea Framework (2010), the EU-Iraq Partnership and Cooperation Agreement (2012), the EU-Viet Nam Framework Agreement on Comprehensive Partnership and Cooperation (2012), the EU-CACM (Central American Common Market) Association Agreement (2012), the EU-Georgia Association Agreement (2014) and the EU-Ukraine Association Agreement (2014).

⁹³ Art.16 (Preventing and combating organized crime, corruption and other illegal activities), TITLE III (Justice, Freedom and Security), *EU-Moldova Association Agreement (2014)*, *supra* note 88.

⁹⁴ Art.242 (Fight against organized and transnational crime and corruption), TITLE V (Cooperation in area of freedom, security and justice), *EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (2015)*, *supra* note 89.

⁹⁵ Art.16 (Fight against organized crime and corruption), TITLE III (Justice, Freedom and Security), *EU-Armenia Comprehensive and Enhanced Partnership Agreement (2017)*, *supra* note 90.

⁹⁶ IACAC, *supra* note 51.

involve a large portion of the FDI outflows and inflows.⁹⁷ Following this, the Council of Europe developed two treaties against corruption: the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, which came into force in 2002 and in 2003, respectively. The criminal treaty applies not only to public sectors but also to private entities, and the civil treaty arguably represents ‘the first attempt to define common international rules for civil litigation in corruption cases’.⁹⁸ The UNCAC is considered to be the first global anti-corruption treaty, and it is now used by 187 contracting States.

(3) A Geographical Feature

The above practices in IIAs have also indicated a geographical feature of the international standards referred by States, which is generally determined by the binding effects and their coverage of these international standards. An Asian country would not refer to the Criminal Law Convention on Corruption of the Council of Europe. After all, corruption is complicated in nature and varies from one country to another with regional characteristics. A corrupt act may present itself in various modes in different jurisdictions; thus, it is understandable that measures against corruption and standards thereof vary from one to another.

In this regard, the UNCAC as an anti-corruption instrument effective for the entire globe may not represent the highest standards because it needs to correspond to global anti-corruption practices and should not cause overly strict standards to some areas where the level of anti-corruption measures remains weak. Otherwise, States in those regions are unlikely to join in this universal anti-corruption treaty. On the other hand, all the standards in the UNCAC have been well recognized by the contracting States and should thus be fully implemented without the opportunity to make excuses in claiming that the obligations therein are inconsistent with the general practices in that particular jurisdiction.

Secondly, the purposes of these conventions are not entirely the same as one another, which to some extent, explains why the scope of the corruption offense and States’ corresponding

⁹⁷ See “OECD International Direct Investment Statistics (2018)”, (2018), online: <<https://www.oecd-ilibrary.org/docserver/bb55ccaf-en.pdf?expires=1580182700&id=id&accname=ocid195496&checksum=EAD90F73DB1D2C685D7E34C7DF18D624>>; Emil P Bolongaita, “Mandate without Means: Strengthening the OECD Anti-Bribery Convention” 2017 OECD Global Anti-Corruption & Integrity Forum 1–24 at 1.

⁹⁸ Philippa Webb, “The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?” (2005) 8:1 Journal of International Economic Law 191–229 at 199.

obligations vary from one treaty to another. The OECD Anti-Bribery Convention and European anti-corruption instruments have a narrower scope than the UNCAC and the IACAC.⁹⁹ For instance, the UNCAC addresses ‘a comprehensive penalization of bribery’ while the OECD Anti-Bribery Convention places emphasis on corruption ‘as a distortion of free competition’.¹⁰⁰

More specifically, the OECD Anti-Bribery Convention was negotiated under the US government’s pressure to level the playing field;¹⁰¹ as a result, this convention is an extended reflection of the Foreign Corrupt Practices Act (FCPA) in the international business area¹⁰² and aims to ‘use domestic law to combat the bribery of foreign public officials’.¹⁰³ By contrast, the UNCAC is not concerned with ensuring ‘fair and free trade’, but advocates that the problems and threats to the stability and security of societies engendered by corruption must be addressed.¹⁰⁴ The differences in objects and purposes determine the inherent divergencies of these standards. This implies that the standards enshrined in the numerous anti-corruption treaties are not unified or consolidated. Broadly referring to several anti-corruption conventions concurrently would trigger additional challenges in promoting the anti-corruption movement.¹⁰⁵

Remarkably, two recently signed and significant comprehensive investment treaties—the CPTPP and the USMCA—not only refer to the above-mentioned major regional and international anti-corruption conventions (the UNCAC, the UNCTOC, the IACAC, and the OECD Anti-Bribery Convention) but also recognize the importance of guiding instruments, towards both the public and private sectors, developed by other regional economic organizations. While the former recognizes the importance of anti-corruption principles contained in the documents of the Asia-

⁹⁹ *Ibid* at 194.

¹⁰⁰ Michael Kubiciel, “Core Criminal Law Provisions in the United Nations Convention Against Corruption” (2009) 9:1 International Criminal Law Review 139–155 at 154. For more discussions on the OECD Anti-Bribery Convention, see generally, Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention on Bribery: A Commentary*, 2d ed (Cambridge: Cambridge University Press, 2013).

¹⁰¹ Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) at 64.

¹⁰² The Foreign Corrupt Practices Act (1977) is an act issued by the US, aiming at prohibiting individuals and legal persons from conducting corrupt acts of foreign officials. The FCPA essentially contributes to building and developing an international legal framework of anti-corruption and has had a significant impact on the content of these current international and regional anti-corruption treaties. For more discussions on the FCPA and its relations to other international anti-corruption instruments, see also Jan Wouters, Cedric Ryngaert & Ann Sofie Cloots, “The International Legal Framework against Corruption: Achievements and Challenges” (2013) 14 Melbourne Journal of International Law 1–76; Kenneth W Abbott & Duncan Snidal, “Values and Interests: International Legalization in the Fight against Corruption” (2002) 31:1 The Journal of Legal Studies S141–S177.

¹⁰³ Webb, *supra* note 98 at 196.

¹⁰⁴ Kubiciel, *supra* note 100 at 154.

¹⁰⁵ These challenges are examined in the following chapter where suggestions are also proposed.

Pacific Economic Cooperation (APEC), like the APEC Conduct Principles for Public Officials and the APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector,¹⁰⁶ the latter reiterates their support to a more comprehensive list of anti-corruption instruments, including the G20 High Level Principles on Organizing against Corruption; G20 High Level Principles on Corruption and Growth; G20 Guiding Principles on Enforcement of the Foreign Bribery Offence (2013); G20 Guiding Principles to Combat Solicitation; G20 High Level Principles on the Liability of Legal Persons for Corruption; APEC Conduct Principles for Public Officials; and the APEC Principles on the Prevention of Bribery and Enforcement of Anti-Bribery Laws.¹⁰⁷

The rapid and extensive growth of anti-corruption norms at the regional and international levels indicates that anti-corruption has become a priority of the international community, and that the trend of curbing corruption has seeped into international investment and business activities. In order to achieve the continued prevention of corruption, all parties, both private and public, must contribute their efforts. Measures curbing corruption in international investment is thus necessary and imperative.

(4) Implications for Investor-State Arbitration

Before moving to the next type of anti-corruption, it is necessary to ascertain whether or not the anti-corruption provisions of this type are subject to arbitration. In reality, the EU IIAs identified in this section do not include an independent *chapter* on investment (not to say a deliberate or sophisticated ISDS regime), but rather only include a few *fragmentary mentions* of investment throughout the whole text. A comprehensive *agreement* on investment is expected to be concluded *separately*. As for those anti-corruption provisions aiming at improving standards in the Canadian IIAs and US IIAs, they are regulated in a separate chapter on transparency; however, the ISDS rules do not apply to provisions outside of the investment chapter.

To some degree, the common practice of excluding anti-corruption provisions of this type from ISA reflects the challenges that the policymakers are facing of in the process of integrating investment provisions into economic and trade agreements. Anti-corruption, protecting the

¹⁰⁶ Art.26.6 (Scope), Section C (Anti-Corruption), Chapter 26 (Transparency and Anticorruption), *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018, signed on 8 March 2018, entered into force on 30 December 2018.

¹⁰⁷ Art.27.2 (Scope), Chapter 27 (Anticorruption), *USMCA*, *supra* note 16.

environment, and safeguarding labor rights are universal goals for both trade market and investment development. However, there appears to be a paradigm exclusive to US FTAs: they incorporate comprehensive provisions addressing these societal values as independent chapters while simultaneously excluding investors from raising claims based on these non-investment provisions under the ISDS rules enshrined within the investment chapter. Overall, this scenario reflects the weak development of anti-corruption in international investment law, particularly in practices of treaties with investment provisions.

3. Provisions with Concrete Anti-Corruption Measures

The last type of provisions that address States' anti-corruption commitment and responsibilities are those specifying concrete and legible measures against corruption. In most times, concrete anti-corruption measures are accompanied by other types of anti-corruption provisions, like provisions establishing cooperation. This is common in the trade agreements concluded by the US, thus exhibiting a *hybrid* feature.

(1) Legislative Anti-Corruption Obligations in the US FTAs

The Office of the United States Trade Representative has issued 16 FTAs, a majority of which have incorporated anti-corruption obligations that must be undertaken by contracting States.¹⁰⁸ Ten of the US FTAs not only commit to establish cooperation and improve anti-corruption provisions, but also include concrete legislative measures to be taken at the domestic level. They are the US-Bahrain FTA (2004),¹⁰⁹ the CAFTA-DR FTA (2004),¹¹⁰ the US-Colombia TPA (2006),¹¹¹ the US-Korea FTA (2007),¹¹² the US-Morocco FTA (2004),¹¹³ the US-Oman FTA

¹⁰⁸ See "Office of the United States Trade Representative, Free Trade Agreements", online: <<https://ustr.gov/trade-agreements/free-trade-agreements>>. In total, there are 12 US FTAs so far addressing anti-corruption matters, except the Chile-US FTA (2003), the Israel-US FTA (1985), the Jordan-US FTA (2000) and the North American Free Trade Agreement (NAFTA) (1992). While 10 of these agreements incorporate anti-corruption obligations in a comprehensive and hybrid mode, the remaining two (the US-Australia FTA (2004) and the US-Singapore FTA (2003)), as discussed in the previous section, only confirm the commitment of establishing cooperation in combating corruption.

¹⁰⁹ Art.17.5(2)-(4) (Anti-Corruption), Chapter 17 (Transparency), *Agreement between the Government of the Kingdom of Bahrain and the Government of the United States of America on the Establishment of a Free Trade Area*, 2004.

¹¹⁰ Art.18.8(Anti-Corruption Measures), Section B (Anti-Corruption), Chapter 18 (Transparency), *The Dominican Republic-Central America-United States Free Trade Agreement*, 2004.

¹¹¹ Art.19.9 (Anti-Corruption Measures), Section B (Anti-Corruption), Chapter 19 (Transparency), *Trade Promotion Agreement between the United States and Colombia*, 2006.

¹¹² Art.21.6(2)-(4) (Anti-Corruption), Chapter 21 (Transparency), *US-Korea FTA (2007)*, *supra* note 74.

¹¹³ Art.18.5(2)-(4) (Anti-Corruption), Chapter 18 (Transparency), *US-Morocco FTA (2004)*, *supra* note 72.

(2006),¹¹⁴ the US-Panama TPA (2007),¹¹⁵ the US-Peru TPA (2006),¹¹⁶ the USMCA (2018)¹¹⁷ and the Trans-Pacific Partnership Agreement (TPP, now is the CPTPP).¹¹⁸ These comprehensive anti-corruption provisions (or sections) are mostly addressed in the *Chapter of Transparency* and embrace several aspects of anti-corruption, such as their commitment to eliminate corruption in international trade and investment, concrete legislative obligations on corruption and the establishment of a collaboration forum. The wording of these anti-corruption sections is, for the most part, similar or virtually identical to one another (with the exception of the USMCA and the CPTPP, which have regulated a wider range of anti-corruption measures). Taking the US-Korea FTA (2007) as an example, Article 21.6 stipulates:¹¹⁹

Chapter 21 Transparency

Article 21.6 Anti-Corruption

1. The Parties reaffirm their resolve to eliminate bribery and corruption in international trade and investment.

2. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:

(a) a public official of the Party or a person who performs public functions for the Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(b) any person subject to the jurisdiction of the Party intentionally to offer or grant, directly or indirectly, to a public official of the Party or a person who performs public functions for the Party any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(c) any person subject to the jurisdiction of the Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, 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; and

(d) any person subject to the jurisdiction of the Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs (a) through (c).

3. Each Party shall adopt or maintain appropriate penalties and procedures to enforce the criminal measures that it adopts or maintains in conformity with paragraph 2.

¹¹⁴ Art.18.5(2)-(4) (Anti-Corruption), Chapter 18 (Transparency), *Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area*, 2006.

¹¹⁵ Art.18.8 (Anti-Corruption Measures), Section B (Anti-Corruption), Chapter 18 (Transparency), *United States-Panama Trade Promotion Agreement*, 2007.

¹¹⁶ Art.19.9 (Anti-Corruption Measures), Section B (Anti-Corruption), Chapter 19 (Transparency), *US-Peru TPA (2006)*, *supra* note 81.

¹¹⁷ Art.27.3 (Measures to Combat Corruption), Chapter 27 (Anticorruption), *USMCA*, *supra* note 16.

¹¹⁸ Now is CPTPP and the US has withdrawn from this comprehensive agreement on 23 January 2017. In the CPTPP, Art.26.7 (Measures to Combat Corruption) regulates concrete anti-corruption measures, *CPTPP*, *supra* note 106.

¹¹⁹ Art.21.6 (Anti-Corruption), *US-Korea FTA (2007)*, *supra* note 74.

4. Each Party shall adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery described in paragraph 2.

5. The Parties recognize the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment. The Parties shall endeavor to work jointly to encourage and support appropriate initiatives in relevant international fora.

According to the second paragraph of this article, the contracting States came to a consensus on what should be defined as a corrupt act as well as the necessity to classify these acts as criminal offenses. This regulation not only conforms to the standards in regional and global anti-corruption treaties, but are stronger, broader and more specific in certain respects.

First of all, the OECD Anti-Bribery Convention only recognizes the importance of preventing ‘solicitation of bribes from individuals and enterprises in international business transactions’ in the preamble and contains no relevant rules in the main text.¹²⁰ However, the provisions here not only outlaw the supply side of corruption—offering a bribe to a domestic public official (Art.21.6.2.b) or to a foreign official (Art.21.6.2.c)—but also expressly prohibit the demand side

¹²⁰ Article 1 of the OECD Anti-Bribery Convention stipulates the offense of bribery of foreign public officials, prohibiting offering bribes to foreign public officials. Although the Good Practice Guidance on Implementing Specific Articles of the OECD Anti-Bribery Convention explains that ‘Article 1 of the OECD Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe’ and emphasizes the need to provide assistance when companies of member countries are confronted with bribe solicitation abroad, such calling has no binding force on the contracting nations and may prove difficult to be implemented. Further, there is no mention of the acceptance of a bribe throughout the OECD Anti-Bribery Convention. See Annex I (Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), *OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 2009, (with amendments adopted by Council 18 February 2010 to reflect the inclusion of Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance); Art.1, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed on 17 December 1997, entered into force on 15 February 1999.

of corruption—soliciting or accepting a bribe (Art.21.6.2.a)¹²¹—which is consistent with the US laws and practice on anti-corruption.¹²²

Secondly, the standards on the purposes of giving a bribe established in these FTAs are consistent with the UNCAC and the OECD Convention. In particular, the UNCAC applies distinct standards to the bribery of *national* public officials and the bribery of *foreign* public officials. Art.21.6.2.b of the Korea-US FTA covers bribery of national public officials ‘in exchange for any act or omission *in the performance of his public functions*’ which equals to ‘in order that the official act or refrain from acting in the exercise of his or her official duties’—a *function* approach—established in Article 15 of the UNCAC.¹²³ As for bribery of *foreign* public officials, Art.21.6.2.c of the US-Korea FTA employs a *business* approach—‘in order to obtain or retain business or other improper advantage *in the conduct of international business*’—which is, virtually verbatim, the

¹²¹ The supply side and the demand side of international corruption are occasionally defined as ‘active corruption’ and ‘passive corruption’ respectively. In the EU-Ukraine Association Agreement (2014), detailed definitions of these two concepts are provided:

“Active corruption” shall mean the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the EU’s financial interests.

“Passive corruption” shall mean the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the EU’s financial interests.

See Annex XLII to TITLE VI (Financial Cooperation, with Anti-Fraud Provisions), *EU-Ukraine Association Agreement (2014)*, *supra* note 87.

Nonetheless, although the OECD Anti-Bribery Convention solely addresses active bribery (offenses of promising or giving the bribe), the Commentaries to this Convention defined ‘passive bribery’ as ‘the offence committed by the official who receives the bribe’ without distinguishing between active requesting (or another word—soliciting) and mere accepting of a bribe. It explains:

This Convention deals with what, in the law of some countries, is called “active corruption” or “active bribery”, meaning the offence committed by the person who promises or gives the bribe, as contrasted with “passive bribery”, the offence committed by the official who receives the bribe. The Convention does not utilise the term “active bribery” simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

See *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 1997 at para 1, adopted by the Negotiating Conference on 21 November, 1997.

¹²² § 201 (Bribery of public officials and witnesses), *18 U.S. Code Chapter 11 - Bribery, Graft, and Conflicts of Interests*.

¹²³ Art.15 Bribery of national public officials, *UNCAC*, *supra* note 51.

statement in Article 16 of the UNCAC¹²⁴ as well as that in Article 1(1) of the OECD Anti-Bribery Convention.¹²⁵

The *function* approach is considered a much broader and more generalized standard than the *business* approach, as it does not limit the purpose of ‘obtaining or retaining businesses’ which is mostly linked to substantial corruption and is the focus of cross-border anti-corruption efforts. On the contrary, small facilitation payments (also called grease payments or speed payments), which are aimed at inducing public officials to speed up ‘a routine or necessary action to which the payer has legal or other entitlement’,¹²⁶ are generally excluded from the scope of the *business* approach.¹²⁷ Nonetheless, these small payments constitute a challenge to the public integrity and good governance and are thus proscribed in certain countries.¹²⁸

Thirdly, as for the standards on the purposes of soliciting or accepting a bribe of public officials, the provisions in these FTAs are broader than the equivalent standards enshrined in the UNCAC. The former FTAs uniformly rely on the *function* standard while the latter instrument of the UN merely associates the *function* standard with solicitation and acceptance by *domestic public*

¹²⁴ Art.16 Bribery of foreign public officials relates to those acts ‘in order to obtain or retain business or other undue advantage in relation to the conduct of international business’, see *Ibid*.

¹²⁵ ‘In order to obtain or retain business or other improper advantage in the conduct of international business’, which is essentially identical to that in the UNCAC. See also Article 1(1), *OECD Anti-Bribery Convention*, *supra* note 51.

¹²⁶ See “Facilitation Payments, Anti-Corruption Glossary”, online: *Transparency International* <https://www.transparency.org/glossary/term/facilitation_payments>. It is worth noting that early efforts focused more on deterring corruption for the purpose of ‘obtaining or retaining of business’ (rather than facilitation payments). But as people understood better the global scourge of corruption, small payments to speed up routine governmental processes are now included as one form of the broad concept of corruption.

¹²⁷ *Commentaries on the OECD Anti-Bribery Convention*, *supra* note 121 at para 9.

¹²⁸ The Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (adopted on 26 November 2009) recognizes the corrosive effect of facilitation payments and recommends States to take measures prohibiting the use of and the solicitation and acceptance of such payments. More precisely, it provides:

Criminalisation of Bribery of Foreign Public Officials

...

VI. RECOMMENDS, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:

- i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;
- ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies’ books and financial records.

VII. URGES all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments.

See *OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, *supra* note 120 at para VI.

*officials*¹²⁹ while applying the lower *business* standard to solicitation and acceptance by *foreign public officials*.¹³⁰

In addition to establishing corruption as a criminal offense, the following paragraph (Art.21.6.3) further requires States to impose proper sanctions on the corruption offense and outlines the necessary procedures to enforce criminal measures. Among these FTAs, four of them additionally establish criminal responsibility for enterprises who have committed a corruption offense,¹³¹ like paragraph 3 of Article 18.8 Anti-Corruption Measures of the CAFTA-DR FTA:¹³²

Chapter 18 Transparency

Section B Anti-Corruption

Article 18.8 Anti-Corruption Measures

...

3. In the event that, under the legal system of a Party, criminal responsibility is not applicable to enterprises, that Party shall ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions, for any of the offenses described in paragraph 1 (equals to Article 21.6.2 of the Korea-US FTA).

This obligation is a verbatim quotation of paragraph 2 of Article 3 (Sanctions) of the OECD Anti-Bribery Convention but confers a broader range which includes not only bribery of foreign public officials but also bribery of national public officials and acts of soliciting and accepting a bribe. Criminal responsibility on enterprises is not a mandatory obligation under these FTAs and rests on the domestic legal system, which leaves some regulatory room to State parties on this matter. This seems to be an internationally recognized standard because Article 2 (Responsibility of Legal Persons) in the treaty of the OECD requires member States to take such measures ‘in accordance with its legal principles’ and paragraph 1 of Article 26 (Liability of legal persons) in the UNCAC obliges States to perform this obligation ‘consistent with its legal principles’. Notwithstanding the foregoing, the UNCAC encourages States to recognize the relevant criminal, civil and/or administrative liabilities of legal persons.¹³³

¹²⁹ Article 15(b), *UNCAC*, *supra* note 51.

¹³⁰ Article 16.2, *Ibid*.

¹³¹ Other three FTAs are the US-Peru TPA (2006), the US-Chile FTA (2003), and the US-Panama FTA (2007).

¹³² *CAFTA-DR FTA (2004)*, *supra* note 110.

¹³³ Article 26 Liability of legal persons of the UNCAC provides:

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

Since the early 21st century, the US has maintained the practice of mainstreaming concrete anti-corruption principles into trade agreements with investment chapters. However, the rules of ISDS in investment chapters are generally not applicable to these anti-corruption provisions; their enforcement therefore still remains at the domestic level. This means that investors cannot use these provisions as a cause of action to initiate arbitration proceedings, but it does not necessarily mean that arbitrators should not make a reference to these standards when there are allegations of corruption that need to be examined.¹³⁴ The effectiveness of the anti-corruption movement in international investment thus remains problematic and requires further investigation when there is a lack of a well-established enforcement mechanism on the international plane. Still, the US should be a pioneer in promoting transparency and eliminating corruption in international investment and trade activities.

(2) A Word on the Anti-Corruption Chapter in the USMCA and the CPTPP

The CPTPP is a multilateral agreement of trade with an investment chapter signed by eleven countries in the Asia-Pacific region,¹³⁵ which is the successor of the TPP after the withdrawal of the US. The USMCA is a trilateral trade and investment agreement, drafted to replace its former antecedent/predecessor—NAFTA (North American Free Trade Agreement) and thus is also named as NAFTA 2.0. While the NAFTA contains no words on anti-corruption, the USMCA has experienced a moderated innovation on this matter by incorporating a comprehensive chapter on anti-corruption, which follows the current trend of regulating anti-corruption through FTAs.¹³⁶

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

See *UNCAC*, *supra* note 51.

¹³⁴ As required by the general treaty interpretation laws (Art.31 of the Vienna Convention on the Law of Treaties (VCLT)), a treaty shall be interpreted in good faith by looking at the object and purpose and the entire context (including the preamble and the annex, if any). See Art.31(1), *Vienna Convention on the Law of Treaties*, 1969 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969).

¹³⁵ They are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

¹³⁶ Chijioke Chijioke-Oforji, “Regulating Corruption Through Free Trade Agreements: An Analysis of the NAFTA 2.0 Anti-Corruption Provisions” (2019) *Transnational Dispute Management* 1–13 at 13 forthcoming. See also, Victoria Gaytan, “The USMCA and its new anti-corruption provisions”, (19 October 2018), online: *Global Americans* <<https://theglobalamericans.org/2018/10/the-usmca-and-its-new-anti-corruption-provisions/>>. It has been recognized that States are increasingly regulating corruption and transparency through regional trade agreements (RTAs) and FTAs, see, e.g., *Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade*, OECD Trade Policy Papers, by Iza Lejárraga, OECD Trade Policy Papers 152 (2013) at 6–7.

Both the CPTPP and the USMCA contain a series of measures against corruption through two key dimensions—States’ responsibilities and investors’ obligations, whose anti-corruption provisions are comprehensive, more balanced, most explicit and greatly detailed. This set of anti-corruption provisions generally addresses corruption through the following aspects: Scope, Measures to Combat Corruption, Promoting Integrity among Public Officials, Participation of Private Sector and Society, Application and Enforcement of Anti-Corruption Laws, Relation to Other Agreements, Dispute Settlement, and Cooperation. With slight differences existing between these two treaties, a majority of the anti-corruption chapter in the USMCA reproduces those provisions in the CPTPP.

On the whole, both the USMCA and the CPTPP adopt higher and more practical standards, compared to the abovementioned IIAs. Firstly, they not only make a reference to the major international and regional norms of anti-corruption but also recognize the adherence to other instruments developed by the G20 and the APEC. In particular, the USMCA makes a special point of the possible modes of cooperation, such as exchanging information between domestic anti-corruption agencies, sharing experiences and best practices, and undertaking technical activities like training programs.¹³⁷ This is arguably important for Mexico who ‘needs to bolster greatly its institutional capacities for investigating and prosecuting corruption activities’.¹³⁸

Secondly, in addition to the concrete legislative measures, these two treaties further address the importance of the ‘integrity, honesty and responsibility among public officials’ and thus incorporate a list of administrative measures that should be implemented to achieve this aim.¹³⁹ The USMCA even makes a clear and explicit clarification on the harmfulness of the facilitation payments and encourages enterprises to refrain from taking this practice.¹⁴⁰

¹³⁷ Art.27.9 (Cooperation), Chapter 27 (Anticorruption), *USMCA*, *supra* note 16.

¹³⁸ Luis Dantón Martínez Corres, “USMCA heralds new era of anticorruption and compliance”, (3 October 2018), online: *The FCPA Blog* <<https://fcpublog.com/2018/10/03/luis-danton-martinez-corres-usmca-heralds-new-era-of-anticor/>>.

¹³⁹ Art.27.4 (Promoting Integrity among Public Officials), Chapter 27 (Anticorruption), *USMCA*, *supra* note 16. Art.26.8 (Promoting Integrity among Public Officials), Section C (Anti-Corruption), Chapter 26 (Transparency and Anticorruption), *CPTPP*, *supra* note 106.

¹⁴⁰ The USMCA provides:

The Parties recognize the harmful effects of facilitation payments. Each Party shall, in accordance with its laws and regulations:

- (a) encourage enterprises to prohibit or discourage the use of facilitation payments; and
- (b) take steps to raise awareness among its public officials of its bribery laws, with a view to stopping the solicitation and the acceptance of facilitation payments.

Thirdly, they have more promotional rules on private sectors and society in preventing corruption. In addition to underlining the promotion of private entities' involvement in the fight against corruption, 'professional associations' and 'nongovernmental organizations' are also placed with high expectations, aiming at assisting enterprises in developing CSR, including measures in preventing and detecting corruption.¹⁴¹

Fourthly, an effective regime of enforcing anti-corruption provisions is provided within these agreements. In spite of certain limits (like excluding matters arising under the clause of application and enforcement of anti-corruption laws), they expressly admit the Dispute Settlement Chapter applying here.¹⁴² The USMCA further requests an expertise in the area of anti-corruption attending in disputes arising out of this anti-corruption chapter.¹⁴³

See Art.27.3(8), *USMCA*, *supra* note 16.

¹⁴¹ See Art.26.10 (Participation of Private Sector and Society), Section C (Anti-Corruption), Chapter 26 (Transparency), *CPTPP*, *supra* note 106. Art.27.5 (Participation of Private Sector and Society), Chapter 27 (Anticorruption), *USMCA*, *supra* note 16. These two agreements employ, for the most part, the same language at this point and here provides several paragraphs in Art.26.10 of the CPTPP:

1. Each Party shall take appropriate measures, within its means and in accordance with fundamental principles of its legal system, to promote the active participation of individuals and groups outside the public sector, such as enterprises, civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption in matters affecting international trade or investment, and to raise public awareness regarding the existence, causes and gravity of, and the threat posed by, corruption. To this end, a Party may:

(a) undertake public information activities and public education programmes that contribute to non-tolerance of corruption;

(b) adopt or maintain measures to encourage professional associations and other non- governmental organisations, if appropriate, in their efforts to encourage and assist enterprises, in particular SMEs, in developing internal controls, ethics and compliance programmes or measures for preventing and detecting bribery and corruption in international trade and investment;

(c) adopt or maintain measures to encourage company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those that contribute to preventing and detecting bribery and corruption in international trade and investment; and

(d) adopt or maintain measures that respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption.

2. Each Party shall endeavour to encourage private enterprises, taking into account their structure and size, to:

(a) develop and adopt sufficient internal auditing controls to assist in preventing and detecting acts of corruption in matters affecting international trade or investment; and

(b) ensure that their accounts and required financial statements are subject to appropriate auditing and certification procedures.

¹⁴² Art.26.12 (Dispute Settlement), Section C (Anti-Corruption), Chapter 26 (Transparency), *CPTPP*, *supra* note 106. Art.27.8 (Dispute Settlement), Chapter 27 (Anticorruption), *USMCA*, *supra* note 16.

¹⁴³ USMCA provides that: 'Further to Article 31.8 (Roster and Qualifications of Panelists), the panel shall have expertise in the area of anticorruption under dispute.' See Art.27.8(6), *USMCA*, *supra* note 16.

Overall, the comprehensive anti-corruption provisions contained in the USMCA and the CPTPP are likely to build a unified and advanced regime against corruption in international trade and investment and to have a profound impact on future investment agreement drafting practice.¹⁴⁴

(3) Concrete Measures in Other Treaties

In addition to the FTAs concluded by the US, concrete measures against corruption have also been incorporated in some other investment treaties requiring States to take legislative action and other related steps to curb corruption in international investment, including treaties like the Canada-Peru FTA (2008),¹⁴⁵ the Canada-Colombia FTA (2008),¹⁴⁶ and the Canada-Panama (2010).¹⁴⁷

Such practice also appears in model investment treaties. Notably, it can be found in the IISD Model Agreement 2005 where anti-corruption obligations are imposed on three actors: foreign investors,¹⁴⁸ host States¹⁴⁹ and home States¹⁵⁰ through separate clauses. Article 22 and Article 32 respectively force host States and home States to criminalize acts of offering, soliciting and accepting of a bribe, to ensure appropriate criminal enforcement and sanctions on such offenses, and to endeavor to prosecute corrupt activities in accordance with their respective domestic laws. Paragraph (C) of Article 32 further discharges an extra obligation on home States, providing that:

Home states shall, when possible, provide all available information that might assist a dispute settlement tribunal under this Agreement in determining whether a breach of an anti-corruption obligation has occurred.

¹⁴⁴ It is worth mentioning that the Brazil-Chile FTA (2018) also contains a comprehensive section on anti-corruption which addresses a wide range of anti-corruption issues. Art.20.7 is directed at ascertaining anti-corruption measures; however, it takes a different approach compared to those in the US FTAs. It does not specify what would constitute an act of corruption but refers to the corruption definition articles in the UNCAC, IACAC and the OECD Anti-Bribery Convention. Art.20.9 and Art.20.10 respectively contain regulations on the ‘promotion of the integrity of public officials’ and ‘participation of the private sector and civil society’. But all of the provisions in this section are beyond subject to the dispute settlement chapter. See Arts.20.6-10, Section B (Anti-Corruption), Chapter 20 (Transparency), *Free Trade Agreement between Brazil and Chile*, 2018.

¹⁴⁵ Art.19.08 (Anti-Corruption Measures), Section B (Anti-Corruption), Chapter 19 (Transparency), *Canada-Peru FTA (2008)*, *supra* note 15.

¹⁴⁶ Art.19.08 (Anti-Corruption Measures), Section B (Anti-Corruption), Chapter 19 (Transparency), *Canada-Colombia FTA (2008)*, *supra* note 15.

¹⁴⁷ Art.21.09 (Anti-corruption Measures), Section B (Anti-Corruption), Chapter 20 (Transparency), *Canada-Panama FTA (2010)*, *supra* note 77.

¹⁴⁸ Art.13 (Anti-corruption), Part 3 (Obligations and Duties of Investors and Investments), International Institute for Sustainable Development (IISD), *supra* note 20.

¹⁴⁹ Art.22 (Anti-Corruption), Part 4 (Host State Obligations), *Ibid.*

¹⁵⁰ Art.32 (Anti-Corruption), Part 6 (Home State Rights and Obligations), *Ibid.*

Later in 2012, the SADC published its Model Bilateral Investment Treaty Template (SADC Model BIT) where common obligations on corruption are primarily imposed on investors¹⁵¹ and the specific obligation on States is, consistent with their applicable law, to prosecute, convict and penalize the persons who are involved or complicit in corrupt activities.¹⁵² This approach is also practiced in the Morocco-Nigeria BIT (2016).¹⁵³

These provisions are remarkable for several reasons. First of all, the obligation to provide information is aimed directly at arbitration proceedings. It requires home States to participate in arbitration procedures by providing necessary information and resources in cases where arbitrators are confronted with corruption issues. This obligation could be implemented at different stages of an arbitration proceeding as long as there is a need to determine whether a non-compliance of an investor's conduct with the anti-corruption obligation exists in the course of an investment. A variety of sources could fall within the coverage of 'all available information' required by this provision. This might be a formal and effective decision made by domestic proceedings on the act at issue: such as a judicial decision rendered by a court or an administrative decision issued by an administrative body. Home States may also be asked to provide domestic anti-corruption laws and regulations and related interpretations on these decrees or particular clauses since national legislation on anti-corruption could be significant and could constitute main resources relied upon by arbitrators who deal with allegations of corruption. Moreover, arbitrators might request that home States provide necessary evidence to examine an investor's behavior.

Investigation on corrupt acts in ISA has been a long and tough challenge faced by both States and arbitrators.¹⁵⁴ There is reason to say that this provision considers this difficulty. It largely facilitates and promotes the fact-finding process of a corrupt act because home States are indeed in a better position to provide important information, especially when some vital documents are only available in the jurisdiction of the home State. However, there are also risks that home States may claim the 'impossibility' to provide such information when they consider the potential for negative

¹⁵¹ The Commentaries to the SADC Model BIT explain that instead of drafting separate clauses for investors, home States, and host States, this anti-corruption provision provides a common obligation for each party. Arts.10(1)-(3) of Model BIT are directed at foreign investors and were analyzed in the previous section of this chapter; here, the focus is Art.10(4) which includes a specific prosecution obligation on States. See Art.10, South African Development Community (SADC), *supra* note 22.

¹⁵² Art.10(4) (Common Obligation against Corruption), *Ibid*.

¹⁵³ Art.17(5) (Anti-Corruption), *Morocco-Nigeria BIT (2016)*, *supra* note 24.

¹⁵⁴ *UNCTAD World Investment Report 2017: Investment and the Digital Economy*, 2017 at 130.

impact on their own interests. For instance, if arbitrators continue to apply the approaches in *World Duty Free* and *Metal-Tech* cases, where all the claims of investors were entirely denied on the premise of a positive finding of a corrupt act, home States may choose not to cooperate with arbitral tribunals out of the desire to protect their own nationals (either individuals or legal persons investors) by *using the excuse* that it is not ‘possible’ for them to implement this obligation.

Moreover, provisions to prosecute the involved persons (both investors and public officials who have engaged in corruption) are much clearer and more precise than the obligation roughly requiring States to establish sanctions on corruption offenses. More importantly, this arguably might ‘be an indication that host State should be liable for the corruption of its public officials in the same way as investors’ claims may lack legal protection under the BIT’.¹⁵⁵ It has been proposed to condition a State’s invocation of corruption defense on the premise that it has prosecuted the involved public officials.¹⁵⁶ This provision, which expressly demands that States take effective measures, is thus said to provide a level playing field in cases of corruption.¹⁵⁷ Although whether or not the ‘prosecuting’ obligation is satisfactory in terms of a State’s responsibility for its involvement in a corrupt act remains problematic, the provision of this type would, to some extent, pressure States to act in compliance with the rule of law.

¹⁵⁵ Okechukwu Ejims, “The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?” (2019) 34:1 ICSID Review 62–84 at 15.

¹⁵⁶ See Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014); Brower & Ahmad, *supra* note 58.

¹⁵⁷ Ejims, *supra* note 155 at 74–75.

CHAPTER 6 A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ANTI-CORRUPTION PROVISIONS

A presentation of the core anti-corruption provisions would be incomplete without an in-depth and comprehensive assessment of its quantitative and qualitative elements, which are vital to a substantial empirical legal analysis. This chapter thus aims to investigate the main features, the development tendencies, and the capacity for deterrence of the core anti-corruption provisions found in the existing international investment agreements (IIAs). While the quantity assessment focuses on their number and concentration in an IIA and their generational and geographical distribution in the whole investment treaty system, the quality mainly lies in the effectiveness of achieving the intended objectives; that is, whether or not and to what extent anti-corruption provisions assist arbitrators in dealing with allegations of corruption, promote sustainable development, achieve the goal of establishing a symmetric balance of the investment treaties, and benefit the foreign direct investment (FDI) attractiveness. This assessment allows for the identification of the underlying challenges facing these anti-corruption provisions and will further unveil efforts need to be taken to promote the deterrence effectiveness over international investment treaties.

This thesis argues that the current IIA regime is experiencing a *shortage* of anti-corruption provisions and that the normative integration of anti-corruption provisions is *fragmented*. While we can notice a trend of *slow* increase of incorporating anti-corruption provisions in investment treaties in recent years, I argue that we must *accelerate* this practice in order to meet the growing need for corruption deterrence at the transnational and international levels. At the same time, quality assessments allow us to come to the conclusion that a large number of the current anti-corruption norms in IIAs can *hardly* achieve the identified expectations (as discussed in Chapter 4). More specifically, anti-corruption provisions that contain State commitments might, to some extent, play an active role in preventing transnational corruption in international investment activities, though mainly through domestic institutions and proceedings; provisions directed at investors, however, are either *weak* in terms of enforcement (i.e., corporate social responsibility (CSR)-based anti-corruption provisions) or *tilting the balance towards host States* (i.e., ‘carve-out’ anti-corruption provisions). Along with an examination of the effectiveness of anti-corruption

provisions, this chapter also attempts to offer several practical proposals to promote the overall effectiveness of anti-corruption provisions and the level of corruption deterrence of investment agreements.

A. The Quantitative Assessment of Anti-Corruption Provisions in Investment Treaties

To evaluate the degree of corruption deterrence of a bilateral investment treaty (BIT) and of the entire investment treaties regime, the number of anti-corruption provisions is a uniquely important factor to consider. The quantity assessment has been undertaken from four different angles: the number, the concentration, the geographical scatter and the generational distribution. First, discussions on the total number of IIAs containing anti-corruption provisions and their scale out of all the IIAs in existence should be given. Secondly, the concentration element is aimed at gaining an understanding of how many (and how many types of) anti-corruption provisions can be found in one IIA. Thirdly, given that the campaign against corruption operates around the world and concerns every State and region, it is necessary to study the geographical scatter of these anti-corruption provisions. Fourthly, to identify future trend of anti-corruption provisions in IIA-making practices, analysis of the generational distribution is equally necessary.

1. The Number of Anti-Corruption Provisions

As of January 2020, there are 2902 BITs (2335 in force) and 389 treaties with investment provisions (TIPs) (314 have entered into force) in existence. In accordance with the IIA Mapping Project initiated by the United Nations Conference on Trade and Development (UNCTAD), 45 out of the 2576 mapped treaties have made some mention of ‘corruption’ or ‘anti-corruption’ in the main text (except in preambles),¹ amounting to less than 2% of the total investment treaties in existence. There are a number of unmapped IIAs that have inserted anti-corruption provisions as well, including those recently signed Brazilian CFIAAs (Cooperation and Facilitation Investment Agreements), the United States’ (US) free trade agreements (FTAs), Canadian FTAs, and a large majority of those European Union’s (EU) association and framework agreements (see Table 1). When all of the unmapped IIAs (in total around 82 IIAs) are added together, the percentage still falls below 3%.

¹ UNCTAD, *International Investment Agreements Navigator, Mapping of IIA Content*, [UNCTAD Mapping of IIA Content].

Table 1 The aggregate IIAs that contain anti-corruption provisions²

	BITs	TIPs	Total
Brazil	10	2	12
Canada	10	8	18
EU	1	10	11
Japan	19	6	25
US	/	10	10
Others	4	2	6
Total	44	38	82

Among the 82 IIAs, 44 of them are BITs and the remaining 38 are in forms of treaties with investment chapters. Although the identified BITs account for a relative larger portion than TIPs, 44 identified BITs merely stand for approximately 1.5% of the total BITs in existence while 38 TIPs stand for nearly 10% of the total TIPs. Table 1 further shows that Brazil and Japan prefer to address anti-corruption issues in BITs while the EU and the US are more likely to insert anti-corruption provisions in TIPs. One underlying ground would be the increasing practices of regulating investment issues through comprehensive economic treaties. The US and the EU have consistently followed this practice in recent years, which reasonably explains why few anti-corruption provisions could be found in BITs signed by the US and those signed by the EU.

The scarcity of anti-corruption provisions in IIA practices suggests that the campaign against corruption in the field of international investment law has not been taken seriously by States and has not received its due attention. This scenario might be common to other innovative elements developed in this very recent IIA reform, such as environmental protection, safeguards for labor

² Here are some clarifications on this chart: (i) The TIPs should embrace a variety forms of agreements with investment chapters or investment provisions, including FTAs, Economic Partnership Agreements (EPAs), Trade Promotion Agreements (TPAs), Economic and Trade Expansion Agreements (ETEs), etc. The bilateral investment agreements signed by Brazil are actually in forms of CFIA but are categorized here under the BIT heading. The EU signed an investment promotion agreement (IPA) with Vietnam which is also factored into the number of BITs. (ii) The total number of IIAs containing anti-corruption provisions in this chart is 82 which includes 45 mapped IIAs under the UNCTAD IIA Mapping Project and 37 unmapped IIAs. (iii) It should be noted that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States-Mexico-Canada Agreement (USMCA) and the Canada-EU Comprehensive Economic and Trade Agreement (CETA) are classified to Canadian BITs and are not double counted to Japan, the US, the EU, or other countries that are also the contracting States to these agreements.

rights, and transparency promotion (an obligation directed at States to publish laws and regulations). In reality, the IIA Mapping Project shows that clauses of transparency have been regulated in 365 mapped IIAs, that 317 investment agreements have incorporated provisions regarding health and environment, that 112 mapped IIAs contain labor standards in the text, and that 40 IIAs contain CSR clauses. These figures point to the overall inadequacy of these sustainable development provisions and reveal that the development of anti-corruption issues as well as other sustainable development objectives in this innovative reform on IIA remains stuck in the initial stage. An intrinsic comparison of these non-investment issues allows us to further conclude that – while States have failed to adequately consider issues such as transparency, health and environment, and labor rights – they have addressed anti-corruption even less sufficiently.

2. The Concentration of Anti-Corruption Provisions

To examine the concentration is to understand how a State frames anti-corruption provisions in its IIAs (see Table 2). A question that ought to be commonly asked is how many (and how many types of) anti-corruption provisions are generally inserted by States. Before proceeding to the data analysis, it should be noted that a State may incorporate more than one type of anti-corruption provision in an IIA, which explains why the total number of anti-corruption provisions of a State is larger than the total number of identified IIAs signed by a given country. Table 2 provides illustrations of this scenario.

Table 2 The concentration and categorization of anti-corruption provisions in IIAs³

	Identified IIAs	<i>Directed at States</i>			<i>Directed at Investors</i>	
		ARC	ECS	CMC	CSR	COS
<i>Brazilian IIAs</i>	12	12	/	/	/	11
<i>Canadian IIAs</i>	18	2	5	5	16	1
<i>EU IIAs</i>	11	/	10	/	/	1
<i>Japanese IIAs</i>	25	25	/	/	/	/
<i>US IIAs</i>	10	/	10	8	/	/

³ In this chart, the first big group of anti-corruption provisions (ARC, ECS, and CMC) are those directed at States and the second (CSR and COS) are those directed at investors. In addition, ARC stands for ‘a rough commitment’ against corruption made by States in investment treaties, ECS represents anti-corruption provisions aimed at ‘establishing cooperation and improving standards’, CMC refers to provisions regulating ‘concrete measures against corruption’, CSR stands for ‘corporate social responsibility’-based anti-corruption provisions, and COS means ‘carve-out’ statements of anti-corruption.

<i>Other IIAs</i>	6	/	1	/	3	2

To start with, many may look at this and be under the impression that some countries mostly incorporate only one type of anti-corruption provision in their IIAs. This practice accounts for a big portion of the sum total of anti-corruption provisions, like the ‘EU IIAs’, ‘Japanese IIAs’, and ‘other IIAs’. Meanwhile, some IIAs contain two or more types of anti-corruption provisions, including those concluded by Brazil, Canada, and the US. Another factor revealed in the above table is that the anti-corruption practices and policies implemented vary from one country to another.

Notably, an anti-corruption provision that makes a brief commitment to curb corruption by States appears in 25 Japanese IIAs. This means that all of the 25 identified Japanese IIAs approach anti-corruption through this type of provision. Hence, Japan prefers, and is thus likely to maintain, the practice of addressing anti-corruption issues primarily by inserting a commitment of corruption prevention in drafting its BITs and investment chapters of TIPs.

Among 11 EU IIAs, anti-corruption provisions aimed at establishing cooperation and improving standards are found in 10 IIAs (most of which are in forms of association agreements, partnership and cooperation agreements, and framework agreements). The only ‘carve-out’ anti-corruption statement is inserted in the EU-Vietnam Investment Protection Agreement (IPA) (2019), which is an investment promotion treaty and was signed very recently. The EU also includes a ‘carve-out’ anti-corruption provision in the EU-Canada Comprehensive Economic Trade Agreement (CETA) (2016), which is categorized under the Canadian IIAs to avoid double counting. However, no provisions expressly addressing anti-corruption issues could be found in the other two recently signed EU IIAs, i.e., the EU-Singapore IPA (2018)⁴ and the EU-Japan Economic Partnership Agreement (EPA) (2018).⁵ It is both baffling and unknown why there is an absence of anti-corruption provisions in the EU-Japan EPA (2018), given that both the EU and Japan have respectively had many practices of concluding anti-corruption provisions prior to 2018. These facts make it so that it is difficult to anticipate the EU’s practices in drafting the anti-corruption components of IIAs in the future, though it is fairly clear that the EU prefers to incorporate anti-

⁴ *Investment Protection Agreement between the European Union and Its Member States, of the one part, and the Republic of Singapore, of the other part*, 2018.

⁵ *Agreement between the European Union and Japan for an Economic Partnership*, 2018.

corruption provisions of cooperation and improving standards as opposed to other categories of anti-corruption provisions when concluding association and partnership agreements with other States.

By contrast, most Brazilian IIAs, a large majority of US IIAs and a small portion of Canadian IIAs embrace a larger diversity of anti-corruption provisions with their own traits. Provisions of a rough State commitment on anti-corruption are found in 12 Brazilian IIAs and ‘carve-out’ anti-corruption provisions exist in 11 IIAs signed by Brazil. This signifies that Brazil normally addresses anti-corruption from both perspectives of States and foreign investors. Such practice is consistent with the 2015 Brazil Model BIT. On the flip side, the international and national policies on investment enshrined in the Brazil Model BIT 2015 have been practiced moderately by the State.

As for the US IIAs, provisions to establish cooperation and improve anti-corruption standards are found in 10 US IIAs and provisions of concrete measures against corruption appear in 8 US IIAs. One can reckon from these figures that the US’s earliest FTAs generally embarked upon the legislative path in the fight against corruption but also committed to cooperate and improve standards of anti-corruption by referring to international and regional anti-corruption instruments. The US’s practices of including concrete legislative requirements in FTAs blend together well with the adoption and implementation of its national decree—the Foreign Corrupt Practices Act (FCPA)—enacted in 1977. On one hand, the FCPA is an act that prohibits individuals from paying bribes to foreign officials, which provides a fundamental basis for referral (such as the scope of corruption, liabilities and sanctions of corrupt acts) when the US attempts to address corruption issues in the making of an IIA. On the other hand, the FCPA (1977) arguably promotes the emergence of international agreements prohibiting corruption and thus the standards enshrined in those early international norms like the Inter-American Convention against Corruption (IACAC) (1995) and the OCED Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) (1997), which are established on the premise of the FCPA standards.⁶ In this sense, provisions that refer to

⁶ See, e.g., Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015); David Hess, “Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility” (2012) 73:5 Ohio State Law Journal 1121–1144; Robert D Tronnes, “Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” (2000) 33:1 The George Washington Journal of International Law and Economics 97.

international and regional anti-corruption norms in IIAs are likely to encourage other contracting States to enhance their adherence to internationally-recognized standards.

Last but not least, the Canadian IIAs are the most diversified with regard to the types of anti-corruption provisions incorporated within them. Specifically, CSR-based anti-corruption provisions are found in 16 Canadian IIAs and a ‘carve-out’ anti-corruption provision appears in one agreement (i.e., the Canada-EU CETA (2016)). Provisions of a rough State commitment, of establishing cooperation, and of concrete legislative measures can be respectively found in 2, 5, and 5 Canadian agreements. On the one hand, one underlying reason for such a distribution is that the approaches adopted in Canadian BITs and Canadian TIPs are different. CSR-based anti-corruption is incorporated in the Canada Model FIPA (Foreign Investment Protection and Promotion Agreement) 2014;⁷ therefore, this type of provision mostly exists in BITs and investment chapters of FTAs. On the other hand, in FTAs, Canada mostly seeks to deal with corruption through a solid and reliable domestic legal framework to combat corruption in both investment and trade activities, and thus anti-corruption provisions in Canadian FTAs are mostly directed at States to improve standards of anti-corruption and are inserted in chapters on transparency (rather than in the investment chapter). Another reason why Canadian IIAs have such a broad range of anti-corruption provision types is that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA) each include a chapter on anti-corruption which have comprehensively addressed anti-corruption issues in many aspects.⁸

3. The Geographical Scatter of Anti-Corruption Provisions

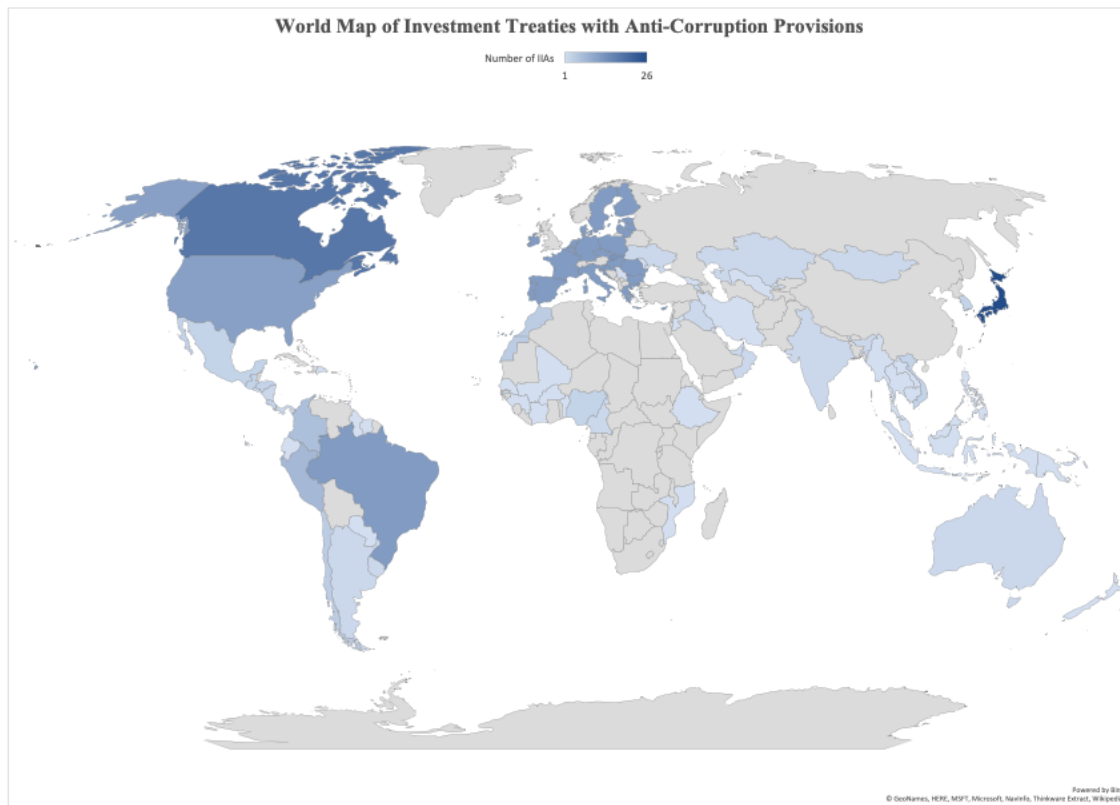
Table 1 and Table 2 – which respectively indicate the number and concentration of anti-corruption provisions – have shown that inserting anti-corruption provisions in investment treaties is not a common practice among the international community, but mostly promoted by certain States like the US, Canada, Japan, Brazil as well as the EU. While it is clear that these countries are taking progressive efforts in regulating anti-corruption matters, practices of other States, limited as they may be, should not be ignored. The world map below shows a global picture of the investment treaties with anti-corruption provisions signed by each State. The darker the area, the more IIAs

⁷ Art.16 (Corporate Social Responsibility), *Canada 2014 Model Foreign Investment Protection and Promotion Agreement*, 2014.

⁸ See Chapter 5 for the detailed anti-corruption provisions in the CPTPP and the USMCA.

signed by this country. The grey area means that no anti-corruption provisions could be found in the IIAs concluded by the State concerned.

Figure 1 World map of investment treaties with anti-corruption provisions⁹



As shown on the map, most countries do not address corruption issues in the making of investment treaties (see grey areas). This said, regions of North America, Latin America & Caribbean, East Asia and the Pacific, and Europe and Central Asia are relatively active in regulating anti-corruption provisions, while certain regions of North America, South Asia, and Sub-Saharan Africa are more

⁹ Given that an IIA is concluded by two or more than two states or country groups, this world map marks all the countries with whom the US, the EU, Canada, Brazil and Japan concluded investment treaties where anti-corruption provisions were incorporated. Some treaties are signed by country grouping, but the number is calculated with reference to the member states. In this sense, the IIAs signed by the EU as a party were counted to its member states, which include 27 states. They are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden. The United Kingdom withdrew from the EU on January 31, 2020. See "European Union Member Countries", online: <https://europa.eu/european-union/about-eu/countries_en>.

reluctant to address issues of anti-corruption. Table 3 provides a full and precise record on these countries and the number of IIAs they concluded.

Table 3 The number of IIAs with anti-corruption provisions signed by each State¹⁰

East Asia and Pacific [38 economies]: Japan (26), Korea (3), Singapore (3), Viet Nam (3), Australia (2), Mongolia (2), Myanmar (1), Philippines (1), Thailand (1), Indonesia (1), Cambodia (1), Lao PRD (1), Papua New Guinea (1), Brunei Darussalam (1), Malaysia (1), New Zealand (1)
Europe and Central Asia [58 economies]: the EU (12), Armenia (2), Kazakhstan (2), Ukraine (2), Georgia (1), Moldova (1), Serbia (1), Uzbekistan (1), Slovak Republic (1)
Latin America & the Caribbean [42 economies]: Brazil (12), Peru (7), Colombia (6), Chile (4), Mexico (3), Costa Rica (3), Guatemala (3), Honduras (3), Argentina (2), Panama (2), Uruguay (2), El Salvador (2), Nicaragua (2), Paraguay (1), Guyana (1), Suriname (1), Ecuador (1), Dominican Republic (1), Trinidad and Tobago (1)
Middle East and North Africa [21 economies]: Iraq (2), Morocco (4), Oman (2), United Arab Emirates (2), Jordan (1), Bahrain (1), Iran (1), Kuwait (1)
North America [3 economies]: Canada (18), the US (11)
South Asia [8 economies]: India (2)
Sub-Saharan Africa [48 economies]: Nigeria (3), Cameroon (2), Mozambique (1), Ethiopia (1), Benin (1), Côte d'Ivoire (1), Mali (1), Senegal (1), Burkina Faso (1), Guinea (1)

This table suggests that the distribution of anti-corruption provisions occurs in each region. Although the distribution seems ‘unbalanced’ in terms of the number of IIAs, this ‘imbalance’ is

¹⁰ The number between “()” indicates how many IIAs the given country has signed that contain anti-corruption provisions. The number between “[]” indicates the total number of States and economies in this particular region. The classification of States is based on criterion established by the World Bank, see The World Bank, “World Bank Country and Lending Groups – World Bank Data Help Desk”, online: <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>>.

caused by numerous factors. First of all, the total number of States in each region is different from one and another, which may produce false impressions of imbalance. For instance, in the North American region, although only two countries have anti-corruption provisions in their IIAs, they represent approximately 67% out of the total 3 States in this region, and the IIAs signed by these two countries make up 34% out of the total 82 identified IIAs.

Secondly, a State's capacity to deter corruption ranges,¹¹ which may also generate an imbalanced geographical distribution of anti-corruption provisions. While one might assume that States with low levels of corruption pay little attention to corruption prevention, the opposite actually tends to be true: States with very clean records tend to devote considerable effort to combating corruption, including taking measures in international investment activities. The Corruption Perceptions Index (CPI) 2019 report issued by Transparency International has ranked 190 countries and territories, using a score range from 100 (very clean) to 0 (highly corrupt).¹² The vast majority of countries who received high scores are from the region of Western Europe or are member States of the EU and others including New Zealand, Japan and Singapore in Asia Pacific and Canada and the US in North America. By contrast, a large number of States with the lowest scores are in the Sub-Saharan Africa region.

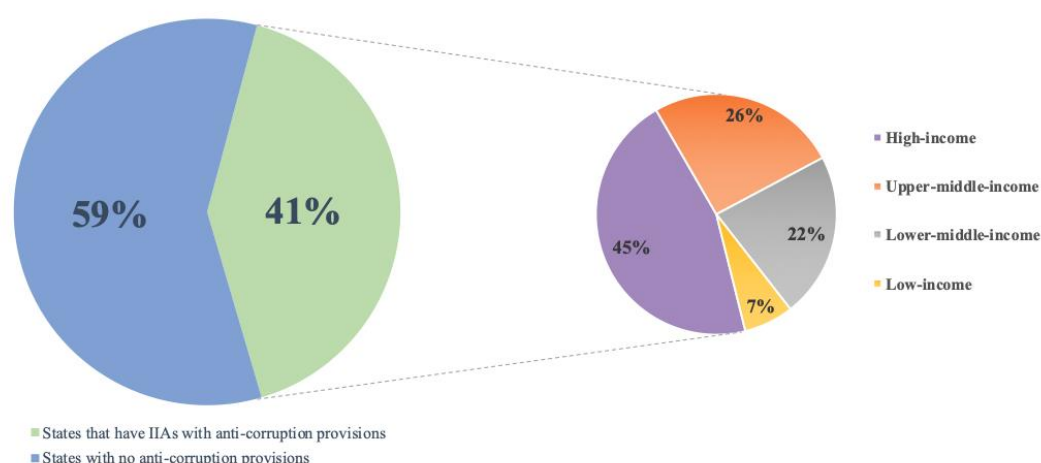
Thirdly, the development level of a State is another determining factor leading to the imbalanced distribution of anti-corruption provisions. In practice, developed countries tend to be more engaged in establishing investment cooperation by negotiating and concluding bilateral and multilateral investment treaties. Moreover, developed countries generally attach more importance to anti-corruption as they may have signed a series of international and regional anti-corruption conventions that less developed nations have not. For instance, the most active States, like Japan, Canada, the US, are developed countries and members of G7 and G20, and have stronger commitments to corruption prevention and elimination than their less developed counterparts. A large majority of the EU member States are not only contracting parties to the Council of Europe Civil Law Convention on Corruption and the Council of Europe Criminal Law Convention on

¹¹ Since 1995, the Transparency International has regularly launched reports of corruption perceptions index (CPI). It has issued 25 reports, from 1995 to 2019, one report each year. The CPI reports relate to perceptions of the corruption degree of a country as seen by private sector and businesspeople. See "Transparency International, Corruption Perceptions Index--Overview", online: <<https://www.transparency.org/research/cpi/overview>>.

¹² "Transparency International, Corruption Perceptions Index 2019", online: www.transparency.org/cpi2019.

Corruption, but also to the OECD Anti-Bribery Convention and the UNCAC. In this sense, the member States of the EU are more strongly compelled to make efforts toward anti-corruption and are thus more likely to address corruption issues in IIAs. This is consistent with the data shown in the pie charts below (Figure 2).

Figure 2 The distribution of IIAs concluded by different income States and economies¹³



Among all those States that have inserted anti-corruption provisions in their IIAs, 45% are high-income States and 26% are upper-middle-income economies, the total of which accounts for more than 70%. On the contrary, only 7% are low-income economies.

In light of the foregoing observations, it is fair to conclude that a large portion of anti-corruption provisions are implemented by developed and developing States who are more willing to implement anti-corruption policies in the making of investment treaties. Although developed countries are currently in the practice of incorporating anti-corruption provisions, more countries will soon follow suit. This is because the IIAs signed by these developed countries will have a significant impact on subsequent investment agreements and such impacts will be enhanced by the G20 and the APEC instruments regarding anti-corruption provisions.

4. The Generational Distribution of Anti-Corruption Provisions

¹³ The left and bigger pie chart indicates the percentage of States that have inserted anti-corruption provisions in IIAs (i.e., 41%) out of all the States and economies. The right and smaller pie chart shows the component of this 41% fan section. The criteria of classifying economies by income are referring to the data issued by the World Bank, see The World Bank, *supra* note 10.

Before discussing the generational distribution of the anti-corruption provisions in IIAs, it is important to first explain how to differentiate between the old generation and the new generation of IIAs. The UNCTAD has constantly reported the ongoing modernization of old-generation treaties in the IIA reform process and the continuing conclusion of ‘new-generation’ IIAs by States. However, the demarcation point of date that divides old and new generation of IIAs remains uncertain. This is understandable since each State might have their own delineating points, which are likely to be different from the point determined when considering all investment treaties as a whole.¹⁴ The parameters utilized here refer to the indicators relied upon in the recent international organization document, the World Investment Report 2019, launched by the UNCTAD, which considers the stock of old-generation treaties signed between 1959 and 2011, and recent new IIAs concluded since 2012 and afterwards.¹⁵ This categorization is a rough one and bears a certain margin of error but can be reasonably tolerated.

Table 4 The generation distribution of IIAs with anti-corruption provisions

<i>Generation of IIAs</i>	BITs	TIPs	Total
<i>Old Generation (1959-2011)</i>	6	20	26
<i>New Generation (2012-)</i>	38	18	56
<i>Total</i>	44	38	82

As can be observed, around two thirds of the IIAs (i.e., 56 IIAs) containing anti-corruption provisions are concluded in the new generation, and the remaining one third (i.e., 26 IIAs) were incorporated in the traditional investment agreements. Looking at the rows in the chart, it is

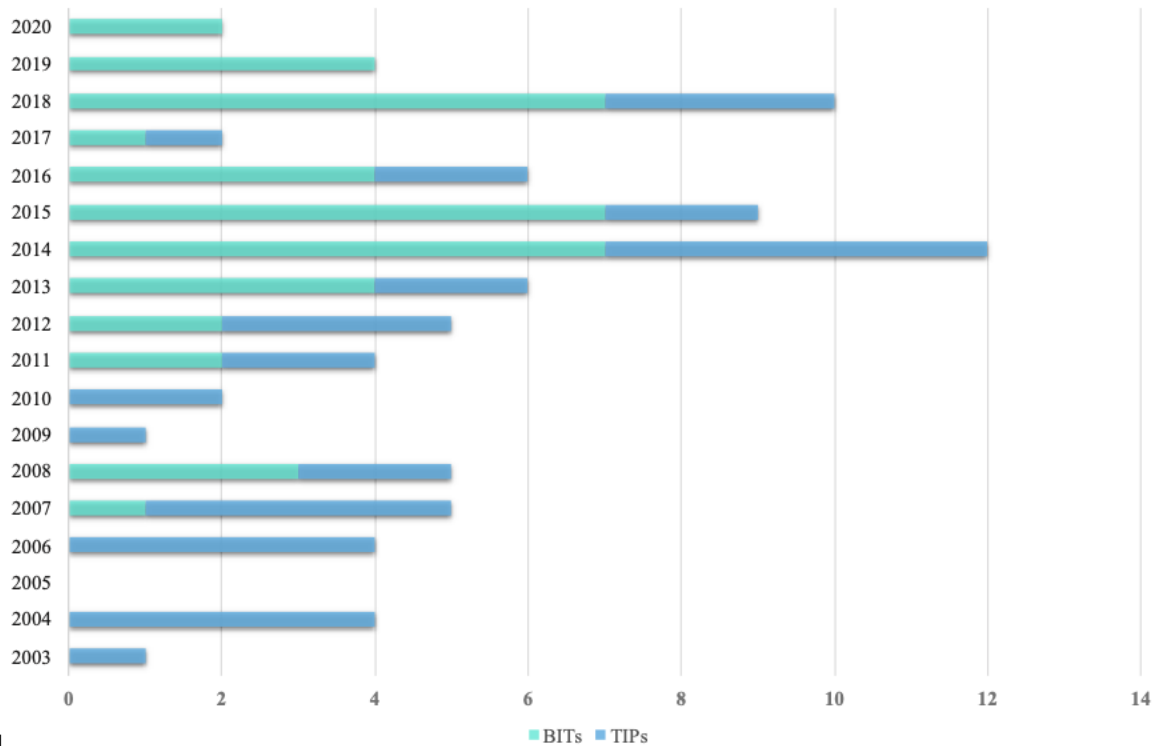
¹⁴ For instance, Japanese IIAs signed post-2002 are considered to be new, as opposed to the traditional investment agreements before and in the year of 2002, see Wolfgang Alschner & Dmitriy Skougarevskiy, “Mapping the Universe of International Investment Agreements” (2016) 19:3 Journal of International Economic Law 561–588 at 578; Shotaro Hamamoto & Luke Nottage, “Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution” (2010) Sydney Law School Legal Studies Research Paper No 10/145. The situation is similar in China which has, arguably, experienced several generations of IIAs, see generally, Elodie Dulac, “The Emerging Third Generation of Chinese Investment Treaties” (2010) 7:4 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1636>>; Stephan W Schill, “Tearing Down the Great Wall: The New Generation Investment Treaties of the People’s Republic of China” (2007) 15 Cardozo Journal of International and Comparative Law 73–118.

¹⁵ See UNCTAD World Investment Report 2019: Special Economic Zones, 2019 at 109. See also “UNCTAD, Taking Stock of IIA Reform: Recent Development, IIA Issues Note, Issue 3, June 2019”, (2019), online: <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf> at 4.

observable that, among the 26 old-generation IIAs, 6 are BITs and 20 are TIPs (half of them are early FTAs signed by the US). As for the 56 IIAs of the new generation, 38 are BITs, representing an approximate 68%, and 18 are TIPs, which accounts for approximately 32%. Analyzing the columns, one can also notice that, out of 44 BITs, a large portion (amounting to 86%) is drafted in the new generation, while the figures of TIPs with anti-corruptions provisions present a more balanced result.

Figure 3 presented below expressly denotes each year's increase of IIAs. It shows that the first IIA containing anti-corruption provisions was drafted in 2003 and earlier, States mostly addressed anti-corruption issues in FTAs instead of through BITs. As shown, from 2003 to 2006, no BITs contained anti-corruption clauses. The traditional BITs with anti-corruption provisions were signed in 2007 (one BIT), in 2008 (3 BITs) and in 2011 (2 BITs). Nonetheless, in 2004, 2006, and 2007, there are respectively 4 TIPs that contain anti-corruption provisions. At that time, most States demonstrated an understanding of the importance of combating corruption in trade but not in investment. In that sense, States tend to address corruption issues outside the investment chapter but in a separate chapter (like the transparency chapter) so that these provisions are applicable to trade matters.

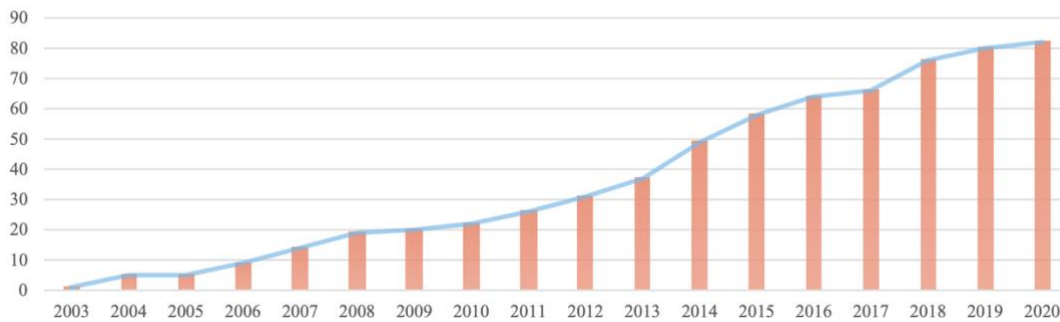
Figure 3 The BITs and TIPs with anti-corruption provisions signed by each year



However, there seems to appear a paradigm shift in the new generation of IIAs in that a sharp increase of BITs is incorporating anti-corruption provisions, particularly in 2014 (7 BITs), in 2015 (7 BITs), and in 2018 (7 BITs). A majority of TIPs in the new generation were concluded in 2012 (3 TIPs), in 2014 (7 TIPs), and in 2018 (3 TIPs). Moreover, the average number of IIAs signed per year is 5 while States have been relatively more active since 2013 and onwards, reaching the peak in 2014 (States concluded 12 IIAs with anti-corruption provisions).

Figure 4 The aggregate number of IIAs with anti-corruption provisions in each year¹⁶

¹⁶ This figure records the total number of IIAs with anti-corruption provisions in each year. For instance, the total number in 2004 is 5 which is comprised of one TIP signed in 2003 plus 4 TIPs signed in 2004.



In addition, an overall trend of anti-corruption provisions is reflected in Figure 4, which suggests that States are attaching increasing importance to regulating anti-corruption issues in IIAs since 2003. The data also indicates that such trends grow slowly but are likely to persist and even accelerate in future IIA-drafting practices.

In brief, the current IIA regime is experiencing a shortage of anti-corruption provisions, and the normative integration of anti-corruption provisions is fragmented. While we can notice a slow increase in the incorporation of anti-corruption provisions in investment treaties over recent years, this thesis argues that the practice of incorporating anti-corruption provisions in investment treaty should be adopted more widely and more quickly to meet the growing need for corruption deterrence at the transnational and international levels.

B. The Qualitative Assessment of Anti-Corruption Provisions

While a quantitative perspective is an invaluable element in identifying the overall trends of anti-corruption provisions in IIA practices, it is necessary to evaluate their qualitative aspects as well. The scope of the qualitative assessment is broad and touches on various aspects of the subject. In this section, the qualitative assessment of anti-corruption provisions is carried out using a dual approach: one is to evaluate the enforcement and implementation of anti-corruption provisions, and the other is to consider whether and to what extent anti-corruption provisions can achieve the desired objectives (as discussed in Chapter 4). The joint evaluation of these two elements is intentional, as they are interrelated as concepts and ought to be treated accordingly.

In general, given that the practice of instituting anti-corruption provisions is emerging from the ground up, it should be acknowledged that incorporating anti-corruption provisions is a big step towards corruption prevention in international investment law. These provisions, to some extent,

contribute to the achievement of intended objectives. However, these contributions may vary between different types of anti-corruption provisions. For instance, State commitments to anti-corruption are more likely to strike a balance of interests between investors and host States. On the contrary, anti-corruption provisions in investor obligations are rather weak when it comes to enhancing sustainable development and striking an equilibrium between investment protection and the regulatory power of host States. This section discusses the merits and weaknesses of these anti-corruption clauses.

1. Performing Restricted Functions in Offering Tools to Investment Arbitration

Given the increased difficulties facing the investor-State arbitration (ISA) tribunals in the context of addressing allegations of corruption, incorporating anti-corruption provisions should, theoretically, be the most direct and effective measure to meet such challenges. However, after a careful analysis of the core anti-corruption provisions in existence, it is difficult to conclude with any confidence that these provisions are performing an effective and essential function in offering tools to ISA.

First, most of the controversial issues surrounding corruption allegations are not addressed. As mentioned in Chapter 4, exclusively referring to international anti-corruption conventions would not be sufficient because a wide range of issues are not addressed, not to mention the intrinsic differences between international and regional anti-corruption norms. Among others, the liabilities for States and evidentiary issues are barely regulated in the current anti-corruption provisions. Although some clauses require States to take certain measures, such as to prosecute the involved persons, these measures are mostly directed at domestic legal frameworks and are of limited significance in terms of assisting ISA in determining the international State responsibilities for corrupt acts in investment activities.

Second, in some treaties, States refer to more than one international anti-corruption convention, which, on the one hand, aim at improving anti-corruption standards, but which, on the other hand, might engender further uncertainty. Such anti-corruption provisions fail to deal with the intrinsic differences between the referred conventions, such as the act of solicitation of public officials between the UNCAC and the OECD Anti-Bribery Convention. There are indeed some treaties that have avoided this dilemma. For instance, the anti-corruption provisions containing concrete legislative measures against corruption have tended to reach a consensus on the scope of corruption

and on the liabilities for soliciting and accepting a bribe. Another inconsistency relates to the scope of corruption with a particular focus on facilitation payments, which are treated differently in the UNCAC¹⁷ and the OECD Anti-Bribery Convention.¹⁸ The USMCA clarifies this issue in the anti-corruption chapter, in which it not only refers to the above to conventions but also provides that:¹⁹

The Parties recognize the harmful effects of facilitation payments. Each Party shall, in accordance with its laws and regulations:

- (a) encourage enterprises to prohibit or discourage the use of facilitation payments; and
- (b) take steps to raise awareness among its public officials of its bribery laws, with a view to stopping the solicitation and the acceptance of facilitation payments.

Although this provision is directed at States' domestic legal frameworks, at the very least, it establishes a consensus on the regulations addressing facilitation payments, which would protect against further inconsistency when arbitrators are confronted with such an issue. However, the USMCA is the only treaty in which a clarification on facilitation payment is provided along with the anti-corruption provisions that refer to international conventions while other treaties remain silent on this matter. In this sense, to pursue the objective of effective corruption deterrence in the international investment law domain, an operative measure would be introducing relevant international anti-corruption standards into IIAs *along with* necessary clarifications and adequate explanations when the standards listed are inconsistent. With the existence of such standards, challenges arising from the vagueness of the legal rules and standards would be avoided. Alternatively, rules with enhanced precision about how States and arbitrators should address corrupt acts could also ensure the rule of law both domestically and internationally, while securing the effectiveness of corruption prevention at the same time.

Third, 'carve-out' statements of anti-corruption indeed suggest a stronger normative integration than other types of anti-corruption as they have a much clearer and more direct impact on the legal result of arbitration.²⁰ However, such statements oblige arbitrators to decline jurisdiction over any disputes arising from corruption-contaminated investments, which means that they have entirely

¹⁷ Art.16(1), *United Nations Convention against Corruption*, 2005, adopted by the UN General Assembly on 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, U.N. GAOR, 58th Sess., 51st Plen Mtg., UN Doc. A/RES/58/4.

¹⁸ *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 1997 at para 9, adopted by the Negotiating Conference on 21 November, 1997.

¹⁹ Paragraph 8 of Art.27.3 (Measures to Combat Corruption), *United States-Mexico-Canada Agreement*, 2018, signed on November 30, 2018 with an agreement on amendments signed on December 10, 2019, effective on 1 July 2020.

²⁰ Jean-Michel Marcoux, *International Investment Law and Globalization: Foreign Investment, Responsibilities and Intergovernmental Organizations* (Routledge, 2019) at 32–34.

cut off the interference and involvement of investment arbitration with regard to the global anti-corruption campaign. Furthermore, ‘carve-out’ anti-corruption provisions additionally bring about an asymmetry between investors and host States (which will be carefully discussed later).

2. Contributions of Anti-Corruption Provisions of State Commitments

Treated with equal importance as the objective of economic growth, sustainable development promotion has recently become a chief pursuit of international investment law development, which is also an important component of IIA reform. The UNCTAD has occasionally made it clear that anti-corruption is instrumental to sustainable development and encourages States to take measures against corruption through investment treaties. Comprehensive discussions on the core anti-corruption provisions suggest that many States are indeed taking strong action to combat corruption, although these provisions are sometime weak in terms of enforcement.

On the one hand, anti-corruption provisions directed at States represent important contributions to the promotion of sustainable development. Efforts to combat corruption to be taken at different levels are foreseeable. At the national level, States are committed to the prevention of corruption in accordance with domestic laws. At the regional level, there is an effort to establish bilateral cooperation and multilateral cooperation against corruption. At the international level, a number of international anti-corruption conventions along with certain guiding documents were referred to, aiming at raising the domestic anti-corruption standards. However, only a small portion of the identified treaties address corruption issues at all three levels, such as those US FTAs in which a comprehensive chapter of anti-corruption is incorporated. Moreover, the enforcement of these provisions is entirely reliant upon States’ ‘voluntariness’ as there is no monitoring system in place. This being said, in order to promote sustainable development, obligations of investors are inseparable from States’ efforts, and is this especially the case in the context of the CSR-based anti-corruption provisions.

Another purpose of anti-corruption provisions is to strike a balance between investment protection and the right to regulate, which is also an important aspect of sustainable development. On one side, anti-corruption provisions directed at States aim to safeguard States’ regulatory autonomy on matters surrounding corruption. Many of these provisions, in particular, provisions demonstrating a rough commitment to anti-corruption in Japanese IIAs and Brazilian IIAs, require States to take certain measures in accordance with its domestic laws. As expressly elaborated upon in the

USMCA, although States are committed to taking legislative measures to establish cooperation and to improve standards, all the regulations, descriptions and interpretations are confined to States' domestic legal frameworks:

Chapter 27 Anticorruption

Art.27.2 Scope

...

5. The Parties recognize that the description of offenses adopted or maintained in accordance with this Chapter, and of the applicable legal defenses or legal principles controlling the lawfulness of conduct, is reserved to each Party's law, and that those offenses shall be prosecuted and punished in accordance with each Party's law.

On the other side, instead of preserving the regulatory autonomy of host States, inserting provisions on investors' obligations against corruption might also help to balance the interests between host States and investors.

3. Limited Effectiveness of CSR-Based Anti-Corruption Provisions²¹

In investment treaties, CSR clauses are generally phrased in the language of voluntary compliance and apply to a wide range of social responsibilities held by foreign investors, including human rights, labor rights, environmental protection and anti-corruption. In spite of the characteristics of voluntariness and self-regulation, these rules should, at least, constitute a valuable step towards promoting the sustainability of foreign investments. Yet, it is difficult to ignore the limitations and weaknesses of CSR-based anti-corruption provisions.

First, the anti-corruption efforts that are expected to manifest in the CSR context are largely confined to the domestic jurisdiction. Domestic administrative and judicial proceedings are the major channels that host States rely on to deal with corruption issues that occur in private enterprises. Accordingly, this method of corruption deterrence requires a robust and comprehensive anti-corruption legal framework: otherwise, such CSR clauses will be of little use. To address this type of scenario, CSR-based anti-corruption provisions should be relied on in combination with other types of anti-corruption provisions, like those establishing cooperation and improving standards. Anti-corruption provisions that refer to the international anti-corruption norms (such as the UNCAC and the OCED Anti-Bribery Convention) not only require States to

²¹ This section forms part of the author's paper published in the Journal of International Economic Law. See Yueming Yan, "Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance" (2020) 23:4 Journal of International Economic Law 989–1013.

establish competent anti-corruption institutions and legalization requirements, but also encourage them to combat corruption cooperatively. These are vital requirements in a context where transnational corruption is widespread and increasingly difficult to prove. Any breaches of investor obligations under these strengthened CSR clauses should result in adequate sanctions being applied in accordance with domestic anti-corruption laws and regulations.

In addition to evaluating CSR-based anti-corruption provisions from the perspective of investor obligations, it is important to consider how these provisions operate from the other side of the scale: not only the State's right to regulate, but also how and when obligations are owed by States to foreign investors. Currently, CSR clauses in most cases have a provision to the effect that 'State parties should encourage *enterprises operating within their territory or subject to their jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies...*'. This language creates an obligation for host States to encourage enterprises to self-regulate according to internationally recognized standards of CSR. However, a State may not devote sufficient efforts to implementing this obligation or may be reluctant to spend time, money and other resources on promoting effective CSR awareness in private enterprises. Further, CSR-based anti-corruption provisions do not encompass cases where the public officials initiate corrupt actions favoring enterprises within their territory: a relatively common and unsurprising phenomenon.

Attention needs to be paid to the 'to encourage' obligation of host States under this provision, as well as its application in ISA. One might ask: should a foreign investor be entitled to bring a case before an investor-state tribunal and ask for relief when a host State allegedly fails to implement its obligations under the CSR clause? Theoretically speaking, the answer should be yes. However, there are difficulties with these types of claims.

First, it might be hard to convince an investment arbitral tribunal that the host State has not fully complied with its 'to encourage' obligations within the relevant CSR clause, given that this obligation 'may easily be discharged by the state by way of notifications, investment guidelines and state-sponsored CSR brief materials.'²² It is one matter for public officials to solicit bribes from private enterprises, however it is quite another to prove that States have failed to fulfill their

²² Charles N Brower & Jawad Ahmad, "The State's Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration" in Katia Yannaca-Small, ed, *Arbitration under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford University Press, 2018) 455 at 479.

obligations of ‘encouraging’ CSR. Having sufficient evidence that a public official of the host State is involved in corrupt activities does not necessarily mean that there is a breach of the CSR clause by the host State. Moreover, among the identified 20 IIAs and one model BIT incorporating CSR-based anti-corruption provisions examined in this thesis, a vast majority of the State parties have explicitly barred foreign investors from bringing claims of a breach of the CSR clause under the investor-State dispute settlement (ISDS) regime.

In short, it seems that CSR clauses presents a misleading image of a balanced scale between investors and State interests, when this is not the fact. In reality, the powers to enforce investor obligations are rather weak, while on the other side, a State’s obligations are mostly excluded from arbitration. In terms of advancing effective State and enterprise involvement in curbing and eliminating corruption in international investment, greater efforts are necessary.

4. Weaknesses of ‘Carve-Out’ Anti-Corruption Provisions²³

The ‘carve-out’ anti-corruption provisions, either in terms of imposing direct obligations against corruption, denying treaty protection, or precluding access to arbitration, aim to deprive investors’ right to arbitration if the investments are obtained through corruption. Compared to other types of anti-corruption provisions, the incorporation of ‘carve-out’ anti-corruption provisions in investment treaties is a more recent development in IIA-making practice.²⁴ ‘Carve-out’ anti-corruption provisions are strongly preferred in model IIAs which are seen as more balanced investment treaties, such as the Brazil Model BIT 2015,²⁵ the India Model BIT 2015,²⁶ and the Pan-African Investment Code 2015 (PAIC).²⁷

²³ This section forms part of the author’s paper published in the Journal of International Economic Law. See Yan, “Anti-Corruption Provisions in International Investment Agreements”, *supra* note 21.

²⁴ Andrea Bjorklund, Yarik Kryvoi & Jean-Michel Marcoux, *Investment Promotion and Protection in the Canada-UK Trade Relationship* (2018) at 31–32.

²⁵ See, e.g., Nitish Monebhurrun, “Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model” (2017) 8:1 Journal of International Dispute Settlement 79–100; Joaquim P Muniz, Kabir A N Duggal & Luis A S Peretti, “The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change” (2017) 32:2 ICSID Review 404–417.

²⁶ See generally Prabhash Ranjan & Pushkar Anand, “The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction” (2017) 38:1 Northwestern Journal of International Law & Business 1-54; Grant Hanessian & Kabir Duggal, “The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?” (2017) 32:1 ICSID Review 216–226.

²⁷ Makane Moïse Mbengue & Stefanie Schacherer, “The ‘Africanization’ of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime” (2017) 18 The Journal of World Investment & Trade 414–448.

On the surface, the ‘carve-out’ anti-corruption provisions seem to be a natural way to advance sustainable development in foreign investments, to better balance investors’ rights and obligations, and to safeguard the right to regulate in public interests. However, ‘carve-out’ anti-corruption provisions generate numerous concerns and uncertainties from the broad viewpoints of corruption deterrence, the principle of proportionality, and theories of attracting FDI. More precisely, ‘carve-out’ anti-corruption provisions might have a significant deterrent effect on potential foreign investors who do not want to risk initiating corrupt acts with public officials of host States. However, these provisions – as demonstrated by case law in investment arbitration – have had little success in discouraging acts of solicitation of host States, regardless of whether the action was motivated by conspiracy, impulsion or imprudence.

As analyzed in Part One of this thesis, before the introduction of ‘carve-out’ anti-corruption provisions, the tribunals in ISA adopted the approach of completely dismissing investors’ claims in cases where investors were found to have conducted corrupt acts with the public officials of the host States. This approach was taken in the cases of *World Duty Free v. Kenya* (2006), *Metal-Tech v. Uzbekistan* (2013) and *Spentex Netherlands v. Uzbekistan* (2016). One can observe this trend in an increasing number of investment cases, although for the most part, such claims remain unproven.²⁸ It is fair to conclude that lodging allegations of corruption has become a strategy of host States who wish to defend themselves against investors in ISA.²⁹

Notably, the outcome of dismissing investor’s claims in their entirety and ‘overlooking’ host States’ involvement in corruption has prompted many critics to consider issues of ‘unfairness, unjust enrichment, possible distortions of the arbitration process’,³⁰ ‘asymmetric liabilities on both parties’,³¹ ‘unjust enrichment of an equally culpable part’³² and whether this outcome is ‘inconsistent with the principles of state responsibilities.’³³ This approach also sends dangerous

²⁸ See Chapter 1 of this thesis.

²⁹ See, e.g., Stephan Wilske & Willa Obel, “The ‘Corruption Objection’ to Jurisdiction in Investment Arbitration” in Krista Nadakavukaren Schefer, ed, *Poverty and the International Economic Legal System* (Cambridge: Cambridge University Press, 2013) 177; Jason Webb Yackee, “Investment Treaties and Investor Corruption: An Emerging Defense for Host States” (2012) 3 *Virginia Journal of International Law* 723–746.

³⁰ See generally John R Crook, “Remedies for Corruption” (2015) 9:3 *World Arbitration & Mediation Review* 303–316.

³¹ Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014) at 277.

³² R Zachary Torres-Fowler, “Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration” (2012) 52:4 *Virginia Journal of International Law* 995–1040 at 1017.

³³ Isuru C Devendra, “State Responsibility for Corruption in International Investment Arbitration” (2019) 10:2 *Journal of International Dispute Settlement* 248–287.

messages to host States that allegations of corruption are a ‘viable state defence’ against corruption claims of investors.³⁴ More concerning perhaps is the fact that States are able to ‘receive the benefit of the investment, have the opportunity to sell the concession a second time and double that benefit, and walk away with the bribe.’³⁵ Even worse, this might incentivize States to solicit bribes from investors, something which occurred in the case of *World Duty Free v. Kenya* (2006). However, there are no remedies available for investors to seek in cases of solicitation,³⁶ as Prof. Riesman comments:

Now, it does not seem to me that this is a model that provides a proper incentive for host State officials who participate in the bribery process to comply with the general policy. If you are willing to contemplate this dimension, then a series of very awkward questions are presented of the international arbitrators who decide these cases. Article 3 of the OCED [Anti-Bribery] Convention says...that sanctions, among other things, should be proportionate. One of the questions...will be: How do arbitration tribunals encountering these complex issues accommodate the general policy expressed in the OECD and many of the other anti-bribery conventions with the need for proportionality so that this problematic behaviour is disincentivized and not incentivized?

.....

When we talk about sanctions, we ought to make a distinction between sanctions that are effective and actually tend to disincentivize subsequent behaviour and sanctions that are ceremonial taps on the wrist.

In the same vein, ‘carve-out’ anti-corruption provisions that exclude corrupt investors from accessing arbitration by focusing solely on investor behavior – without any consideration of relevant State conduct – also constitute another *de facto* ‘corruption allegation defense’. This issue with ‘carve-out’ anti-corruption provisions highlights the imperative to confront these challenges stemming from the problems of ‘incentivization or disincentivization’ and from the pursuit of ‘symmetric sanctions’ to achieve proportionality between investors and States.

Moreover, the concept of ‘sustainable development’ was originally introduced in investment treaties to preserve the State’s regulatory autonomy in matters affecting the public interest and to eliminate ‘the likelihood of successful challenges of non-discriminatory public welfare measures’.³⁷ Expropriating an investment where the major business activities involve corruption is unlikely to be criticized because such expropriation would mostly be perceived as corresponding

³⁴ Yackee, *supra* note 29 at 742.

³⁵ “Key Note Presentation: Everything You Always Wanted to Know About Foreign Bribery and Corruption but Were Afraid to Ask, by Nicola Bonucci, With Commentary by Professor W. Michael Reisman” (2015) 9:3 World Arbitration & Mediation Review 239–247 at 245.

³⁶ Yueming Yan, “A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?” in Yuwen Li, Tong Qi & Cheng Bian, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 227 at 230.

³⁷ Caroline Henckels, “Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP” (2016) 19:1 Journal of International Economic Law 27–50 at 28.

to legitimate public policy objectives. However, if an investment was not seriously corrupt – for example, where a single bribe was given or was solicited to make a payment – expropriation measures will be out of proportion to the legitimate aim of safeguarding public interests and promoting sustainable development.

Lastly, viewed from a theoretical perspective (i.e., signalling theory and credible commitment theory), ‘carve-out’ anti-corruption provisions in BITs may not be an appropriate policy for attracting investment flows. Investment treaties are generally concluded by sovereign States – in particular, developing countries – in order to attract and increase investment flows. They ‘allow states that are hospitable to foreign capital to convince investors that they are genuine.’³⁸ The ‘signalling theory’ of BITs holds that States wishing to attract FDI flows need to take ‘costly actions’³⁹ which are capable of showing their willingness to ‘create and maintain a stable and favorable investment climate.’⁴⁰ At the same time, under the ‘credible commitment theory’ of BITs, providing these generous promises and guaranteeing access to ISDS are particularly important actions for those States anxious to increase investment flows.⁴¹ In any event, determining whether (and to what extent) investors can ascertain the risk environment and depth of commitment of the host State are vital factors to consider when deciding whether and where to make investments. Thus, where a State is notorious for soliciting bribes but insists on the policy of incorporating ‘carve-out’ anti-corruption provisions in investment treaties, a reasonable investor is less likely to select this State for his investments. These ‘carve-out’ anti-corruption provisions are strong signals to investors of a State context of heightened risk and a potentially unfavorable environment for investment. ‘Carve-out’ anti-corruption provisions therefore have the potential to undermine the ability of BITs to increase international investment flows.

The above discussion on the potential negative impacts of ‘carve-out’ anti-corruption provisions confirms that ‘carve-out’ anti-corruption provisions are not satisfactory approaches in terms of promoting sustainable development, achieving a balance of interests in an IIA, discouraging

³⁸ Yoram Z Haftel, “Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries” (2010) 17:2 *Review of International Political Economy* 348–377 at 349.

³⁹ *Ibid* at 351.

⁴⁰ Rodrigo Polanco Lazo, Valentino Desilvestro & Azernoosh Bazrafkan, “Missing Investment Treaties” (2018) 21:3 *Journal of International Economic Law* 703–731 at 703.

⁴¹ Jason Webb Yackee, “Do Investment Promotion Agencies Promote Bilateral Investment Treaties?” in Andrea K Bjorklund, ed, *Yearbook on International Investment Law and Policy 2013-2014* (Oxford University Press, 2015) 529 at 531–532; Polanco Lazo, Desilvestro & Bazrafkan, *supra* note 40 at 703–704.

corruption in investment activities, and in terms of attracting FDI flows. On the contrary, they ‘tilt the balance’ in favor of host States and will continue to do so until the consequences of host State acts of corruption are resolved proportionately and fairly.

A viable solution is requiring States to prosecute those public officials accused of corruption as a pre-condition before being permitted to raise allegations of corruption in international arbitration.⁴² As set out in the Morocco-Nigeria BIT (2016),⁴³ the International Institute for Sustainable Development (IISD) Model BIT 2005,⁴⁴ and the South African Development Community (SADC) Model BIT 2012,⁴⁵ State parties are required to ‘prosecute and where convicted penalize persons that have breached the applicable law implementing this obligation [investor’s anti-corruption obligation].’ Such provisions contribute to a more level playing field in terms of allocating liability for investors and host States who participate in corrupt acts.⁴⁶ Moreover, in addition to ‘carve-out’ anti-corruption provisions, States should clarify the legal consequences for States who have engaged in corrupt acts, like Art.9 of the Netherlands Model BIT 2019 which provides that:⁴⁷

2. A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes:

...

e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct;

⁴² In recent arbitration cases, whether the host States have initiated domestic investigation and prosecution against any public officials or other persons alleged to have conducted corrupt acts (such as accepting a bribe or soliciting a bribe) with investors has been one of the important factors for arbitrators to consider in the fact-finding process. For instance, in *Lao Holdings v. Laos* (2019), the tribunal considered that a lack of such proceedings is ‘relevant to the credibility of the Government’s allegations [of corruption]’. (*Lao Holdings NV v Lao People’s Democratic Republic, ICSID Case No ARB (AF)/12/6, Award of 6 August 2019*, 2019 at para 112 [*Lao Holdings v. Laos (1), Award (2019)*]). In *Georg Gavrilovic v. Croatia* (2018), when examining the evidence in relation to corruption allegations raised by the respondent State, the tribunal noted the absence of domestic prosecutions on the alleged corrupt payments. (*Georg Gavrilovic and Gavrilovic d.o.o v Republic of Croatia, ICSID Case No ARB/12/39, Award of 25 July 2018*, 2018 at para 345 [*Georg Gavrilovic v. Croatia, Award (2018)*].) It is also argued that ‘failure to prosecute corruption would ... be a form of acquiescence under the law on State responsibility...’ (Llamzon, *supra* note 31 at 273–275.)

⁴³ Art.17.5, *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria*, 2016.

⁴⁴ Art.22 (Anti-Corruption), International Institute for Sustainable Development (IISD), “IISD Model International Agreement on Investment for Sustainable Development”, (1 March 2005), online: <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf>.

⁴⁵ Art.10.3, South African Development Community (SADC), “SADC Model BIT 2012”, (2012), online: <<https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2875>>.

⁴⁶ Okechukwu Ejims, “The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?” (2019) 34:1 ICSID Review 62–84 at 74–75.

⁴⁷ Art.9, “The Netherlands Model BIT 2019”, (2019), online: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>>.

Although it is not yet clear how Art.9 of the Netherlands Model BIT 2019 will be applied and interpreted coherently with ‘carve-out’ anti-corruption provisions, it is significant that this model BIT – for the very first time – explicitly provides that States violate treaty obligations when they adopt corrupt practices.

Another potential solution could be preserving sufficient remedial measures, at national or international levels or both, for foreign investors who are confronted by corrupt solicitation and specifying these remedies in investment treaties.⁴⁸ Such a clause will then enable investors to challenge acts of solicitation and to obtain reasonable compensation if investors have incurred loss or damage by reason of such acts. More importantly, States should make every effort to promote and enhance the integrity of public officials, which can be realized by inserting concrete obligations, especially those well-established under the UNCAC, on States in investment treaties. which established promotional anti-corruption measures directed at private entities. Alternatively, the State commitments to adhering to international/regional conventions prohibiting corruption or to improving anti-corruption standards should be included. Promotional anti-corruption measures directed at private entities may also be inserted, like Art.26.10 of the CPTPP⁴⁹ and Art.27.5 of the USMCA.⁵⁰ In a word, States should adopt a more *balanced* approach to anti-corruption obligations on investors *and* on States rather than impose obligations merely on a single party to it.

⁴⁸ Yan, *supra* note 36 at 240.

⁴⁹ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018, signed on 8 March 2018, entered into force on 30 December 2018.

⁵⁰ *USMCA*, *supra* note 19.

CONCLUDING REMARKS

This thesis undertakes a critical analysis of the existing approaches to anti-corruption issues in international investment law. It scrutinizes the jurisprudence of corruption allegations in investor-State arbitration (ISA) as well as assesses the practices of anti-corruption provisions in the international investment agreement (IIA) mechanism. After critiquing the existing dominant binary approach, in which a positive finding of corruption results in the dismissal of an investor's claim whilst leaving unpunished (an even rewarding) the host State whose official was party to the corrupt act, this thesis suggests an innovative dual-track approach to corruption. This thesis looks into international investment law's treatment of (anti-)corruption not just from the point of view of cases but also investment treaties and recent amendments to them. After examining the core anti-corruption provisions found in the existing IIAs, it proposes that treaty drafters include strong obligations of anti-corruption on both investors and host States.

A. Addressing Allegations of Corruption in Investment Arbitration: *From a Binary to a Dualistic Approach*

Since *World Duty Free v. Kenya* (2006) and *Metal-Tech v. Uzbekistan* (2013), allegations of corruption have been the subject of extensive academic literature. The corruption allegation is typically raised as a jurisdictional objection or defense by the host State against the investor's claims brought against it by an investor, with the State contending that the investment at issue was secured by corrupt acts and is thus excluded from treaty protection. While most alleged corrupt acts have not been substantiated, ISA tribunals have consistently adopted a so-called *binary* approach to any proven corruption. This all-or-nothing approach means that an international investment arbitration tribunal dismisses an investor's claims for lack of jurisdiction or as a matter of inadmissibility, upon a positive finding of a corrupt act conducted between the investor and the public official of the host State in order to advance the establishment of the investment; otherwise, the proceeding continues to a merits stage whereby the substance of the investor's claims are examined and the corruption allegations are generally left aside.

Using the binary approach has resulted in an imbalance of liability for the two sides of the corrupt act (i.e., the investor side and the host State side), especially taking into account the bilateral nature of the corrupt conduct; in the vernacular, it 'takes two to tango'. Both the demand side and the

supply side of corruption are proscribed by domestic laws, international conventions, and transnational public policy, yet the binary approach focuses only on the supply side. This result has arguably had a detrimental impact on the global effort to deter corruption.

Moreover, it is now commonly agreed upon that allegations of corruption have become a strategy developed by host States, given that ISA tribunals are facing increasing corruption claims in practice, although most of them have been unsuccessful. The conclusion about the growth of corruption allegations is distinct in the existing scholarship and is reinforced by the case study provided in Chapter 1 of this thesis. It reviews several significant attributes of the latest corruption-involved investment disputes, especially those awards issued after *Metal-Tech*.

This thesis introduces the ways in which the binary approach operates in corruption cases and acknowledges the pernicious influences that this jurisprudence potentially generates, and also goes a step further. More precisely, the chapters in Part One of this thesis take a closer look into the *legal bases* that have led to the application of the binary approach, demonstrate why investment arbitration tribunals have *wrongly* relied upon these legal authorities, clarify the *responsibilities* that should be undertaken by the host State side for the corrupt act, and propose a novel approach – a *dual-track* approach – to address prospective allegations of corruption.

The binary approach in corruption cases has been built on three different legal authorities – the legality requirement (or the ‘in accordance with host State laws’ clause), the ‘clean hands’ doctrine, and transnational public policy – that govern investor misconduct in investment transactions. These concepts evaluate the lawfulness of the investment at hand, limit investment protection to legal investments, and exclude any claims arising from illegal ones.

More precisely, under the legality requirement, investors must establish that the investment was made in conformity with the domestic laws of the host State. Tribunals in *Metal-Tech* and in *Vladislav Kim* have ruled that an investment procured by corrupt practices constitutes a non-fulfilment of the legality requirement and therefore cannot enjoy treaty protection. While the ‘clean hands’ doctrine is, to date, an ill-defined notion, it arguably leads to dismissing the claims of the plaintiff who brings the case with its own illicit acts or improper conduct in connection with the dispute. In *Spentex* and *World Duty Free*, tribunals endorsed the application of this doctrine to allegations of corruption. These two tribunals additionally held that investments obtained through

corruption went against international public policy and the investor ‘is not legally entitled to maintain any of its pleaded claims in these proceedings’.

There is no denying that corrupt acts, especially those made for the purposes of advancing investments, contradict domestic anti-corruption law and transnational public policy; but, given the bilateralism of corruption and other complexities, ISA tribunals have wrongly applied these three notions to corruption defenses.

First of all, the recent development of the *de minimis* threshold and the principle of estoppel as exceptions to the legality requirement indicate that the use of this legal concept in a specific dispute is not rigid and that it is expected to conform with its purpose anytime that it is applied – to prevent abuse of the system – as clarified in *Phoenix Action v. Czech Republic*. One should also note the important distinction between corruption (an inherently *bilateral* act) and other categories of investor wrongdoings (of a *unilateral* in nature) impugned in the context of the legality requirement, such as fraudulent misrepresentation in *Fraport v. Philippines (1)* and in *Plama v. Bulgaria*. This bilateralism has potentially diminished the objectives of the legality requirement, because its application in corruption cases is likely to generate an abuse of power on the host State side: misuse sovereign powers to conduct further liability-free acts of corruption or regulatory measures to harm foreign investment and impair the international investment law system. To avoid such destructive outcomes, this thesis concludes that it is improper, by referring to the legality clause, to deny all claims of investors whose investments were procured through corruption.

Secondly, the ‘clean hands’ doctrine has become a controversial concept whose contours are unclear, whose legal status in international law is so far unsettled, and whose practice in international courts and tribunals is divergent. In fact, the International Court of Justice (ICJ) has been consistently reluctant to endorse this doctrine when facing allegations of a claimant’s misconduct, as reflected in certain recent cases such as *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, and *Jadhav (India v. Pakistan)*. Accordingly, it is problematic to refer to such a disputed doctrine to deal with allegations of corruption.

This being said, if adopting the most-referred to meaning of the doctrine, the conditions necessary for it to apply are not met in corruption cases. *Reciprocity* is the key attribute of the ‘clean hands’ doctrine (if it even exists as international law), which requires that the two alleged illegalities (one

illegality is alleged by the claimant and the other is alleged by the respondent who is also the party raising the ‘clean hands’ doctrine) are ‘precisely similar action, similar in fact and similar in law’. In allegations of corruption, we must ascertain whether the alleged treaty breaches by the host State (the first illegality alleged by the claimant investor, e.g., an illegal expropriation) is ‘precisely similar’ to the alleged investor wrongdoing (the second illegality alleged by the respondent State, i.e., the corrupt act here). Given that the reciprocity trait does not occur between these two types of misconduct, the ‘clean hands’ doctrine cannot be applied to support allegations of corruption. Even in exceptional circumstances where this doctrine is applied, it will not result in the inadmissibility of the claims.

Thirdly, this thesis agrees that international arbitration possesses the inherent capacity to protect international public policy, which concerns core values applicable to all States, anti-corruption included. However, usually the regulatory measures of the host State allegedly in breach of the investment treaty are not responding to the ‘discovery of the investor’s payment of a bribe’. By contrast, in many cases, the host States never take any measures of investigation nor prosecution against the public officials involved in the corrupt acts, whether before it was sued by investors or after the case is closed, but *only in the arbitration proceedings* to defend against the investor’s claims. In this sense, the motivation to raise corruption allegations is suspect: is it being done to combat corruption or merely for its own benefit? Moreover, any blame of the supply side of corruption should not be made at the cost of tolerating the other side of corruption (i.e., the host State’s corrupt acts). ISA tribunals are entrusted with the duty of reconciling the interests and striking a balance between fighting corruption and preserving the integrity of international investment law, instead of simply throwing out the investor without due consideration of its potential risks.

At the other end of the spectrum, whether an act of a governmental official’s extortion and/or acceptance of a bribe from an investor is properly attributed to the host State has been highly debated. In particular, the tribunal’s decision in *World Duty Free* to refuse to attribute the Kenyan President’s acts of solicitation to that particular country has given rise to mounting criticism. Some scholars have indeed concurred with what was ruled in *World Duty Free*, but opposing views exist as well. This thesis re-examines the controversial liability issue by looking into norms on State attribution under international law on State responsibility as represented by the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC

Articles), which is the most frequently cited norms in investor-State disputes and which has been widely recognized as customary international law.

In cases of corruption, which is often defined as the abuse of a public power for private gain, the focal point of the attribution issue is deciding which category the public official's acts belong to: *ultra vires* public conduct or purely private conduct, the former being attributable to the host State while the latter not. This thesis identifies that the key factor to differentiating these two types of acts is evaluating whether or not the concerned act is 'cloaked with authority', or put differently, 'in an apparently official capacity' or 'under color of authority'.

In corrupt cases, an official is normally using its privileged position to extort or accept a bribe from an investor; it is exactly this authority entrusted to advance and secure investment that drives an investor to bribe a specific public official, without which a reasonable investor is unlikely to make a substantial payment to the official in question. The Commentary to the ILC Articles has also demonstrated that acceptance of a bribe by a public official constitutes an act of *ultra vires* public authority that is thus attributable to the host State.

In addition to attribution, in order for an act to lead to international responsibility of a State, the State must have had an international obligation as well. An act of corruption attributable to the host State may constitute a breach of a specific anti-corruption obligation (as long as there is a related anti-corruption provision imposing obligations on the host State) and substantive treatment standards (such as the fair and equitable treatment, as the tribunal ruled in *EDF (Services) v. Romania*). The host State's omission or failure to prevent the typical corrupt acts may also be in breach of the treaty obligation.

In view of the foregoing, this thesis proposes the abandonment of the binary approach and the adoption of a more balanced approach to responsibility for corrupt acts – the *dual-track* approach. This approach suggests that a positive finding of corruption should not be the sole ground for dismissal of investors' claims but demands an examination of both the alleged illegal acts – corruption and investors' claims of treaty violation – with corresponding liabilities. If corruption is proven, the host State should be required to prosecute the individual officials involved or make compensation in lieu of prosecution. This compensation, together with the bribe payments, should be donated to international anti-corruption initiatives (ACIs). The host State should be also responsible for any breach of the investment treaty in the forms of full reparation like

compensation. Only a portion of the compensation should go to the investor depending on the factual findings (the more actively the investor has engaged in corrupt acts, the less compensation this investor should be granted) and any remaining amount should be donated to ACIs.

The dual-track approach prevents the host States from self-immunizing from liability for corruption and for its regulatory measures (if proven illegal), and effectively avoids the adverse effects to which the binary approach leads. This paradigm shift is built on the theory that international investment arbitration tribunals should go beyond fact-finding and law-ascertainment functions but ‘consider the impact of their rulings on States, persons, or entities not directly represented in the case before them’. It demands that arbitrators adjudicate the allegations of corruption, especially when the domestic institutions are reluctant to do so.

B. Anti-Corruption Provisions in Investment Treaties: *Limits and Prospects*

In addition to tribunal practices in investment arbitrations, recent development on anti-corruption in international investment treaties is also deserving of a detailed study. Matters regarding corruption or anti-corruption are seldom addressed in traditional investment treaties. States have begun to attach growing importance to corruption deterrence and elimination as a matter of investment policy since the commencement of the IIA reform, which might be traced to the first decade of the twenty-first century. Now that investors, States, and arbitrators have encountered certain challenges in addressing allegations of corruption in ISA, more attention as well as expectations are given to the practices of anti-corruption provisions in IIAs. A comprehensive analysis of the existing anti-corruption provisions has been lacking; Part Two of this thesis thus fills this gap by providing an empirical study of all of the corruption-related provisions that are found in more than 3,000 investment treaties, which includes a typology analysis and qualitative and quantitative assessments.

The typology study suggests that current anti-corruption provisions can be roughly divided into two major categories: those directed at investors and those directed at States. The former type aims to impose anti-corruption obligations on investors while the latter contains commitments to combat corruption made by States.

The anti-corruption provisions that foster compliance by foreign investors are regulated either in a weak manner (such as through corporate social responsibility (CSR) clauses) or a strong manner

(such as through ‘carve-out’ statements). CSR-based anti-corruption provisions are mostly regulated from a ‘State perspective’, and require the host State to ‘encourage enterprise operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies’, including issues of anti-corruption. ‘Carve-out’ statements on anti-corruption explicitly exclude investments obtained through corruption from substantive treaty protection or access to international investment dispute settlement. It may regulate that ‘[a]n investor may not submit a claim to arbitration’ or that ‘[t]he tribunal shall decline jurisdiction’ in the event that the investment has been made through corruption.

On the other end, the anti-corruption provisions in which State commitments are couched vary between IIAs. We have observed some provisions that simply demonstrate a rough commitment to deterring corruption in international investment, stating that ‘[e]ach Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations’. Anti-corruption provisions, as such, broadly require that States take action without specifying the concrete measures expected to be taken. Japan and Brazil are two countries that have inserted this type of provision into their recent investment treaties.

Another sub-group of State commitments seeks to establish a cooperative regime in combating corruption in international investment and to improve their anti-corruption standards by adhering to internationally recognized standards. While there exist numerous international and regional norms and instruments of anti-corruption, the United Nations Convention against Corruption (UNCAC) is the most frequently referred to, partly because it has a large number of State parties and partly because it contains comprehensive rules on corruption issues.

Moreover, several countries seem to be more determined to curb corruption because they have incorporated comprehensive *and* concrete measures they are committed to taking. These specific measures include legislative obligations, such as the need to criminalize corrupt acts as offenses and to ensure that the involved individuals or legal persons are subject to effective, proportionate, and dissuasive penalties.

In addition to a presentation of the core anti-corruption provisions, the quantitative and qualitative assessments in this thesis further indicate that the current IIA regime has a shortage of anti-

corruption provisions (approximate 82 IIAs and 10 model investment treaties have incorporated anti-corruption provisions) and that the normative integration of anti-corruption provisions is fragmented. But we do witness a slowly increasing trend of incorporating anti-corruption provisions in investment treaties in recent years. Given that corruption penetrates cross-border transactions quickly, States are expected to speed up taking measures necessary to deter this phenomenon. This thesis thus advocates for the acceleration of incorporating anti-corruption provisions in investment treaties in order to meet the growing need for corruption deterrence at the transnational and international levels. At the same time, State should insert anti-corruption provisions in their future investment treaties in a certain way (for instance, imposing concrete, specific, and more balanced obligations on investors and host States) to ensure the effectiveness of these provisions. The quality assessment allows us to conclude that the current anti-corruption norms in IIAs can hardly achieve the identified expectations.

More specifically, provisions encapsulating State commitments on anti-corruption might, to some extent, contribute to the worldwide anti-corruption movement (although mainly through domestic institutions), but they can hardly offer tools to assist investment arbitration. Provisions requiring States to foster compliance of investors through a CSR clause are demonstrations of *weak* enforcement. *Voluntariness* is the first striking expression of such clauses, while their limited enforcement at the *domestic* level is another. ‘Carve-out’ statements are unsatisfactory as well; they *tilt the balance* towards host States, because they focus solely on investor behavior and overlook the misconduct of the host State (which is equally at fault). Given the foregoing, this thesis suggests that States must clarify the legal consequences for States engaged in corrupt acts, as provided in Article 9 of the Netherlands Model BIT 2019. Another viable solution would be to regulate remedy provisions in investment treaties to provide sufficient remedies for foreign investors whenever they are solicited or extorted by public officials of the host State.

Overall, the development of international investment law related to corruption is at a crossroads. Particularly, the investor-State dispute settlement mechanism will attract continuing and increasingly severe criticism if the conventional approach to allegations of corruption remains unchanged. Likewise, the initial ambition of reforming the investment treaty framework with enhanced sustainable development elements and balanced interests between investors and host States is unlikely to be realized to perfection as long as States continue to impose greater anti-corruption obligations on investors but neglect or mitigate their own duties in the making of an

investment treaty. A more balanced approach that considers the bilateralism of the conduct is more likely to accomplish the objectives of combating corruption, preserving the rule of law, and advancing sustainable development and IIA reform in international investment law.

ANNEX TABLES

Annex Table 1

Anti-Corruption Provisions that Foster Compliance by Foreign Investors in Investment Treaties

No.	IIAs	Entered into force	ACPs	ACP Type			
				CSR	IDO	DTP	PAA
1	Canada-Colombia FTA (2008)	√	Art.816	√			
2	Canada-Peru FTA (2008)	√	Art.810	√			
3	Canada-Panama FTA (2010)	√	Art.9.17	√			
4	Canada-Benin BIT (2013)	√	Art.16	√			
5	Canada-Honduras FTA (2013)	√	Art.10.1			√	
			Art.10.16	√			
6	Canada-Korea FTA (2014)	√	Art.8.16	√			
7	Canada-Côte d'Ivoire BIT (2014)	√	Art.15(2)	√			
8	Canada-Mali BIT (2014)	√	Art.15(3)	√			
9	Canada-Senegal BIT (2014)	√	Art.16	√			
10	Canada-Serbia BIT (2014)	√	Art.16	√			
11	Canada-Nigeria BIT (2014)		Art.16	√			
12	Canada-Cameroon BIT (2014)	√	Art.15(2)	√			
13	Canada-Burkina Faso BIT (2015)	√	Art.16	√			
14	Canada-Guinea BIT (2015)	√	Art.16	√			
15	Canada-Mongolia BIT (2016)	√	Art.14	√			
16	Canada-European Union CETA (2016)		Art.8.18(3)(5)				√
17	USMCA (2019)	√	Art.14.17	√			
18	Brazil-Chile CFIA (2015)		Art.16(4)			√	
19	Brazil-Colombia CFIA (2015)		Art.14(2)			√	
20	Brazil-Peru ETEA (2016)		Art.2.14(2)			√	
21	Intra-MERCOSUR CFIA (2017)		Art.13(1)		√		
			Art.15(2)			√	
22	Brazil-Chile FTA (2018)		Art.8.16(2)			√	

23	Brazil-Guyana CFIA (2018)		Art.16(2)			√	
24	Brazil-Suriname CFIA (2018)		Art.16(2)			√	
25	Brazil-Ethiopia CFIA (2018)		Art.15(2)			√	
26	Brazil-United Arab Emirates CFIA (2019)		Art.16(2)-(3)			√	
27	Brazil-Morocco CFIA (2019)		Art.13(2)	√			
28	Brazil-Ecuador CFIA (2019)		Art.15(2)(c)			√	
			Art.16(2)			√	
29	Brazil-India CFIA (2020)		Art.10			√	
30	Colombia-Costa Rica FTA (2013)	√	Art.12.9	√			
31	Additional Protocol to the Framework Agreement of the Pacific Alliance between Colombia, Peru, Mexico and Chile (2014)	√	Art.10.30(2)	√			
32	Slovakia-Islamic Republic of Iran BIT (2016)	√	Art.4(4)			√	
			Art.14(2)				√
33	Morocco-Nigeria BIT (2016)		Art.17(2)-(4)		√		
34	Nigeria-Singapore BIT (2016)		Art.11	√			
35	European Union-Viet Nam IPA (2019)		Art.3.27(2)				√

Note:

ACP: Anti-Corruption Provision

CSR: Within CSR Clause

IDO: Imposing Direct Obligation

DTP: Denying Treaty Protection

PAA: Precluding Access to Arbitration

BIT: Bilateral Investment Treaty

CFIA: Cooperation and Facilitation Investment Agreement

ETEA: Economic and Trade Expansion Agreement

FTA: Free Trade Agreement

IPA: Investment Protection Agreement

CETA: Comprehensive Economic and Trade Agreement

USMCA: United States-Mexico-Canada Agreement

Annex Table 2

Anti-Corruption Provisions that Foster Compliance by Foreign Investors in Model Treaties

No.	Model IIAs	ACPs	ACP Type			
			CSR	IDO	DTP	PAA
1	Morocco Model BIT 2019	Art.19		√		
		Art.32(1)				√
2	Belgium-Luxembourg Economic Union Model BIT 2019	Art.19(2)				√
3	The Netherlands Model BIT 2019	Art.16(2)				√
4	Draft Pan-African Investment Code 2016	Art.21		√		
5	Brazil Model BIT 2015	Art.15(2)			√	
6	Norway Model BIT (draft) 2015	Art.14(5)				√
7	India Model BIT 2015	Art.11(2)		√		
		Art.12	√			
		Art.13(2), (4)				√
8	Canada Model FIPA 2014	Art.16	√			
9	SADC Model BIT 2012	Art.10(1)-(3)		√		
10	IISD Model Agreement on Investment for Sustainable Development 2005	Art.13		√		

Note:

FIPA: Foreign Investment Protection and Promotion Agreement

SADC: South African Development Community

IISD: International Institute for Sustainable Development

Annex Table 3

Anti-Corruption Provisions of State Commitments in Investment Treaties and Model Treaties

No.	IIAs	Entered into force	ACPs	ACP Type		
				ARC	ECS	CMC
1	Japan-Cambodia BIT (2007)	√	Art.10	√		
2	Japan-Laos BIT (2008)	√	Art.10	√		
3	Japan-Uzbekistan BIT (2008)	√	Art.9	√		
4	Japan-Peru BIT (2008)	√	Art.10	√		
5	Japan-Papua New Guinea BIT (2011)	√	Art.9	√		
6	Japan-Colombia BIT (2011)	√	Art.8	√		
7	Japan-Kuwait BIT (2012)	√	Art.9	√		
8	Japan-Iraq BIT (2012)	√	Art.9	√		
9	Japan-Mozambique BIT (2013)	√	Art.10	√		
10	Japan-Myanmar BIT (2013)	√	Art.11	√		
11	Japan-Kazakhstan BIT (2014)	√	Art.10	√		
12	Japan-Uruguay BIT (2015)	√	Art.14	√		
13	Japan-Ukraine BIT (2015)	√	Art.11	√		
14	Japan-Oman BIT (2015)	√	Art.8	√		
15	Japan-Armenia BIT (2018)	√	Art.10	√		
16	Japan-United Arab Emirates BIT (2018)	√	Art.10	√		
17	Japan-Jordan BIT (2018)	√	Art.9	√		
18	Japan-Argentina BIT (2018)		Art.9	√		
19	Japan-Morocco BIT (2020)		Art.7	√		
20	Japan-Philippines EPA (2006)	√	Art.8 (Chapter I General Provisions)	√		
21	Japan-Thailand EPA (2007)	√	Art.7 (Chapter I General Provisions)	√		
22	Japan-Indonesia EPA (2007)	√	Art.8 (Chapter I General Provisions)	√		

23	Japan-India EPA (2011)	√	Art.7 (Chapter I General Provisions)	√		
24	Japan-Peru EPA (2011)	√	Art.9 (Chapter I General Provisions)	√		
25	Japan-Mongolia EPA (2015)	√	Art.1.7 (Chapter I General Provisions)	√		
26	Brazil-Colombia CFIA (2015)		Art.14(1)	√		
27	Brazil-Chile CFIA (2015)		Art.16(3)	√		
28	Brazil-Peru ETEA (2016)		Art.2.14(1) (Chapter 2 Investment)	√		
29	Intra-MERCOSUR CFIA (2017)		Art.15(1)	√		
30	Brazil-Chile FTA (2018)		Art.8.16(1) (Chapter 8 Investment Cooperation and Facilitation)	√		
			Art.20.7(1)		√	
			Art.20.7(2)			√
			Art.20.7(3)	√		
			Art.20.8		√	
			Art.20.9			√
			Art.20.10			√
31	Brazil-Guyana CFIA (2018)		Art.16(1)	√		
32	Brazil-Suriname CFIA (2018)		Art.16(1)	√		
33	Brazil-Ethiopia CFIA (2018)		Art.15(1)	√		
34	Brazil-United Arab Emirates CFIA (2019)		Art.16(1)	√		
35	Brazil-Ecuador CFIA (2019)		Art.16(1)	√		
36	Brazil-India CFIA (2020)		Art.10	√		
37	Morocco-Nigeria BIT (2016)		Art.17(5)			√
38	Guatemala-Trinidad and Tobago BIT (2013)	√	Art.17		√	
39	US-Australia FTA (2004)	√	Art.22.5 (Chapter 22 General Provisions and Exceptions)		√	
40	US-Morocco FTA (2004)	√	Art.18.5(5) (Chapter 18 Transparency)		√	

			Art.18.5(2)-(4)			√
41	US-Oman FTA (2006)	√	Art.18.5(5) (Chapter 18 Transparency)		√	
			Art.18.5(2)-(4)			√
42	US-Korea FTA (2007)	√	Art.21.6(5) (Chapter 21 Transparency)		√	
			Art.21.6(2)-(4)			√
43	US-Panama FTA (2007)	√	Art.18.9 (Chapter 18 Transparency)		√	
			Art.18.8			√
44	CAFTA-DR FTA (2004)	√	Art.19.7 (Chapter 18 Transparency)		√	
			Art.18.9 (Chapter 18 Transparency)			
			Art.18.8			√
45	US-Peru TPA (2006)	√	Art.19.8 (Chapter 19 Transparency)		√	
			Art.19.9			√
46	US-Singapore FTA (2003)	√	Art.21.5 (Chapter 21 General and Final Provisions)		√	
47	US-Bahrain FTA (2004)	√	Art.17.5(5) (Chapter 17 Transparency)		√	
			Art.17.5(2)-(4)			√
48	US-Colombia TPA (2006)	√	Art.19.8		√	
			Art.19.9			√
49	Canada-Colombia FTA (2008)	√	Art.19.09 (Chapter 19 Transparency)		√	
			Art.19.08			√
50	Canada-Peru FTA (2008)	√	Art.19.09 (Chapter 19 Transparency)		√	
			Art.19.08			√
51	Canada-Panama FTA (2010)	√	Art.20.10 (Chapter 20 Transparency)		√	
			Art.20.09			√

52	EU-Korea Framework Agreement (2010)		Art.35 (Title VII Cooperation in the area of justice, freedom and security)		√	
53	EU-Iraq Partnership and Cooperation Agreement (2012)	√	Art.106 (Title IV Justice, Freedom and Security)		√	
54	EU-Vietnam Framework Agreement (2012)		Art.23 (Title V Cooperation in the area of justice)		√	
55	EU-CACM Association Agreement (2012)	√	Arts.37-38 (Title II Justice, Freedom and Security)		√	
56	EU-Georgia Association Agreement (2014)	√	Art.37 (Title III Justice, Freedom and Security)		√	
57	EU-Ukraine Association Agreement (2014)	√	Art.22 (Title III Justice, Freedom and Security)		√	
58	EU-Moldova Association Agreement (2014)	√	Art.16 (Title III Justice, Freedom and Security)		√	
59	EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (2015)		Art.242 (Title V Cooperation in area of freedom, security and justice)		√	
60	EU-Armenia Comprehensive and Enhanced Partnership Agreement (2017)		Art.16 (Title III Justice, Freedom and Security)		√	
61	EU-Cameroon EPA (2009)		Art.105 (Title VIII General and Final Provisions)		√	
62	CPTPP (2018)	√	Art.26.6		√	
			Art.26.7			√
			Art.26.8			√
			Art.26.10			√
63	USMCA (2018)	√	Art.27.2(2)-(4)		√	
			Art.27.3			√
			Art.27.4			√
			Art.27.5			√

			Art.27.9		√	
64	Brazil Model BIT 2015		Art.15(1)	√		
65	IISD Model International Agreement on Investment for Sustainable Development 2005		Art.22			√
			Art.32			√
66	SADC Model Bilateral Investment Treaty Template 2012		Art.10(4)			√

Note:

ACP: Anti-Corruption Provision

BIT: Bilateral Investment Treaty

FTA: Free Trade Agreement

EPA: Economic Partnership Agreement

CPTPP: Comprehensive and Progressive Agreement for Trans-Pacific Partnership (concluded by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam)

CFIA: Cooperation and Facilitation Investment Agreement

ETEA: Economic and Trade Expansion Agreement

TPA: Trade Promotion Agreement

ARC: A Rough Commitment without Concrete Measures

ECS: Establishing Cooperation and Standards

CMC: Concrete Measures against Corruption

BIBLIOGRAPHY

INTERNATIONAL MATERIALS

International Conventions and Documents

Additional Protocol to the Criminal Law Convention on Corruption, European Treaty Series No 19, 15 May 2003 (entered into force 1 February 2005).

African Union Convention on Preventing and Combating Corruption, 11 July 2003, 43 ILM 5 (adopted by the Second Ordinary Session of the Assembly of the Union, entered into force 5 August 2006).

Agreement Establishing the Group of States against Corruption (GRECO), GMC (98) 21, 6 May 1998 (entered into force 1 May 1999).

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (entered into force 14 October 1966).

Council of Europe, Civil Law Convention on Corruption, European Treaty Series No 174, 4 November 1999 (entered into force 1 November 2003).

Council of Europe, Criminal Law Convention on Corruption, European Treaty Series No 173, 27 January 1999 (entered into force 27 January 1999).

Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission, in the Yearbook of the International Law Commission, 2001, Volume II, Part Two, 2001.

Energy Charter Treaty, 2080 UNTS 95, 17 December 1994 (entered into force 16 April 1988).

Inter-American Convention against Corruption, S. Treaty Doc. No. 105-39, 35 ILM 724, 29 March 1996 (entered into force 6 March 1997).

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 17, 1997 (entered into force 15 February 1999).

OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 26 November 2009 – C(2009) 159/REC1/FINAL, amended on 18 February 2010 – C(2010)19.

OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, 11 April 1996.

Statute of the International Court of Justice, 59 Stat 1031, 26 June 1945 (entered into force 24 October 1945).

United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, 2010.

United Nations Convention against Corruption, United Nations General Assembly, 31 October 2003, A/58/422 (entered into force 14 December 2005).

United Nations Convention against Transnational Organized Crime, UNGA, Fifty-fifth Sess, UNGA Doc A/RES/55/25, 8 January 2001.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1997), UNGA, 86th Sess, UNGA Doc. A/RES/51/191.

United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

Other International Documents

APEC Conduct Principles for Public Officials, 3 July 2007, Agenda Item V, 2007/SOM3012attB3rev1.

APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector, September 2007, APEC #207-SO-05 1.

APEC General Elements of Effective Voluntary Corporate Compliance Programs.

APEC Principles on the Prevention of Bribery and Enforcement of Anti-Bribery Laws.

Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, by Committee on International Commercial Arbitration (London Conference: International Law Association, 2000).

Council of Europe, Resolution No (97)24 on the Twenty Guiding Principles for the Fight Against Corruption (adopted by the Committee of Ministers on 6 November 1997 at the 101st session of the Committee of Ministers).

G20 High Level Principles on Corruption and Growth.

G20 High Level Principles on Private Sector Transparency and Integrity.

G20 Guiding Principles on Enforcement of the Foreign Bribery Offence.

G20 Guiding Principles to Combat Solicitation.

G20 High Level Principles on the Liability of Legal Persons for Corruption.

Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants, 1 January 2011, the World Region, Board Report, No 61109, Vol 1 (disclosure date 13 April 2011).

ICSID, History of the ICSID Convention, Volume I, 1970.

ICSID, History of the ICSID Convention, Volume II-2, 1968.

“ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development” (2002) 49:2 Netherlands International Law Review 299–305.

International Bar Association’s Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council, 29 May 2010.

OECD, 2010 Good Practice Guidance on Internal Controls, Ethics, and Compliance, adopted on 18 February 2010.

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (19 March 1965).

Scope and Definition: A Sequel, UNCTAD/DIAE/IA/2010/2 (New York, NY: United Nations, 2011).

The Rules of Procedure for Arbitration Proceedings of ICSID, ICSID/15/Rev 1, 1 January 2003).

UNCTAD Global Action Menu for Investment Facilitation, 2016.

UNCTAD IIA Issues Note: Towards a New Generational Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making, No. 5 (2013).

UNCTAD, Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019, IIA Issues Note 2, (July 2020).

UNCTAD Investment Policy Framework for Sustainable Development, 2015.

UNCTAD World Investment Report 2001: Promoting Linkages, 2001.

UNCTAD World Investment Report 2010: Investing in a Low-Carbon Economy, 2010.

UNCTAD World Investment Report 2012: Towards A New Generation of Investment Policies, 2012.

UNCTAD World Investment Report 2015: Reforming International Investment Governance, 2015.

UNCTAD World Investment Report 2016: Investor Nationality - Policy Challenges, 2016.

UNCTAD World Investment Report 2017: Investment and the Digital Economy, 2017.

UNCTAD World Investment Report 2018: Investment and New Industrial Policies, 2018.

UNCTAD World Investment Report 2019: Special Economic Zones, 2019.

UNCTAD World Investment Report 2020: International Production Beyond the Pandemic.

UNCTAD's Reform Package for the International Investment Regime (2018).

United Nations Guide for Anti-Corruption Policies, United Nations Office on Drugs and Crime, November 2003.

United Nations General Assembly, Responsibility of States for Internationally Wrongful Acts: Resolution adopted by the General Assembly, 28 January 2002, A/RES/56/83.

International Investment Treaties and Model Agreements

Additional Protocol to the Framework Agreement of the Pacific Alliance, 2014.

Agreement Between Canada and Mali for the Promotion and Protection of Investments, 2014.

Agreement Between Canada and Mongolia for the Promotion and Protection of Investments, 2016.

Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments, 2014.

Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, 2014.

Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments, 2014.

Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 2014.

Agreement between Japan and Mongolia for an Economic Partnership, 2015.

Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment, 2018.

Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment, 2007.

Agreement between Japan and the Kingdom of Thailand for an Economic Partnership, 2007.

Agreement between Japan and the Lao People's Democratic Republic for the Liberalization, Promotion and Protection of Investment, 2008.

Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment, 2015.

Agreement between Japan and the Republic of Armenia for the Liberalization, Promotion and Protection of Investment, 2018.

Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, 2011.

Agreement between Japan and the Republic of Indonesia for an Economic Partnership, 2007.

Agreement between Japan and the Republic of Iraq for the Promotion and Protection of Investment, 2012.

Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment, 2014.

Agreement between Japan and the Republic of Peru for an Economic Partnership, 2011.

Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalization of Investment, 2008.

Agreement between Japan and the Republic of the Philippines for an Economic Partnership, 2006.

Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment, 2008.

Agreement between Japan and the State of Kuwait for the Promotion and Protection of Investment, 2012.

Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment, 2015.

Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investment, 2018.

Agreement between Japan and Ukraine for the Promotion and Protection of Investment, 2015.

Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment, 2018.

Agreement between the European Union and Japan for an Economic Partnership, 2018.

Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, 2018.

Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, 2015.

Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, 2013.

Agreement between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment, 2011.

Agreement between the Government of Japan and the Government of the Republic of Mozambique on the Reciprocal Liberalization, Promotion and Protection of Investment, 2013.

Agreement between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalization, Promotion and Protection of Investment, 2013.

Agreement between the Government of the Kingdom of Bahrain and the Government of the United States of America on the Establishment of a Free Trade Area, 2004.

Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Reciprocal Promotion and Protection of Investments, 1994.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments, 1996.

Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, 2006.

Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment, 2020.

Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments, 2013.

Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, 2016.

Agreement Establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other, 2012.

Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea, 2015.

Agreement for the Reciprocal Promotion and Protection of Investments between the Republic of El Salvador and the Kingdom of Spain, 1995.

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 2014.

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, 2014.

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Ukraine, of the Other Part, 2014.

Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates, 2017.

Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement, 2014.

Canada-Honduras Free Trade Agreement, 2013.

Canada-Korea Free Trade Agreement, 2014.

Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part and the Republic of Armenia, of the other part, 2017.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018.

Comprehensive Economic Partnership Agreement between Japan and the Republic of India, 2011.

Comprehensive Trade and Economic Agreement between Canada and the European Union, 2016.

Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Kingdom of Morocco, 2019.

Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Republic of Ecuador, 2019.

Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Republic of Suriname, 2018.

Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, 2019.

Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Cooperative Republic of Guyana, 2018.

Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Republic of Chile, 2015.

Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Republic of Colombia, 2015.

Draft-Pan African Investment Code (Draft-PAIC), 2016.

Economic-Trade Expansion Agreement between the Federative Republic of Brazil and the Republic of Peru, 2016.

Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, 2015.

Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part, 2010.

Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one Part, and the Socialist Republic of Vietnam, of the other Part, 2012.

Free Trade Agreement between Brazil and Chile, 2018.

Free Trade Agreement between Canada and Colombia, 2008.

Free Trade Agreement between Canada and Panama, 2010.

Free Trade Agreement between Canada and Peru, 2008.

Free Trade Agreement between the Government of the United States of America and the Government of Australia, 2004.

Free Trade Agreement between the Republic of Colombia and the Republic of Costa Rica, 2013.

Free Trade Agreement between the United States and Korea, 2007.

Free Trade Agreement between the United States and Morocco, 2004.

Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, 2009.

Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), 2017.

Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore, 2016.

Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, 2019.

Investment Protection and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India, 2020.

North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States, 1994.

Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, 2012.

Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 2016.

The Dominican Republic-Central America-United States Free Trade Agreement, 2004.

Trade Promotion Agreement between the United States and Colombia, 2006.

Trade Promotion Agreement between the United States and Peru, 2006.

Transatlantic Trade and Investment Partnership between the United States and the European Union (in the process of negotiation).

United States-Mexico-Canada Agreement, 2018.

United States-Panama Trade Promotion Agreement, 2007.

United States-Singapore Free Trade Agreement, 2003.

Agreement between Canada and _____ for the Promotion and Protection of Investments, 2014 [Canada Model Investment Treaty 2014].

Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and _____ on the other hand, on the Reciprocal Promotion and Protection of Investments, 2019 [Belgium-Luxembourg Economic Union Model BIT 2019].

Agreement between the Kingdom of Norway and _____ for the Promotion and Protection of Investments (draft version), 2015 [Norway Model Investment Treaty (draft) 2015].

Agreement on Reciprocal Promotion and Protection of Investments between _____ and the Kingdom of the Netherlands, 2018 [Netherlands Model Investment Agreement 2018].

Agreement on Reciprocal Promotion and Protection of Investments between _____ and the Kingdom of the Netherlands, 2019 [Netherlands Model Investment Agreement 2019].

Bilateral Investment Treaty between the Government of the Republic of India and _____, 2015 [Model Text for the Indian Bilateral Investment Treaty 2015].

Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and _____, 2015 [Brazil Model Investment Treaty 2015].

International Institute for Sustainable Development (IISD), IISD Model International Agreement on Investment for Sustainable Development, March 2005.

South African Development Community (SADC), Model Bilateral Investment Treaty Template, July 2012.

Treaty between the Government of the United States of America and the Government of _____ concerning the Enforcement and Reciprocal Protection of Investment, 2012 [U.S. Model Bilateral Investment Treaty].

Accord entre le Royaume du Maroc et _____ pour la Promotion et la Protection Réciproques des Investissements, 2019 [Morocco Model Investment Treaty, 2019].

Domestic Legislation

Amendment (IX) to the Criminal Law of the People's Republic of China, 2015.

Criminal Law of the People's Republic of China (2020 Amendment), 2021.

Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Embezzlement and Bribery, 2016.

18 U.S. Code Chapter 11 - Bribery, Graft, and Conflicts of Interests.

The United States of America, Foreign Corrupt Practices Act of 1977, 15 USC § 78.

The United Kingdom, Bribery Act 2010 c.23.

Permanent Court of International Justice Cases

Diversion of Water from the Meuse (The Netherlands v Belgium), PCIJ Series A/B, No 70, Judgment of June 28th, 1937, 61.

Diversion of Water from the Meuse (The Netherlands v Belgium), PCIJ Series A/B, No 70, Judgment of June 28th, 1937, Dissenting Opinion of M Anzilotti.

Diversion of Water from the Meuse (The Netherlands v Belgium), PCIJ Series A/B, No 70, Judgment of June 28th, 1937, Individual Opinion by Mr Hudson.

Factory at Chorzów (Germany v Poland), Judgement No 8, PCIJ, Series A, Jurisdiction of 26 July 1927.

Factory at Chorzów (Germany v Poland), Judgement of Merits, No 17, PCIJ, Series A.

International Court of Justice Cases

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002, Dissenting Opinion of Judge ad hoc Van den Wyngaert.

Certain Iranian Assets (Islamic Republic of Iran v United States of America), Preliminary Objections, Judgment, ICJ Reports 2019.

Corfu Channel case, Judgment of April 9th, 1949, ICJ Reports 1949, 4.

Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997, 1997.

Jadhav case (India v Pakistan), Judgment (Merits) of 17 July 2019, Declaration of Judge Iwasawa.

Jadhav case (India v Pakistan), Judgment of 17 July 2019.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004, 136.

Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Preliminary Objections, Judgment, ICJ Reports 2017.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986, Dissenting Opinion of Judge Schwebel, 1986.

United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, 3.

UNRIAA Cases

Estate of Jean-Baptiste Caire (France) v United Mexican States (1929), 5 UNRIAA vol V, 516–534.

Francisco Mallén (United Mexican States) v United States of America (1927), UNRIAA, vol IV, 173–190.

L F H Neer and Pauline Neer (United States of America) v United Mexican States (1926), 4 UNRIAA, vol IV, 8.

ICSID Convention and Additional Facility Cases

Adel A Hamadi Al Tamimi v Sultanate of Oman, ICSID Case No ARB/11/33, Award of 3 November 2015, 2015.

African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v La République démocratique du Congo, ICSID Case No ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité of 29 July 2008, 2008.

Alasdair Ross Anderson et al v Republic of Costa Rica, ICSID Case No ARB(AF)/07/3, Award of 19 May 2010, 2010.

Alasdair Ross Anderson et al v Republic of Costa Rica, ICSID Case No ARB(AF)/07/3, Award of 19 May 2010, 2010.

Alpha Projektholding GmbH v Ukraine, ICSID Case No ARB/07/16, Award of 8 November 2010, 2010.

Antoine Goetz et consorts v République du Burundi, ICSID Case No ARB/95/3, Award (Embodying the Parties' Settlement Agreement) (French) of 10 February 1999, 1999.

Asian Agricultural Products Ltd v Republic of Sri Lanka, ICSID Case No ARB/87/3, Final Award of 27 June 1990, 1990.

Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v The Republic of Azerbaijan, ICSID Case No ARB/06/15, Award of 8 September 2009.

Azurix Corp v The Argentine Republic, ICSID Case No ARB/01/12, Award of 14 July 2006, 2006.

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Decision on Jurisdiction on 14 November 2005, 2005.

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Award of 27 August 2009, 2009.

Bear Creek Mining Corporation v Republic of Peru, ICSID Case No ARB/14/21, Award of 30 November 2017, 2017.

Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award of 24 July 2008, 2008.

Consortium Groupement LESI- DIPENTA v République algérienne démocratique et populaire, ICSID Case No ARB/03/08, Award of 10 January 2005, 2005.

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya, ICSID Case No ARB/15/29, Award of 22 October 2018, 2018.

Crystallex International Corporation v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award of 4 April 2016, 2016.

Desert Line Projects LLC v the Republic of Yemen, ICSID Case No ARB/05/17, Award of 06 February 2008, 2008.

EDF (Services) Limited v Romania, ICSID Case No ARB/05/13, Award of 8 October 2009, 2009.

Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3 (also known as: Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic), Decision on Jurisdiction of 14 January 2004, 2004.

Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No ARB/03/25, Award of 16 August 2007, 2007.

Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines, ICSID Case No ARB/03/25, Dissenting Opinion of Mr Bernardo M Cremades (19 July 2007), 2007.

Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines, ICSID Case No ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide of 23 December 2010, 2010.

Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No ARB/11/12, Award of 10 December 2014, 2014.

F-W Oil Interests, Inc v The Republic of Trinidad and Tobago, ICSID Case No ARB/01/14, Award of 3 March 2006, 2006.

Georg Gavrilovic and Gavrilovic d.o.o v Republic of Croatia, ICSID Case No ARB/12/39, Award of 25 July 2018, 2018.

Getma International v Republic of Guinea (1), CCJA Case No 001/2011/ARB, Tribunal Award (French) of 29 April 2014, 2014.

Getma International and others v Republic of Guinea (2), ICSID Case No ARB/11/29, Award (French) of 16 August 2016, 2016.

Getma International and others v Republic of Guinea (2), ICSID Case No ARB/11/29, Decision on Jurisdiction (French) of 29 December 2012.

Glencore International AG and CI Prodeco SA v Republic of Colombia, ICSID Case No ARB/16/6, Award of 27 August 2019, 2019.

Glencore International AG, C I Prodeco SA, and Sociedad Portuaria Puerto Nuevo SA v Republic of Colombia, ICSID Case No ARB/19/22.

Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No ARB/07/24, Award of 18 June 2010, 2010.

H&H Enterprises Investments, Inc v Arab Republic of Egypt, ICSID Case No ARB 09/15, Excerpts of Award of 6 May 2014, 2014.

Hochtief AG v The Argentine Republic, ICSID Case No ARB/07/31, Decision on Liability of 29 December 2014, 2014.

Inceysa Vallisoletana SL v Republic of El Salvador, ICSID Case No ARB/03/26, Award of 2 August 2006, 2006.

Infinito Gold Ltd v Costa Rica, ICSID Case No ARB/14/5, Decision on Jurisdiction of 4 December 2017, 2017.

Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine, ICSID Case No ARB/08/8, Decision on Jurisdiction of 8 March 2010, 2010.

Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania (1), ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility of 24 September 2008, 2008.

Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania (1), ICSID Case No ARB/05/20, Final Award of 11 December 2013, 2013.

Ioannis Kardassopoulos v The Republic of Georgia, ICSID Case No ARB/05/18, Decision on Jurisdiction of 6 July 2007, 2007.

Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No ARB/03/11, Award on Jurisdiction of 6 August 2004.

Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan, ICSID Case No ARB/13/1, Award of 22 August 2017, 2017.

Krederi Ltd v Ukraine, ICSID Case No ARB/14/17, Award of 2 July 2018 (Excerpts), 2018.

Lao Holdings NV v Lao People's Democratic Republic, ICSID Case No ARB (AF)/12/6, Award of 6 August 2019, 2019.

LESI S.p.A and ASTALDI S.p.A v République Algérienne Démocratique et Populaire, ICSID Case No ARB/05/3, Decision of 12 July 2006, 2006.

Libananco Holdings Co Limited v Republic of Turkey, ICSID Case No ARB/06/8, Award of 2 September 2011, 2011.

Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan, ICSID Case No ARB/07/14, Excerpts of the Award of 22 June 2010.

Metalpar SA and Buen Aire SA v The Argentine Republic, ICSID Case No ARB/03/5, Decision on Jurisdiction of 27 April 2006, 2006.

Metal-Tech Ltd v Republic of Uzbekistan, ICSID Case No ARB/10/3, Award of 4 October 2013, 2013.

MOL Hungarian Oil and Gas Company Plc v Republic of Croatia, ICSID Case No ARB/13/32.

Mr Franck Charles Arif v Republic of Moldova, ICSID Case No ARB/11/23, Award of 8 April 2013, 2013.

Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”), ICSID Case No ARB/10/11 and No ARB/10/18, Decision on Jurisdiction of 19 August 2013, 2013.

Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”), ICSID Case No ARB/10/11 and No ARB/10/18, Decision on the Corruption Claim of 25 February 2019, 2019.

Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”), ICSID Case No ARB/10/11 and No ARB/10/18, Procedural Order No 13 of 26 May 2016, 2016.

Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”), ICSID Case No ARB/10/11 and No ARB/10/18, Third Decision on the Payment Claim of 26 May 2016, 2016.

Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic, ICSID Case No ARB/03/13, Decision on Preliminary Objections of 27 July 2006.

Phoenix Action, Ltd v The Czech Republic, ICSID Case No ARB/06/5, Award of 15 April 2009, 2009.

Plama Consortium Limited v Republic of Bulgaria, ICSID Case No ARB/03/24, Award of 27 August 2008, 2008.

Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia, ICSID Case No ARB/06/2, Decision on Jurisdiction of 27 September 2012, 2012.

Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia, ICSID Case No ARB/06/2, Award of 16 September 2015, 2015.

RSM Production Corporation and others v Grenada, ICSID Case No ARB/10/6, Award 10 December 2010, 2010.

Republic of Croatia v MOL Hungarian Oil and Gas Company Plc, PCA CASE No 2014-15, Final Award of 23 December 2016, 2016.

Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan, ICSID Case No ARB/05/16, Award of 29 July 2008, 2008.

Saba Fakes v Republic of Turkey, ICSID Case No ARB/07/20, Award of 14 July 2010, 2010.

Saipem S.p.A v The People's Republic of Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, 2007.

Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction of 31 July 2001, 42 ILM 609 (2003), 2001.

Sanum Investments Limited v Lao People's Democratic Republic, UNCITRAL, PCA Case No 2013-13, Award of 6 August 2019, 2019.

SAUR International SA v Republic of Argentina, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012, 2012.

Sempra Energy International v The Argentine Republic, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award of 9 June 2010.

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3, Award of 20 May 1992, 1992.

Spentex Netherlands, BV v Republic of Uzbekistan, ICSID Case No ARB/13/26, 2016.

Suez, Sociedad General de Aguas de Barcelona, SA. and Vivendi Universal, SA v Argentine Republic, ICSID Case No ARB/03/19 (formerly Aguas Argentinas, SA, Suez, Sociedad General de

Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, Award of 9 April 2015, 2015.

SwemBalt AB, Sweden v The Republic of Latvia, UNCITRAL, Decision by the Court of Arbitration of 23 October 2000, 2000.

Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited, ICSID Case No ARB/98/8, Final Award of 12 July 2001, 2001.

Técnicas Medioambientales Tecmed, SA v The United Mexican States, ICSID Case No ARB (AF)/00/2, Award of 29 May 2003, 2003.

Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic, ICSID Case No ARB/09/1, Decision on Jurisdiction of 21 December 2012, 2012.

Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan, ICSID Case No ARB/12/1, Decision on Jurisdiction and Liability of 10 November 2017, 2017.

Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan, ICSID Case No ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons) of 10 November 2017, 2017.

Tokios Tokelés v Ukraine, ICSID Case No ARB/02/18, Decision on Jurisdiction of 29 April 2004, 2004.

TSA Spectrum de Argentina SA v Argentine Republic, ICSID Case No ARB/05/5, Award of 19 December 2008, 2008.

Tulip Real Estate and Development Netherlands BV v Republic of Turkey, ICSID Case No ARB/11/28, Award of 10 March 2014.

Unión Fenosa Gas, SA v Arab Republic of Egypt, ICSID Case No ARB/14/4, Dissenting Opinion of Arbitrator Mark Clodfelter (31 August 2018), 2018.

Unión Fenosa Gas, SA v Arab Republic of Egypt, ICSID Case No ARB/14/4, Award of 31 August 2018, 2018.

United Parcel Service of America Inc v Government of Canada, ICSID Case No UNCT/02/1, Award on the Merits of 24 May 2007, 2007.

Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No ARB/07/26, Award of 8 December 2016, 2016.

Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany, ICSID Case No ARB/09/6 (formerly *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co KG v The Federal Republic of Germany*), Award of 11 March 2011, 2011.

Vladislav Kim and others v Republic of Uzbekistan, ICSID Case No ARB/13/6, Decision on Jurisdiction of 8 March 2017, 2017.

Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), 2000.

World Duty Free Company v Republic of Kenya, ICSID Case No Arb/00/7, Award of 4 October 2006, 2006.

Other Cases

Customs and Tax Consultancy LLC v Democratic Republic of Congo, ICC Case No 19515/MCP/DDA, Partial Award (French) of 22 July 2015, 2015.

Chevron Corporation and Texaco Petroleum Corporation v Ecuador (2), PCA Case No 2009-23, Second Partial Award on Track II of 30 August 2018, 2018.

Getma International v Republic of Guinea (1), CCJA Case No 001/2011/ARB, Judgment of the Common Court of Justice and Arbitration of OHADA of 19 November 2015, 2015.

Getma International v Republic of Guinea (1), CCJA Case No 001/2011/ARB, Tribunal Award (French) of 29 April 2014, 2014.

Guyana v Suriname, Award of the Arbitral Tribunal of 17 September 2007, PCA Case No 2004-04, (2013) XXX RIAA 1.

ICC Case No 1110 (1963), Award, 10 *Arbitration International* 282, 292 (1994).

Methanex Corporation v United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, 2005.

Pan African Minerals and others v Burkina Faso, ICC Case No 22450/DDA, Procedural Order No 4 on Provisional Measures (French) of 11 May 2018, 2018.

Philip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015, 2015.

Republic of Croatia v MOL Hungarian Oil and Gas Company Plc, PCA CASE No 2014-15, Final Award of 23 December 2016, 2016.

Securiport v Republic of Benin, ICC Case No22814/DDA.

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, INC v Government of Canada, UNCITRAL, Permanent Court of Arbitration Case No 2009-04, Award of Jurisdiction and Liability of 17 March 2015, 2015.

Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No 2005-04/AA227, Final Award of 18 July 2014, 2014.

SECONDARY SOURCES

Books

Baizeau, Domitille & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Paris, France: International Chamber of Commerce, 2015).

Bernasconi-Osterwalder, Nathalie & Lise Johnson, eds, *International Investment Law and Sustainable Development: Key Cases from 2000-2010* (Winnipeg, Man.: International Institute for Sustainable Development, 2011).

Berkeley, Andrew & Kristine Karsten, *Arbitration: Money Laundering, Corruption and Fraud* (International Chamber of Commerce, 2003).

Betz, Kathrin, *Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence* (Cambridge University Press, 2017).

Bishop, Doak, James Crawford & Michael Reisman, *Foreign Investment Disputes: Cases Materials and Commentary*, 2nd ed (Kluwer Law International, 2014).

Cheng, Bin, *General Principles Of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953).

Cheng, Tai-Heng, *When International Law Works: Realistic Idealism after 9/11 and the Global Recession* (Oxford: Oxford University Press, 2012).

Chi, Manjiao, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge, 2018).

Collins, David, *An Introduction to International Investment Law* (Cambridge, United Kingdom: Cambridge University Press, 2017).

Cordonier Segger, Marie-Claire, Markus W Gehring & Andrew Paul Newcombe, eds, *Sustainable Development in World Investment Law*, Global trade law series (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2011).

Crawford, James et al, eds, *The Law of International Responsibility* (Oxford & New York: Oxford University Press, 2010).

Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (New York: Cambridge University Press, 2002).

Dolzer, Rudolf & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed (Oxford University Press, 2012).

Dolzer, Rudolf & Margret Stevens, *Bilateral Investment Treaty* (The Hague: Martinus Nijhoff Publishers, 1995).

Douglas, Zachary, *The International Law of Investment Claims* (Cambridge, UK & New York: Cambridge University Press, 2009).

Dugan, Christopher F, et al, *Investor-State Arbitration* (New York: Oxford University Press, 2008).

Fitzmaurice, Gerald, *The General Principles Of International Law Considered from the Standpoint Of the Rule of Law* (1957) 92:1 Recueil des Cours.

Gaillard, Emmanuel, *Legal Theory of International Arbitration* (Leiden & Boston, Mass: Martinus Nijhoff Publishers, 2010).

Gallagher, Norah & Wenhua Shan, *Chinese Investment Treaties: Policies and Practice*, *Oxford International Arbitration Series* (Oxford University Press, 2009).

Greenwald, Brody K & Jennifer A Ivers, *Addressing Corruption Allegations in International Arbitration*, *Brill Research Perspectives* (Leiden: Brill, 2019).

Hindelang, Steffen & Markus Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016).

Kulick, Andreas, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2016).

Kreindler, Richard, *Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements* (Hague Academy of International Law, 2013).

Lauterpacht, Hersch, *The Development of International Law by the International Court* (Cambridge University Press, 1982).

Llamzon, Aloysius, *Corruption in International Investment Arbitration* (Oxford University Press, 2014).

Marcoux, Jean-Michel, *International Investment Law and Globalization: Foreign Investment, Responsibilities and Intergovernmental Organizations* (Routledge, 2019).

Miles, Kate, ed, *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing, 2019).

Newcombe, Andrew & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law & Business, 2009).

Pieth, Mark, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention on Bribery: A Commentary*, 2d ed (Cambridge: Cambridge University Press, 2013).

Polanco, Rodrigo, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (Cambridge University Press, 2019).

Ripinsky, Sergey & Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008).

Rose, Cecily, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015).

Rousseau, Charles, *Droit International Public. Tome V: Les rapports conflictuels* (Paris: Editions Sirey, 1983).

Sabahi, Borzu, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press, 2011).

Sayed, Abdulhay, *Corruption in International Trade and Commercial Arbitration*, International arbitration law library (The Hague: Kluwer Law International, 2004).

Schacherer, Stefanie, *International Investment Law and Sustainable Development: Key Cases from the 2010s*, Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, eds (International Institute for Sustainable Development, 2018).

Schill, Stephan, *The Multilateralization of International Investment Law*, International trade and economic law series (Cambridge, UK; Cambridge University Press, 2009).

Schreuer, Christoph et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009).

Shihata, Ibrahim F I, *The Power of the International Court to Determine its Own Jurisdiction: Compétence de la Compétence* (The Hague: M. Nijhoff, 1965).

Sornarajah, M, *The International Law on Foreign Investment*, 4th ed (Cambridge University Press, 2017).

Subedi, Surya P, *International Investment Law: Reconciling Policy and Principle*, 3rd ed (Hart Publishing, 2016).

Uluc, Inan, *Corruption in International Arbitration* (London, England: Wildy, Simmonds & Hill Publishing, 2018).

Vandeveld, Kenneth J, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010).

Waibel, Michael et al, eds, *The Backlash against Investment Arbitration: Perceptions and Reality* (Austin, Tex: Kluwer Law International, 2010).

Vandeveld, Kenneth J, *U.S. International Investment Agreements* (Oxford University Press, 2009).

Book Chapters

Allen, Brooks E, “The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners” in Michael E Schneider & Joachim Knoll, eds, *Performance as A Remedy: Non-Monetary Relief in International Arbitration* ASA Special Series No. 30 (Huntington, N.Y.: JurisNet, LLC) 281.

Alvarez, José E, “What are International Judges for? The Main Functions of International Adjudication” in Cesare P R Romano, Karen J Alter & Yuval Shany, eds, *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 158.

Baizeau, Domitille & Tessa Hayes, “The Arbitral Tribunal’s Duty and Power to Address Corruption Sua Sponte” in Andrea Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity* ICCA Congress Series (Kluwer Law International, 2017) 225.

Banifatemi, Yas, “The Law Applicable in Investment Treaty Arbitration” in Katia Yannaca-Small, ed, *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 191.

Banifatemi, Yas, “The Impact of Corruption on ‘Gateway Issues’ of Arbitrability, Jurisdiction, Admissibility and Procedural Issues” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Paris, France: International Chamber of Commerce, 2015) 16.

Besson, Sébastien, “Corruption and Arbitration: Impact of Criminal Investigations” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Paris, France: International Chamber of Commerce, 2015) 103.

Bjorklund, Andrea K, “Sustainable Development and International Investment Law” in Kate Miles, ed, *Research Handbook on Environment and Investment Law* Research Handbooks in Environmental Law Series (Edward Elgar Publishing, 2019) 38.

Bockstiegel, Karl-Heinz, “The Role of the Arbitrators in Investment Treaty Arbitration” in Albert Jan van den Berg, ed, *International Commercial Arbitration: Important Contemporary Questions* (The Hague & New York: Kluwer Law International, 2003) 366.

Brower, Charles N & Jawad Ahmad, “The State’s Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration” in Katia Yannaca-Small, ed, *Arbitration under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford University Press, 2018) 455.

Brown, Chester & Domenico Cucinotta, “Treatment Standards in Environment-Related Investor-State Disputes” in Kate Miles, ed, *Research Handbook on Environment and Investment Law* Research Handbooks in Environmental Law Series (Edward Elgar Publishing, 2019) 175.

Cosar, Utku, “Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions” in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges* ICCA Congress Series (Kluwer Law International, 2015) 541.

Crawford, James Richard & Paul Mertenskötter, “The Use of the ILC’s Attribution Rules in Investment Arbitration” in Meg Kinnear et al, eds, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2016) 27.

Diel-Gligor, Katharina & Rudolf Hennecke, “Investment in Accordance with the Law” in Marc Bungenberg et al, eds, *International Investment Law: A Handbook* (C.H.BECK, Hart, Nomos, 2015) 566.

Donovan, Donald Francis, “Investment Treaty Arbitration” in *Mandatory Rules in International Arbitration* (JurisNet, LLC, 2011) 275.

Fernández-Armesto, Juan, “The Effects of a Positive Finding of Corruption” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Paris, France: International Chamber of Commerce, 2015) 167.

Gehring, Markus W & Avidan Kent, “International Investment Agreements and Sustainable Development: Future Pathways” in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (Routledge, 2012) 561.

Gehring, Markus W & Avidan Kent, “Sustainable Development and IIAs: From Objective to Practice” in Armand De Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (Routledge, 2012) 284.

Gordon, Kathryn, “International Investment Agreements: A survey of Environmental, Labour and Anti-Corruption Issues” in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008) 135.

Hanotiau, B & O Caprasse, “Public Policy in International Commercial Arbitration” in E Gaillard & D di Pietro, eds, *Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention in Practice* (London: Cameron May Ltd., 2008) 787.

Haugeneder, Florian & Christoph Liebscher, “Chapter V: Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof”, in Gerold Zeiler, Irene Welser, et al, eds, *Austrian Arbitration Yearbook 2009* (MANZ Verlag Wien, 2009) 539.

Henckels, Caroline, “Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference” in Andrea Bjorklund, ed, *Yearbook on International Investment Law and Policy 2012-2013* (New York, United States: Oxford University Press, 2014) 305.

Hindelang, Steffen & Markus Krajewski, “Towards a More Comprehensive Approach in International Investment Law” in Steffen Hindelang & Markus Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016) 1.

Hobér, Kaj, “Remedies in Investment Disputes” in Andrea K Bjorklund, Ian A Laird & Sergey Ripinsky, eds, *Investment Treaty Law: Current Issues III, Remedies in International Investment Law Emerging Jurisprudence of International Investment Law* (London: British Institute of International and Comparative Law, 2006) 3.

Hobér, Kaj, “State Responsibility and Attribution” in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 549.

Jarvin, Sigvard, “Non-Pecuniary Remedies: The Practice of Declaratory Relief and Specific Performance in International Commercial Arbitration” in Arthur W. Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007* (Leiden & Boston: Martinus Nijhoff Publishers, 2008) 167.

Karanja, Elizabeth “Report on the Session Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse”, in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series No.18 (Wolters Kluwer Law & Business, 2015) 439.

Kevin, Lim, “Upholding Corrupt Investors’ Claims against Complicit or Compliant Host States—Where Angels should not Fear to Tread” in Karl P Sauvant, ed, *Yearbook on International Investment Law and Policy (2011-2012)* (Oxford University Press, 2013) 601.

Kreindler, Richard, “Aspects of Illegality in the Formation and Performance of Contracts”, in Albert Jan van den Berg, ed, *International Commercial Arbitration: Important Contemporary Questions*, Issue 11 of ICCA Congress Series (Kluwer Law International, 2003) 209.

Kreindler, Richard, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in Kaj Hobér et al, eds, *Between East and West: Essays in honour of Ulf Franke* (Huntington, N.Y.: Juris, 2010) 309.

Kreindler, Richard, “Corruption and International Arbitration: Is Anything Broken or Otherwise Worth Fixing” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Paris, France: International Chamber of Commerce, 2015) 187.

Kreindler, Richard & Jean-Yves Garaud, “The Impact of Public Policy Considerations” in *Arbitration of International Intellectual Property Disputes*, 2nd ed (JurisNet, LLC, 2021) 505.

Kriebaum, Ursula, “Investment Arbitration - Illegal Investments” in Christina Klausegger et al, eds, *Austrian Yearbook on International Arbitration 2010* (Beck, Stämpfli & Manz, 2010) 307.

Lalive, Pierre, “Transnational (or Truly International) Public Policy and International Arbitration” in Pieter Sanders, ed, *Comparative Arbitration Practice and Public Policy in Arbitration ICCA Congress Series* (Kluwer Law International, 1987) 258.

Lamm, Carolyn B & Andrea Menaker, “The Consequences of Corruption in Investor-State Arbitration” in Meg Kinnear et al, eds, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 433.

Llamzon, Aloysius, “On Corruption’s Peremptory Treatment in International Arbitration: State Responsibility, Unclean Hands, and the Return of Corruption as a Jurisdictional Issue” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law (Kluwer Law International, 2015) 32.

Llamzon, Aloysius & Anthony C Sinclair, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct” in Albert Jan van den Berg, ed, *Legitimacy; Myths, Realities, Challenges ICCA Congress Series 18* (Kluwer Law International, 2015) 451.

Marboe, Irmgard, “State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests” in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford University Press, 2010).

Mayeda, Graham, “Chapter 22: Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries” in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law Global Trade Law Series* (Kluwer Law International, 2011) 539.

Mills, Alex, “The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration” in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 437.

Mills, Karen, “Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto”, in Albert Jan van den Berg, ed, *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series No 11 (Kluwer Law International, 2003) 288.

Mückenberger, Ulrich, “Can International Investment Agreements Support Labour Standards?” in Sigurt Vitols, ed, *Long-Term Investment and the Sustainable Company: A Stakeholder Perspective* (European Trade Union Institute, 2015) 177.

Nappert, Sophie, “International Arbitration as a Tool of Global Governance” in Eric Brousseau, Jean-Michel Glachant & Jérôme Sgard, eds, *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (2019).

Nappert, Sophie, “Raising Corruption as a Defence in Investment Arbitration” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Paris, France: International Chamber of Commerce, 2015) 175.

Newcombe, Andrew, “Investor misconduct: Jurisdiction, admissibility or merits?” in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 187.

Paulsson, Jan, “Jurisdiction and Admissibility” in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* Publication 693 (Rochester, NY: ICC Publishing, 2005) 601.

Prislan, Vid & Ruben Zandvliet, “Labour Provisions in International Investment Agreements: Prospects for Sustainable Development” in Andrea Bjorklund, ed, *Yearbook on International Investment Law and Policy 2012-2013* (New York, United States: Oxford University Press, 2014) 357.

Prislan, Vid & Ruben Zandvliet, “Mainstreaming sustainable development into international investment agreements: What role for labour provisions?” in Stephan Schill, Christian Tams & Rainer Hofmann, eds, *International Investment Law and History* (Edward Elgar Publishing, 2015) 390.

Raeschke-Kessler, Hilmar, “Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects”, in Stefan Michael Kröll & Norbert Horn, eds, *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law*, Volume 19 (Kluwer Law International, 2004) 471.

Schreuer, Christoph H, “Denunciation of the ICSID Convention and Consent to Arbitration” in Michael Waibel et al, eds, *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 353.

Schreuer, Christoph, “Investment Protection and International Relations” in August Reinisch & Ursula Kriebaum, eds, *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (The Netherlands: Eleven International Publishing, 2007) 345.

Schultz, Thomas, “The Three Pursuits of Dispute Settlement” in Alexander J Bělohlávek & Naděžda Rozehnalová, eds, *Czech (& Central Europe) Yearbook of Arbitration: The Relationship between Constitutional Values, Human Rights and Arbitration* (JurisNet, LLC, 2011) 227.

Schwebel, Stephen M, “Clean Hands, Principle” in Rüdiger Wolfrum, ed, *Max Planck Encyclopedias of Public International Law* (Oxford University Press, 2012) 232.

Segger, Marie-Claire Cordonier & Andrew Newcombe, “Chapter 6: An Integrated Agenda for Sustainable Development in International Investment Law” in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law*, Global Trade Law Series (Kluwer Law International, 2011) 101.

Tamada, D, “Host States as Claimants-Corruption Allegations” in Shaheez Lalani & Lazo R Polanco, eds, *The Roles of the State in Investor-State Arbitration* (Leiden & Boston: Brill Nijhoff, 2015) 118.

Tezuka, Hiroyuki, “Corruption Issues in the Jurisdictional Phase of Investment Arbitrations: An Arbitrator’s Checklist” in Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Paris, France: International Chamber of Commerce, 2015) 51.

Tienhaara, Kyla, “Regulatory Chill and the Threat of Arbitration: A View from Political Science” in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606.

Ulfstein, Geir, “The International Judiciary” in Jan Klabbers, Anne Peters & Geir Ulfstein, eds, *The Constitutionalization of International Law* (Oxford University Press, 2009) 126.

Veit, Marc, “Chapter 35: Proving Legality instead of Corruption”, in Patricia Shaughnessy & Sherlin Tung, eds, *The Powers and Duties of an Arbitrator: Liber Amicorum: Pierre A Karrer* (Kluwer Law International, 2017) 373.

Wei, Shen, “Is (In)Consistency A Problem? A Close Look at Juridical Techniques in Interpreting Jurisdiction Clauses in Chinese BIT Cases” in Li Yuwen, Qi Tong & Bian Cheng, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 156.

Welser, Irene, “Chapter III: The Arbitrator and the Arbitration Procedure, ‘Sweetening’ or ‘Baiting’ – A New Crime for Arbitrators?”, in Christian Klausegger, Peter Klein, et al, eds, *Austrian Yearbook on International Arbitration 2013* (C.H.Beck, 2013) 151.

Wilske, Stephan & Todd J. Fox, “Part I: International Commercial Arbitration, Chapter 26: Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?”, in Stefan Michael Kröll, Loukas A. Mistelis, et al., eds, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 489.

Wilske, Stephan & Willa Obel, “The ‘Corruption Objection’ to Jurisdiction in Investment Arbitration” in Krista Nadakavukaren Schefer, ed, *Poverty and the International Economic Legal System* (Cambridge: Cambridge University Press, 2013) 177.

Yackee, Jason Webb, “Do Investment Promotion Agencies Promote Bilateral Investment Treaties?” in Andrea K Bjorklund, ed, *Yearbook on International Investment Law and Policy 2013-2014* (Oxford University Press, 2015) 529.

Yan, Yueming, “A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?” in Yuwen Li, Tong Qi & Cheng Bian, eds, *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge, 2019) 227.

Yotova, Rumiana, “Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?” in Joseph Klingler, Yuri Parkhomenko & Constantinos Salonidis, eds, *Between the Lines of the Vienna Convention?*

Canons and Other Principles of Interpretation in Public International Law (Kluwer Law International, 2018) 307.

Articles

Abbott, Kenneth W & Duncan Snidal, “Values and Interests: International Legalization in the Fight against Corruption” (2002) 31:S1 *The Journal of Legal Studies* S141–S177.

Akandeire, Ayodeji, “Corruption in Investor-State Arbitration: Balancing the Scale of Culpability” (2019), online: <<https://papers.ssrn.com/abstract=3464618>>.

Alschner, Wolfgang & Dmitriy Skougarevskiy, “Mapping the Universe of International Investment Agreements” (2016) 19:3 *Journal of International Economic Law* 561–588.

Amianto, Lodovico, “The Role of ‘Unclean Hands’ Defences in International Investment Law” (2019) 6:1 *McGill Journal of Dispute Resolution* 3-37.

Arato, Julian, Chester Brown & Federico Ortino, “Parsing and Managing Inconsistency in Investor-State Dispute Settlement” (2020) 21:2–3 *The Journal of World Investment & Trade* 336–373.

Bantekas, Ilias, “Corporate Social Responsibility in International Law” (2004) 22 *Boston University International Law Journal* 309-347.

Bayley, David H, “The Effects of Corruption in a Developing Nation” (1966) 19:4 *Political Research Quarterly* 719–732.

Bernardini, Piero, “Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties’ Interests” (2017) 32:1 *ICSID Review* 38–57.

Bernasconi-Osterwalder, Nathalie et al, *Harnessing Investment for Sustainable Development: Inclusion of Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements*, by Nathalie Bernasconi-Osterwalder et al (International Institute for Sustainable Development, 2018).

Betz, Kathrin, “Economic Crime in International Arbitration” (2017) 35:2 *ASA Bulletin* 281–292.

Bjorklund, Andrea K & Lukas Vanhonnaecker, “Yukos: The Clean Hands Doctrine Revisited” (2015) 9:2 *Diritti umani e diritto internazionale* 365-385.

Bjorklund, Andrea, Yarik Kryvoi & Jean-Michel Marcoux, *Investment Promotion and Protection in the Canada-UK Trade Relationship* (2018).

Blundell-Wignall, Adrian & Caroline Roulet, *Foreign Direct Investment, Corruption and the OECD Anti-Bribery Convention*, OECD Working Papers on International Investment, by Adrian Blundell-Wignall & Caroline Roulet, OECD Working Papers on International Investment 2017/01 (2017).

Bolongaita, Emil P, “Mandate without Means: Strengthening the OECD Anti-Bribery Convention” 2017 OECD Global Anti-Corruption & Integrity Forum 1–24.

Bulovsky, Andrew T, “Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development” (2019) 118:1 *Michigan Law Review* 117-147.

“Key Note Presentation: Everything You Always Wanted to Know About Foreign Bribery and Corruption but Were Afraid to Ask, by Nicola Bonucci, With Commentary by Professor W. Michael Reisman” (2015) 9:3 *World Arbitration & Mediation Review* 239–247.

Brabandere, Eric De, “The (Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux” (2020) 21:6 *The Journal of World Investment & Trade* 847–866.

Bradfield, Michelle & J C Thomas, “Non-Pecuniary Remedies: A Missed Opportunity?” (2015) 30:3 *ICSID Review* 635–664.

Brower, Charles N & Stephan W Schill, “Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?” (2009) 9:2 *Chicago Journal of International Law* 471–498.

Cai, Congyan, “China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications” (2009) 12:2 *Journal of International Economic Law* 457–506.

Chijioke-Oforji, Chijioke, “Regulating Corruption Through Free Trade Agreements: An Analysis of the NAFTA 2.0 Anti-Corruption Provisions” (2019) *Transnational Dispute Management* 1–13.

Chi, Manjiao, “The ‘Greenization’ of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China’s Future Bit-Making” (2015) 18:3 *Journal of International Economic Law* 511–542.

Choudhury, Barnali, “Investor Obligations for Human Rights” (2020) siaa002 *ICSID Review - Foreign Investment Law Journal*, online: <<https://doi.org/10.1093/icsidreview/siaa002>>.

Christofi, Despina, “The Relationship between Allegations of Economic Crimes in Foreign Investments and the Adjudicative Power of Investor – State Tribunals” (2020) siaa036 *ICSID Review - Foreign Investment Law Journal* 1–21 at 19.

Cieślak, Andrzej & Łukasz Goczek, “Control of Corruption, International Investment, and Economic Growth – Evidence from Panel Data” (2018) 103 *World Development* 323–335.

Concepción, Carlos F, “Combating Corruption and Fraud from an International Arbitration Perspective” (2016) 9:1 *Arbitraje Revista de arbitraje comercial y de inversiones* 369–396.

Crawford, James, “Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture” (2010) 1:1 *Journal of International Dispute Settlement* 3–24.

Crawford, James, “Investment Arbitration and the ILC Articles on State Responsibility” (2010) 25:1 *ICSID Review* 127–199.

Crawford, James, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect” (2002) 96:4 *American Journal of International Law* 874–890.

Crook, John R, “Remedies for Corruption” (2015) 9:3 *World Arbitration & Mediation Review* 303–316.

Descour-Karmitz, Romy, “The Role of ICSID Tribunals in the Combat against Corruption” (2017) 11:1 *World Arbitration and Mediation Review*, online: <<https://arbitrationlaw.com/library/role-icsid-tribunals-combat-against-corruption-wamr-2017-vol-11-no-1>>.

Devendra, Isuru C, “State Responsibility for Corruption in International Investment Arbitration” (2019) 10:2 *Journal of International Dispute Settlement* 248–287.

Douglas, Zachary, “The Plea of Illegality in Investment Treaty Arbitration” (2014) 29:1 *ICSID Review* 155–186.

Drude, Joachim, “Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration” (2018) 35:6 *Journal of International Arbitration* 665–718.

Dulac, Elodie, “The Emerging Third Generation of Chinese Investment Treaties” (2010) 7:4 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1636>>.

Dumberry, P & G Dumas-Aubin, “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law” (2013) 10:1 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1933>>.

Dumberry, Patrick, “State of Confusion: The Doctrine of ‘Clean Hands’ in Investment Arbitration After the Yukos Award” (2016) 17:2 *The Journal of World Investment & Trade* 229–259.

Ejims, Okechukwu, “The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?” (2019) 34:1 *ICSID Review* 62–84.

Faruque, Abdullah Al, “Mapping the Relationship between Investment Protection and Human Rights” (2010) 11:4 *The Journal of World Investment & Trade* 539–560.

Fortier, L Yves, “Arbitrators, Corruption, and the Poetic Experience: ‘When Power Corrupts, Poetry Cleanse’” (2015) 31:3 *Arbitration International* 367–380.

Franck, Susan D, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions” (2005) 73:4 *Fordham Law Review* 1521–1625.

Gaillard, Emmanuel, “The emergence of transnational responses to corruption in international arbitration” (2019) 35:1 *Arbitration International* 1–19.

Garcia, Frank J et al, “Reforming the International Investment Regime: Lessons from International Trade Law” (2015) 18:4 *Journal of International Economic Law* 861–892.

Gasanova, Ayshan, Alexander N Medvedev & Evgeny I Komotskiy, “The Assessment of Corruption Impact on the Inflow of Foreign Direct Investment” (Rome, Italy, 2017), AIP Conference Proceedings 1836, 020011 (2017).

Gaukrodger, D & K Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Law (OECD Publishing, 2012).

Gillis Wetter, J, “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) 10:3 *Arbitration International* 277–294.

Guntrip, Edward, “Labour Standards, the Environment and US Model BIT Practice: Where to Next” (2011) 12 *Journal of World Investment & Trade* 101–126.

Habib, Mohsin & Leon Zurawicki, “Corruption and Foreign Direct Investment” (2002) 33:2 *Journal of International Business Studies* 291–307.

Haeri, Hussein, “A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law” (2011) 27:1 *Arbitration International* 27–46.

Haftel, Yoram Z, “Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries” (2010) 17:2 *Review of International Political Economy* 348–377.

Haftel, Yoram Z & Alexander Thompson, “When Do States Renegotiate Investment Agreements? The Impact of Arbitration” (2018) 13:1 *The Review of International Organizations* 25–48.

Halpern, Michaela, “Corruption as a Complete Defense in Investment Arbitration or Part of a Balance” (2015) 23:2 *Willamette Journal of International Law and Dispute Resolution* 297–318.

Hamamoto, Shotaro & Luke Nottage, “Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution” (2010) *Sydney Law School Legal Studies Research Paper* No 10/145.

Hanessian, Grant & Kabir Duggal, “The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?” (2017) 32:1 *ICSID Review* 216–226.

Henckels, Caroline, “Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP” (2016) 19:1 *Journal of International Economic Law* 27–50.

Hepburn, J, “In Accordance with Which Host State Laws? Restoring the ‘Defence’ of Investor Illegality in Investment Arbitration” (2014) 5:3 *Journal of International Dispute Settlement* 531–559.

Herstein, Ori J, “A Normative Theory of the Clean Hands Defense” (2011) 17:3 *Legal Theory* 171–208.

Hess, David, “Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility” (2012) 73:5 *Ohio State Law Journal* 1121–1144.

Ishikawa, Tomoko, “Restitution as a ‘Second Chance’ for Investor-State Relations: Restitution and Monetary Damages as Sequential Options” (2016) 3 *McGill Journal of Dispute Resolution* 154–175.

Jana, Andrés, “Reparation in Investment Treaty Arbitration” (2016) 110 *Proceedings of the Annual Meeting (American Society of International Law)* 288–292.

Juratowitch, Ben, “The Relationship between Diplomatic Protection and Investment Treaties” (2008) 23:1 *ICSID Review* 10–35.

Kaj, Hobér, “State Responsibility and Investment Arbitration” (2008) 25:5 *Journal of International Arbitration* 545–568.

Kałuński, Marcin, “Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration” (2015) 4:2 *Polish Review of International and European Law* 69–101.

Kendra, Thomas & Anna Bonini, “Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus” (2014) 31:4 *Journal of International Arbitration* 439–453.

Klaw, Bruce W, “State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities” (2015) 33:1 *Berkeley Journal of International Law* 60–113.

Knahr, C, “Investments ‘in accordance with host state law’” (2007) 4:5 *Transnational Dispute Management* 1–28.

Kreindler, Richard, “Standards of Procedural International Public Policy” (2008) 2 *Stockholm International Arbitration Review*, online: <<https://arbitrationlaw.com/library/standards-procedural-international-public-policy-stockholm-international-arbitration-review>>.

Kreindler, Richard H, “Approaches to the Application of Transnational Public Policy by Arbitrators” (2003) 4:2 *The Journal of World Investment & Trade* 239–250.

Kriebaum, Ursula, “Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes” (2018) 33:1 ICSID Review 14–28.

Kryvoi, Yarik, “Economic Crimes in International Investment Law” (2018) 67:3 International and Comparative Law Quarterly 577-605.

Kubiciel, Michael, “Core Criminal Law Provisions in the United Nations Convention Against Corruption” (2009) 9:1 International Criminal Law Review 139–155.

Kulick, Andreas, “About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals” (2016) 27:1 European Journal of International Law 107–128.

Kulick, A & C Wendler, “A Corruption Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption” (2010) 37:1 Legal Issues of Economic Integration 61–85.

Kulick, Andreas, “Legal Issues of Economic Integration” (2010) 37:1 Legal Issues of Economic Integration 61–85.

Lavopa, Federico M, Lucas E Barreiros & M Victoria Bruno, “How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties” (2013) 16:4 Journal of International Economic Law 869–891.

Lejárraga, Iza, “Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade”, OECD Trade Policy Papers, by Iza Lejárraga, OECD Trade Policy Papers 152 (2013).

Levashova, Yulia, “The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law” (2018) 14:2 Utrecht Law Review 40-55.

Llamzon, Aloysuis, “State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration” (2013) 10:3 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1958>>.

Llamzon, Aloysuis, “The Control of Corruption through International Investment Arbitration: Potential and Limitations” (2008) 102 Proceedings of the Annual Meeting (American Society of International Law) 208–212.

Llamzon, Aloysius, “Yukos Universal Limited (Isle of Man) v The Russian Federation: The State of the ‘Unclean Hands’ Doctrine in International Investment Law: Yukos as both Omega and Alpha” (2015) 30:2 ICSID Review 315–325.

Loewendahl, Henry, *Innovations in Foreign Direct Attraction*, by Henry Loewendahl (Inter-American Development Bank, 2018).

Losco, Michael A, “Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction” (2014) 63:5 Duke Law Journal 1201–1242.

Low, Lucinda A, “Dealing with Allegations of Corruption in International Arbitration” (2019) 113 AJIL Unbound 341–345.

Luca, A De, “Non-Pecuniary Remedies Under the Energy Charter Treaty” (2015) 12:3 Transnational Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=2224>>.

Malik, Mahnaz, IISD, *Recent Developments in Regional and Bilateral Investment Treaties* (Marrakech, Morocco, 2009).

Marcoux, Jean-Michel, “The Need to Make Sense of a Practice in Investment Arbitration: A Response to Eric De Brabandere” (2020) 21:6 The Journal of World Investment & Trade 867–879.

Marcoux, Jean-Michel, “Transnational Public Policy as a Vehicle to Impose Human Rights Obligations in International Investment Arbitration” (2020) 21:6 The Journal of World Investment & Trade 809–846.

Marcoux, Jean-Michel, “Transnational Public Policy as an International Practice in Investment Arbitration” (2019) 10:3 Journal of International Dispute Settlement 496–515.

Marcoux, Jean-Michel & Andrea K Bjorklund, “Foreign Investors’ Responsibilities and Contributory Fault in Investment Arbitration” (2020) 69:4 International & Comparative Law Quarterly 877–905.

Mauro, Paolo, “Corruption and Growth” (1995) 110:3 The Quarterly Journal of Economics 681–712.

Mayada, Graham, “Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation” (2017) 18 *The Journal of World Investment & Trade* 131–162.

Mbengue, Makane Moïse & Stefanie Schacherer, “The ‘Africanization’ of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime” (2017) 18 *The Journal of World Investment & Trade* 414–448.

Mbiyavanga, Stefan, “Improving Domestic Governance through International Investment Law: Should Bilateral Investment Treaties Learn from International Anti-Corruption Conventions?” (2017) 2017 OECD Global Anti-Corruption & Integrity Forum 17.

Menaker, Andrea J, “The Determinative Impact of Fraud and Corruption on Investment Arbitrations” (2010) 25:1 *ICSID Review* 67–75.

Meshel, Tamar, “The Use and Misuse of the Corruption Defence in International Investment Arbitration” (2013) 30:3 *Journal of International Arbitration* 267–281.

Meyer, Timothy & Tae Jung Park, “Renegotiating International Investment Law” (2018) 21:3 *Journal of International Economic Law* 655–679.

Miles, Cameron A, “Corruption, Jurisdiction and Admissibility in International Investment Claims” (2012) 3:2 *Journal of International Dispute Settlement* 329–369.

Moloo, R, “A Comment on the Clean Hands Doctrine in International Law” (2011) 8:1 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1646>>.

Moloo, R, C B Lamm & H T Pham, “Fraud and Corruption in International Arbitration” (2013) 10:3 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1952>>.

Moloo, Rahim & Alex Khachaturian, “The Compliance with the Law Requirement in International Investment Law” (2011) 34:6 *Fordham International Law Journal* 1473–1501.

Monebhurrin, Nitish, “Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model” (2017) 8:1 *Journal of International Dispute Settlement* 79–100.

Muchlinski, Peter T, “The Rise and Fall of the Multilateral Agreement on Investment: Where Now?” (2000) 34:3 *The International Lawyer* 1033–1053.

Muniz, Joaquim P, Kabir A N Duggal & Luis A S Peretti, “The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change” (2017) 32:2 *ICSID Review* 404–417.

Nadeau-Séguin, Sara, “Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices?” (2013) 10:3 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1963>>.

Nasarre, Cecilia AS, “International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator” (2013) 10:3 *Transnational Dispute Management (TDM)*, online: <<https://www.transnational-dispute-management.com/article.asp?key=1965>>.

Newcombe, Andrew, “Sustainable Development and Investment Treaty Law” (2007) 8:3 *The Journal of World Investment & Trade* 357–407.

Nowrot, Karsten, “How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?” (2014) 15 *The Journal of World Investment & Trade* 612–644.

Obadia, Eloïse, “Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3): Introductory Note” (2000) 15:2 *ICSID Review* 454–456.

Obersteiner, Thomas, “‘In Accordance with Domestic Law’ Clause: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors” (2014) 31:2 *Journal of International Arbitration* 265–288.

OECD, “Fair and Equitable Treatment Standard in International Investment Law”, OECD Working Papers on International Investment (OECD Publishing, 2004).

O’Toole, Leo, “Investment Arbitration: A Poor Forum for the International Fight Against Corruption”, (1 December 2016), online: *Yale Journal of International Law* <<https://www.yjil.yale.edu/investment-arbitration-a-poor-forum-for-the-international-fight-against-corruption/>>.

Paulsson, Jan, “The Power of States to Make Meaningful Promises to Foreigners” (2010) 1:2 *Journal of International Dispute Settlement* 341–352.

Pavic, Vladimir, “Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy” (2012) 43 Victoria University Wellington Law Review 661–686.

Perillo, Joseph, “Restitution in a Contractual Context” (1973) 68 Columbia Law Review 1007–1026.

Pieth, Mark & Kathrin Betz, “Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators” (Competence Centre: Arbitration and Crime; Basel Institute on Governance, 2019) 1–24.

Polanco Lazo, Rodrigo, Valentino Desilvestro & Azernoosh Bazrafkan, “Missing Investment Treaties” (2018) 21:3 Journal of International Economic Law 703–731.

Polkinghorne, Michael & Sven-Michael Volkmer, “The Legality Requirement in Investment Arbitration” (2017) 34:2 Journal of International Arbitration 149–168.

Pomson, Ori, “The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumbery” (2017) The Journal of World Investment & Trade 712–734.

Pomson, Ori & Yonatan Horowitz, “Humanitarian Intervention and the Clean Hands Doctrine in International Law” (2015) 48:2 Israel Law Review 219–251.

Posadas, Alejandro, “Combating Corruption Under International Law” (2000) 10 Duke Journal of Comparative & International Law 345–414.

Ranjan, Prabhash & Pushkar Anand, “The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction” (2017) 38:1 Northwestern Journal of International Law & Business 1–54.

Raouf, Mohamed Abdel, “How Should International Arbitrators Tackle Corruption Issues?” (2009) 24:1 ICSID Review 116–136.

Reinisch, August, “How to Distinguish ‘In Accordance with Host State Law’ Clauses from Similar International Investment Agreement Provisions?” (2018) 2:1 Indian Journal of Arbitration Law 70–83.

Rose, Cecily, “The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention” (2012) 6 International and Comparative Law Quarterly 485–499.

Rose, Cecily E, “Questioning the Role of International Arbitration in the Fight against Corruption” (2014) 31:2 *Journal of International Arbitration* 183–264.

Rose, Cecily, “Circumstantial Evidence, Adverse Influences, and Findings of Corruption: Metal-Tech Ltd. v. The Republic of Uzbekistan” (2014) 15:3–4 *The Journal of World Investment & Trade* 747–756.

Rousaki, Angeliki, “Corruption in International Commercial Arbitration”, (1 January 2015), online: <<https://papers.ssrn.com/abstract=2531044>>.

Sacerdoti, Giorgio, “Corruption in Investment Transactions: Policy Initiatives, Legal Principles and Arbitral Practice” (2009) 24:2 *ICSID Review* 565–586.

Schill, Stephan W, “Illegal Investments in International Arbitration” (2012) *SSRN Electronic Journal*, online: <<http://www.ssrn.com/abstract=1979734>>.

Schill, Stephan W, “Illegal Investments in Investment Treaty Arbitration” (2012) 11:2 *The Law & Practice of International Courts and Tribunals* 281–323.

Schill, Stephan W, “Tearing Down the Great Wall: The New Generation Investment Treaties of the People’s Republic of China” (2007) 15 *Cardozo Journal of International and Comparative Law* 73–118.

Schreuer, Christoph, “Non-Pecuniary Remedies in ICSID Arbitration” (2004) 20:4 *Arbitration International* 325–332.

Sheffer, Wells, “Bilateral Investment Treaties: A Friend or Foe to Human Rights” (2011) 39 *Denvor Journal of International Law and Policy* 483.

Shihata, Ibrahim F I, “Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA” (1986) 1:1 *ICSID Review* 1–25.

Spalding, Andrew Brady, “Deconstructing Duty-Free: Investor-State Arbitration as Private Anti-Bribery Enforcement” (2016) 49:2 *UC Davis Law Review* 443–495.

Spears, Suzanne A, “The Quest for Policy Space in a New Generation of International Investment Agreements” (2010) 13:4 *Journal of International Economic Law* 1037–1075.

Summerfield, Jason N, “The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions” (2009) 6:1 *Transnational*

Dispute Management (TDM), online: <<https://www.transnational-dispute-management.com/article.asp?key=1357>>.

Torres-Fowler, R Zachary, “Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration” (2012) 52:4 *Virginia Journal of International Law* 995–1040.

Tronnes, Robert D, “Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” (2000) 33:1 *The George Washington Journal of International Law and Economics* 97.

Trujillo, Elizabeth, “Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime” (2018) 59:8 *Boston College Law Review* 2735–2764.

VanDuzer, J Anthony, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*, by J Anthony VanDuzer, Penelope Simons & Graham Mayeda (Commonwealth Secretariat, 2012).

Webb, Philippa, “The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?” (2005) 8:1 *Journal of International Economic Law* 191–229.

Wei, Shang-Jin, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?*, by Shang-Jin Wei, Policy Research Working Paper Series 2048 (The World Bank, 1999).

Wood, Tim, “State Responsibility for the Acts of Corrupt Officials: Applying the ‘Reasonable Foreign Investor’ Standard” (2018) 35:1 *Journal of International Arbitration* 103–117.

Woo, Jung-Yeop, “The Impact of Corruption on a Country’s FDI Attractiveness: A Panel Data Analysis, 1984–2004” (2010) 17:2 *Journal of International and Area Studies* 71–91.

Wouters, Jan, Cedric Ryngaert & Ann Sofie Cloots, “The International Legal Framework against Corruption: Achievements and Challenges” (2013) 14 *Melbourne Journal of International Law* 1–76.

Wright, Quincy, “The Goa Incident” (1962) 56:3 *American Journal of International Law* 617–632.

Yackee, Jason Webb, “Investment Treaties and Investor Corruption: An Emerging Defense for Host States” (2012) 3 *Virginia Journal of International Law* 723–746.

Yan, Yueming, “Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance” (2020) 23:4 *Journal of International Economic Law* 989–1013.

Zeng, Huaqun, “Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice” (2014) 17:2 *Journal of International Economic Law* 299–332.

Ziadé, Nassib, “Accountability for Corruption in Investment Arbitration: Equitable Remedies for Findings of Illegality” (2016) 3:2 *BCDR International Arbitration Review* 423–440.

Other Online Sources

Bella, Danilo Ruggero Di, “A Debate About the Not So Straightforward Applicability of the Articles on State Responsibility to Investor-State Arbitrations”, (10 October 2018), online: *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2018/10/10/a-debate-about-the-not-so-straightforward-applicability-of-the-articles-on-state-responsibility-to-investor-state-arbitrations/>>.

Bohmer, Lisa, “In jurisdictional ruling, arbitrators view improprieties surrounding claimant’s acquisition of assets as part of a quid pro quo where he transported ‘suitcases of cash’ out of country so as to assist his country in eluding an international embargo”, (13 August 2018), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/in-newly-surfaced-ruling-arbitrators-view-improprieties-surrounding-claimants-acquisition-of-assets-as-part-of-a-quid-pro-quo-where-he-transported-suitcases-of-cash-out-of-country-so-as-to-assi/>>.

Bjorklund, Andrea K, *OECD Public Consultation on Investor-State Dispute Settlement with Comments*, online: <http://www.oecd.org/industry/inv/internationalinvestmentagreements/ISDSconsultationcomments_web.pdf>

Charlotin, Damien, “Analysis: Aynes-chaired ICC tribunal finds that state validly terminated public-private partnership, and rejects corruption allegations”, (18 March 2020), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/analysis-aynes-chaired-icc-tribunal-finds-that-state-validly-terminated-public-private-partnership-and-rejects-corruption-allegations/>>.

Corres, Luis Dantón Martínez, “USMCA heralds new era of anticorruption and compliance”, (3 October 2018), online: *The FCPA Blog* <<https://fcpablog.com/2018/10/03/luis-danton-martinez-corres-usmca-heralds-new-era-of-anticor/>>.

Djanic, Vladislav, “In newly unearthed Uzbekistan ruling, exorbitant fees promised to consultants on eve of tender process are viewed by tribunal as evidence of corruption, leading to dismissal of all claims under Dutch BIT”, (22 June 2017), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/>>.

Dubin, Laurence, “Corporate Social Responsibility Clauses in Investment Treaties”, (21 December 2018), online: *Investment Treaty News* <<https://www.iisd.org/itn/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/>>.

“European Union Member Countries”, online: <https://europa.eu/european-union/about-eu/countries_en>.

“Facilitation Payments, Anti-Corruption Glossary”, online: *Transparency International* <https://www.transparency.org/glossary/term/facilitation_payments>.

FitzGerald, E V K, R Cubero-Brealey & A Lehmann, “OECD, The Development Implications of the Multilateral Agreement on Investment”, online: <<https://www.oecd.org/investment/investment-policy/1922690.pdf>>.

Gaytan, Victoria, “The USMCA and its new anti-corruption provisions”, (19 October 2018), online: *Global Americans* <<https://theglobalamericans.org/2018/10/the-usmca-and-its-new-anti-corruption-provisions/>>.

“Glencore initiates second investment treaty arbitration against Colombia”, (11 July 2019), online: *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/glencore-initiates-second-investment-treaty-arbitration-against-colombia/>>.

International Institute for Sustainable Development (IISD), “Developing and Negotiating Based on a Model Investment Treaty: Background Note to the IISD Webinar Series on Investment Law

and Policy” (2018), online: <<https://www.iisd.org/sites/default/files/model-investment-treaty-webinar-note.pdf>>.

“Introduction, Investment Policy Framework for Sustainable Development, Investment Policy Hub, UNCTAD”, online: <<https://investmentpolicy.unctad.org/investment-policy-framework>>.

Isayev, UT, “Foreign Investment During the Transition: How to Attract It, and How to Make the Best Use of It”, online: <<https://www.imf.org/external/np/eu2/kyrgyz/pdf/isayev.pdf>>.

Kendra, Thomas & Matt Coleman, “How Far Do Tribunals Have a Duty to Investigate Corruption? The Kenyan High Court Has Its Word”, (4 December 2018), online: Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2018/12/04/how-far-do-tribunals-have-a-duty-to-investigate-corruption-the-kenyan-high-court-has-its-word/>>.

“Liability of Legal Persons for Foreign Bribery: A Stocktaking Report - OECD”, online: <<https://www.oecd.org/corruption/liability-of-legal-persons-for-foreign-bribery-stocktaking-report.htm>>.

Mann, Howard, “The Right of States to Regulate and International Investment Law”, (2002), online: <https://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf>.

“OECD, Evolution of International Investment Agreements (IIAs) in the MENA Region (Paper prepared in the context of the MENA-OECD Working Group on Investment Policies and Promotion)”, (December 2010), online: <<https://www.oecd.org/mena/competitiveness/46581917.pdf>>.

“OECD Guidelines for Multinational Enterprises”, (2011), online: <https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en>.

“OECD International Direct Investment Statistics (2018)”, (2018), online: <<https://www.oecd-ilibrary.org/docserver/bb55ccaf-en.pdf?expires=1580182700&id=id&accname=ocid195496&checksum=EAD90F73DB1D2C685D7E34C7DF18D624>>.

“OECD Public Consultation on Investor-State Dispute Settlement - the Scoping Paper”, online: <<http://www.oecd.org/investment/internationalinvestmentagreements/publicconsultationisds.htm>>.

“Office of the United States Trade Representative, Free Trade Agreements”, online: <<https://ustr.gov/trade-agreements/free-trade-agreements>>.

Peterson, Luke Eric, “Indian company invokes Dutch BIT – rather than Indian treaty – in new arbitration over withdrawn subsidies in Uzbekistan”, (30 September 2013), online: Investment Arbitration Reporter <<https://www.iareporter.com/articles/indian-company-invokes-dutch-bit-rather-than-indian-treaty-in-new-arbitration-over-withdrawn-subsidies-in-uzbekistan/>>.

Peterson, Luke Eric & Vladislav Djanic, “In an innovative award, arbitrators pressure Uzbekistan – under threat of adverse cost order – to donate to UN anti-corruption initiative; also propose future treaty-drafting changes that would penalize states for corruption”, (22 June 2017), online: Investment Arbitration Reporter <<https://www.iareporter.com/articles/in-an-innovative-award-arbitrators-pressure-uzbekistan-under-threat-of-adverse-cost-order-to-donate-to-un-anti-corruption-initiative-also-propose-future-treaty-drafting-changes-that-would/>>.

“Report of the World Commission on Environment and Development: Our Common Future”, online: <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>>.

“Spentex v. Uzbekistan, Investment Dispute Settlement Navigator, UNCTAD Investment Policy Hub”, online: <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/545/spentex-v-uzbekistan>>.

“The Johannesburg Declaration on Sustainable Development”, (4 September 2002), online: <https://ec.europa.eu/environment/archives/wssd/documents/wssd_pol_declaration.pdf>.

The World Bank, “World Bank Country and Lending Groups – World Bank Data Help Desk”, online: <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>>.

The World Bank Group, “Helping Countries Combat Corruption: The Role of the World Bank”, online: <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>>.

“Transparency International, Corruption Perceptions Index 2019”, online: www.transparency.org <<https://www.transparency.org/cpi2019>>.

“Transparency International, Corruption Perceptions Index--Overview”, online: <<https://www.transparency.org/research/cpi/overview>>.

“UNCTAD University IIA Mapping Project”, online: <<https://worldinvestmentforum.unctad.org/programme2016/international-investment-agreements-conference-2016/unctad-iaa-mapping-project/>>.

UNCTAD, International Investment Agreements Navigator, Mapping of IIA Content.

“UNCTAD, Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims, IIA Issues Note No.2 (December 2010)”, online: <https://unctad.org/en/docs/webdiaeia20106_en.pdf>.

“UNCTAD, International Investment Agreements Navigator, Model Agreements”, online: <<https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>>.

“UNCTAD, Taking Stock of IIA Reform: Recent Development, IIA Issues Note, Issue 3, June 2019”, (2019), online: <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf>.

UN Department of Economic and Social Affairs, Division for Sustainable Development, “Plans of Implementation of the World Summit on Sustainable Development”, (2002), online: <https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>.

United Nations, “Monterrey Consensus of the International Conference on Financing for Development”, (March 2002), online: <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.198_11.pdf>.

United Nations Conference on Environment and Development, “Rio Declaration on Environment and Development”, (June 1992), online: <<https://www.cbd.int/doc/ref/rio-declaration.shtml>>.

Yackee, Jason Webb, Jarrod Wong & Andrea K. Bjorklund, “VJIL Symposium: Investment Treaties & Investor Corruption: An Emerging Defense for Host States?” (2012), online: <<http://opiniojuris.org/2012/05/31/vjil-symposium-introducing-investment-treaties-and-investor-corruption/>>.

Yalkin, Tolga, “The International Minimum Standard and Investment Law: The Proof is in the Pudding”, (3 August 2009), online: *EJIL: Talk!* <<https://www.ejiltalk.org/international-minimum-standard/>>.