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Nobumichi Teramura
Luke Nottage
Bruno Jetin *Editors*

Corruption and Illegality in Asian Investment Arbitration

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Nobumichi Teramura · Luke Nottage · Bruno Jetin
Editors

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Editors
Nobumichi Teramura
Institute of Asian Studies
Universiti Brunei Darussalam
Bandar Seri Begawan, Brunei Darussalam

Luke Nottage
Law School
University of Sydney
Sydney, NSW, Australia

Bruno Jetin
Institute of Asian Studies
Universiti Brunei Darussalam
Bandar Seri Begawan, Brunei Darussalam

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Foreword

This book explores the interface of two important fields of law and policy: norms against bribery and other similarly serious illegal behaviour, and international investment law and arbitration. A primary concern is: What do or should arbitral tribunals do when foreign investors bring claims for violations of substantive commitments like non-discrimination made by host states under international investment treaties or free trade agreements, but the state raises a defence that its officials were bribed when the investment was originally made? Should the tribunal simply decline jurisdiction, so no claims at all can be protected and dealt with under the treaty by tribunals, possibly then incentivising host states by deliberately asking for bribes as evidence and keeping them as a 'get out of jail free card' if foreign investors ever try to file arbitration claims to enforce treaty rights? Or are only some claims inadmissible? Or does the corruption or illegality only impact on the merits of the claim, or on damages awarded or on allocations of costs associated with the treaty? How have Asian parties and stakeholders dealt with such questions and what should they do in future, in dealing with such disputes or (re)drafting investment agreements?

One particularly interesting question for me, having written some years ago (with one of the co-editors) on potential models for Asia–Pacific investment dispute resolution, is whether the socio-economic and political diversity across the Asian region can be channelled into more harmonised approaches to dealing with such issues.

Another more specific question, also discussed in this book, is the standard of proof needed for arbitral tribunals to establish evidence of corruption sufficient to trigger the range of potential consequences sketched above. Even if we can identify the best standard to apply, such as 'clear and convincing evidence', as in some recent arbitral awards including in Asia-related cases, should this be drafted into international investment agreements? Instead, should this be left to arbitration rules (incorporated by reference in those agreements), or should we just trust that arbitrators will gradually converge on the preferred standard? It is uncommon to specify evidentiary rules with that much detail in the hard or soft law of international arbitration.

How and when to codify evidence law in national legal systems is also a difficult question, as the New Zealand Law Commission has found with its work focused on domestic law reform. The Commission spent a decade developing an evidence

code in the 1990s, which led to the enactment of the Evidence Act 2006 (NZ). However, the Commission is currently undertaking its third (and final) review of that Act, focussing on identifying ongoing issues with the Act's operation and exploring options for reform. As part of the review, the Commission has identified, for example, potential problems with the application of current standards of proof to different types of evidence. The Commission also recognises it may be better to leave some issues to be resolved by courts on a case-by-case basis.

These and many other issues are commendably raised and examined by the combination of economists, lawyers and legal academics mainly in or from the Asia–Pacific region, in this first-ever book focusing on both corruption and investment arbitration in Asia.

Dr. Amokura Kawharu
President, New Zealand Law Commission
Panel of Arbitrators and Conciliators, ICSID
Wellington, New Zealand

Preface and Acknowledgements

We acknowledge support from the following institutions and people for this book project. The Institute of Asian Studies (IAS) and the School of Business and Economics (SBE) at Universiti Brunei Darussalam (UBD) hosted an international conference on 29 May 2023 where full draft papers for this volume were presented by 19 speakers. The conference was funded by a research grant from UBD. The Centre for Asian and Pacific Law at the University of Sydney (CAPLUS) hosted a webinar workshop for authors to discuss preliminary papers on 15 June 2022. We appreciated the closing remarks for the webinar by His Excellency Yang Amat Mulia Pengiran Indera Negara Pengiran Anak Haji Puteh ibni Al-Marhum Pengiran Pemancha Pengiran Anak Haji Mohamed Alam (past Permanent Secretary at the Ministry of Foreign Affairs, Brunei Darussalam). CAPLUS and Sydney Law School's Legal Scholarship Support Fund provided funding to assistants for research and editorial assistance, especially Christina Shin and Flora Lee. The University of Wollongong's Transnational Law and Policy Centre added funding for assistance from Caitlin Turner.

We are enormously indebted to the contributors to this volume, all of whom are top experts in the field of dispute resolution or economics. Without their time and dedication, despite the extra challenge of the global COVID-19 pandemic, this book would simply not have been possible. There have been other scholars and practitioners who have shared their insights into investment arbitration and financial regulations in Asia and beyond. It is regrettable that space does not allows us to list them all by name.

We also thank the Springer staff, especially Alexandra Campbell, for getting this volume to press, and UBD for financing open access to it.

Finally, due to the large numbers of investment agreements cited by the authors, the bilateral ones are only cited by reference to the two states party and year of signature.

Bandar Seri Begawan, Brunei Darussalam	Nobumichi Teramura
Sydney, Australia	Luke Nottage
Bandar Seri Begawan, Brunei Darussalam	Bruno Jetin
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Editors and Contributors

About the Editors

Nobumichi Teramura is Assistant Professor at Universiti Brunei Darussalam and Affiliate at the Centre for Asian and Pacific Law at the University of Sydney, specialising in business law, with a particular interest in arbitration, private international law, contract law and Asian law. Nobumichi is the author of *Ex Aequo et Bono as a Response to the Over-Judicialisation of International Commercial Arbitration* (Wolters Kluwer, 2020), based on his doctoral thesis from the University of New South Wales in Australia, which received a PhD Excellence Award when completed in 2018. He has taught private international law and commercial law as a lecturer at the Adelaide Law School, Australia (since 2019). He also lectured at the Tañada-Diokno School of Law at De La Salle University in the Philippines in 2016, 2017 and 2019 on international arbitration and trade law.

Luke Nottage is Professor of Comparative and Transnational Business Law at Sydney Law School, specialising in arbitration, contract and consumer law, and corporate governance, with a particular interest in Japan and the Asia–Pacific. He is founding Co-Director of the Australian Network for Japanese Law (ANJeL), Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS), and Special Counsel with Williams Trade Law. Luke has consulted for law firms worldwide as well as for ASEAN, the European Commission, the OECD, UNCTAD, UNDP and the Governments of Japan and Saudi Arabia. Luke is also a Rules Committee Member of ACICA and is on the Panel of Arbitrators for AIAC (KLRCA), BIAC, CAAI, JCAA, KCAB, NZIAC, SCIA, TAI and THAC. Luke was Visiting Professor at Universiti Brunei Darussalam in 2020 and 2023.

Bruno Jetin is Associate Professor at Universiti Brunei Darussalam (UBD); he was also Director of the Institute of Asian Studies (2018–2022). Prior to joining UBD, he was a researcher at the Institute for Research on Contemporary Southeast Asia (IRASEC, CNRS-MAEE, Bangkok) and Associate Professor at the University Sorbonne Paris Nord where he was Deputy Director of the Research Center in Economics. He holds a PhD in economics from the University of Sorbonne Paris Nord. His current research areas include ASEAN and the Belt and Road Initiative, foreign investment and trade in the Asia–Pacific, income distribution and growth. He is also an expert on the automobile industry and the electric car.

Contributors

Vivienne Bath University of Sydney Law School, Sydney, NSW, Australia

Simon Butt University of Sydney Law School, Sydney, NSW, Australia

Aloysius Chang Independent Practitioner, Singapore

Antony Crockett Herbert Smith Freehills, Hong Kong, China

Jocelyn P. Cruz Ramon V Del Rosario College of Business, De La Salle University, Manila, Philippines

Tianqi Gu University of Sydney Law School, Sydney, NSW, Australia

Till Haechler Supreme Court of the Canton of Zürich, Zürich, Switzerland

Michael Hwang Michael Hwang Chambers LLC, Singapore

Martin Jarrett Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Bruno Jetin Institute of Asian Studies, Universiti Brunei Darussalam, Bandar Seri Begawan, Brunei

Ahmed M. Khalid School of Business and Economics, Universiti of Brunei Darussalam, Bandar Seri Begawan, Brunei

Sirilaksana Khoman Thammasat University, Bangkok, Thailand

Joongi Kim Yonsei Law School, Seoul, South Korea

Tim Lindsey Melbourne Law School, Melbourne, VIC, Australia

Tianyu Liu Leiden University Law School, The Hague, Netherlands

Thomas Elliot A. Mondez Ramon V Del Rosario College of Business, De La Salle University, Manila, Philippines

Luke Nottage University of Sydney Law School, Sydney, NSW, Australia

Prabhash Ranjan Jindal Global Law School, O P Jindal Global University (JGU), Sonipat, India

Haingo Ratiarison University of Strasbourg, Strasbourg, France

Anselmo Reyes Singapore International Commercial Court (SICC), Singapore

Jamel Saadaoui Faculty of Economics and Management, University of Strasbourg, Strasbourg, France

Uma Sharma Jones Day, Singapore

Nobumichi Teramura Institute of Asian Studies, Universiti Brunei Darussalam, Bandar Seri Begawan, Brunei

Sakda Thanitcul Chulalongkorn University, Bangkok, Thailand

Romesh Weeramantry Clifford Chance, Perth, WA, Australia

Yueming Yan Faculty of Law, Chinese University of Hong Kong, Hong Kong, China

Abbreviations

AANZFTA	ASEAN Australia New Zealand Free Trade Area (2009)
ACC	Anti-Corruption Court (Indonesia)
ACIAP	Anti-Corruption Initiative for Asia and the Pacific
ACPs	Anti-corruption provisions
ADB	Asian Development Bank
AFC	Asian Financial Crisis
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASEAN+5 RCEP	ASEAN+5 Regional Comprehensive Economy Partnership
ASIC	Australian Securities and Investment Commission
ASX	Australian Securities Exchange
BANI	Badan Arbitrase Nasional Indonesia (Indonesian National Board of Arbitration)
BIT	Bilateral investment treaty
BOI	Board of Investment (Thailand)
BOT	Build-Operate-and-Transfer
BRI	Belt and Road Initiative
CAG	Comptroller Auditor General (India)
CBI	Central Bureau of Investigation (India)
CC	Control of Corruption
CCDI	CCP Central Commission for Discipline Inspection (China)
CCP	Chinese Communist Party
CCS	Cabinet Committee on Security (India)
CETA	Comprehensive Economic Trade Agreement
CHAFTA	China–Australia Free Trade Agreement
CIO	Corruption Investigation Office for High-Ranking Officials (South Korea)
COA	Commission on Audit (Philippines)
COMELEC	Commission on Elections (Philippines)
CPI	Corruption Perceptions Index
CPIO	Corruption Prevention and Investigation Office (Philippines)

CPIO	Corruption Prevention and Investigation Office (Singapore)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018)
CSC	Civil Service Commission (Philippines)
CSR	Corporate social responsibility
CTLI	Corruption Tolerable Level of Investment
DT	Deutsche Telekom
ECT	Energy Charter Treaty
ED	Enforcement Directorate (India)
EEC	Eastern Economics Corridor (Thailand)
EPA	Economic partnership agreement
EU	European Union
FATF	Financial Task Force (China)
FCPA	US Foreign Corrupt Practices Act 1977
FDI	Foreign direct investment
FET	Fair and equitable treatment
FIE	Foreign investment enterprise/entity
FIL	Foreign Investment Law of the People's Republic of China 2019
FTA	Free trade agreement
GCC	Gulf Corporation Council
GFCF	Ratio of gross fixed capital formation to GDP
GOCCs	Government Owned or Controlled Corporations (Philippines)
HKIAC	Hong Kong International Arbitration Centre
IAACA	International Association of Anti-Corruption Authorities
IACAC	Inter-American Convention Against Corruption
ICAC	Independent Commission Against Corruption
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International investment agreement
IISD	International Institute for Sustainable Development
ILC	International Law Commission
IMF	International Monetary Fund
INF	Inflation
IRM	Implementing Review Mechanism (UNCAC)
ISA	Investor–state arbitration
ISDS	Investor–state dispute settlement
ISI	Import-substitution industrialisation
ISRO	Indian Space Research Organisation
JIB	Judicial Integrity Board (Philippines)
JIS	Joint Interpretive Statement
JPEPA	Japan Philippines Economic Partnership Agreement (2008)
JTWG	Joint Technical Working Group (Philippines)
JV	Joint venture

KADIN	Kamar Dagang dan Industri Indonesia (Indonesian Chamber of Commerce and Industry)
KEB	Korea Exchange Bank
KPK	Komisi Pemberantasan Korupsi (Corruption Eradication Commission, Indonesia)
LCI	Law Commission of India
LGU	Local government unit
LHNV	Lao Holdings N.V.
MENA	Middle East and North Africa
MFN	Most-favoured nation
MIT	Multilateral investment treaty
MLA	Mutual Legal Assistance
MoU	Memorandum of Understanding
NACC	National Anti-Corruption Commission (Thailand)
NAIA	Ninoy Aquino International Airport
NCLAT	National Company Law Appellate Tribunal (India)
NCLT	National Company Law Tribunal (India)
NDA	National Democratic Alliance (India)
NPS	National Pension Service
NPSEA	National Public Services Ethics Act (Japan)
NSC	National Supervisory Commission (China)
NSW	New South Wales (Australia)
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OFDI	Outbound foreign direct investment
PACC	Presidential Anti-Corruption Commission (Philippines)
PCA	Permanent Court of Arbitration
PCGG	Presidential Commission on Good Government (Philippines)
PNP	Philippine National Police
PVECM	Panel vector error correction model
RCEP	Regional Comprehensive Economic Partnership Agreement (2022)
RPC	Revised Penal Code (Philippines)
RTA	Regional FTA
RTC	Regional Trial Court
SAIC	State Administration for Industry and Commerce (China)
SALN	Statement of Assets, Liabilities and Net Worth (Philippines)
SASAC	State-owned Assets Supervision and Administration Commission of the State Council (China)
SDG	Sustainable Development Goal
SEC	US Securities and Exchange Commission
SFC	Securities and Futures Commission (Hong Kong)
SICC	Singapore International Commercial Court

SOE	State-owned enterprise
SPC	Supreme People's Court (China)
SPP	Supreme People's Procuratorate (China)
SSA	Sub-Saharan African
TAFTA	Thailand–Australia Free Trade Agreement
TAI	Thai Arbitration Institute
THAC	Thailand Arbitration Center
TPP	Trans-Pacific Partnership Agreement
UCPA	Unfair Competition Prevention Act (Japan)
UKJCEPA	UK–Japan Comprehensive Economic Partnership Agreement
UNCAC	United Nations Convention against Corruption (2003)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime (2000)
VCLT	Vienna Convention on the Law of Treaties (1969)
WB	World Bank
WDI	World Development Indicators
WFOE	Wholly foreign owned enterprise
WGI	World Governance Indicators
WJP	World Justice Project
WTO	World Trade Organization

Chapter 1
Bribery and Other Serious Investor Misconduct in Asian International Arbitration

Nobumichi Teramura, Luke Nottage, and Bruno Jetin

Abstract Bribery and other serious illegal behaviour by foreign investors face wide condemnation in any society. Yet there remains a lack of consensus on the consequences of corruption and illegality affecting international investment, and especially in investment arbitration—a transnational procedure to resolve disputes between a foreign investor and a host state. A core issue is whether a foreign investor violating a host state's law should be awarded protection of its investment, as per its contract with the host state and/or the applicable investment or trade agreement between the home state and the host state. Some suggest such protection would be unnecessary, as the investor committed a crime in the host state, while others attempt to establish an equilibrium between the investor and the host state. Some others claim to protect investment, invoking the sanctity of promises made. This book explores Asian approaches towards the issue, setting it in the wider political economy and domestic law contexts. It also considers the extent to which significant states in Asia are or could become 'rule makers' rather than 'rule takers' regarding corruption and serious illegality in investor–state arbitration.

N. Teramura (✉) · B. Jetin
Institute of Asian Studies, Universiti Brunei Darussalam, Bandar Seri Begawan, Brunei
e-mail: nobumichi.teramura@ubd.edu.bn
URL: https://ias.ubd.edu.bn/nobumichi-teramura/

B. Jetin
e-mail: bruno.jetin@ubd.edu.bn
URL: https://ias.ubd.edu.bn/bruno-jetin/

L. Nottage
University of Sydney Law School, Sydney, NSW, Australia
e-mail: luke.nottage@sydney.edu.au
URL: https://www.sydney.edu.au/law/about/our-people/academic-staff/luke-nottage.html

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1.1 Introduction

Almost everyone regards corruption and bribery as an international evil, and encourages global society to eradicate such illegal activities.[1] Various international initiatives against corruption have gained international support. Very important is the United Nations Convention against Corruption (UNCAC) (open for signature in 2003), which has 189 member states and is the only universal legally binding anti-corruption instrument, covering the making and soliciting of bribery of local and foreign officials.[2] Another influential international legal instrument is the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). This was 'the first and only international anti-corruption instrument focused on the "supply side" of the bribery transaction – the person or entity offering, promising or giving a bribe',[3] requiring member states to criminalise such activity, even abroad, under their own domestic laws. It was inspired by the Foreign Corrupt Practices Act 1977 in the US, which then pushed for an international treaty to level the playing field so that not only US businesspeople abroad but also those from other states would be prevented from bribing public officials in their dealings abroad. (The US legislation, as subsequently amended, and the Bribery Act 2010 in the United Kingdom, remain very important domestic laws given the centrality still of both countries for investment and financial intermediation.[4]) The 1997 OECD Convention has been adopted by 44 signatories—all 37 OECD developed economies, plus Argentina, Brazil, Bulgaria, Costa Rica, Peru, Russia and South Africa.[5] Both treaties reflect the normative global consensus against corruption and bribery,[6] and Asian states certainly form part of the consensus.[7]

Nevertheless, despite both treaties having mechanisms for peer review by member states,[8] enforcement of these treaties and related national laws remains problematic.[9] The treaties only set a baseline, and some key concepts are not clear or spelled out.[10] International investment agreements are starting to add provisions urging enactment and enforcement of anti-corruption laws, including in the intra-Asian context, though these do not add detail and remain few.[11]

Corruption and poor governance remain serious problems worldwide, including in many Asian jurisdictions.[12] For example, the majority of East (North and South East) and South Asian states and jurisdictions performed poorly in Transparency International's 2021 Corruption Perceptions Index, which scored and ranked 180 countries and territories based on their perceived levels of public sector corruption according to responses from experts and businesspeople. Scores were little changed in the 2022 Index report.[13] As demonstrated in Table 1.1, Singapore, Hong Kong, Japan, Bhutan and Taiwan are ranked in the top 30 least corrupt countries and territories, but 12 among 23 East and South Asian jurisdictions sank below the top 90.

Moreover, the World Justice Project (WJP) Rule of Law Index 2021 measured 'the rule of law in 139 countries and jurisdictions by providing scores and rankings based on eight factors: Constraints on Government Powers, *Absence of Corruption*, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice'.[14] Again, little improvement is evident from the

Table 1.1 2021 (and 2022) Corruption Perception Index (CPI) Rankings for East and South Asia (Best to Worst)

Country/Territory	Singapore	Hong Kong	Japan	Bhutan	Taiwan	South Korea	Malaysia	China	India
Global Rank	4 (5)/180	12 (12)/180	18 (18)/180	25 (25)/180	25 (25)/180	32 (31)/180	62 (61)/180	66 (65)/180	85 (85)/180/180
Country/Territory	Maldives	Vietnam	Indonesia	Sri Lanka	Mongolia	Thailand	Philippines	Nepal	Papua New Guinea
Global Rank	85 (85)/180	87 (77)/180	96 (110)/180	102 (101)/180	110 (116)/180	110 (101)/180	117 (116)/180	117 (110)/180	124 (130)/180
Country/Territory	Laos	Myanmar	Bangladesh	Cambodia	North Korea				
Global Rank	128 (126)/180	140 (157)/180	147 (147)/180	157 (150)/180	174 (171)/180				

2022 Index. Assessments of 17 East, South East and South Asian countries and territories are not outstanding. None of them were in the top 10 countries with strong rule of law, and 10 out of the 17 jurisdictions ranked in the bottom half, as shown in Table 1.2. The COVID-19 pandemic reportedly exacerbated corruption in Asia because the Asian governments rolled out huge economic recovery plans, without providing adequate checks and balances.[15]

This reality in many parts of Asia as well as worldwide encourages some foreign investors, even from OECD Convention member states, to pay bribes or engage in other illegal behaviour—often with the explicit or implicit encouragement or support of host state officials and/or local investment partners.[17] This issue is particularly important as the flows and stocks of foreign investment have increased significantly in and out of the Asian region, particularly since the 1980s and including recently to a growing extent among Asian economies,[18] as shown in Fig. 1.1.

FDI started to surge in the 1990s when the deregulation of world markets and the decline of protectionism initiated hyper-globalisation.[20] Figure 1.1 shows that, at the world level, FDI has embraced the global economy, accelerating sharply during the periods of growth and collapse after the dotcom crisis of 2001 and the financial crisis of 2008–2009. A peak was reached at USD2 trillion in 2016, fuelled by a flurry of megadeals in cross-border mergers and acquisitions in high-income countries.[21] The decline in the subsequent years (2017–2019) was driven by a decrease in the average profit rate on foreign investment, escalation and broadening of trade conflicts, a fall in greenfield investments and large-scale repatriation of accumulated foreign earnings following tax reforms in the US.[22] Excluding one-off factors, FDI growth averaged 1% per year after the global financial crisis (2009–2018) compared with 8% over the period 2000–2007.[23] This evolution has fuelled the debate concerning the entry into a period of deglobalisation.[24] In this gloomy context for foreign investment, the shock of the COVID-19 pandemic occurred. The fall in 2020 brought global FDI back to USD1 trillion, an amount equivalent to the sum in 2005 and around 20% lower than the trough following the global financial crisis of 2009. However, the end of the pandemic brought about a sharp increase in FDI in 2021, recovering to the 2005–2021 average of USD1.5 trillion.

In comparison, FDI inflows into Asia have grown steadily since the 1990s, registering only a modest drop in 2009. They maintained their growth after 2016 and even during the COVID-19 pandemic in 2020 when FDI was plummeting globally. This is mainly explained by the resilience of East Asian economies. South East Asia recovered later and was strongly hit by the paralysis of international trade as it relies more on FDI related to global value chains, while in the Chinese case, FDI is more attracted by the vast potentialities of its internal market.[25] Consequently, FDI in South East Asia was down 43% in 2020 compared to 2019. FDI in South Asia remains around two times and four times less than in South East and East Asia, respectively. This is because India's economy is around five times smaller than China's and because South Asia remains fragmented by geopolitical conflicts that hinder deeper regional integration. As a result, India does not attract as much FDI as China and is not the hub of regional value chains that assemble intermediate products imported from neighbouring countries. However, FDI in South Asia proved resilient during the pandemic

Table 1.2 2021 (and 2022) WJP Rule of Law Index Rankings for East and South Asia, Best to Worst[16]

Country/Territory	Japan	Singapore	Hong Kong	South Korea	Malaysia	Mongolia	Indonesia	Nepal	Sri Lanka
Global Rank	15 (16)/139 (140)	17 (17)/139 (140)	19 (22)/139 (140)	20 (19)/139 (140)	54 (55)/139 (140)	61 (62)/139 (140)	66 (64)/139 (140)	70 (69)/139 (140)	76 (74)/139 (140)
Country/Territory	India	Thailand	Vietnam	China	Philippines	Bangladesh	Myanmar	Cambodia	
Global Rank	79 (77)/139 (140)	80 (80)/139 (140)	88 (84)/139 (140)	98 (95)/139 (140)	102 (97)/139 (140)	124 (127)/139 (140)	128 (132)/139 (140)	138 (139)/139 (140)	

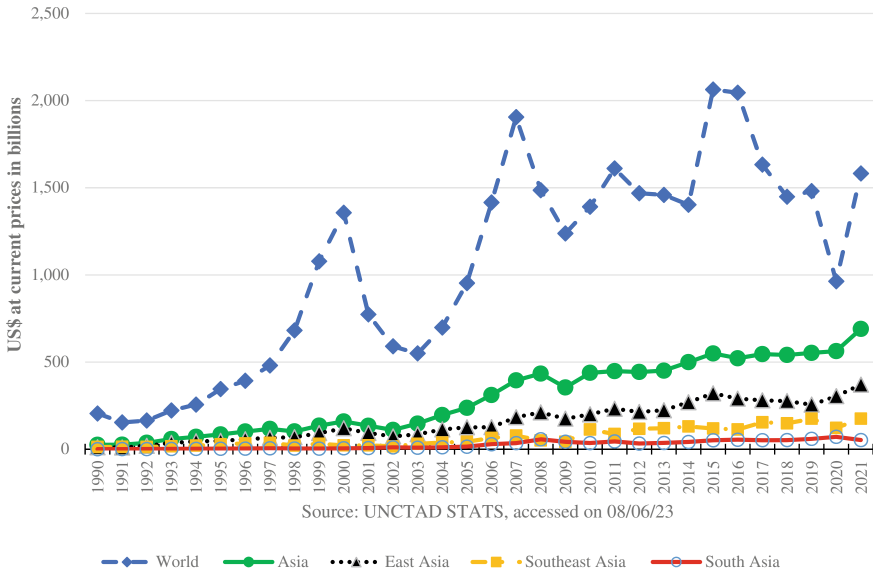

Fig. 1.1 Inflows of Foreign Direct Investment in Asia, 1990–2021[19]

and grew by 17% in 2020 compared to 2019. Nonetheless, in 2021, South Asia experienced a decline in FDI, while the rest of Asia returned to its pre-pandemic growth pattern. Overall, FDI in Asia increased firmly despite the global economic decline, reaching 44% of the world total in 2021, up from 37% in 2019. In 2021, East Asia attracted 23%, South East Asia 11% and South Asia 3.3% of global FDI inflows. This is a new indication of the shift towards Asia in the accumulation of world capital.

Nonetheless, discussion has been limited and fragmented about the many legal issues arising from the interface between foreign investment and corruption, particularly in and across the diverse and vibrant Asian region. One situation is where a local competitor bribes host state officials, disadvantaging foreign investors.[26] Another growing issue and the main focus on this book is where foreign investors bring other claims against host states, which then raise as a defence some significant bribery made in connection with the initial investment. Such disputes nowadays are typically resolved by international arbitration, under two main routes. The first involves individually negotiated investment contracts between a foreign investment and a host state entity (and sometimes a local investment partner). These contracts typically include an arbitration clause, requiring disputes to be resolved by an expert international tribunal of chosen arbitrators, at a chosen neutral seat.[27] Also, the parties usually expressly agree on applicable rules to be followed with the tribunal, such as the ad hoc United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, or institutional arbitration rules such as those of the International Chamber of Commerce (ICC). The underlying investment contracts are typically expressed to be governed by an agreed national contract law, or sometimes the '*lex*

mercatoria' or 'general principles of law' (such as the UNDROIT Principles of International Commercial Contracts).[28] The resultant awards are enforceable typically through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) now ratified by around 172 states,[29] in the manner of most purely commercial arbitral awards rendered by a foreign-seated tribunal today, or through seat courts applying increasingly (especially across Asia) arbitration legislation based on the template of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).[30] Both the Model Law and the NYC permit only limited grounds to refuse enforcement of awards; but one is 'public policy' of the state enforcing the award, which—even if interpreted in an internationalist spirit—can make it difficult to enforce an award against a government entity.[31]

A variant, that may provide better scope to enforce awards, is for the parties to the investment contract to consent to resolve disputes through arbitration administered by the International Centre for the Settlement of Investment Disputes (ICSID, headquartered in Washington DC and affiliated with the World Bank). If the host state is further party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), with 156 member states,[32] it can consent to arbitration under ICSID Arbitration Rules. If the home state of the foreign investor is also party to the ICSID Convention, resultant awards can then only be challenged by an ad hoc annulment committee of separate arbitrators, as there is no 'seat' and related court, and the grounds for setting aside the awards (to prevent enforcement) are even narrower by not including the 'public policy' of any state.[33] Further, such ICSID Convention awards can be enforced against assets of the losing host state in any Convention member state, as if they were the final judgment of that state's court system,[34] thus preventing any further review there for 'public policy' or other NYC-like grounds for refusing enforcement.[35]

The second main route for foreign investors to resolve international investment disputes with governments is through consent to arbitration through a standalone investment treaty, or (more common recently) an investment chapter within a free trade agreement (FTA). As these have proliferated and become more widely known, most investment disputes involve such treaty-based arbitration, and cases under this route (and related treaty provisions) are also the main—though not exclusive—focus of this book. Through such treaties, the host state promises to the home state that it will provide agreed substantive protections to the home state's investor, to encourage and protect foreign investment. The host state also makes these commitments more credible by agreeing to have an international arbitral tribunal hear and give awards regarding alleged violations, if and when the foreign investor commences such investment treaty arbitration. The consent provided in the treaty generally allows for ad hoc UNCITRAL arbitration (which have been applied therefore in about a third of all known claims) or institutional arbitration through ICSID (about two-thirds of claims), with very few treaties and therefore claims being filed under other international arbitration centre rules (such as ICC Rules).[36]

Such investment treaty arbitration is typically referred to as an investor–state dispute settlement (ISDS), especially in the media, which has become increasingly concerned about this dispute resolution process and outcomes, including recently

in parts of Asia.[37] However, ISDS can also be broadly interpreted as encompassing dispute resolution under investment contracts including arbitration clauses (especially where the host state is party to the ICSID Convention and consents to its type of administered arbitration),[38] as well as investor–state conciliation or mediation rather than arbitration (so far rare, but of growing interest including via investment treaty provisions).[39] In this chapter and volume, we refer to this route of consent to arbitration through investment treaties as 'treaty-based ISDS' or more generally 'ISDS arbitration'. Known cases have become increasingly common worldwide (reaching over 1,303 filings as of 31 July 2023).[40] This is because foreign investment flows have burgeoned—especially for foreign direct investment (FDI) involving investors taking larger and more controlling stakes—in conjunction with more investment treaties (over 3,200 signed[41]) that increasingly provide for ISDS as well as interstate arbitration processes, especially since the 1990s. The proportions of East and South Asian cases were quite low until around 2010, compared to other regions and the stocks of FDI, arguably perhaps due to various 'institutional barriers' to commencing or defending claims (such as a relatively paucity of arbitrators and counsel in the region).[42] However, the proportions and absolute numbers related to Asia have been increasing significantly over the last decade.[43]

Such treaty-based ISDS arbitration cases tend to attract more attention because they have wider implications than disputes involving contract-based consents to arbitration from government entities, as the latter typically only have implications for the relevant individual investor(s) and can depend on the wording of the investment contract terms. By contrast, tribunals in treaty-based ISDS arbitrations must interpret and apply still often more broadly drafted substantive protections offered by host states to all foreign investors of the home state under public international law. An award favouring one investor under such a treaty-based ISDS claim, because of a host state measure found by the investor to violate its substantive treaty commitments, could lead to similar claims by other investors from the same host state also adversely affected by this violation—or even by similarly affected investors from other states under different treaties but with similarly worded protections against such measures.[44]

1.2 Investor–State Arbitration Disputes Implicating Corruption

The core problem of interest in this volume, arising under both main routes for resolving investor–state disputes through arbitration, can be explained as follows. A foreign investor, even if having had staff found actually or possibly to have engaged in some bribery, may well expect complete or at least some protection for its investment, pursuant to its contract with a host state and/or applicable investment treaties such as an FTA or Bilateral Investment Treaty (BIT). At least, it will attempt to make such a claim against the host country before an independent tribunal established by

an investment treaty or, less frequently nowadays, through an arbitration agreement included in any investment contract with the host state.[45] The investor will not favour litigation in the host state, as it perceives the domestic legal system to be biased and partial,[46] and it feels that the host state should respect what it has agreed to provide in investment treaties and/or contracts. Indeed, typical investment treaties afford foreign investors protection from expropriation, fair and equitable treatment,[47] national treatment, most-favoured-nation treatment, full protection and security, and dispute resolution by a neutral third party (especially arbitration).[48] Accordingly, the investor might well feel entitled to assert those rights in front of an independent tribunal.

The host state will react negatively, however, usually relying on illegality provisions expressly or impliedly included in investment agreements. Many BITs and FTAs require foreign investments to be made in accordance with or in conformity with domestic laws of the host state,[49] which normally criminalise corrupt practices such as bribery.[50] The host state may find this legality requirement useful to assert the non-availability of investment protection for the corrupting investor, invoking the violation of the treaty provision from the investor's side. In other words, the state may reject affording protection to investment tainted by corruption or other such seriously illegal conduct. Indeed, the corruption defence has often led arbitral tribunals to dismiss investors' claims for investment protection because tribunals tend not to provide foreign investors with such rights if they find that the investment has been made through illegal conduct.[51]

The dilemma then is that the investor may feel that this defence is too favourable towards the host state. For example, even if the host state clearly misbehaves, say by expropriating the investment without compensation or by breaching other substantive commitments promised under the investment treaty, the investor loses access to an independent dispute resolution forum. The host state might go even further, giving the investor the impression that it is common to give the public official an informal payment in the form of donations or consulting agreements, or even essentially coercing the foreign investor into paying the bribe in order to start operations.[52] As soon as the payment is made or alleged, the investor loses protection over the investment. In other words, it is not impossible for the state to abuse the corruption defence, for it obtains both the investment and the bribe, while the investor loses the investment and a neutral forum to recover its loss. It may even lead to perverse incentives: a host state may ensure a bribe is taken and evidenced, but never prosecuted, to raise (sometimes decades later) if and when a foreign investor commences an ISDS arbitration.

The problem is particularly acute in developing economies because ISDS-backed protections are arguably useful to encourage foreign investment into jurisdictions with weak rule of law, governance and political systems.[53] The very type of jurisdictions likely still to be struggling with problems of corruption and lack of transparency in public affairs, therefore, are nonetheless likely to be hit by ISDS claims at least in the shorter term.[54] Over the longer term, appropriately commenced and resolved ISDS arbitration claims might also lead to improvements in transparency, good governance and the rule of law particularly in developing economies.[55]

Accordingly, the tribunal needs to consider how to strike a balance between the investor and the host state in handling corruption allegations. However, ISDS tribunals have not yet settled this issue. The lack of their discussion and consensus on the issue was recently criticised by the Expert Group Meeting on Corruption and International Investments, co-organised by the United Nations Office on Drugs and Crime (UNODC) and the United Nations Conference on Trade and Development (UNCTAD) in 2021, as follows:

> Despite a growing number of investor–state disputes involving corruption allegations, arbitral tribunals often do not address the issue and the limited number of awards that did deal with corruption allegations lack consistency. Arbitrators generally appear hesitant to address corruption allegations, and when they do their approaches seem ambiguous and inconsistent. Coherent standards must be in place to ensure that corruption allegations based on credible sources are appropriately addressed based on international public policy.[56]

This critique appears to be fair: arbitral tribunals' approaches towards corruption and illegality are indeed fragmented, despite quite a few arbitral awards addressing the issues, as demonstrated in the following section.

1.3 Arbitral Tribunals' Approaches to Dealing with Corruption

Arbitral tribunals have dealt with the issue of corruption in various ways. Several academic commentators have identified three broad approaches: (1) the 'zero tolerance' approach; (2) the 'closer look' approach; and (3) the 'it depends' approach.[57] Those approaches have evolved by absorbing debates also about other serious illegal behaviour by foreign investors such as forgery and fraud, occasionally but insufficiently in the context of Asia.

1.3.1 The 'Zero Tolerance' Approach

The 'zero tolerance' approach does not admit the tribunal's jurisdiction if it finds evidence of any (non-trivial) corruption. It suggests either dismissing any claims arising out of contracts procured through corruption or concluded for paying bribes, or conferring no protection to investments made through corruption.[58] The origin of the former justification can be found in the award of Judge Lagergren in ICC Case No. 1110 (1963), which concerned a commission/consultancy agreement to bribe Argentinian government officials.[59] Judge Lagergren highlighted the existence of an international public policy against corruption and held that: 'in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature … Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to

ask for assistance of … arbitral tribunals … in settling their disputes'.[60] Several investment arbitral tribunals have followed suit, holding that such intermediatory contracts contemplating bribery are void(able) and therefore should not give rise to valid claims.[61]

Some other tribunals have rejected hearing arguments on investments 'tainted by corruption', refusing to protect investments that violate an investment treaty clause that the foreign investment shall be 'in accordance with the domestic law of the host state'. This type of clause has also been applied to decline jurisdiction for other serious investor misconduct. In an early Asia-related claim under a BIT with Germany, the tribunal in *Fraport AG Frankfurt Airport Services Worldwide v. the Republic of the Philippines (I)* [2007][62] (*Fraport (I)* case) adopted this option. Disputes arose from the claimant's investment into a Filipino company joining a concession contract for the construction and operation of Ninoy Aquino International Airport Passenger Terminal III. After the Philippine Supreme Court ruled that the concession contract was null and void, the claimant commenced a BIT claim against the Philippines under ICSID Convention Arbitration Rules. However, the tribunal considered that the claimant 'was consistently aware that the way it was structuring its investment in the Philippines was in violation of the [Anti-Dummy Law] and accordingly sought to keep those arrangements secret … [and that] it proceeded with the investment by secretly [and knowingly] violating Philippine law through the secret shareholder agreements'.[63] The tribunal concluded that it lacked jurisdiction over the case as the claimant did not make an investment 'in accordance with law' under the applicable BIT.[64] Thus, the tribunal used the legality clause to exclude unlawfully established investments from the scope of the BIT protection and to deny its jurisdiction *ratione materiae*.[65]

Some arbitral tribunals have gone even further, holding that no explicit legality clause is required for them to dismiss claims for the protection of illegal investments because investment treaties in general and the ICSID Convention implicitly require the compliance of investments with the host states' laws.[66] However, this view is quite controversial because its legal basis is unclear, and arbitral tribunals adopted different rationales without uniformity.[67] Several commentators and arbitrators further criticise the view, suggesting that contracting parties (i.e., states) do not consent to limit the jurisdiction of a tribunal without an express agreement.[68] They claim that denouncing its jurisdiction based on an allegedly implied legality clause would risk the tribunal exceeding its jurisdiction and would thereby cause the resulting award to be challenged under Article 52 of the ICSID Convention.[69] Accordingly, the lack of legality clause or the lack of explicit jurisdictional hurdle 'cannot be overcome by resorting to general principles of law or considerations of object and purpose'.[70] Therefore, the 'zero-tolerance' approach would only become reasonable where a tribunal relied on an explicit legality clause in an investment treaty or agreement. Further issues then include the wording needed to constitute such a clause, depriving the investor of jurisdiction and treaty protection if the tribunal is convinced that serious illegality or corruption occurred. In particular, ISDS tribunal awards have split in interpreting treaty provisions along the lines that the host state shall admit such investments in accordance with its laws and investment policies.

One view is that such wording has the same effect (limiting treaty protection) as a provision defining covered investments as those made in accordance with host state law. Another view is that this merely conditions the obligation otherwise on the host state to admit or let in foreign investment.[71]

The 'zero-tolerance' approach may somewhat rebalance the interests between the investor and host state in the current framework of ISDS, which is (arguably) disproportionately pro-investor.[72] Since that view was expressed, however, UNCITRAL and ICSID have engaged in widespread consultation to identify whether and more specifically how treaty-based ISDS could be too pro-investor, and therefore what more targeted mechanisms might be promoted to address any such imbalances.[73] A recent detailed study by Ishikawa also argues that many existing investment treaties already contain considerable scope for host states to bring counter-claims against foreign investors, focusing on their hard and soft law obligations to ensure environmental sustainability[74] but with potential extension to avoiding bribery. Other commentators claim that this strict approach may advance anti-corruption objectives.[75] In short, the zero-tolerance approach is the most rigorous among the three approaches against corruption in investor–state arbitration.

1.3.2 The 'Closer Look' Approach

The 'closer look' approach finds that the tribunal has jurisdiction but can reject some claims on the grounds of corruption. This approach is different from the zero-tolerance approach in that its focus is directed at the claim itself and its admissibility rather than the basis of a tribunal's jurisdiction.[76] In *Plama Consortium Limited v. Republic of Bulgaria* (2008),[77] the tribunal found claims for investment protection to be inadmissible if the investment has violated the domestic law of the host state and principles of international law. Moreover, in *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia* (2016) (*Churchill Mining* case),[78] the tribunal decided that all the claims by the British company and its Australian subsidiary were inadmissible because these were effectively 'based on documents forged to implement a fraud aimed at obtaining mining rights', with the foreign investor found to be wilfully blind to the local investment partner's forgery of the coal mining exploration licences.[79] If issues of corruption or serious irregularity instead go to admissibility of certain claims, rather than jurisdiction, not only can the ISDS tribunal hear evidence to decide the matter,[80] but there may be some other claims from investors that could still be admissible.[81] The tribunal's decision will also not trigger any provisions in applicable treaties or arbitration law (say at the seat), for court review of arbitrator decisions on jurisdictional matters.[82] This approach may be therefore somewhat less favourable for the host state, compared to the zero-tolerance approach where a tribunal upholding jurisdiction (after dismissing the corruption defence) can have that decision challenged in another forum by the host state.

The dissenting opinion by Cremades in the *Fraport (I)* case was somewhat in line with this approach. It pointed out that the zero-tolerance approach may leave an

investor without a remedy, and a host state secure and immune in a gross violation of an investment or trade agreement thanks to its corrupt government official.[83] His point is that the tribunal needs to examine corruption allegations carefully to avoid the unfair consequence, and the jurisdictional phase is not appropriate for the tribunal to undertake such careful examination.[84] Newcombe is also in favour of the closer look approach, claiming it is useful to avoid procedural complications at later stages such as a challenge to the arbitral award for the tribunal's failure to exercise jurisdiction.[85]

1.3.3 The 'It Depends' Approach

The 'it depends' approach argues that the tribunal should carefully hear the substance or merits of the case, depending on the nature of the relevant corruption allegations.[86] This can impact on liability, remedies awarded (typically damages)[87] and cost orders by ISDS tribunals.[88] Factors taken into consideration by the tribunal include whether the allegedly corrupt country government officials are still in power, and whether there is a commercial custom of back payments in the host state. The approach encourages tribunals to look at the substance of investment claims, in relation also to the cause of action (e.g., violation of fair and equitable treatment commitments), referring to the diversity of corrupt practices and the bilateral nature of corruption.[89] The tribunal may opt for this approach, for instance, where there is misconduct by the investor and the host state, or where entry into the domestic market by foreign investors is practically impossible in the host state without some sort of 'commission payment'. Several arbitral tribunals have considered corruption allegations in examining the merits of the dispute,[90] especially where they came across issues pertaining to post-investment corruption.[91] For instance, the tribunal in the *Fraport (I)* case held that '*[i]f, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment*, as a justification for state action with respect to the investment, *might be a defence to claimed substantive violations of the BIT*'.[92]

The ISDS tribunals are further divided on more specific issues, which can arise under all or some of the three approaches outlined above.[93] Controversial topics include standards of proof for allegations of corruption,[94] the evaluation of risk factors that may imply the existence of corruption (i.e., the treatment of circumstantial evidence or 'red flags' of corruption),[95] the arbitrator's investigative and reporting rights and duties on corruption (including obligations to report corruption to the responsible authority),[96] the burden of proof for allegations of corruption,[97] the impact of criminal investigations over arbitral proceedings,[98] the attribution to the host state of the corrupt behaviour on the part of a state official (and then appropriateness for the state to raise corruption as a defence),[99] the availability of remedies for findings of illegality (such as restitution of benefits under contracts tainted by corruption),[100] the possibility for an investor to raise the demand for a bribe from a state agency as the infringement of its rights such as legal expropriation and fair and equitable treatment,[101] the plausibility of raising the general corruption situation in a

host state as part of claims of denial of justice (arguing the state's failure to accord fair and equitable investor treatment),[102] and the prospects of host-state counter-claims where the state is not liable for corruption.[103]

1.4 Limited Research on 'Asian' Views on Corruption and Investment Arbitration

Despite by now there being quite a few Asian ISDS arbitration cases, including awards discussing corruption and other serious misconduct by investors,[104] the literature on Asian perspectives and approaches in this field is rather scarce. This is surprising given the growing interest in Asian investment treaty and arbitration practice, including questions as to whether this is or may become distinctive by global standards.[105] Thus, for example, Llamzon's *Corruption in International Investment Arbitration* (published by Oxford University Press in 2014) is the first (and probably only) comprehensive research monograph that addresses transnational corruption in investment arbitration, aiming in the words of another commentator 'to develop a framework for arbitral decision-making when issues of corruption arise in investment arbitration proceedings'.[106] The 358-page volume offers deep insights into the relationship between investment arbitration and corruption based on the author's careful and rigorous legal research.[107] However, the book only occasionally discusses the perspectives of Asian countries because its focus is not on Asian approaches, although it does indeed examine several Asia-related ISDS decisions discussing corruption.[108]

In addition, Greenwald and Ivers contributed in 2018 a 93-page report on *Addressing Corruption Allegations in International Arbitration*.[109] This material also provides a comprehensive overview of the key issues that arise in international investment arbitrations involving corruption allegations, without analysing Asian insights on the issues. Further, the ICC issued in 2015 a dossier in the ICC Institute of World Business Law Series: *Addressing Issues of Corruption in Commercial and Investment Arbitration*.[110] This dossier compiles various reports analysing topical issues of corruption and arbitration, and the authors of the reports include individuals having a connection with Asia. However, none of the reports offers a close examination of Asian approaches towards corruption in ISDS. In more recent years, the ICC has constituted a 'Task Force Addressing Issues of Corruption in International Arbitration' (co-chaired by prominent Hong Kong-based arbitrator Chiann Bao), cooperating with the ICC Corporate Responsibility and Anti-Corruption Commission and the International Bar Association. It aims to explore existing approaches to allegations or signs of corruption in disputes and articulate guidance for arbitral tribunals on how to deal with such occurrences, but it is unclear whether it incorporates any regional perspectives or when reports will be made public.[111]

Such limited coverage of Asia is also salient in research articles addressing specific topics of corruption and other illegal conduct. On the fundamental issue of whether international arbitration is an appropriate forum to decide corruption claims, Rose's

article suggests that arbitral tribunals are ill-suited to the adjudication of corruption allegations due to the relatively closed and non-transparent character of international arbitration, which is at odds with the public interest involved in such allegations.[112] However, this generalised statement sits awkwardly with the legal environment of Asia where quite a few jurisdictions have been consistently evaluated by international organisations as having judicial institutions that offer limited legal certainty and a weak rule of law, as mentioned above.[113] Polkinghorne and Volkmer discuss three important investment arbitration issues, namely the source of legality requirement in investment arbitration, its scope and whether legality is a jurisdictional issue or a merit issue, but they pay little attention to BITs concluded between Asian states or arbitration cases involving Asian parties.[114] Wilske and Obel classify arbitral tribunals' handling of corruption allegations into three categories, but their focus is also not on Asia.[115]

In addition, several commentators consider state responsibility for corruption in investment arbitration, discussing when states should be held liable for conduct by their bribed officials. Wood claims that the conduct of a corrupt official should seldom be attributable to his or her state because 'a foreign investor cannot reasonably assume an official (no matter how high-ranking) to be authorised to engage in and act upon corruption'.[116] The proponents of the zero-tolerance approach are likely to find Wood's thesis useful as it suggests making states immune from the conduct of their allegedly corrupted civil servants. In contrast, Devendra states that 'when the international law of [s]tate responsibility is applied, there are circumstances in which a host [s]tate may be held internationally responsible for the corrupt conduct of its public officials'.[117] Devendra claims the occurrence of such circumstances depends on several factors, including the public official's conduct, the host state's conduct, the investor's conduct and the surrounding circumstances. He also comments that the critical factor is whether the government officer ostensibly exercised official capacity when she or he engaged in the corrupt conduct. Requiring careful examination by tribunals of corruption and illegality allegations, Devendra's thesis is compatible with the 'closer look approach' and the 'it depends approach'. Unfortunately, however, the discussion of state responsibility for corruption in investment arbitration is limited as Wood's thesis does not examine corruption cases in Asia in detail, while Devendra's argument is largely based on general international law, which has been criticised by some commentators for its Eurocentrism and/or Western centrism.[118]

Overall, these useful and significant contributions by leading experts of investment arbitration analyse core issues around corruption and investment arbitration without paying great attention to Asian contexts. This is also true of a more recent treatise entitled *Corruption and Fraud in Investment Arbitration: Procedural and Substantive Challenges* (published by Springer in 2022).[119]

Several works certainly discuss 'corruption in Asia' or 'investment treaties and arbitration in Asia', but they typically treat such subjects as distinct and separated matters. They tend not to deeply delve into the intersection between 'corruption in Asia' and 'Asian ISDS'. For instance, the *Routledge Handbook of Corruption in Asia* consists of 20 chapters addressing diverse Asian experiences in corruption and anti-corruption reforms.[120] The edited handbook provides a critical review of the major

issues, trends and challenges of (anti-)corruption reform in Asia, basically without touching upon matters related to ISDS. Moreover, the *Handbook on the Geographies of Corruption* contains national case studies examining specific countries that struggle with corruption, including some Asian states such as Pakistan, Bangladesh, China, the Philippines, Indonesia and the countries of post-Soviet Central Asia.[121] However, this 392-page *Handbook* published by Edward Elgar Publishing does not refer to ISDS or investment treaties either. *Investment Protection in Southeast Asia: A Country-by-Country Guide on Arbitration Laws and Bilateral Investment Treaties* (published by Brill in 2017) is a handy reference tool especially for practitioners to study investment protection in the region.[122] This 462-page collection contains country reports for all ASEAN member states and Timor-Leste, and each report covers a few key areas, such as arbitral legislation and institutions in the country, domestic laws related to FDI, an analysis of the BITs entered into by the state and cases involving the state or its investors. However, the country reports rarely refer to how the country regulates investment-related corruption or how it has dealt with corruption-related ISDS cases. Moreover, Chaisse and Nottage's *International Investment Treaties and Arbitration Across Asia* (published by Brill in 2018) introduces FDI trends and regulations, investment treaties and arbitration across Asia.[123] The reach of this 700-page voluminous edited book is more comprehensive in that it offers studies for the ten member states of ASEAN and other major players in Asia, including Japan, India, China and Korea. However, relatively few pages of the volume discuss ISDS matters involving corruption and other serious illegal misconduct. There is also limited attention given to corruption in ISDS in *The Asian Turn in Foreign Investment* (published by Cambridge University Press in 2021)[124] and *ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options* (published by Edward Elgar Publishing in 2022).[125] In sum, there has hitherto been no comprehensive study comparing Asian laws and practices addressing corruption and other serious investor illegality in the context of investor-state arbitration.

1.5 Developing Asian Perspectives on Corruption and Illegality in Investment Arbitration

This book aims to examine Asian approaches and case studies about corruption and serious investor misconduct in international investment arbitration. It focuses on corruption-related disputes between private parties and public sector entities operating in East (North and Southeast) and South Asia.[126] It also covers other serious illegal conduct in the region that foreign investors have or may become engaged in, which are related to or broadly equivalent to corruption and bribery.

Since Asia entered the age of mega-regional free trade agreements, investigating Asian views on corruption and illegality in investment arbitration has become ever more important. The Comprehensive and Progressive Agreement for Trans-Pacific

Partnership (CPTPP) and the Regional Comprehensive Economic Partnership Agreement (RCEP Agreement) came into force in 2018 and 2022, respectively, mandating member states to combat corruption and other illegal conduct.[127] Accordingly, the member states of those arrangements—mostly Asian countries—are now facing elevated and collective pressure to fight against corruption.[128] Nevertheless, both trade agreements remain silent on how specifically to deal with disputes arising from corruption and illegality at the inter-state level. They set out provisions allowing the member states to settle differences through arbitration, but matters arising from the obligation to address corruption are excluded from such dispute settlement provisions, which reduces their impact.[129] Obligations to encourage 'corporate social responsibility' among investors under these mega-regional FTAs, which could reinforce their anti-bribery obligations, are loosely worded and so not easily amenable to ISDS dispute resolution processes[130] Nonetheless, this type of anti-bribery provision contained in several recent BITs concluded by Japan, for example, 'although framed as the host state's obligation, might be taken into account by [an ISDS arbitration] tribunal in determining whether, or to what extent, the investor may invoke [the treaty's] protection'.[131] Hence, amidst the fresh region-wide condemnation of corrupt acts, investment arbitration remains a potentially influential platform impacting on corruption-related ISDS cases in Asia.

Nevertheless, the current efforts for fighting corrupt practices in investor–state arbitration are often fragmented, as discussed elsewhere in this chapter. In view of the situation, we should certainly praise the calls by UNODC and UNCTAD for further action to establish coherent standards for investment tribunals to tackle corruption,[132] provided that the standards reflect also a voice from Asia. Unfortunately, the voice has unlikely reached the ears of international policymakers yet. For instance, UNODC and UNCTAD revealed a lack of Asian representation in their Expert Group Meeting on Corruption and International Investments, which aimed to 'provide a platform for anti-corruption and foreign investment specialists to exchange ideas, discuss common challenges and identify ways forward with respect to minimising the risk of and opportunities for corruption in foreign direct investments'.[133] The Meeting reportedly gathered over 140 experts from 60 countries,[134] but the number of presenters in the event was 18,[135] and only 2 speakers were from Asian countries (Mongolia and China).[136] Moreover, as demonstrated above, there is a paucity of research appraising Asian perspectives on corruption in investment arbitration. Thus, Asian views on corruption and other issues have not gained international attention, despite the comments of many trade and investment law experts now suggesting treaty reforms to upgrade the framework of investor–state arbitration at a global level.[137] Someone needs to challenge the status quo, otherwise Asian states will miss golden opportunities to influence the ongoing international policy-making process for investment arbitration.

Against this backdrop, this edited volume aims to accumulate and present Asian perspectives, so that Asia may build a foundation so as to lead the next rounds of treaty reforms in the field of corruption and ISDS. In particular, it intends to address the following questions.

1. What are the real impacts of corruption, potentially of very different types, particularly on FDI and local economies in Asian jurisdictions?
2. Has Asia in general been, and will it remain, 'ambivalent' about international law prohibiting corruption and illegality? How have Asian countries been combatting corruption and other illegal activities particularly regarding foreign investment?
3. Have Asian countries dealt with corruption and illegality in relation to foreign investment projects? And if so, how? What laws and rules exist, and how do they operate in the respective jurisdictions? What are the recent developments? If Asian countries have faced any international investment claims involving corruption and illegality, whether treaty-based ISDS cases or those based on investment contracts providing consent to arbitration, what are the outcomes and consequences?
4. Have Asian countries been, or are they more likely to become, 'rule makers' (creating rules on their own initiative) rather than 'rule takers' (following primarily Western normative templates) in international investment law, specifically regarding corruption and illegality?[138]

These questions will support us to achieve the central objective: to examine Asian approaches toward corruption and illegality in international investment arbitration.

This book further takes into account not only legal perspectives but also non-legal ones such as angles from international economics. These perspectives reinforce that corruption is not monolithic, and indeed may have a significant correlation (if not necessarily also a causal impact) on foreign investment and/or economic growth trajectories. For example, a political economist's recent study of China's own 'gilded age' highlights how corruption can be similar to theft (usually illegal and bad for growth) or instead exchange-based (not necessarily illegal or bad for growth).[139] Jurists negotiating, drafting and applying investment treaties need to appreciate such nuances and perspectives when considering corruption both in theory and practice. Jurists also need to be humble as to the capacity of legal norms to address pervasive problems like corruption, compared to technological or other non-legal initiatives.[140]

1.6 Structure of the Book

Following this introductory chapter, the edited volume proceeds as follows. Part I considers wider economic issues relating to corruption and investment in the Asian region. In Chap. 2 Ahmed Masood Khalid surveys diverse discussions on investment-related corruption and its impact on local economies. His analysis focuses on how certain corrupt business practices have deterred (or possibly enhanced) economic growth in Asian countries and beyond.[141] In Chap. 3 Bruno Jetin, Jamel Saadaoui and Haingo Ratiarison turn to how the level of corruption in host states likely affects the amount of foreign investment into Asian nations. Their statistical analysis explores a correlation (if any) between the seriousness of corruption in Asian countries and the decrease and/or increase of FDI flows into the host states.

Part II discusses general legal issues related to corruption and investment arbitration in Asia. In Chap. 4 Anselmo Reyes and Till Haechler consider corruption regulations in Asia generating cross-border economic and geopolitical tensions. Their chapter discusses how Asian states may invoke their municipal laws to destabilise the world's largest companies and evade the arbitral tribunal's jurisdiction, for the benefit of their national industries and interests. In Chap. 5 Yueming Yan and Tianyu Liu examine international and regional frameworks against corruption in Asia, as well as anti-corruption provisions in investment treaties concluded by Asian states. In Chap. 6 Michael Hwang and Aloysius Chang offer an anatomy of corruption in ISDS arbitrations, focusing on definitions, evidentiary problems, attribution of responsibility and legal consequences. Next, Martin Jarrett in Chap. 7 more closely explores how an investor's misconduct should influence the examination of a host state's liability for an internationally wrongful act under an investment treaty. As critics have pointed out the imbalances between states and investors pertaining to corruption, Jarrett discusses the way to rebalance the asymmetries and fragmentation regarding (non-)Asian ISDS.

Part III collects the reports of corruption in key jurisdictions across Asia, mostly net FDI importing states and large net FDI exporters: China (including Hong Kong), India, Indonesia, Japan, the Lao Republic, the Philippines, South Korea and Thailand. Topics covered in each country report include general governance and corruption, investment treaty trajectories in the context of corruption, and relevant ISDS cases involving alleged bribery and serious investor misconduct based on an investment treaty or (less frequently) a one-off contract.

Beginning with the largest economies in Asia, for instance, the Chinese Communist Party launched a far-reaching anti-corruption campaign following the conclusion of the 18th National Congress in 2012. Accordingly, in Chap. 8 Vivienne Bath and Tianqi Gu discuss the impact of the nationwide campaign against corruption on the Chinese and Hong Kong environments for FDI and ISDS, taking into account other Party initiatives such as the Belt and Road Initiative and the China International Commercial Court.

Next, Prabhash Ranjan in Chap. 9 examines India's approach to corruption and illegality in investor–state arbitration. Ranjan surveys India's BIT programme and then sheds light on the country's new investment treaty practice, referring to the Final 2016 Indian Model BIT and the Joint Interpretative Statement on the India–Mauritius BIT. He further discusses the Devas Saga in which two corruption-related BIT claims were brought against India by the foreign investors of Devas, an Indian multimedia company.[142]

In Chap. 10 Simon Butt, Antony Crockett and Tim Lindsey provide a thorough overview of Indonesia's quite pervasive corruption (including notably among the judiciary), and its domestic laws and institutions aiming to combat it (including some backlash against the anti-corruption agency). They discuss Indonesia's evolving investment treaty regime, highlighting the government's interest in offering better protection and fair treatment to foreign investments. They further examine Indonesia's experience in responding to corruption or illegality claims in ISDS, such as in the *Churchill Mining* case and the *Al Warraq* case.

In Chap. 11 on Japan, a large net capital exporter rather than a major destination for FDI, Luke Nottage and Nobumichi Teramura show how Japan's limited tolerance for corruption domestically is matched by the growing inclusion of provisions in its investment treaties from around 2007 that urge host states to implement anti-corruption measures. They remark that this favours Japan's many outbound investors, but so does the more erratic treaty practice that still exists around the incorporation of clear legality clauses.

Turning then to smaller and/or more developing economies in Asia, Chap. 12 by Romesh Weeramantry and Uma Sharma succinctly explores corruption law and practice in the Lao Republic, highlighting ISDS experience in the cases of *Sanum Investments (I)* and *Lao Holdings (I)*. For the Philippines, Thomas Elliot Mondez and Jocelyn Cruz in Chap. 13 discuss the pitfalls of local corruption related to FDI, referring to the landmark *Fraport (I)* case and its aftermath.

Joongi Kim in Chap. 14 on South Korea follows a similar format and approach to that of Nottage and Teramura's chapter on Japan, but revealing more corruption domestically (especially around 2006–2007, perhaps linked to the then Korean President and associates being arrested for corruption). Korea also has significantly more inbound ISDS arbitration claims, arguably linked to its larger network of treaties. These claims may explain why its recent treaties seem to have more consistent express legality provisions than Japan's treaties, as they offer more scope for host state defences. Kim also outlines a major ISDS dispute, involving US investors (Mason and Elliott) complaining that Korean government corruption violated their right to fair and equitable treatment, which was still pending when this book went to press.[143] This case study is a reminder that ISDS arbitration can play a significant role in incentivising host states to eschew corruption, in addition to the multilateral anti-corruption treaties and other initiatives outlined in our introduction.

Lastly, in Chap. 15 Sirilaksana Khoman, Luke Nottage and Sakda Thanitcul address Thailand, a country characterised by high inbound FDI and economic growth since the 1980s, yet multiple military coups and political upheaval as well as domestic laws and institutions aiming to address corrupt practices. They summarise the distinctive phases and features of Thailand's investment treaty practices, and key arbitration cases involving the government under treaties or investment contracts (including one brought recently by an Australian company) where occasionally corruption or serious investor illegality have been raised before tribunals and/or seat courts.

Based on the foregoing general and country-specific reports that examine Asian approaches toward corruption and illegality in international investment arbitration, the concluding chapter by Teramura, Nottage and Jetin elaborate on whether Asia has been or could likely become a 'rule maker' rather than 'rule taker' in ISDS regarding corruption and illegality. More normatively, the chapter considers what the Asian states and territories should do to better contribute to or even lead further investment treaty reforms pertaining to corruption in investor–state arbitration, and thereby better address corrupt practices and related poor governance more generally.[144]

Notes

1. Kofi Annan, past Secretary General of the United Nations, described corruption as an insidious plague that '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' (Annan 2004). See also Pavić 2012, p. 663; Wetter 1994, p. 294; *Glencore International AG v. Republic of Colombia*, Award, ICSID Case No ARB/16/6, 27 August 2019 [663] (*Glencore* case).
2. UNODC n.d.-c.
3. OECD n.d.-c.
4. Beasley 2015, p. 196.
5. OECD n.d.-c.
6. Gaillard 2019, p. 14. These conventions offer various definitions on corruption because there is no universal definition (Baizeau 2015, p. 9). However, corruption normally refers to 'the deliberate abuse of authority or trust to benefit a private interest' including '"bribery" (giving or offering something to someone as a reward for doing something), "embezzlement" (improperly taking control of assets to which one has access) and "fraud" (false representations by statements or conduct to gain a material advantage) (Banifatemi 2015, p. 16).
7. The only Asian state that has not signed or ratified the UNCAC is the Democratic People's Republic of Korea (North Korea): UNODC n.d.-b. In contrast, only Japan and South Korea have adopted the OECD Convention in Asia (in its narrower sense, described below). In addition, there are regional conventions fighting against corruption—albeit not in Asia—such as the 1996 Inter-American Convention Against Corruption, the 1999 Council of Europe Criminal Law Convention on Corruption and the 1999 Council of Europe Civil Law Convention on Corruption. See also Chap. 5 in this volume.
8. See OECD n.d.-a and UNODC n.d.-a. Further accountability and incentives to implement the OECD Convention come from the regular reports entitled *Exporting Corruption* from Transparency International, an influential international non-governmental organisation: see e.g., https://www.transparency.org/en/publications/exporting-corruption-2022. The United Nations has also extended this idea of peer review in its revised (2015) Guidelines on Consumer Protection: see UNCTAD n.d.-e.
9. See e.g., Arnone and Borlini 2014; Beasley 2015; Davids and Schubert 2011; Joutsen 2011; OECD n.d.-b; Pieth 2020. However, enforcement of these treaties targeting corruption can sometimes be strong, e.g., even just for temporary domestic electoral advantage: see e.g., Cohen and Li 2021. The treaties also create a 'harder law' regime compared to say more recent initiatives in many parts of the world to address modern slavery in corporate supply chains: see e.g., Harris and Nolan 2021.
10. See Chap. 4 in this volume.
11. See Chap. 5 in this volume.
12. The geographic focus of this volume is Asia, comprising primarily East, South East and South Asia, because of their strong geographical and socio-economic relations, apart from Chaps. 2 and 5, following the United Nations definition of Asia that extends to Central and Western Asia.
13. See Transparency International 2022a, 2023.
14. WJP 2021, p. 9 (emphasis added).
15. Transparency International 2022b.
16. WJP 2021, 2022.
17. Brouwer 2023.
18. UNCTAD 2021. The major outbound investors in the region are Japan, China and South Korea, but this book mostly focuses on inbound FDI flows into East, South East and South Asia as this closely links to the domestic issues of corruption and illegality in the host states.
19. Source: Jetin's computation with UNCTAD data.

20. Carroll et al. 2020; Subramanian and Kessler 2013.
21. UNCTAD 2018.
22. UNCTAD 2019.
23. UNCTAD 2019.
24. Antràs 2020.
25. UNCTAD 2022.
26. See the Mason and Elliott claims pending against Korea (outlined in Chap. 14 in this volume).
27. However, undermining neutrality somewhat, some government entities (e.g., in Thailand) have laws or policies requiring them for at least some types of public contracts to insist on arbitration seated in and therefore subject to supervision by the courts in their own jurisdiction: see e.g., Nottage and Thanitcul 2017.
28. For a recent example of where an arbitral tribunal applied these Principles (even though not originally expressly chosen to apply to a lease agreement) to award nearly USD15 billion to eight Filipino individuals (heirs to the last Sultan of Sulu) against Malaysia (successor to the British North Borneo Company), see Charlotin 2022.
29. UNCITRAL n.d.-a.
30. UNCITRAL n.d.-b; and generally e.g., Bell 2018.
31. Article V of the NYC and Article 36 of the Model Law. The state may also have taken the NYC reservation, or adapted the Model Law template, to allow only enforcement of 'commercial' awards and then explicitly or implicitly excluded awards from arbitration agreements involving government entities. See generally e.g., Bermann 2017.
32. ICSID 2024b.
33. Article 52 of the ICSID Convention.
34. Article 54 of the ICSID Convention.
35. If the host state but not the home state has not ratified the ICSID Convention, it can still consent to allowing the foreign investor to commence arbitration administered by ICSID, but those will proceed under different ICSID Rules, and resultant awards will be enforced typically via the NYC rather than the ICSID Convention enforcement regime.
36. UNCTAD n.d.-b. Out of 1,303 treaty-based ISDS claims recorded as of 31 July 2023, e.g., 68 were ad hoc arbitrations under the UNCITRAL Rules. The reason for many treaty claims being referred to ad hoc arbitration might be that the leaders of arbitration centres were involved in corruption allegations in the past, as discussed in Sim 2019 on the Asian International Arbitration Centre.
37. See e.g., Nottage 2021a, 2023a.
38. There have been 146 cases filed with ICSID under consents to arbitration in individual contracts, according to ICSID 2024a. Of these, 145 involved ICSID Convention Arbitration Rules.
39. Claxton 2020; Ubilava 2022.
40. There had been 1,303 known filings, according to UNCTAD n.d.-c.
41. There had been 2,833 BITs signed (2221 in force) and 453 signings of other investment agreements such as FTAs (375 in force), according to UNCTAD n.d.-a.
42. Kim 2012; Nottage and Weeramantry 2012, 2011.
43. See e.g., Chaisse and Nottage 2018.
44. This explains, for example, large numbers of claims brought by investors from various home states under quite similarly worded BITs concerning quite similar measures introduced by Argentina to address an economic crisis in the 1990s, or under treaties and the Energy Charter Treaty against Spain after it significantly changed its renewable energy legislation, or against India over various measures after an adverse 2011 award. See Singh 2021; Alvarez and Topalian 2012; Park and Samples 2017 (focusing on the subset of bond claims after the crisis); on Spain/renewable energy policy change ISDS claims see García-Castrillón 2016, 2017; Schmidl 2021; Ballantyne 2021 (introducing a Japanese investor's successful ICSID claims against the Spanish government over solar reforms).
45. Walter 2015, pp. 85, 90ff.
46. Besch 2015, pp. 140–141.

47. Of 2,538 BITs signed between 1959 and 2016, 2,418 (95%) have a fair and equitable treatment clause: UNCTAD n.d.-d.
48. Hobe 2015, p. 13; Meshel 2013, pp. 270–271.
49. For example, of 2,538 BITs signed between 1959 and 2016, 66% contain an 'in accordance with host State law' clause: UNCTAD n.d.-d.
50. Obersteiner 2014, p. 276; Tamada 2015, p. 107.
51. See generally Banifatemi 2015.
52. See the argument that systemic corruption could amount to duress under international law, undermining the host state's defence, in Chap. 7 in this volume.
53. Discussing the empirical evidence on the impact of ISDS-backed provisions on FDI flows, see e.g., Armstrong 2018; Armstrong and Nottage 2022; Nottage 2021b; Singh 2021.
54. Dupont et al. 2022, p. 367 (suggesting that 'poor governance, understood as corruption and lack of rule of law, has a statistically significant relation with investment arbitration claims').
55. However, significant net positive effects on local legal and political institutions from ISDS claims may need to be accompanied by specific law reforms, such as enactment of broader arbitration legislation following global standards, as suggested recently, e.g., by Rogers and Drahozal 2022.
56. UNODC 2021, p. 6.
57. Wilske and Obel 2013, pp. 181–186; Tamada 2015, pp. 115ff; Raouf 2009 (introducing the 'zero tolerance' approach and the 'eyes shut' approach in which arbitrators rely on weak procedural grounds to avoid inquiry into matters strongly indicating the existence of corruption); Schefer 2021, pp. 892–902 (introducing the three types of the illegality defence regarding corruption along the lines of the three approaches).
58. Greenwald and Ivers 2018, pp. 56–72.
59. Wetter 1994.
60. Wetter 1994, p. 294.
61. Greenwald and Ivers 2018, pp. 56ff; Llamzon 2015, pp. 32–33. For example, in *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated 4 October 2006 (*World Duty Free* case), the tribunal concluded that 'bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy, [and therefore] claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal' (para. 157). Also, see *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, and Bangladesh Oil Gas and Mineral Corporation*, ICSID Cases Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction dated 19 August 2013 (*Niko* case).
62. ICSID Case No. ARB/03/25, Award dated 16 August 2007. For more on this ISDS dispute, and related court litigation in the Philippines, see Chap. 13 in this volume.
63. *Fraport (I)* case, pp. 159 and 170.
64. Ibid, p. 194.
65. See also *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013 (*Metal-Tech* case) (discussed further in Chap. 4 in this volume).
66. Greenwald and Ivers 2018, pp. 67ff; Polkinghorne and Volkmer 2017, pp. 155–158; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009; *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated 6 June 2012 (translation); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction dated 25 July 2012 (*Khan Resources* case); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award dated 10 December 2014; *Cortec Mining Kenya Limited* et al. *v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award dated 22 October 2018.
67. Reichenbach 2022, paras. 21.31–21.33 (noting that some tribunals failed to explain why the ICSID Convention only protects lawful investments, and that other tribunals justified the implicit legality requirements based on various grounds, including the principle of good

faith, *nemo auditur*, unclean hands and international public policy). See further generally Chap. 6 in this volume.

68. Reichenbach 2022, para. 21.34; Moloo and Khachaturian 2011, p. 1489; *Bear Creek Mining Corp v. Republic of Peru*, Award, ICSID Case No ARB/14/21, 30 November 2017 [320] (noting that 'under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties').
69. Moloo and Khachaturian 2011, p. 1490; Reichenbach 2022, para. 21.34.
70. Drude 2018, p. 704.
71. The latter view is ultimately preferred by Reinisch 2018, p. 82. However, the former view may gain favour among tribunals as worldwide concerns about corruption continue to grow.
72. Tamada 2015, p. 117.
73. See e.g., UNCITRAL 2024 (with helpful summaries of deliberations via McInerney-Lankford and Vasquez 2020; Roberts and John 2019). In Working Group III (Investor-State Dispute Settlement Reform) at UNCITRAL, the South African delegate proposed to limit the protection of investment and the jurisdiction of ISDS tribunals to 'claims by responsible investors who have not violated any law, rules, regulations and internationally recognised values, or participated in corrupt activities': UNCITRAL 2019, pp. 6 and 9. See also ICSID 2021 (with new ICSID Rules brought into effect from 1 July 2022); and CIDS n.d. (with Concept Papers to support the work of delegates to the UNCITRAL reform deliberations, elaborated into a special issue: Langford et al. 2020).
74. Ishikawa 2022, reviewed by Nottage 2023b.
75. Meshel 2013.
76. Banifatemi 2015, p. 19 (noting that the short-term result of jurisdiction and admissibility may be the same—the dismissal of arbitral proceedings at the preliminary stage, although a tribunal may not raise admissibility on its own motion, unlike the case of jurisdiction).
77. ICSID Case No. ARB/03/24, Award, 27 August 2008.
78. ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40, Award, 6 December 2016 (discussed further in Chap. 10 in this volume).
79. The *Churchill Mining* case, p. 191. See further in Chap. 10 in this volume.
80. See generally Banifatemi 2015.
81. See further Reichenbach 2022 (and Chap. 4 in this volume).
82. Banifatemi 2015; Weeramantry and Packer 2023.
83. The *Fraport (I)* case, p. 23/24.
84. Wilske and Obel 2013, p. 184.
85. Newcombe 2011, p. 199, referring to *Malaysian Historical Salvors SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10,
Decision on Annulment of 16 April 2009, para. 80) where the ICSID ad hoc Committee held that the tribunal exceeded its authority by failing to exercise jurisdiction. More broadly on that case, see also Coppens 2011.
86. Tamada 2015, p. 116; Wilske and Obel 2013, pp. 184–186.
87. See, e.g., *Hesham T. M. Al Warraq v. Republic of Indonesia* (*Al Warraq* case), UNCITRAL, Final Award dated on 15 December 2014 (discussed by Chap. 10 in this volume); Burgstaller and Risso 2021, p. 703. See also the *Sanum v. Laos* cases (discussed in Chap. 12 in this volume).
88. Weeramantry and Packer 2023, p. 455, noting that in *Metal-Tech v. Uzbekistan* although the tribunal found corruption and so withdrew jurisdiction, it required the host state to bear its own costs and equally share in the costs of the tribunal and ICSID; and in *Spentex v. Uzbekistan* the majority unusually urged the host state to donate USD8 million to a United Nations anti-corruption project (which it apparently did), failing which it would be ordered to pay the entire costs of the proceedings, including 75% of the claimant's costs (approximately USD12 million).
89. Wilske and Obel 2013, p. 185.
90. Schefer 2021, pp. 901–902; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 December 2000; *Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award dated 26 January 2006.

91. Greenwald and Ivers 2018, pp. 72–74; the Khan Resources case, p. 83; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227 (*Yukos* case), Final Award dated 18 July 2014, p. 430.
92. The *Fraport (I)* case, pp. 164–165 (emphasis added). See also the dissent of the *Fraport (I)* case, noting that '[a]s a matter of principle, therefore, the legality of the investor's conduct is a merits issue' (p. 22).
93. See Chap. 6 in this volume.
94. Caprasse and Tecqmenne 2022; Greenwald and Ivers 2018, pp. 38–49; Hoepfner 2017, pp. 216ff; Khvalei 2015; Menaker 2015; Sayed 2017; Valle and Carvalho 2022.
95. Haugeneder 2021, pp. 433–435 (noting that arbitrators are increasingly adopting *ICC Guidelines on Agents, Intermediaries and Other Third Parties 2010*, which is the ICC's publication on 'red flags' indicating a risk of corruption). See also Gaillard 2019, pp. 3–9; Low 2019; Pieth and Betz 2019; Levine 2021; Pieth and Betz 2019.
96. Baizeau and Hayes 2017; Marcenaro 2015; Rose 2014; Sprange 2015; Ziadé 2015.
97. Menaker 2015, 79–82; Tezuka 2015, 58–59.
98. Besson 2015; Wallgren-Lindholm 2015, pp. 185–186.
99. Devendra 2019; Llamzon 2014, pp. 238–281, 2015; Nappert 2015; Wood 2018.
100. Fernández-Armesto 2015, pp. 169ff; Gaillard 2019, pp. 10–12; Partasides 2017.
101. Llamzon 2014, pp. 119–200; Schefer 2021, pp. 35–36; Vijayvergia and Belmannu 2020, Sect. 2.4; Ziadé 2015, pp. 746–747.
102. Chan 2022.
103. Vijayvergia and Belmannu 2020.
104. The *Fraport (I)* case; the *Metal-Tech* case; the *Niko* case; the *Churchill Mining* case; *Amco Asia* et al. *v. Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984; *Westinghouse* et al. *v. National Power Company*, ICC Case No. 6401, 19 September 1991; *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000; *Hesham Talaat M. Al-Warraq v. Republic of Indonesia,* UNCITRAL Arbitration, Final Award, 15 December 2014; *Lighthouse Corporation Pty Ltd. and Anor v. Democratic Republic of Timor-Leste,* ICSID Case No. ARB/15/2, Award, 22 December 2017; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award dated 12 July 2019 (see also Bohmer 2019); *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013–13 (the *Sanum Investments (I)* case), Award dated 6 August 2019, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (the *Lao Holdings (I)* case), Award dated 6 August 2019. On the development of the two Lao-related cases, see Hepburn and Peterson 2012; Charlotin 2021. On a recent corruption-related ISDS case involving the government of Mongolia, see Djanic 2022.
105. See e.g., Chaisse and Nottage 2018; Nottage et al. 2021a, b; Mohan and Brown 2021.
106. Mistelis 2014.
107. Donoghue 2015.
108. *Himpurna California Energy Ltd. (Bermuda) v. P.T. (Persero) Perusahaan Listruk Negara (Indonesia)*, Final Award dated 4 May 1999; *SGS v. Philippines*, Case No. ARB/02/6, Decision on Jurisdiction dated 29 January 2004; *Malaysian Historical Salvors v. Malaysia Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment dated 16 April 2009; *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, BAPEX, and PETROBANGLA*, ICSID Case Nos. ARB/10/11 and ARB 10/18, Decision on Jurisdiction dated 19 August 2013.
109. Greenwald and Ivers 2018.
110. Baizeau and Kreindler 2015. The ICC Commission on Arbitration and ADR also has a Task Force on 'Addressing Issues of Corruption in International Arbitration' that is currently compiling national reports, with results expected to be forthcoming in 2024 via ICC n.d, but it is unclear how many Asian jurisdictions will be covered.
111. ICC n.d.
112. Rose 2014.
113. For example, Vietnam, Cambodia and Laos: Teramura 2021b, p. 27; Teramura 2021a.

114. Polkinghorne and Volkmer 2017.
115. Wilske and Obel 2013. Other articles on the three categories do not focus on Asia either. See Tamada 2015; Raouf 2009; Schefer 2021.
116. Wood 2018, p. 117.
117. Devendra 2019.
118. Caserta 2021, p. 321.
119. Tussupov 2022. See also Caprasse and Tecqmenne 2022 and Valle and Carvalho 2022 (discussing evidential issues related to corruption in investment arbitration with limited consideration of Asian contexts) and Reisman 2021 (considering the apportionment of fault for performance corruption in investment arbitration generally).
120. Gong and Scott 2016.
121. Warf 2018.
122. Malintoppi and Tan 2017.
123. Chaisse and Nottage 2018.
124. Mohan and Brown 2021.
125. Calamita and Giannakopoulos 2022.
126. As mentioned earlier, with limited exceptions, this volume does not focus on the more geographically remote and socio-economically quite distinctive Central Asian region. However, several important cases against states in that region that have raised corruption concerns are discussed by individual authors. See generally Weeramantry et al. 2023 and also (for *Tethyan v. Pakistan*) Boehmer 2019.
127. See Chapter 26 (Transparency and Anticorruption) of the Consolidated TPP Text; and Article 17.9 of the RCEP Agreement. See further Chaps. 4 and 5 in this volume.
128. Chaisse et al. 2022, suggesting the RCEP agreement 'represents [a region-wide] effort to reconcile overlapping agreements around a more common template'.
129. Article 26.12.3 of the TPP Text and Article 17.9.2 of the RCEP Agreement.
130. For example, TPP Article 9.17 states: 'The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party'. Investor accountability and due diligence, however, have been gaining increasing traction in international investment law: Burgstaller and Risso 2021; Ishikawa 2022; Jarrett et al. 2021; Llamzon and Chrostin 2021.
131. Ishikawa 2018, pp. 537–538.
132. UNODC 2021, p. 6.
133. UNODC 2021, p. 3.
134. Kryvoi 2021.
135. UNODC 2021, p. 2.
136. The Mongolian speaker was a UNODC officer based in Vienna, Austria.
137. Nottage et al. 2018; Trakman 2018.
138. Compare generally Chesterman 2017; Chaisse and Nottage 2018; Nottage et al. 2021a, b; Hsieh 2021 (arguing that a looser, more consensus based 'new Asian regionalism' is shaping the new regional economic order and international trade norms).
139. Ang 2020, pp. 8–14.
140. Compare e.g., Lomborg 2023 (summarising recent research suggesting huge cost–benefit advantages by introducing e-procurement regimes, particularly in developing economies).
141. For example, see Ang 2020.
142. *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No 2013–09, Award on Jurisdiction and Merits, 25 July 2016; *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014–10, Interim Award, 13 December 2017.
143. For further updates, as these disputes remain ongoing, see Kim 2023.
144. Cf. Kawharu and Nottage 2017.

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Nobumichi Teramura is Assistant Professor at Universiti Brunei Darussalam and Affiliate at the Centre for Asian and Pacific Law at the University of Sydney, specialising in business law, with a particular interest in arbitration, private international law, contract law and Asian law. Nobumichi is the author of *Ex Aequo et Bono as a Response to the Over-Judicialisation of International Commercial Arbitration* (Wolters Kluwer, 2020), based on his doctoral thesis from the University of New South Wales in Australia, which received a PhD Excellence Award when completed in 2018. He has taught private international law and commercial law as a lecturer at the Adelaide Law School, Australia (since 2019). He also lectured at the Tañada-Diokno School of Law at De La Salle University in the Philippines in 2016, 2017 and 2019 on international arbitration and trade law.

Luke Nottage is Professor of Comparative and Transnational Business Law at Sydney Law School, specialising in arbitration, contract and consumer law, and corporate governance, with a particular interest in Japan and the Asia–Pacific. He is founding Co-Director of the Australian Network for Japanese Law (ANJeL), Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS), and Special Counsel with Williams Trade Law. Luke has consulted for law firms worldwide as well as for ASEAN, the European Commission, the OECD, UNCTAD, UNDP and the Governments of Japan and Saudi Arabia. Luke is also a Rules Committee Member of ACICA and is on the Panel of Arbitrators for AIAC (KLRCA), BIAC, CAAI, JCAA, KCAB, NZIAC, SCIA, TAI and THAC. Luke was Visiting Professor at Universiti Brunei Darussalam in 2020 and 2023.

Bruno Jetin is Associate Professor at Universiti Brunei Darussalam (UBD); he was also Director of the Institute of Asian Studies (2018–2022). Prior to joining UBD, he was a researcher at the Institute for Research on Contemporary Southeast Asia (IRASEC, CNRS-MAEE, Bangkok) and Associate Professor at the University Sorbonne Paris Nord where he was Deputy Director of the Research Center in Economics. He holds a PhD in economics from the University of Sorbonne Paris Nord. His current research areas include ASEAN and the Belt and Road Initiative, foreign investment and trade in the Asia–Pacific, income distribution and growth. He is also an expert on the automobile industry and the electric car.

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Part I
The Economic Context of Corruption and Investment

Chapter 2
Does Corruption Hinder Foreign Direct Investment and Growth in Asia and Beyond? The Grabbing Versus the Helping Hand Revisited

Ahmed M. Khalid

Abstract Corruption is considered a major issue globally, particularly for developing countries, as it takes away important resources resulting in huge costs to the economy. This is especially true in the case of attracting foreign direct investment (FDI) in the host country. However, the theoretical literature contains counterarguments, with some scholars agreeing with the above argument while others suggest that, in some cases, corrupt practices facilitate business transactions, thus helping to attract FDI. This chapter further explores this literature. It first provides a review of the theoretical and empirical literature on corruption–growth and corruption–investment relationships. This is followed by some interesting details on the cost of corruption. Subsequently, some econometric analysis is performed to verify the 'grabbing hand' and 'helping hand' views on the impact of corruption. The empirical findings of this chapter support a grabbing hand view for the top 20 (least corrupt) countries while the evidence suggests a helping hand view for the bottom 20 (most corrupt) countries. The author also finds evidence supporting a non-linear corruption–growth and corruption–investment relationship for the sample of the 20 most corrupt countries. He believes that these are interesting findings and could have important policy implications.

2.1 Introduction

Although the word 'corruption' (or corrupt practices) is commonly used to refer to illegal transactions in return for receiving favours, it is difficult to define exactly what corruption is in practice. Experts have provided a variety of definitions of corruption, but none can be considered as universally accepted.[1] For instance, an interesting example is provided by Ray (2006) who observed that offering gifts in traditional

A. M. Khalid (✉)
School of Business and Economics, Universiti Brunei Darussalam, Bandar Seri Begawan, Brunei
e-mail: ahmed.khalid@ubd.edu.bn
URL: https://ubd.edu.bn/menu/staff-directory/2017/04/20/dr.-ahmed-masood-khalid/

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Eastern cultures is considered a custom. The same is regarded as corruption in the Western world. Due to the difficulty in adopting a universally acceptable definition of corruption, the United Nations Convention against Corruption (UNCAC) defines specific acts of corruption through a series of Articles (legal articles).[2]

Irrespective of how I define it, corruption is considered a major issue for the global economy, especially for developing countries, as it results in the loss of potential resources. It also limits a country's ability to meet the United Nations 2030 Agenda for Sustainable Development and the underlying Sustainable Development Goals (SDGs). Corrupt practices have taken a substantial amount of money that could have been invested into governance, social protection and transitioning to a green economy. These are the priority areas the SDG Push had designed to prevent 169 million people from being driven into extreme poverty. UNDP (2022) observed that, for African countries with high levels of corruption, governments spend 25% less on health and 58% less on education. Corruption is also believed to hinder the inflow of foreign direct investment (FDI), especially in developing countries with limited avenues for domestic investment.

With this background, the aim of this chapter is to discuss and investigate the cost and impact of corruption with a specific focus on FDI. Besides providing conceptual details and theoretical discussion, the chapter also presents new empirical evidence on the impact of corruption on economic growth and investment using data from a sample of 40 countries (the 20 least corrupt and the 20 most corrupt). Although empirical findings suggest that corruption does impact growth and FDI, the relationship is non-linear. While empirical evidence supports a 'grabbing hand' view for the sample of 20 least corrupt countries, a 'helping hand' view is also evident for the 20 most corrupt countries. The chapter is organised as follows. Section 2.2 discusses the economic cost of corruption; Sect. 2.3 reviews the empirical literature on corruption, while some data presentation and an econometric framework for empirical analysis are provided in Sect. 2.4. Section 2.5 discusses the results and Sect. 2.6 draws conclusions.

2.2 The Economic Cost of Corruption

As stated above, corruption takes away potential resources and could have a substantial cost to the economy. Some estimates suggest that the economic cost of corruption is extremely high and is more than 5% of global GDP.[3] Johnsøn and Taxel (2015) report that, globally, around USD1 trillion is paid in bribes each year. The report also claimed that 20 to 40% (equivalent to USD20 to USD40 billion) is stolen each year from official development assistance thanks to high-level corruption within the public budgets of developing countries and subsequently hidden overseas.[4]

It is believed that the risk and amount of corrupt practices in public sector spending would have increased during crisis periods such as the COVID-19 pandemic. Potential practices include misappropriation of allocated funds as part of relief measures,

the delivery and distribution of vaccines and the procurement of medical equipment such as personal protective equipment, swabs and ventilators.[5] Cadrado (2022) provides some evidence of corruption during COVID-19 in different countries. The main sources of corruption include the sales of falsified COVID test certificates (South Africa, Lesotho, the UK, France and Spain); bribes and queue-jumping to access COVID-19 vaccines (Lebanon, Malaysia, the Philippines, Peru, Argentina, Spain, Poland, Canada and Ecuador); profiteering through artificially creating an oxygen crisis, hefty fees for hospital bed access, as well as artificial scarcity for such beds (India and Peru); and a black market for vaccines and the use of fake vaccines (Venezuela and Iran).

Scholars have provided detailed estimates of the cost of corruption in different countries (see Table 2.1). Although the authenticity of these estimates is dependent on the data and methodologies used, the substantial cost of corruption, particularly in developing countries, means that the issue remains important and requires further investigation. The estimates highlight some extreme cases of how corrupt practices could impact the GDP or the national budget of an economy. For instance, Reinikka and Svensson (2004) provide estimates that losses due to corruption in public spending of educational funds intended to cover schools' non-wage payments in Uganda amounted to 87% of the total allocated funds. Olken (2007) reports that Indonesia lost 24% of the cost of the building of rural roads (funded through a national government programme) due to corruption. Khawaja and Mian (2005) found that politically connected loans in Pakistan led to a loss of GDP in the range of 0.3 to 1.9%. Anwar and Khalid (2006) observed that estimated public sector losses due to corruption in the same country accounted for about 10% of GDP. Niehaus and Sukhtankar (2013) estimate that in India 79% of labour expenditures have been lost from the 'wages on the National Rural Employee Guarantee Scheme'. According to Gorodnichenko and Peter (2007), bribes received by public sector employees in Ukraine amount to 1% of GDP. Javaid (2010) estimated that, as a result of corruption in developmental projects, particularly in public sector procurement, Pakistan loses PKR200 billion (USD2.35 billion; at 2010 exchange rate) to the economy every year. Unfortunately, this is just the tip of the iceberg in the context of a 'corruption pandemic', particularly in developing countries, and implies a huge cost to the global economy.[6]

Mo (2001) used data covering a large sample of 54 countries over the period 1960 to 1985 and found that for every 1% increase in corruption level, economic growth declines by 0.72%. Although his findings suggest that corruption impacts the level of human capital and the share of private investment, the most important channel through which corruption affects economic growth is political instability, which can account for around 53% of the total effect. Hopkins and Rodriguez-Pose (2007) differentiates between government interventions which could be linked to corruption or non-corruption. They found that in countries where private business activities are lightly regulated, a high level of public spending is linked to low levels of corruption.

Mauro et al. (2019) observed that natural resources (especially oil and mining), state-owned enterprises (energy, utilities and transportation) and public sector

Table 2.1 Economic cost of corruption

Papers	Country	Context	Corruption estimate (%)
Svensson (2003)	Uganda	Bribes firms paid	8% of costs
Olken and Barron (2009)	Indonesia	Bribes truck drivers paid to police on their routes	13% of cost of a trip
McMillan and Zoido (2004)	Peru	Bribes the secret police paid to judges, politicians and the media to support the Fujimori regime	N/A
Sequeira and Djankov (2010)	South Africa	Bribes paid to port and border post officials	14% of shipping costs
Reinikka and Svensson (2004)	Uganda	Graft in public spending of educational funds intended to cover schools' non-wage payments	87% of funds
Olken (2007)	Indonesia	Graft in the building of rural roads funded through a national government programme	24% of cost of the roads
Olken (2006)	Indonesia	Theft of rice from a programme that distributed subsidised rice	18% of programme expenditure
Hsieh and Moretti (2006)	Iraq	Bribes from the under-pricing of oil in Iraq's Oil-for-Food programme	2% of oil revenues
Khwaja and Mian (2005)	Pakistan	Politically connected loans	0.3–1.9% of GDP
Niehaus and Sukhtankar (2013)	India	Wages on the national rural employee guarantee Scheme	79% of labour expenditures
Fishman (2001)	Indonesia	Value of political connections to president Soeharto for Indonesian public firms	23% of firm value
Fishman and Miguel (2007)	United States	Value of personal ties to vice president Cheney for US public firms	0% of firm value
Faccio (2006)	Cross-country	Value of political connections for firms across sample of 47 countries	2.3–4.3% of company value
Gorodnichenko and Peter (2007)	Ukraine	Bribes received by public sector employees	1% of GDP
Ferraz and Finan (2011)	Brazil	Corruption in municipal government	8% of total amount audited
Besley et al. (2012)	India	Beneficiary selection by village council	2% of beneficiaries selected
Javaid (2010)	Pakistan	Grand corruption in developmental projects, particularly in public sector procurement	Estimates show PKR200 billion loss to the economy every year

(continued)

Table 2.1 (continued)

Papers	Country	Context	Corruption estimate (%)
Transparency international India report (2005)	India	In 2005, 11 public sector departments had been surveyed; 62% of respondents (citizens) said corruption is a serious issue	The study reveals that the common people pay INR210,680 million as bribes per year
Quah (2013)	India	In 2008, the World Bank investigated corruption scandals in India's healthcare projects of USD568 million	
Transparency international (2012)	Pakistan	In 2012, Transparency international (TI) calculated that Pakistan had lost more than PKR8.5 trillion (USD 94 billion) in corruption, tax evasion and bad governance in the coalition government from 2008 to 2013	PKR8.5 trillion (USD94 billion)
UNDP (2022)	General	Tax abuse by multinational corporations and rich people costs USD483 billion, enough to fully vaccinate the world against COVID-19 more than three times over	USD483 billion
	General	Of the approximately USD13 trillion that governments spend on public spending, up to 25% is lost to corruption	USD13 trillion
	Europe	In Europe 28% of all health industry corruption cases are related to medical equipment. And in the EU one in five people pay bribes for healthcare	N/A
	Africa	From 2000 to 2015, the illegal money leaving Africa amounted to USD836 billion, about 3.7% of its GDP	USD836 billion
	General	Of the USD7.5 trillion that is spent every year on health, USS500 billion is lost to corruption	
Wathne and Stephenson (2021)	General	Approximately USD1 trillion in bribes is paid worldwide every year	
		Approximately USD2.6 trillion in public funds is stolen/embezzled every year	
		Corruption costs the global economy approximately USD2.6 trillion, or 5% of global GDP, each year	

(continued)

Table 2.1 (continued)

Papers	Country	Context	Corruption estimate (%)
		Corruption, together with tax evasion and illicit financial flows, costs developing countries approximately USD1.26 trillion each year	
		Approximately 10–25% of government procurement spending is lost to corruption each year	
		Approximately 10–30% of the value of publicly funded infrastructure is lost to corruption each year	
		Approximately 20–40% of spending in the water sector is lost to corruption each year	
		Up to 30% of development aid is lost to fraud and corruption each year	
		Customs-related corruption costs world customs organization members at least USD2 billion per year	
		Approximately 1.6% of the annual deaths of children under five years of age (over 140,000 deaths per year) are due in part to corruption	

Sources The above results are extracted from Olken and Pande 2012; Hassan 2022; United Nations Development programme 2022; and Wathne and Stephenson 2021

spending on purchases of goods and services by the government (especially during crises, as stated above in this section) are the main sectors bogged down by corrupt practices. The latest Investment Dispute Settlement Navigator report by UNTAD shows that 343 of the total 1257 long-term investment disputes are still pending and date back to projects initiated in 1981 UNCTAD (2022).[7] Their estimates suggest that public sector procurement accounts for 13 % and 36% of GDP in OECD countries and advanced economies, respectively. They also claim that corrupt practices are relatively difficult in the education and health sectors. This is perhaps the reason why more corrupt countries have a small proportion of GDP spent on education and health; Fig. 2.1 shows that spending on education and health is lower in relatively more corrupt countries. Mauro et al. (2019) show that public spending (as a percentage of total spending) on health and education, on average, in low-income countries is about 10% less in high corruption countries as compared to low corruption countries. The gap is about 4% in emerging market economies and only 2% in advanced economies.[8] UNDP (2022) also reported that more than half of the corruption cases are related to public spending.

2.3 Review of the Empirical Literature on Corruption

Corruption is a major problem in many developing countries. During the 1980s and 1990s,[9] some Asian countries implemented a series of liberalisation and economic reform policies. These policies helped to improve trade share and attract foreign investment, thus achieving high growth targets. This inspired many other developing countries to follow suit. However, negotiations on foreign investment agreements also gave incentives for kickbacks and illegal commissions.[10] Such corrupt practices not only increase the cost of doing business but also discourage genuine investors.[11] Many experts have focussed on investigating how corruption impacts economic growth. Although most of the published work and commentaries support the view that corruption hampers economics, Ang (2020) argues that this view is 'over-simplistic'.[12] Interest in this area of research increased after 1995 when Transparency International started publishing rankings and absolute values of corruption perception for each country. Although there is a rich empirical literature on the issue of how corruption impacts growth, this review is restricted to the corruption–investment relationship which is the main focus of this chapter.

2.3.1 The Corruption and Investment Debate

The theoretical literature differentiates between the positive and negative effects of corruption on investment. Accordingly, scholars have provided contrasting views on corruption. The view of the 'grabbing hand' refers to corrupt practices which create uncertainty and substantially increase the cost of foreign funds, thus negatively affecting investment flows into a host country. The quality of the institutional environment is considered one of the main determinants of corruption. A weak institutional environment and regulatory structure provide incentives for more corrupt practices, or as it is termed, the 'grabbing hand'. Conversely, a 'helping hand', a bribing mechanism, helps to facilitate transactions and procedures to set up and start businesses, thus encouraging foreign investment.[13]

An interesting theoretical paper by Abosti (2016) observed that corruption is inevitable in developing countries. Using firm optimization theory, he claims corruption has a positive impact on FDI at a high level of institutional quality and a negative impact with a low level of institutional quality. He refers to this threshold as a 'corruption tolerable level of investment'.[14]

The empirical literature is inconclusive on whether corrupt practices decrease or increase foreign investment. Most scholars studying the effects of corruption on FDI support the 'grabbing hand' view of the phenomenon.[15] Some scholars support the 'helping hand' view,[16] though these empirical findings have been made by only a few and are inconclusive.[17]

Mauro (1995) is perhaps one of the first studies investigating the impact of corruption on investment using survey data. Using a sample of 67 countries, he finds that

corruption impacts negatively on the ratio of investment to GDP. Campos et al. (1999) argues that both the level of corruption and the nature of corruption are important in determining the impact of corruption on investment. Corrupt regimes that are more predictable have less negative impact on investment than those that are less predictable. Wei (2000) investigated the effect of taxation and corruption on FDI from 14 source countries to 45 host countries. His empirical findings support the view that an increase in corruption reduced inward FDI. Vinod (2003) used data for 14 Asian countries and found that FDI is low in corrupt countries. Zhao et al. (2003) used panel data for 40 countries over a seven-year period. The results suggest that high corruption and low transparency negatively impact the inflow of FDI to host countries. Felipe and Travares (2004) used a broad cross-section of countries over the period 1970 to 1994 and found that a lower corruption level is associated with a high level of FDI.

Freckleton et al. (2012) found a similar result using a panel of 42 developing and 28 developed countries (1998–2008), namely that a low level of corruption leads to a positive impact of FDI on growth. Ayadi et al. (2014) investigated the relationship between the degree of transparency and the level of FDI inflows for 13 sub-Saharan African countries (1998–2008) and found a positive association between the two. Alemu (2012) used a sample of Asian economies and found that corruption hinders inflow of FDI in those countries. More specifically he found that a decrease in the level of corruption by 1% raises the inward FDI by 9.1%. Yahyaoui (2023) used data from a sample of African economies for the period 1996 to 2016 and determined that corruption mitigates the effect of FDI on economic growth. Azam and Ahmad (2013) found that the level of FDI inflow is influenced by the level of corruption, market size and inflation. Hakimi and Hamdi (2017) investigated the effects of corruption on investment and growth in 15 MENA countries. Using data over the period 1985 to 2013 and employing the panel vector error correction model (PVECM) they found that corruption negatively affects the inflow of FDI, thereby impacting growth in the sample countries.

Gründler and Potrafke (2019) used data for 175 countries over the period 2012–2018 and found that 'the cumulative long-run effect of corruption on growth is that real per capita GDP decreased by around 17% when the reversed CPI increased by one standard deviation'.

In a very interesting paper, Ledyaeva et al. (2013) used a large firm-level panel dataset over the period 1996–2007 to investigate the level of corruption against the type of political regime in the country of origin of a foreign investor. They found that 'foreign investors from less corrupt and more democratic countries tend to invest in less corrupt and more democratic countries while foreign investors from more corrupt and non-democratic countries tend to invest in more corrupt and less democratic countries'.

Conversely, Egger and Winner (2005) used a large panel of 73 developed and less-developed countries over the period 1995–1999 and found a positive impact of corruption on growth both in the short term and long term, thus supporting the 'helping hand' view. Quazi et al. (2014) also found that corruption facilitates FDI inflows in Africa.

Zheng and Xiao (2020) used a principal-agent model to examine 'the conditions under which corruption prompts investment'. They investigate three policies which can be used to control corruption: strengthening monitoring, increasing compensation and enhancing accountability. The theoretical model suggests that strengthening monitoring could help in mitigating corruption but at the cost of reduced investment. This theoretical result is further confirmed in the empirical investigation of this paper where the authors found a negative correlation between infrastructure investment and anti-corruption efforts.

Bayar and Alakbarov (2016) also found similar results suggesting that control of corruption and the rule of law had no significant impact in attracting FDI for 23 emerging market economies (2002–2014). Belloumi and Alshehry (2021) used a panel of GCC countries over the period 2003–2016 and found corruption to be neutral regarding FDI inflows for GCC countries. More specifically they did not find a significant relationship between corruption and FDI inflows. However, this study finds corruption to have a positive impact on domestic investment. The authors argue that '*bribery acts can help in overcoming the administration bureaucracy and inefficient regulations*'.

Petrou and Thanos (2014) suggest that perhaps the relationship is non-linear, which could accommodate both sides of the theoretical arguments. Interestingly, in using firm-level data for 131 banks in 40 host countries, the empirical findings of Petrou and Thanos (2014) support a U-shaped relationship, implying that at low to moderate levels of corruption, a grabbing hand view is supported, while at a high level of corruption the helping hand view is supported. Hopkin and Rodriguez-Pose (2007) found that financial development followed by an increase in corruption tends to reduce FDI inflows.

2.3.2 What Do the Data Tell Us?

To further understand the dynamics between the 'grabbing hand' and 'helping hand' views in the context of growth-corruption and investment-corruption scenarios, I will present some data and use empirical analysis. For both analyses, data are sourced from the corruption perception index (CPI) published by Transparency International (2022) over the period 2000 to 2022.[18] The index provides a ranking and a country specific score. A country's **score** is the perceived level of public sector corruption on a scale of 0 to 100, where 0 means highly corrupt and 100 means very clean.[19] Following Petrou and Thanos (2014), the CPI scores used in this chapter are reversed to be more intuitive. For ease of interpretation, these scores are converted into ascending order by taking a difference from 100. In this way, a clean country gets a 0 score and a highly corrupt country gets a 100 score. This way an increase in score is an indication of increasing corruption and vice versa. This helps us to directly compare the CPI score with increase in growth and FDI.

To provide a comparison between low and high corrupt countries I split the entire group into the top 20 least corrupt countries and the bottom 20 most corrupt countries.[20] This section investigates how corruption impacts growth and FDI between the two groups. Figure 2.1 shows that the top 20 countries on average experienced a somewhat downward trend in corruption (which means an increase in CPI score) over the sample period (Fig. 2.1a).[21] However, improvement in corruption (a decline in CPI score) is significantly visible in the bottom 20 countries (Fig. 2.1b).[22] This trend becomes clearer when the CPI for the top 5 and bottom 5 countries is plotted (see Fig. 2.2a and b). For developing countries, this trend could be explained by measures adopted by these countries to combat corruption.

Finally, I use scatter plots to further explore these relationships. Figure 2.3 shows a direct relationship between corruption and growth. A downward trend is evident for the top 20 countries (Fig. 2.3a) which implies that GDP growth improves as CPI moves downward (towards less corruption). One would expect a similar trend for the bottom 20 countries. However, the trend line is upward sloping, suggesting that higher corruption leads to higher economic growth (see Fig. 2.3b). This perhaps supports the 'helping hand' view. A similar picture emerges in Fig. 2.4 through a

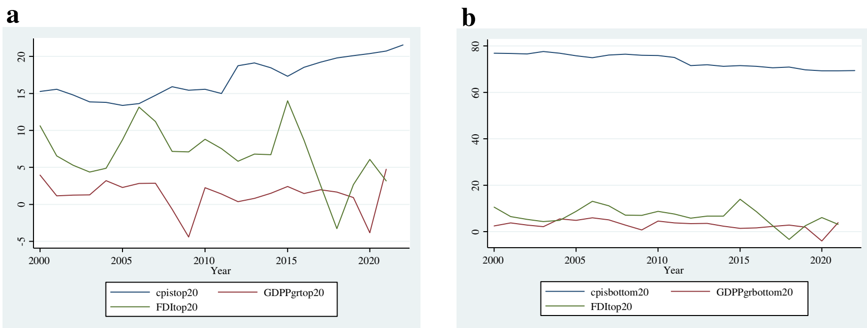

Fig. 2.1 Trend of CPI, GDP growth and FDI/GDP. **a** Countries with top 20 CPI (least corrupt) **b** Countries with bottom 20 CPI (most corrupt)

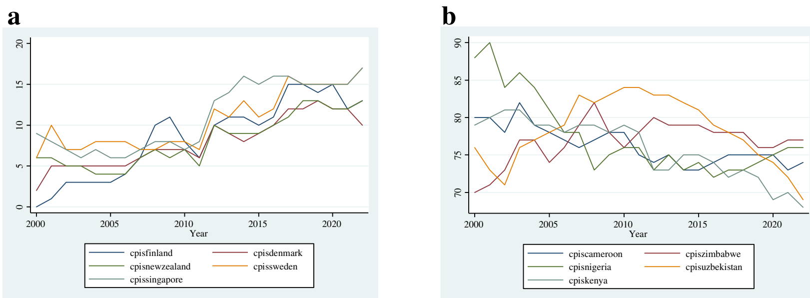

Fig. 2.2 Trend of CPI over time (2000–2022). **a** Top 5 (least corrupt) **b** Bottom 5 (most corrupt)

trend line between CPI and FDI (FDI/GDP). Figure 2.4a shows a downward trend indicating a positive relationship between less corruption and high growth. However, Fig. 2.4b has an upward slope, suggesting that corruption helps to attract more FDI which, again, supports the 'helping hand' view.[23]

Finally, the analysis attempts to verify the observation made by Mauro et al. (2019).[24] For this plot the data on average government spending on education for the top 20 and bottom 20 countries over three periods (2000, 2010 and 2021) is presented in Fig. 2.5. Surprisingly, for the top 20 (least corrupt) countries, public spending on education shows an increasing trend from the years 2000 to 2010. However, the same declined significantly in the year 2021. A very similar trend is observed in the bottom 20 (most corrupt) countries where public spending on education increased between the years 2000 and 2010 but then declined. The most striking observation is that during the year 2021, the top 20 countries' allocation on education (as a percentage of GDP) was even less than the bottom 20 countries. As discussed in Sect. 2.2, this significant decline was initially thought to be due to the fact that

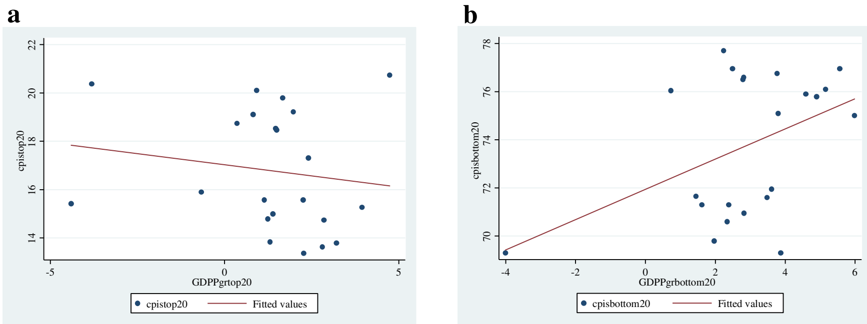

Fig. 2.3 Scatter plot CPI versus GDP growth **a** Countries with top 20 CPI (least corrupt) **b** Countries with bottom 20 CPI (most corrupt)

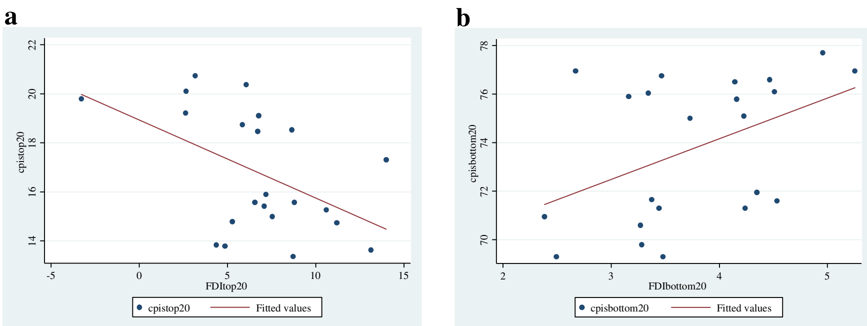

Fig. 2.4 Scatter plot CPI versus FDI **a** Countries with top 20 CPI (least corrupt) **b** Countries with bottom 20 CPI (most corrupt)

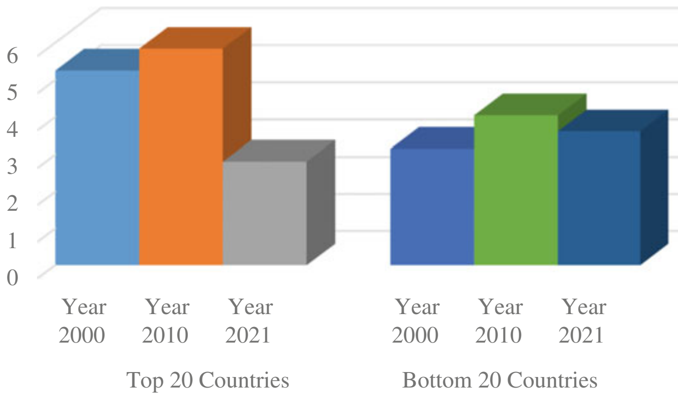

Fig. 2.5 Government expenditure on education (% of GDP)

during COVID-19 more resources were diverted towards governmental emergency support programmes for small businesses as well as towards relatively poor segments of society who suffered the most during the pandemic. For this reason, the sample data cease beyond 2019 to isolate the effects of COVID-19 (see Fig. 2.A1). Interestingly the trend was still the same, though the decline is not as significant as observed in 2021. Also note the expenditure on education in 2000 and 2019 is almost the same for the top 20 countries, although it has increased for the bottom 20 countries for the same period. This evidence supports the view of diverted spending on priority areas during the COVID-19 pandemic. Figure 2.A1 also confirms a decline in spending on education in 2021 (as compared to 2019). It also confirms that the spending on education in 2019 was higher for the top 20 relative to bottom 20 countries.

Next, the analysis focuses on public expenditure on health. This comparison is presented in Fig. 2.6. The figure demonstrates that the picture is significantly different between the two groups. There is evidence of reasonably high and accelerated spending on health in the top 20 (least corrupt) countries. The figure also shows that public spending on health increased from over five percent of GDP to above six percent between the years 2000 and 2021. However, the evidence suggests that the bottom 20 (most corrupt) countries do not spend much on health and the growth is also extremely slow. Public spending on health in the most corrupt countries rose from around 1.5% of GDP in the year 2000 to just below two percent in the year 2021.

2.3.3 Empirical Analysis

To gain more insight into the corruption–growth–FDI relationship and verify the ‘grabbing hand’ versus the ‘helping hand’ view, I will perform some econometric tests. To do so I use the following two specifications; one for economic growth and

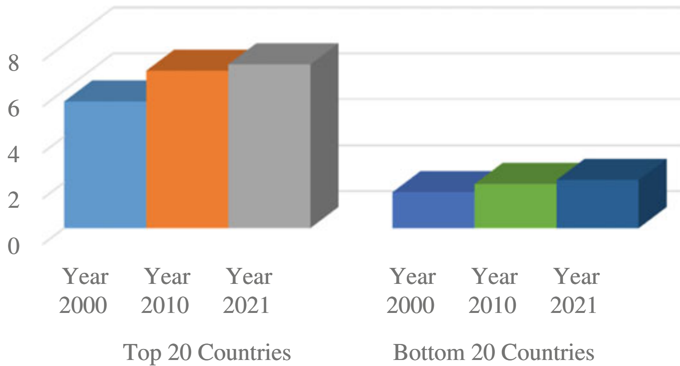

Fig. 2.6 Government expenditure on health (% of GDP)

another for FDI. The underlying model with fixed effects takes the form:

$$g_{it} = \beta_0 + \beta_1 CPI_{it} + \beta_2 FDI_{it} + \gamma Controls_{it} + \eta_i + \theta_t + \varepsilon_{it} \quad (2.1)$$

$$FDI_{it} = \beta_0 + \beta_1 CPI_{it} + \beta_2 g_{it}(-1) + \gamma Controls_{it} + \eta_i + \theta_t + \varepsilon_{it} \quad (2.2)$$

Equation (2.1) is to see the impact of corruption (CPI) on economic growth (g). In Eq. (2.1), g_{it} is economic growth measured by the growth of the real GDP per capita in country i at time t. CPI is the value taken from the corruption perception index. As stated above, the converted CPI scores range from 0 to 100, where 0 means clean or no corruption and 100 means the highest level of corruption.[25] FDI is foreign direct investment and is measured as a ratio of FDI to GDP. I also use a number of control variables. These include Gov_exp (government expenditure to GDP ratio), GFCF (a proxy for domestic investment which is measured as a ratio of gross fixed capital formation to GDP) and INF (to measure inflation). Finally η_i is a country-specific fixed effect, θ_t is a time effect, and ε_{it} is a multivariate normally distributed random disturbance. Equation (2.2) is to see the impact of corruption on foreign direct investment. Here, one period lag of growth is used in the specification. A fixed effects model, rather than a random effects model, is estimated as the η_i's are likely to represent omitted country-specific characteristics which are correlated with other explanatory variables.

Data on GDP growth, FDI and all control variables are taken from the World Bank World Economic Indicators. Data on the corruption perception index is taken from the Transparency International website.

For empirical estimation I use two variants of the model. The first is as stated in Eqs. (2.1) and (2.2). I also add an interaction term in Eq. (2.1) to further explore the joint effect of CPI and FDI on growth. Hence the equations are modified as follows:

$$g_{it} = \beta_0 + \beta_1 CPI_{it} + \beta_2 FDI_{it} + \beta_3 CPI.FDI_{it} + \gamma Controls_{it} + \eta_i + \theta_t + \varepsilon_{it} \quad (2.3)$$

All three equations are estimated using three samples: sample 1 combines data on the top 20 and bottom 20 countries, sample 2 uses the top 20 countries and sample 3 only uses the bottom 20 countries.

Following the theoretical literature and our discussion in Sect. 2.3, I expect a positive relationship to exist between CPI and growth which would indicate that an improvement (decrease) in corruption would yield higher growth. I also expect higher FDI to enhance growth. Based on the empirical evidence, Gov exp is expected to negatively impact growth. INF is also expected to have a negative impact on growth. As for the FDI equation, I expect that improvement (decrease) in corruption would help to attract more foreign direct investment, hence a positive value for the relevant parameter. However, the result would depend on whether the 'helping hand' view is stronger than the 'grabbing hand'. Further, the interaction term is expected to take a positive or negative value depending on the above view as well.

Finally, I investigate if the corruption–growth and corruption–FDI relationships are linear or non-linear. To do so I add the squared term of CPI in the model. Accordingly, the two equations take the following form.

$$g_{it} = \beta_0 + \beta_1 \text{cpi}_{it} + \beta_2 \text{cpi}_{it}^2 + \beta_3 \text{FDI}_{it} + \gamma \text{Controls}_{it} + \eta_i + \theta_t + \varepsilon_{it} \tag{2.4}$$

$$\text{FDI}_{it} = \beta_0 + \beta_1 \text{cpi}_{it} + \beta_2 \text{cpi}_{it}^2 + \beta_3 g_{it}(-1) + \gamma \text{Controls}_{it} + \eta_i + \theta_t + \varepsilon_{it} \tag{2.5}$$

2.4 Discussion of the Results

Here I discuss the results of the estimated model.

2.4.1 The Corruption–Growth–FDI Relationship

Table 2.2 reports the results of the combined sample (the combined top 20 and bottom 20). The empirical evidence strongly supports the view that more corruption enhances economic growth (model 1(a)). This result is consistent with the 'helping hand' view which claims that corruption facilitates economic activities and could lead to higher growth. The results also suggest a strong positive impact of FDI inflows on economic growth. Both Gov_exp and INF exert a negative (weak significance) impact on growth while the impact of gross investment (GCF) is strong. The 'helping hand' view is further confirmed when an interactive term is added in the regression model (model 2(a)). Now we find that CPI still has a positive impact on growth, although it loses its significance. Further, the interaction term emerges as a strong positive value indicating that an increase in corruption enhances FDI thus leading to

higher growth. Other variables show a similar pattern as per model 1(a), except that GFCF is not significant anymore.

Perhaps the above discussion should be taken with caution. The results represent a sample which combines the two extreme and opposing ends of corruption—the top 20 and the bottom 20 countries. To further evaluate these results, let's move to the next model which uses the sub-sample of the top 20 (least corrupt) countries. The results in Table 2.3 (model 1(c)) support a 'grabbing hand' view where the parameter for CPI is negative (though not significant) while FDI has a positive and significant impact on growth. The inclusion of the interactive term does not change the sign or significance of the relationship between corruption and growth (model 2(c)).

Finally, I use the sub-sample of the bottom 20 (most corrupt) countries. The results (see Table 2.4) are very similar to the whole sample. CPI again has a strong positive impact on growth, indicating that more corruption leads to high growth (model 1(e)).

Table 2.2 Fixed effect estimation: combined sample

Model/ Variables	Growth				FDI	
	Model 1		Model 2 (with interaction term)		Model 3	
	1(a) Linear	1(b) Non-linear	2(a) Linear	2(b) Non-linear	3(a) Linear	3(b) Non-linear
CPI	0.073 (1.81)[a]	−0.062 (−0.81)	0.039 (0.95)	−0.080 (−1.06)	−0.064 (−0.52)	−0.607 (−2.65)[c]
CPI^2		0.001 (2.08)[b]		0.001 (1.88)[a]		0.006 (2.8)[c]
FDI	0.029 (2.53)[b]	0.027 (2.37)[b]	−0.021 (−0.96)	−0.019 (−0.93)		
g_{t-1}					0.103 (0.83)	0.047 (0.38)
Gov_exp	–0.662 (−7.4)[c]	−0.626 (−6.99)[c]	−0.686 (−7.71)[c]	−0.651 (−7.3)[c]	0.101 (0.36)	0.210 (0.75)
GFCF	0.067 (1.67)[a]	0.075 (1.85)[a]	0.008 (0.19)	0.017 (0.38)	0.357 (2.89)[c]	0.381 (3.12)[c]
INF	−0.036 (−5.73)[c]	−0.036 (−5.66)[c]	−0.037 (−5.84)[c]	−0.037 (−5.77)[c]	0.001 (0.06)	0.003 (0.15)
CPI*FDI			0.002 (2.78)[c]	0.002 (2.66)[c]		
Constant	8.337 (4.82)[c]	9.468 (5.27)[c]	11.33 (5.94)[c]	12.20 (6.24)[c]	−8.293 (−1.22)	3.278 (0.43)
No. of obs	758	758	758	758	725	725
F-Stat	17.25[c]	15.24[c]	15.88[c]	14.30[c]	2.12[a]	3.14[c]
R-Sq (Within)	0.1078	0.1137	0.1179	0.1233	0.0153	0.0270

Note [a, b, c] indicate the level of significance at 1%, 5% and 10% respectively

Table 2.3 Fixed effect estimation: Top 20 CPI (least corrupt countries)

Model/variables	Growth				FDI	
	Model 1		Model 2 (with interaction term)		Model 3	
	1(c) Linear	1(d) Non-linear	2(c) Linear	2(d) Non-linear	3(c) Linear	3(d) Non-Linear
CPI	–0.007 (–0.18)	−0.078 (−0.67)	−0.005 (−0.11)	−0.076 (−0.65)	−0.395 (−1.74)[a]	−0.992 (−1.45)
CPI^2		0.002 (0.65)		0.002 (0.66)		0.018 (0.93)
FDI	0.020 (2.03)[b]	0.020 (1.98)[b]	0.024 (0.67)	0.025 (0.69)		
g_{t-1}					0.057 (0.19)	0.063 (0.20)
Gov_exp	−0.959 (−8.16)[c]	−0.947 (−8.0)[c]	−0.961 (−8.12)[c]	−0.950 (−7.98)[c]	−0.654 (−0.88)	−0.588 (−0.79)
GFCF	−0.037 (−0.68)	−0.037 (−0.7)	−0.038 (−0.7)	−0.040 (−0.72)	−0.472 (−1.54)	−0.482 (−1.57)
INF	0.109 (1.02)	0.099 (0.92)	0.110 (1.02)	0.101 (0.93)	−0.503 (−0.84)	−0.565 (−0.94)
CPI*FDI			−0.0003 (−0.14)	−0.0003 (−0.17)		
Constant	20.64 (7.87)[c]	20.93 (7.85)[c]	20.68 (7.85)[c]	20.99 (7.83)[c]	37.59 (2.58)[c]	40.61 (2.74)[c]
No. of obs	397	397	397	397	379	379
F-Stat	16.31[c]	13.66[c]	13.56[c]	11.68[c]	1.40	1.31
R-Sq (Within)	0.1794	0.1805	0.179	0.1805	0.0194	0.0218

Note [a,b,c] indicate the level of significance at 1%, 5% and 10% respectively

FDI is positive but no longer significant, while other variables have a similar relationship as discussed above. Inclusion of the interactive term gives the most surprising results (model 2(e)). Now both CPI and FDI have a strong positive relationship with growth while the interactive term has a negative and weakly significant impact. This, perhaps, suggests that corruption has a negative impact on FDI though this has subsided with the direct positive impact on growth.

2.4.2 Digging Deeper: Is the Corruption–Growth–FDI Relationship Non-linear?

Given these surprising results, I will further explore whether the corruption–growth relationship is in fact non-linear. This can be verified by estimating Eqs. (2.4) and

Table 2.4 Fixed Effect Estimation: Bottom 20 CPI (Most Corrupt Countries)

Model/variables	Growth (g)				FDI	
	Model 1		Model 2 (with interaction term)		Model 3	
	1(e) Linear	1(f) Non-linear	2(e) Linear	2(f) Non-Linear	3(e) Linear	3(f) Non-linear
CPI	0.128 (1.78)[a]	2.524 (2.10)[b]	0.226 (2.77)[c]	2.462 (2.03)[b]	0.110 (1.74)[a]	−0.040 (−0.04)
CPI²		−0.017 (−2.0)[b]		−0.015 (−1.85)[a]		0.001 (0.15)
FDI	0.115 (1.56)	0.108 (1.46)	2.062 (2.88)[b]	1.978 (2.74)[c]		
GDP per capita$_{t-1}$					−0.006 (−0.15)	−0.006 (−0.16)
Gov_exp	–0.499 (−3.97)[c]	−0.499 (−3.95)[c]	−0.521 (−4.12)[c]	−0.518 (−4.09)[c]	0.095 (1.02)	0.094 (1.0)
GFCF	0.057 (0.74)	0.076 (0.98)	0.082 (1.04)	0.099 (1.25)	0.631 (12.69)[c]	0.631 (12.62)[c]
INF	−0.034 (−4.77)[c]	−0.035 (−4.85)[c]	−0.034 (−4.81)[c]	−0.035 (−4.88)[c]	0.003 (0.59)	0.003 (0.59)
CPI*FDI			−0.025 (−2.75)[c]	−0.024 (−2.62)[c]		
Constant	−1.214 (−0.35)	−87.94 (−3.68)[c]	−8.892 (−2.40)[b]	−89.74 (−3.93)[c]	−20.06 (−15.69)[c]	−14.63 (−1.55)
No. of obs	361	361	361	361	346	346
F−Stat	8.69[c]	7.87[c]	8.46[c]	7.76[c]	32.72[c]	27.21[c]
R−Sq (Within)	0.1145	0.1235	0.1316	0.1400	0.3376	0.3378

Note [a,b,c] indicate the level of significance at 1%, 5% and 10% respectively

(2.5). The results of the whole sample can be seen in 1(b) of Table 2.2. The results clearly confirm a non-linear relationship. The linear coefficient of CPI maintains a negative (but not significant) sign, whereas the non-linear (squared term of cpi) is positive and strongly significant. This means that as corruption changes from low to moderate levels, growth falls to its minimum; but when corruption changes from moderate to high levels, growth accelerates.

These findings are consistent with Petrou and Thanos (2014) who also found a U-shaped relationship between corruption and investment. These findings support a 'grabbing hand' view[26] at the low to moderate levels of corruption and a 'helping hand' view[27] at high levels of corruption. The empirical results did not provide any such evidence when a sample of the top 20 (least corrupt) countries was used (see Table 2.3, model 1(d)). In fact, the results are inconclusive as parameters of both the linear and non-linear terms are statistically insignificant.[28] Testing the bottom 20 (most corrupt) countries provides the most interesting results (see Table 2.4, model 1(f)). This results in the linear coefficient of CPI being positive and significant while

the squared term is negative and significant. This means that at low to moderate levels of corruption, growth increases and reaches a maximum level; but at high levels of corruption, growth falls. This is evidence of an inverted U-shaped relationship between corruption and growth where a 'helping hand' view is supported at the low to moderate levels of corruption while a 'grabbing hand' view is supported at the high levels of corruption. This result is opposite to the findings of Petrou and Thanos (2014). This is perhaps due to the nature of the weak regulatory structure, bureaucratic red tape and lack of a formal infrastructure in developing countries. Bribery and corruption help to bypass such constraints to attract FDI leading to high growth. However, over time, countries develop better infrastructure, regulatory controls take place and governance structure is improved, leading to a decline in corrupt practices but higher growth.

2.4.3 The Corruption–FDI Relationship

This section discusses the effect of corruption on foreign direct investment. The results using a combined sample are presented in Table 2.2, model 3(a) and appear to be less strong as no variable other than GFCF is statistically significant. Nevertheless, there is a negative relationship between CPI and FDI which suggests that an improvement in corruption (less corruption) helps to attract more FDI in the mixed sample, a view supported by the proponents of the 'grabbing hand'. Similar to the growth equation, the results also support a U-shaped relationship between corruption and FDI (see Table 2.2, model 3(b)). This result is further strengthened when a sample of top 20 countries is used. Now the CPI shows a negative and statistically significant relationship with FDI (Table 2.3, model 3(c)). There is no evidence of a non-linear relationship in this case. Interestingly the results for the bottom 20 countries are consistent with the previous findings of supporting a 'helping hand' view. Now the CPI has a positive and significant relationship with FDI suggesting that corruption helps to facilitate FDI (Table 2.4, model 3(e)). The results in Table 2.4, model 3(f) do not support a non-linear relationship between corruption and FDI for the most corrupt countries.[29]

Finally, the analysis focuses on a sample of Asian countries.[30] For analytical purposes, a randomly selected sample of 33 Asian countries was used to continue the above analysis.[31] These results are reported in Table 2.5.[32] The results of the linear model support a 'helping hand' view for the corruption–FDI relationship. However, the results did not find a non-linear relationship between CPI and FDI. Although the parameter for CPI has a positive sign while the CPI squared term has a negative sign, in both cases these parameters are statistically insignificant.

Table 2.5 Fixed Effect Estimation: Sample of Asian Countries

Variable	FDI	
CPI	0.0748[b] (2.119)	0.146 (1.168)
CPI^2		−0.000603 (−0.593)
$Growth_{t-1}$	0.00991 (0.431)	0.00973 (0.422)
Gov_exp	–0.0321 (−1.173)	−0.0311 (−1.135)
GFCF	0.135[c] (4.698)	0.134[c] (4.649)
Inflation	0.00763 (0.559)	0.00778 (0.569)
Population	−0.327 (−0.237)	−0.423 (−0.304)
Constant	1.564 (0.132)	1.279 (0.108)
No. of obs	858	858
F-Stat	4.48[c]	3.89[c]
R-Sq (within)	0.0318	0.0322

Note [a, b, c] indicate the level of significance at 1%, 5% and 10% respectively

2.5 Conclusions

Corruption has been perceived as a major problem impacting the growth and investment in a country, especially developing countries. The empirical literature is divided on the impact of corruption. Some scholars argue that corrupt practices serve as a helping hand by removing the obstacles towards investment while others oppose it. There are also a few papers arguing about the nature of the corruption–growth and corruption–FDI relationships, namely whether they are linear or non-linear. This chapter has revisited these issues in the context of the least and the most corrupt countries. First, I provided an in-depth literature review on this issue. I then discussed in detail the cost of corruption supplemented with some actual numbers from different countries. Next, I performed some econometric tests to verify the relationship between corruption, growth and FDI. For an empirical investigation, I used panel data for the top 20 least corrupt and the bottom 20 most corrupt countries over the period 1995–2022 and applied the fixed-effects estimation technique. I also expanded the analysis by taking a sample of 33 Asian countries.

The empirical findings of this chapter support a 'grabbing hand' view for the least corrupt countries while a 'helping hand' view is supported for the most corrupt countries. I also found the relationship is non-linear, suggesting that for the most corrupt countries, corrupt practices do facilitate investment at the initial stage and

may help to attract FDI. However, over time, when a better regulatory structure is developed, corrupt practices hurt growth and FDI. These are interesting results and consistent with similar findings by Egger and Winner (2005) and Quazi et al. (2014) who also found that 'corruption is a stimulus for FDI' thus supporting the 'helping hand' view. The results are, however, contrary to Petrou and Thanos (2014) who also support a U-shaped relationship but found that at low to moderate levels of corruption a 'grabbing hand' view is supported while at high level of corruption the 'helping hand' view is supported. The tests of a small sample of Asian countries are, in general, consistent with the above results. These are interesting findings and could lead to further research in this area.

However, these results should be taken with caution. First, as stated in note 19, this study used data for a combined sample over the period 2000–2022. A more appropriate way would be to use data starting in 2012. However, this would leave a shorter timespan to perform a meaningful analysis. Future research could focus on the CPI data starting in 2012. Second, the study used a sample of the 20 least corrupt and 20 most corrupt countries, and not all countries. Hence, these results may not be generalised. Third, since countries differ significantly in terms of their economic and political environment and regulatory structure, a country-specific study would shed better light on the impact of corruption. However, due to limited data availability on the corruption perception index, such estimations may suffer from a small sample bias at present and this may be better done when more data is available. Nevertheless, the findings of this chapter do add new evidence to the existing literature. Finally, I will make some recommendations for policymakers and respective governments:

- There is a need to further improve the definition of corruption. The current measure of corruption (CPI) is more suitable for developed countries but not for the developing world, thus increasing the risk of under- or over-estimation of corruption scores.
- Institutional development, more transparent policies and better communication among government departments and ministries are needed to combat corruption, especially in sectors with a high potential for corrupt practices such as procurement, privatisation and foreign direct investment.
- Technology should be used in government transactions to keep track of them and reduce the incidence of corruption.

Appendix: Sample of Asian Countries

Bahrain, Bangladesh, Bhutan, Brunei, Cambodia, China, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Kazakhstan, Kyrgyzstan, Laos, Lebanon, Malaysia, Mongolia, Nepal, Oman, Pakistan, Philippines, Saudi Arabia, Singapore, South Korea, Sri Lanka, Tajikistan, Timor-Leste, Thailand, United Arab Emirates, Uzbekistan and Vietnam.

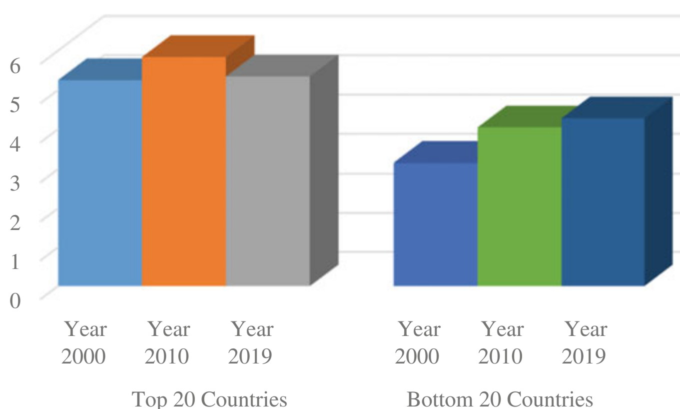

Fig. 2.A1 Government expenditure on education (% of GDP)

Table 2.A1 Top 20 countries (Least Corrupt): CPI scores

	Country	2000	2010	2022
1	Finland	0	8	13
2	Denmark	2	7	10
3	New Zealand	6	7	13
4	Sweden	6	8	17
5	Canada	8	11	26
6	Iceland	9	15	26
7	Norway	9	14	16
8	Singapore	9	7	17
9	Netherlands	11	12	20
10	United Kingdom	13	24	27
11	Luxembourg	14	15	23
12	Switzerland	14	13	18
13	Australia	17	13	25
14	US	22	29	31
15	Austria	23	21	31
16	Japan	36	22	27
17	Germany	24	21	21
18	Belgium	39	29	27
19	Ireland	28	20	23

Table 2.A2 Bottom 20 countries (most corrupt): CPI scores

	Country	2000	2010	2022
1	Kazakhstan	70	71	64
2	Zimbabwe	70	76	77
3	Cote d'Ivoire	73	78	63
4	Mozambique	78	73	74
5	Philippines	72	76	67
6	Bolivia	73	72	69
7	Venezuela	73	85	86
8	Ecuador	74	75	64
9	Moldova	74	71	61
10	Tanzania	75	73	62
11	Vietnam	75	73	58
12	Uzbekistan	76	84	69
13	Uganda	77	75	74
14	Kenya	79	79	68
15	Russia	79	79	72
16	Cameroon	80	78	74
17	Indonesia	83	72	66
18	Azerbaijan	85	76	77
19	Ukraine	85	76	67
20	Nigeria	88	76	76

Notes

1. See Bardhan 1997 and Buchanan 1997 for more details.
2. For example, UNCAC Article 15 defines bribery as '[t]he 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'. Similarly, Article 17 states 'that the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position'. Article 19 defines 'abuse of function', 'when committed intentionally, [as] the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity' (UNODC 2004).
3. UNDP 2018.
4. Baker 2009. Also see Johnsøn and Nils (2015) for more details on the impact on foreign aid due to corruption.
5. UNODC 2022; Csonka and Salazar 2021; Gaspar et al. 2020.
6. Locatelli et al. (2017) used an institutional theory to study the impact of corruption in public sector projects and megaprojects. The study observed that 'corruption worsens both cost and time performance, and the benefits delivered'.

Table 2.A3 Fixed effect estimation: a selected sample of Asian countries

Model/variables	Growth (g)				FDI	
	Model 1		Model 2 (with interaction term)		Model 3	
	1(g) Linear	1(h) Non-linear	2(g) Linear	2(h) Non-linear	3(g) Linear	3(h) Non-linear
CPI	0.118 (1.77)[a]	0.069 (0.13)	0.217 (2.97)[c]	0.528 (0.94)	−0.009 (−0.28)	0.893 (3.55)[c]
CPI^2		0.0004 (0.09)		−0.002 (−0.56)		−0.007 (−3.61)[c]
FDI	0.716 (3.68)[c]	0.721 (3.6)[c]	4.982 (3.93)[c]	5.096 (3.95)[c]		
Growth_{t-1}					−0.062 (−2.73)[c]	−0.066 (−2.99)[c]
Gov_exp	–0.618 (−3.06)[c]	−0.618 (−3.05)[c]	−0.577 (−2.79)[c]	−0.576 (−2.78)[c]	−0.129 (−1.2)	−0.218 (−2.08)[b]
GFCF	0.117 (1.66)[a]	0.117 (1.65)[a]	0.137 (1.9)[a]	0.137 (1.9)[a]	0.049 (1.23)	0.023 (0.6)
INF	−0.308 (−6.54)[c]	−0.308 (−6.5)[c]	−0.321 (−6.99)[c]	−0.319 (−6.91)[c]	0.009 (0.56)	0.012 (0.76)
Population	5.590 (2.05)[b]	5.639 (2.02)[b]	6.547 (2.32)[b]	6.295 (2.21)[b]	1.611 (0.92)	1.795 (1.11)
CPI*FDI			−0.064 (−3.38)[c]	−0.066 (−3.41)c		
Constant	−106.86 (−2.48)[b]	−106.16 (−2.43)[b]	−133.1 (−3.18)[c]	−138.8 (−3.25)[c]	−27.68 (−1.74)[a]	−59.23 (−3.68)[c]
No. of obs	189	189	189	189	182	182
F−Stat	11.31[c]	9.64[c]	12.05[c]	10.53[c]	1.62	3.33b

Note [a, b, c] indicate the level of significance at 1%, 5% and 10% respectively

7. Some examples of these pending claims indicating corrupt practices in awarding contracts and the execution of projects include oil and gas related investment (Caistor and Villarán, 2006; Werlin, 1994), land development projects (Czech Republic, 1997) and infrastructure development (Costa Rica, 1997; Pakistan 1997).
8. A study in Brazil found evidence that where federal transfers to local governments for education spending are partially lost to corruption, dropout rates are higher and test scores worse.
9. In the case of Thailand, reforms started even earlier, around the 1950s.
10. Lambsdorff (2003) found that law and order in a country is crucial in attracting capital.
11. See Lambsdorff (2006) for a detailed review of the empirical literature.
12. Ang (2020) compares the economic performance of China (among the most corrupt countries) with that of the United States (among the least corrupt countries) from 1995 to 2016 and shows how both superpowers managed to achieve a remarkable GDP of around USD11 trillion during the period. This obviously negates the common belief of a negative impact of corruption on growth. He believes that this is due to the mechanism of the construction of the commonly used corruption perception index (CPI) and provides further explanations to this debate.
13. Petrou and Thanos 2014.

14. Also see Shleifer and Vishny 1993 for more details on this argument.
15. Javorcik and Wei 2009; Uhlenbruck et al. 2006; Voyer and Beamish 2004; Wei 2000; Wei 1997; Mauro 1995.
16. Egger and Winner 2005; Wheeler and Mody 1992; Lui 1985.
17. Barassi and Zhou 2012; Helmy 2013; Al-Sadig 2009; Habib and Zurawicki, 2002; Nguyen and van Dijk 2012.
18. Transparency International started publishing CPI data in 1995. However, not many countries were listed in the report until 2000. Hence, I use 2000 as the starting point in our analyses.
19. From 1995 to 2011, Transparency International used an old methodology for measuring CPI using a scale from 0 to 10, where 0 represents very high levels of perceived corruption. I have converted the scale from the old data to the new by simply multiplying old values by 10. This may not be the ideal method, but perhaps the only way to do so. However, Transparency International suggests that due to a change in their methodology in 2012, results from before that year cannot be compared. Only CPI results from 2012 onwards can be compared (Transparency International, 2020). For empirical analysis, I have conducted some robustness checks, which is a point also raised in Chap. 3 (Jetin et al.). See note 29 for further details on empirical analysis.
20. The list is provided in the Appendix in Tables 2.A1 and 2.A2.
21. This can also be verified by Table 2.A1 where the top 15 of the top 20 least corrupt countries in 2000 experienced an increase in their CPI (converted) scores in 2022, indicating a gradual increase in corruption. In the case of Canada and Iceland, according to CPI scores, corruption seems to have increased significantly.
22. This is consistent with the numbers reported in Table 1b. The numbers suggest that CPI improved (a decline in corruption) between 2000 and 2022 in all the bottom 20 (most corrupt) countries. The only exceptions are Zimbabwe and Venezuela, where corruption has increased significantly.
23. Ang (2020) found a similar trend using a cross-section of selected countries in 2016 (see Fig. 1.1, p. 3).
24. As stated in Sect. 2.2, Mouo et al. (2019) observed that public sector spending is one of the main sectors for attracting corruption.
25. This helps us to interpret the CPI parameter with a positive (increase in corruption) or a negative sign (decline in corruption).
26. Javorcik and Wei 2009; Uhlenbruck et al. 2006; Voyer and Beamish 2004; Wei 2000; Wei 1997; Mauro 1995.
27. Egger and Winner 2005; Wheeler and Mody 1992; Lui 1985.
28. Barassi and Zhou 2012; Helmy 2013; Al-Sadig 2009; Habib and Zurawicki 2002; Nguyen and van Dijk 2012.
29. As stated in note 19, Transparency International suggests that due to a change of methodology, 'CPI scores before 2012 are not comparable over time'. However, this leaves us with a shorter timespan to do a meaningful analysis. To avoid this problem, I have used data from 2000. To check the robustness of the results, I then replicated the same analysis using data from 2012. The results, in general, are similar to the combined dataset. We, however, observe that due to lack of sufficient data, some variables are not statistically significant, though still having the same signs. The only notable difference is model 3 for the bottom 20 countries where the non-linear model is now statistically significant and suggests a U-shaped relationship. This will be further investigated in a separate paper.
30. The UN classification of 'Asian region' is used. According to the UN regional classification and definition, regions included under 'Asia' are: Southern Asia, West Asia, South-Eastern Asia, Eastern Asia, Central Asia, Other Asia and Other Non-Commonwealth (United Nations n.d.).
31. Initially, the sample consisted of 48 counties. A few countries were removed for various reasons, leaving a sample of 33 countries over the period 2000–2022. See the Appendix for a list of sample countries.
32. I also have added population as another control variable.

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Ahmed M. Khalid holds a PhD in economics from Johns Hopkins University, US. He joined Universiti Brunei Darussalam in 2015 as a Professor of Economics. Previously, he worked at the Bond Business School, Australia and the National University of Singapore. Ahmed has also worked as a consultant with the World Bank and many international institutions as well as holding visiting faculty positions in different universities. His research interests include applied macroeconomics/monetary economics with a focus on financial reforms, regional integrations and globalization. He currently serves as Editor-in-Chief of the Journal of Business and Economic Analysis and Associate Editor of the Singapore Economic Review as well as member of editorial boards of a number of regional and international journals.

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Chapter 3
The Effect of Corruption on Foreign Direct Investment at the Regional Level: A Positive or Negative Relationship?

Bruno Jetin, Jamel Saadaoui, and Haingo Ratiarison

Abstract This chapter looks at the effect of corruption on foreign direct investment (FDI) at the world and regional levels, with a focus on East, South and Southeast Asia. The academic literature is inconclusive because the nature of corruption can be different from one country to another and because various other factors can decide whether a foreign company will invest in a country or region despite a relatively high level of corruption. To shed light on the effect of corruption, the authors proceed to a panel econometrics investigation that assesses the relationship between the stock of FDI and the 'control of corruption', published by the World Bank, for a sample of 180 countries over the period 2002–2019. The 'control of corruption' index combines 23 different assessments and surveys capturing perceptions of the extent to which public power is exercised for private gains. A low score means that the authorities do not fight corruption or are not effective in fighting it, and therefore corruption is high; and vice versa. The authors include two control variables (real GDP and secondary school enrolment) to better estimate the specific role of corruption. Their results show that at the world level, the control of corruption is low and has a positive effect on FDI, which means that corruption is a stimulus to FDI, in line with Egger and Winner's findings. However, in East Asia, Southeast Asia, Australia and New Zealand, corruption has a 'grabbing hand' effect. In the European Union, corruption is a helping hand. The authors' results confirm the importance of a regional approach to the analysis of the effect of corruption on FDI.

B. Jetin (✉)
Institute of Asian Studies, Universiti Brunei Darusslam, Bandar Seri Begawan, Brunei
e-mail: bruno.jetin@ubd.edu.bn
URL: https://ias.ubd.edu.bn/bruno-jetin/

J. Saadaoui
Faculty of Economics and Management, University of Strasbourg, Strasbourg, France
e-mail: saadaoui@unistra.fr
URL: https://www.jamelsaadaoui.com/

H. Ratiarison
University of Strasbourg, Strasbourg, France
URL: https://www.linkedin.com/in/haingo-ratiarison-20a2b21bb/?originalSubdomain=fr

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3.1 Introduction

Corruption has been long considered one of the greatest obstacles to economic and social development. Already in 1998, a survey of more than 150 high-ranking public officials and key members of civil society from more than 60 developing countries ranked 'public sector corruption as the most severe impediment to development and growth in their countries'.[1] The United Nations Secretary General António Guterres, citing estimates by the World Economic Forum, declared that 'the global cost of corruption is at least $2.6 trillion, or 5 per cent of the global gross domestic product (GDP), adding that, according to the World Bank, businesses and individuals pay more than $1 trillion in bribes every year'.[2] Sustainable Development Goal 16 aims to 'substantially reduce corruption and bribery in all their forms'.[3]

The World Bank defines corruption simply as the 'use of public office for private gain',[4] a definition shared by Vito Tanzi from the International Monetary Fund.[5] It includes bribery and extortion, fraud and embezzlement. Although the World Bank does not acknowledge it, this narrow definition tends in practice to limit the causes of corruption to high-ranked public officers and to excesses of regulation, and generally leads to advocating the reduction of state intervention as the principal remedy to corruption. However, corruption goes beyond the misconduct of individual public officials. It involves a 'network of politicians, organisations, private companies, and private individuals colluding to benefit from access to power, public resources, and policy-making at the expense of the public good'.[6] This implies that the supply side of corruption counts as much as the demand side.[7] Moreover, the corruption of public authorities casts suspicion on big private corporations, small businesses and local traders.[8] The impact of public authorities' corruption on private companies is differentiated because there are 'strategic activities conducted by firms in response to corruption'.[9] Accordingly, the definition of corruption needs to be inclusive and encompass all possible forms.[10] Synthesizing the literature, Bahoo et al. (2020) define corruption as 'an illegal activity (bribery, fraud, financial crime, abuse, falsification, favouritism, nepotism, manipulation, etc.) conducted through misuse of authority or power by public (government) or private (firms) officeholders for private gain and benefit, financial or otherwise'. This is this definition that we use in this chapter.

There are multiple causes of corruption and have been the subject of many investigations summarised in several surveys of the literature.[11] For instance, Dimant and Tosato[12] list: bureaucracy and inefficient administrative and political structure; civil participation/press freedom; economic freedom; economic growth; ethnic diversity; gender; globalisation; government size; government structure; government system; historical drivers; contagious effects; economic prosperity; and education as the most important causes of corruption—the last three being considered new in the literature. Bahoo et al. (2020) perform an exhaustive bibliometric and content analysis of the business academic literature (137 articles over 17 years) and conclude that common situations, characteristics of the firm, and economic and cultural factors are the main determinants of corruption. However, analysing a comprehensive list of 36 potential corruption determinants across 123 countries (covering 87 percent of the world

population), Jetter and Parmeter (2018) find that economic and institutional factors play the dominant role, not culture.

The effects of corruption on the economy encompass many issues including growth, domestic and foreign direct investment (FDI), international trade, bureaucratic inefficiency, the shadow economy, poverty and social inequalities, civil and political rights, human development, the state's legitimacy, trust in institutions, brain drain, fiscal deficit, human capital, the environment, natural resources and climate change.[13] The impact on the environment is a growing issue.[14]

For all these effects of corruption, the economic literature tries to assess whether the relationship is positive or negative. As is often the case in applied economics, there is no convergence towards a positive or a negative relation for each effect. The sample of countries and the time periods are not the same: the tested equations, the source of variables and the econometric investigations differ. Teixeira and Guimarães (2015, p. 175) have shown convincingly that 'using distinct proxies for corruption variables, as well as controlling for other types of the countries' institutional quality, generate distinct outcomes'.

It is beyond the scope of our chapter to address all the effects of corruption on these economic and social dimensions. We restrict our investigation to the relationship between corruption and FDI. This choice is motivated by the fact that FDI plays a key role in the economic development of the host countries, in particular in developing countries.[15] More precisely, we investigate the nature of the relationship between the control of corruption and the inward stock of FDI. The relation is positive when countries which are controlling corruption successfully attract more FDI. It is negative when controlling corruption reduces FDI.

Our contribution to the literature is to look at this relation on a geographical basis. This geographical approach is based on a recent result from the literature. Corruption has a significant regional dimension.[16] According to Gründler and Potrafke (2019, p. 2), 'empirical evidence shows that corruption in an individual country or region is positively correlated with corruption in neighbouring countries or regions'. This is consistent with the above definition that corruption operates within networks, and the fact that regions like Europe or Asia have intense trade and investment internal relations prompted by well-established regional value chains.[17] This geographical approach is of great interest in some regions like East Asia or Southeast Asia that have received in the recent past a large share of FDI, although they have performed poorly in terms of corruption—a phenomenon that Wedeman (2003) called two decades ago 'the East Asian paradox'.

This paradox is illustrated by Figs. 3.1, 3.2 and 3.3. Figure 3.1 shows the evolution of the control of the corruption[18] of: East, Southeast and South Asia; Australia; New Zealand; plus Europe and the EU.[19] One can see that Australia and New Zealand enjoy a high level of control of corruption (+2), two times higher than Europe and the EU average (+1), which have a positive but declining score. East Asia, which regroups the most developed countries in Asia, has a low but positive score. China is among them and has gradually improved its control of corruption.[20] Southeast and South Asia have negative scores, which means that the perceived corruption

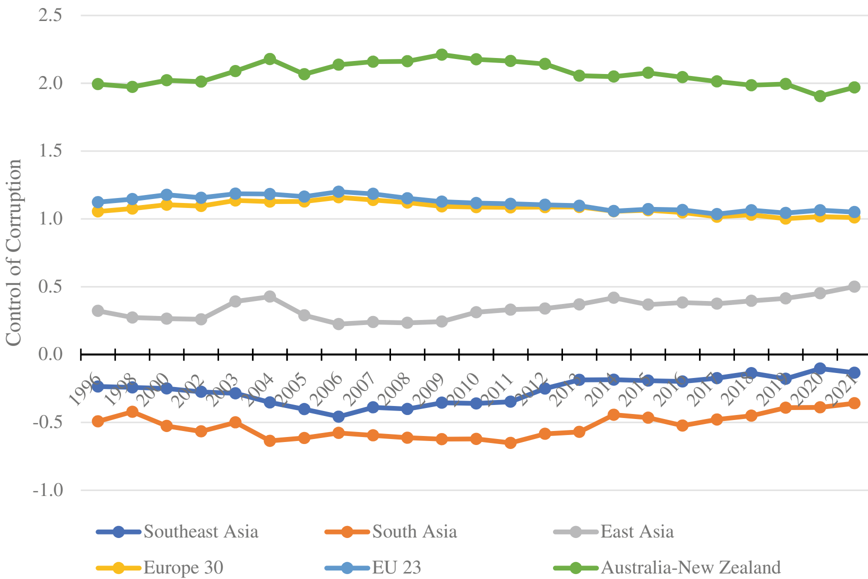

Fig. 3.1 Control of corruption in Asia–Pacific and Europe (1996–2021). *Source* Authors' estimation using World Governance Indicators, the World Bank

in these sub-regions is still currently high and significant, although there has been improvement since 2006 for Southeast Asia and since 2011 for South Asia.

In terms of stocks of FDI, although Europe and the Americas still dominate by far, Asia has increased its global share significantly since 2000, mostly at the expense of the Americas (see Fig. 3.2). A focus on East, Southeast and South Asia shows that the stocks of FDI have dramatically increased, leading to an acceleration of growth and a catch-up with Western countries (see Fig. 3.3). The progress has been much more limited for South Asia.

Looking at the effect of the control of corruption on the FDI in 43 European countries and 39 Asian countries[21] for the period 1996–2013, Abotsi (2018) finds that the relationship is negative for both Europe and Asia, although both regions were large recipients of FDI over the period. This confirms the existence of a paradox for both regions at the time. However, the recent evolution of the control of corruption and FDI in Asia leads one to wonder if the 'East Asian paradox' still exists.

To answer this question, we establish robust regional effects between corruption and FDI. Our contribution to the literature is threefold. First, we explore a large macroeconomic panel of 163 countries to provide a more reliable inference on the relationship. Second, we use a country-fixed-effects model to consider cross-sectional differences between countries in an era of financial integration, the 2002–2019 period. Third, we focus on the regional and sub-regional difference in the relation thanks to interaction terms with regional dummies.

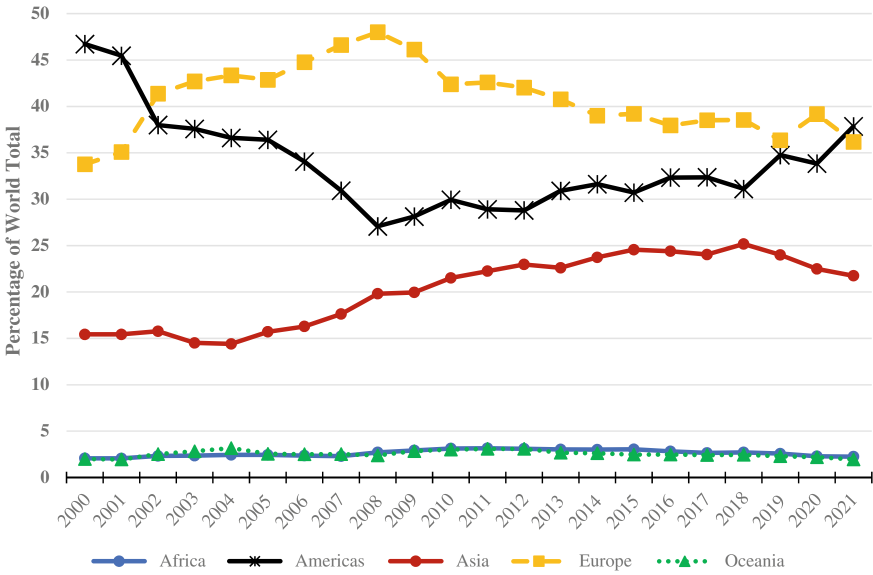

Fig. 3.2 Breakdown of global inward stock of FDI (2000–2021). *Source* UNCTAD STATS, accessed 7 June 2023

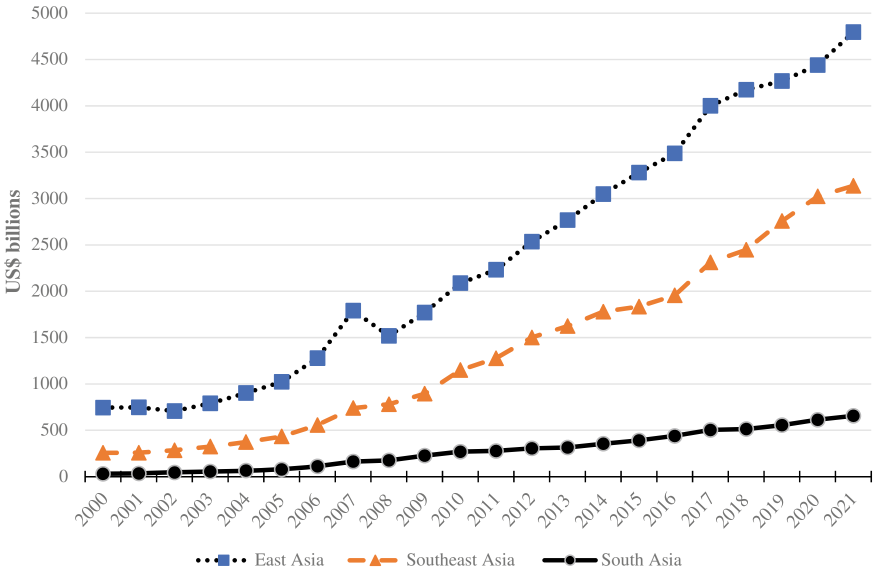

Fig. 3.3 Stock of inward FDI in Asia (2000–2021). *Source* UNCTAD STATS, accessed 7 June 2023

The rest of this chapter is organised as follows. Section 3.2 reviews the literature dedicated to the effect of corruption on FDI. Section 3.3 presents our model and estimations of the relationship between corruption and FDI at world and regional levels. Section 3.4 discusses the results and concludes.

3.2 Corruption and FDI: A Controversial Relationship

The relationship between corruption and FDI has been extensively examined by a large number of economists with the objective of determining if corruption has a negative effect on—or at least a correlation with—FDI or not (see also Chap. 2 in this volume for an extensive review). The substantive arguments used by most economists regarding corruption are not based on ethics or moral criteria but rather on efficiency. Does corruption help the market economy to work better, or does it create inefficiencies? This narrow view explains why in the 1960s some writers[22] defended the argument that corruption can help promote development by getting around inefficiencies in bureaucracy. The importance given to bureaucracy is justified not only by those who think that the state is always the source of the problem but also because the early studies on corruption focused on developing countries, where it was believed that the state was more inefficient and more prone to corruption or cronyism. Despite the central role given to bureaucracy, not all economic studies on corruption actually check whether it is really the main cause of corruption, with a few exceptions. For instance, Mungiu-Pippidi and Fazekas (2020) find a negative effect of the administrative burden on corruption. The empirical studies on the relationship between FDI and corruption have latterly embraced a growing number of variables, taking into account various macro-economic and socio-institutional variables such as those we have listed above.

It appears that empirically, at the macro-level, the majority of studies find evidence that corruption does have an adverse effect on growth and development, and this effect is larger among lower-income countries.[23] Very few have found a positive effect of corruption on FDI.[24] This growing literature on the adverse effect of corruption explains why many international organisations decided to promote new international agreements to better coordinate the fight against corruption, such as the United Nations Convention Against Corruption (open for signature in 2003, and very widely ratified) and the 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transaction (see Chap. 1 as well as Chaps. 4 and 5 in this volume). However, looking back, these broad treaties have been found not to have been very effective, as measured for example by survey and case study evidence. One of the reasons may be that corruption operates also at a regional level, so a regional coordination of the fight against corruption may be more effective. This is an additional reason for investigating the relation between corruption and FDI at the regional level.

3.3 Empirical Model and Estimations

Our objective is to obtain robust estimates of the relationship between corruption and FDI. To that end, we adopt the approach of Egger and Winner (2005) but for a much larger sample. Whereas Egger and Winner used a sample of 73 developed and less developed countries and the period 1995–1999, our sample includes 163 countries over the period 2002–2019 and 2752 observations. Our specification is the following:

$$F_{it} = \beta_0 + \beta_1 G_{i(t-1)} + \beta_2 S_{i(t-1)} + \beta_3 G_{i(t-1)} \cdot S_{i(t-1)} + \beta_5 C_{it} + \eta_i + u_{it}$$

F_{it} denotes country i's FDI inward stock in year t as a percentage of GDP (source: UNCTAD database).

$G_{i(t-1)}$ is the real GDP in constant 2015 USD (source: World Development Indicators, WDI, from the World Bank). It is a proxy for foreign market size. We expect the positive impact of an increase in market size on inward FDI.

$S_{i(t-1)}$ is the secondary school gross enrolment share (source: WDI) and is a proxy for the high-skilled to low-skilled labour ratio. A low ratio reflects an abundance of low-skilled labour that attracts vertical FDI, and a high ratio of skilled labour attracts more horizontal FDI.[25] We expect a negative sign in the case of vertical FDI and a positive sign when horizontal FDI predominates.[26]

$G_{i(t-1)} \cdot S_{i(t-1)}$ is an interaction variable between the size of the market and the secondary school gross enrolment share. It is an additional variable that also captures the importance of vertical FDI. It is a proxy for absolute differences of the skilled ratio in different countries.[27] Typically, a large developing country with an abundance of low-skilled workers will attract vertical FDI. A negative sign is expected when vertical FDI dominates.

C_{it} = Control of Corruption CC, one of the six World Governance Indicators of the World Bank.[28] Contrary to Egger and Winner, we use the CC of the World Bank instead of the Corruption Perceptions Index (CPI) published by Transparency International, for two reasons. Firstly, the CC fits better with our definition of corruption as it includes corruption of both public and private agents, whereas the CPI estimates the corruption of public officials only. Secondly, there is a data break in the CPI series between the years 1996–2011 and 2012 onwards. Due to a change in methodology, the two periods cannot be merged.[29] The CC does not have this problem over the period 2002–2019.

η_i = country fixed effect. This absorbs all time-invariant unobserved factors affecting F_{it}.

For instance, the distance from the source to the host country increases the transaction costs and therefore impacts FDI negatively.

u_{it} is an idiosyncratic error, specific to country and time period.

We do not include the variable Legal Quality L, of the Economic Freedom Network, which is in Egger and Winner's original specification, because it is not available for all the selected countries over the whole period.

We take the log of all the variables, and lagged values are used to avoid a potential problem of endogeneity.

We estimate this equation using fixed country effects. We are interested in estimating the effect of a change in the control of corruption through time. Thus, we use a fixed model in order to control for time-invariant country-specific factors. The Hausman tests indicate that the fixed effect model has to be selected. Besides, one can argue that the CC variable exhibits a limited time variation. In this case, the fixed effect model will be adapted to capture the effects of the control of corruption, which are time-invariant. The main results are presented in Table 3.1.

Columns 3 to 7 show that the size of the market (real GDP) is significant, and has a positive expected sign. This implies that the stock of FDI increases with the size of the host country's market. The secondary school enrolment and the interaction term are significant, and have respectively a positive and negative sign. This means that multinational firms combine horizontal and vertical FDI at the world and regional levels. Our results differ from Egger and Winner's findings (2005), which could not identify a significant interaction term and therefore any significant evidence of the dominance of vertical FDI. This can be explained by the emergence of several developing countries in the more recent period that have now shifted to higher income levels, and which have now their own multinational firms investing abroad. Multinational firms from Malaysia, Indonesia, Thailand and the Philippines are now investing in Southeast Asia and beyond.[30] Chinese multinational enterprises are doing the same.[31]

The control of corruption 'cc' is negative for all specifications. This means that at the world level, an increase in the control of corruption decreases the stock of FDI. In other words, an increase in corruption increases the stock of FDI in line with the 'helping hand' argument.[32] We therefore have confirmed the results obtained by Egger and Winner,[33] but for a larger sample and a longer and more recent period. This implies that, at the world level, multinational firms accept paying bribes to bypass excessive bureaucracy, obtain access to the host country's market and resources or publicly funded projects, and circumvent laws and regulations. This means that despite the cost that corruption adds to their investment projects, they are still considered profitable. It also shows that despite the fact that 189 countries have signed the UNCAC since 2003 (see Chap. 1), paying bribes to invest in a host country is still pervasive at the world level.

However, results for the different regions can be seen in columns 5 to 7, which include dummy variables for each region. Column 5 includes a dummy variable for Europe and South Asia, which turns out to be non-significant. When we substitute Europe with the largest European Union economies (EU 15) in column 7, we can see that the dummy variables for East Asia, Southeast Asia, the EU 15, and the Pacific Island countries of Australia and New Zealand are significant. It is positive for all regions except for the EU 15, where it is negative.

Using column 7, we estimate the final effect by the addition of the estimate of cc and each regional dummy variable. The results are presented in Table 3.2. We can see that in East Asia and Southeast Asia, the control of corruption has a positive relationship with the inward stock of FDI. In other words, corruption has a negative

Table 3.1 Results

Variables	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	FE_full	FE_fullaprime	FE_fulla	FE_fullb	FE_fullc	FE_fulld	FE_fulle
	lfdistocks	lfdistocks	lfdistocks	lfdistocks	lfdistocks	lfdistocks	lfdistocks
L.lrealgdp	0.6858***	0.6751***	1.3953***	1.4184***	1.4033***	1.4344***	1.4508***
	(0.1141)	(0.1157)	(0.2324)	(0.2068)	(0.2335)	(0.2078)	(0.2080)
L.lschoolgross			3.2330***	3.4912***	3.2213***	3.5067***	3.5946***
			(1.1217)	(0.9880)	(1.1240)	(0.9870)	(0.9872)
cL.lrealgdp#cL.lschoolgross			−0.1211***	−0.1330***	−0.1206***	−0.1337***	−0.1377***
			(0.0464)	(0.0411)	(0.0464)	(0.0411)	(0.0411)
Control of Corruption, cc	–0.1969**	−0.2292**	−0.2114***	−0.1788***	−0.1913**	−0.1738**	−0.1595**
	(0.0774)	(0.0900)	(0.0765)	(0.0674)	(0.0966)	(0.0815)	(0.0760)
1.europe#c.cc		−0.1515			−0.2084	−0.2276	
		(0.1611)			(0.1664)	(0.1599)	
1.southasia#c.cc		0.3100			−0.2370	−0.2117	−0.2222
		(0.1905)			(0.1829)	(0.1762)	(0.1735)
1.eastasia#c.cc		0.5990**			0.1700	1.3526***	1.3361***
		(0.2878)			(0.2408)	(0.3902)	(0.3877)
1.southeastasia#c.cc		0.7379***			0.7522***	0.7990***	0.7835***
		(0.1904)			(0.2009)	(0.1974)	(0.1951)
1.ausnz#c.cc		0.5512			1.8972***	1.8318***	1.8171***
		(0.3474)			(0.4531)	(0.4371)	(0.4356)
1.europe15#c.cc							−0.4918**
							(0.2238)

(continued)

Table 3.1 (continued)

Variables	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	FE_full	FE_fullaprime	FE_fulla	FE_fullb	FE_fullc	FE_fulld	FE_fulle
	lfdistocks	lfdistocks	lfdistocks	lfdistocks	lfdistocks	lfdistocks	lfdistocks
Constant	−13.2810***	−13.0127***	−32.1455***	−32.2942***	−32.3487***	−32.6881***	−33.0041***
	(2.7690)	(2.8158)	(5.4936)	(4.8515)	(5.5251)	(4.8769)	(4.8796)
Observations	2,752	2,752	1,517	1,849	1,517	1,849	1,849
R-squared	0.6779	0.6784	0.8604	0.8783	0.8614	0.8796	0.8799
Countries	163	163	98	152	98	152	152
RMSE	0.832	0.832	0.403	0.392	0.402	0.391	0.390

*** $p < 0.01$, ** $p < 0.05$, *$p < 0.1$
Note Robust standard errors in parentheses

Table 3.2 Summary of results

Region	Regional effect	Total effect	Effect of corruption
East Asia	1.34	1.18	Grabbing hand
Southeast Asia	0.78	0.62	Grabbing hand
Australia/New Zealand	1.81	1.65	Grabbing hand
EU 15	–0.49	–0.65	Helping hand

Note Effect of control of corruption at world level = –0.16. Example for East Asia: –0.16 + 1.34 = 1.18

relationship with FDI in line with the grabbing hand representation. This surprising result is consistent with Fig. 3.3, which shows that the control of corruption is positive and improving in East Asia, and negative but improving in Southeast Asia.[34] It tends to decline in Europe and in the EU but remains at a high level in Australia and New Zealand. The result for Europe and notably for the EU is surprising due to the existence of the 1999 Council of Europe Criminal Law Convention and the 1999 Council of Europe Civil Law Convention on Corruption (see Chaps. 1 and 5 in this volume). For Australia and New Zealand, the positive relationship between the control of corruption and FDI is in line with their reputation as 'clean' countries. Additionally, Canare (2017) finds that a country which is not corrupt and has stayed that way for many years tends to receive more FDI inflows. That is exactly the case of Australia and New Zealand in our sample.

3.4 Discussion and Conclusions

Our discussion has focused on Asian countries. The results validate the interest in a regional approach. They also answer the question we raised in Sect. 3.1. There is no longer an 'East Asian paradox' because both East Asia and Southeast Asia now attract more FDI because they have increased their control of corruption. Our results are in line with Canare (2017) who also relies on the control of corruption to estimate its effect on a sample of 46 countries in Asia and the Pacific for the years 2006–2013. For the whole sample, Canare finds that both the level and the change in the control of corruption have a positive effect on FDI inflows. Countries with less corruption or that improve their control of corruption receive more FDI. However, he found no significant relationship when the analysis was limited to low- and middle-income countries. This means that other factors might play a role in determining FDI in these countries.

Looking specifically at Southeast Asian countries[35] for the same period as our study (2002–2019), Nguyen et al. (2021) conclude that FDI inflows are positively affected by GDP growth and trade openness. In addition, control of corruption has a positive effect on FDI inflows. Although they used a different statistical approach,[36]

these results confirm our own findings. In another study dedicated to that sub-region, Lustrilanang et al. (2023) reach the same conclusions.

However, our findings do not confirm those of Khalid (in Chap. 2 in this volume) who investigated a sample of 33 Asian countries for the period 1995–2022 and found evidence instead of a 'helping hand' effect. The difference is probably explained by the difference of sample and methodology. Khalid retains the United Nations broader definition of 'Asia', which includes Western and Central Asia, whereas our investigation is focused on East, Southeast and South Asia. The difference of geographical areas is significant because certain variables affect countries differently, and the interplay between macroeconomic variables and institutions is not the same in area or another.[37] This is all the more the case given that corruption has spillover effects in neighbouring countries in Asia.[38] That explains why for East and Southeast Asia, we found instead a 'grabbing hand' effect. The choice of different indicators for corruption and the use of regional dummies instead of sub-samples, as in Khalid's contribution, also play a role. For these reasons we believe that there is no contradiction but rather complementarity between the two chapters.

In conclusion, we have attempted in this chapter to investigate the relationship between the control of corruption and FDI at the world and regional levels, with a focus on the regions and countries that are primarily studied in this volume. Asia was known as one of the regions that received the most FDI in the recent past, although it was also known for its cronyism and high level of corruption. This situation was known as the 'East Asian paradox' because the majority of studies had concluded that a high level of corruption hampers FDI. The main conclusion of our chapter is that the situation has changed, and such a paradox no longer exists.

Our results show that Asian countries which improved their control of corruption, even if they started from a low level or had initially a high level of corruption, do attract (or at least are significantly associated with) more FDI. This is an encouraging result for policymakers, the judicial system and civil society engaged in the fight against corruption. Improving the control of corruption brings additional benefits. In a study of eight Southeast country members, Lustrilanang et al. (2023) found that a higher control of corruption leads to enhancing the quality of governance in the sample countries. This is an important result because an improvement in the quality of institutions has a positive influence on FDI[39] and an overall beneficial effect on society at large.

Appendix: Descriptive Statistics for Table 3.2

Variables	(1)	(2)	(3)	(4)	(5)
	N	mean	sd	min	max
cc	3,202	–0.0552	0.990	–1.849	2.459
lfdistocks	3,088	3.413	1.409	–19.18	9.092

(continued)

(continued)

Variables	(1)	(2)	(3)	(4)	(5)
	N	mean	sd	min	max
lrealgdp	3,193	24.07	2.413	17.14	30.62
lschoolgross	2,209	4.305	0.505	1.780	5.099

List of countries:

Asia: 20 countries.
East Asia (4): China, Japan, Korea, Republic of Mongolia.
Southeast Asia (9): Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam.
South Asia (7): Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka.
Europe (29): Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, the United Kingdom.
EU15: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom.

Notes

1. Gray and Kaufman 1998.
2. United Nations 2018.
3. United Nations 2015.
4. Huther and Shah 2000.
5. Tanzi 1998.
6. Kaufmann 2015.
7. 'Those who pay bribes are sometimes depicted as innocent parties, forced by ruthless officials to provide kickbacks and do special favours in return for business. The reality is that both parties to corrupt practices conspire to defraud the public, to undermine fair trade, to waste resources, to frustrate development, and often to increase human suffering' (Vogl 1998, p. 30).
8. Gillanders and Neselevska 2018.
9. Galang 2012.
10. Dine 2017.
11. Ades and Tella 1996; Bahoo 2020; Dimant and Tosato 2018; Jain 2001; Jetter and Parmeter 2018.
12. Dimant and Tosato 2018, pp. 344–345.
13. Dimant and Tosato 2018; Spyromitros and Panagiotidis 2022; Urbina 2020.
14. Pujiati et al. 2023; Tacconi and Williams 2020; Wang et al. 2020.
15. Almfraji and Almsafir 2014.
16. Becker et al. 2009; Borsky and Kalkschmied 2019; Goel and Saunoris 2022; Jetter and Parmeter 2018; Sanyal and Samanta 2020.
17. Jetin 2018.

18. The Control of Corruption (CC) 'captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as 'capture' of the state by elites and private interests' (Kray et al. 2010, p. 4). It is one the six Global Governance Indicators published by the World Bank, and aggregates 23 indexes. See Kaufmann 2015. Its value ranges from –2.5 (very corrupted) to +2.5 (not corrupted).
19. The regional average is calculated as the average of the CC index of each country in each region. The list of countries and of regions is given in the Appendix.
20. Ang 2020.
21. Unfortunately, the list of European and Asian countries is not given, but their number suggests a fairly broad definition of Europe and Asia.
22. Huntington 1968; Leff 1964; Leys 1965.
23. Aizenman and Spiegel 2003; Barassi and Zhou 2012; Cuervo-Cazurra 2008; Habib and Zurawicki 2002; Hakkala et al. 2008; Javorcik and Wei 2009; Mauro 1995; Voyer and Beamish 2004; Wei 2000.
24. Egger and Winner 2005 is one of the exceptions.
25. Markusen and Maskus 2002.
26. A 'vertical' FDI is realised when firms geographically separate activities by stages of production in different countries, locating low-skilled jobs in countries where low-paid work is abundant. Typically, for example, a Japanese firm invests in different Southeast Asian countries. A 'horizontal' FDI is made when multi-plant firms duplicate roughly the same activities in many countries, which have similar sizes and labour forces. Typically, a Japanese firm invests in the United States to produce and sell in the local market. See Markusen and Maskus 2002.
27. Egger and Winner 2005, p. 937.
28. The control of corruption is an aggregate indicator constructed by the World Bank as one of the six composite World Governance Indicators to capture corruption on a scale of –2.5 to + 2.5, where the higher the index, the less the corruption indicated. It captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as the 'capture' of the state by private interests. It combines the views of a large number of enterprises, citizens and expert survey respondents (Economist Intelligence Unit, Freedom House, Transparency International Global Corruption Barometer, World Economic Forum Global Competitiveness Survey, Gallup World Poll, etc.).
29. Corruption Perceptions Index 2012: An updated methodology. Transparency International.
30. Al-Fadhat 2020, p. 182; Faisal Hastiadi 2019.
31. Kim 2016.
32. Compare also Chap. 2 in this volume.
33. Egger and Winner 2005.
34. To test the robustness of our results for Southeast Asia, we performed the test without Singapore. That country may be considered as an outlier because it combines a very high level of control of corruption and a constant high level of inward stock of FDI (see Chap. 1 in this volume). The results were almost identical, confirming that corruption is a grabbing hand in Southeast Asia. Removing Indonesia, the largest economy of Southeast Asia does not change the results either.
35. Six Southeast Asian economies are considered: Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam.
36. The generalised method of moments.
37. Canare 2017.
38. Khodapanah et al. 2022.
39. Sabir et al. 2019.

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Bruno Jetin is Associate Professor at Universiti Brunei Darussalam (UBD); he was also Director of the Institute of Asian Studies (2018–2022). Prior to joining UBD, he was a researcher at the Institute for Research on Contemporary Southeast Asia (IRASEC, CNRS-MAEE, Bangkok) and Associate Professor at the University Sorbonne Paris Nord where he was Deputy Director of the Research Center in Economics. He holds a PhD in economics from the University of Sorbonne Paris Nord. His current research areas include ASEAN and the Belt and Road Initiative, foreign investment and trade in the Asia–Pacific, income distribution and growth. He is also an expert on the automobile industry and the electric car.

Jamel Saadaoui is a lecturer and researcher in social sciences, specialising in several topics related to International Economics. Since 2013, he has been Senior Lecturer with Habilitation in Economics at the University of Strasbourg and is affiliated to the BETA laboratory for his research activities. He also teaches Economics and Statistics at the Faculty of Economics and Management, FSEG, at the University of Strasbourg. His recent works in Applied Economics explore the interactions between geopolitical tensions and the economy, the nature of long-run economic growth, the flattening of the Phillips curve in the EU regions and the buffering effects of the international reserve holdings.

Haingo Ratiarison is currently a student at the University of Strasbourg and is following a double training in Master 1 ‘Macroeconomics and European Policies’ and a selective diploma course allowing advanced initiation to research called ‘Magistère’. She holds a bachelor’s degree in economics at the Faculty of Economics and Management from the University of Strasbourg. In addition, she is one of the research assistants of Jamel Saadaoui, Senior Lecturer and researcher affiliated to the Bureau d’Economie Théorique et Appliquée-Centre National de la Recherche Scientifique (BETA-CNRS) laboratory in Strasbourg. Her research interests are corruption and tax evasion and their macroeconomic effects. She is also interested in development economics and European macroeconomics.

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Part II
General Legal Issues from the Interface of Corruption, Illegality and Investment Arbitration

Chapter 4
Anti-Corruption Laws and Investment Treaty Arbitration: An Asian Perspective

Anselmo Reyes and Till Haechler

Abstract There are multiple international agreements that require states to criminalise corruption. This chapter deals with the effects of such international anti-corruption agreements in the field of investment treaty arbitration. Focus will be placed on Asia. This Asian perspective is pertinent given the continued prevalence of corruption in many Asian jurisdictions, despite their growing economic importance. International agreements on corruption and their implementation in domestic law can have an unintended consequence in the field of investment treaty arbitration. This is because anti-corruption laws can provide states with an effective defence against an arbitral tribunal's jurisdiction. This chapter concludes with a proposal on how this consequence can be tempered by applying to international investment law the more nuanced approach to illegality established in recent common law jurisprudence. The article will be divided into four sections. Section 4.2 will survey multilateral and bilateral international agreements on corruption. Section 4.3 will discuss how international agreements on corruption have been implemented in the domestic laws of various Asian jurisdictions. It will consider differences in anti-corruption laws of Asian states and comment on whether such differences give rise to uncertainty as to the scope of corruption crimes. Section 4.4 will look into how host states can use anti-corruption laws as a means of evading the scrutiny by arbitral tribunals of confiscatory conduct. Section 4.5 will argue that the 'all or nothing' approach to investments tainted with corruption should be replaced with a balancing approach to illegality.

A. Reyes (✉)
Singapore International Commercial Court (SICC), Singapore
e-mail: reyes.anselmo@gmail.com
URL: https://www.sicc.gov.sg/about-the-sicc/judges

T. Haechler
Supreme Court of the Canton of Zürich, Zürich, Switzerland
e-mail: till.haechler@lenzstaehelin.com
URL: https://www.linkedin.com/in/till-haechler-b09b051b6/?locale=es_ES

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4.1 Introduction

There are multiple international agreements that require states to criminalise corruption. This chapter deals with the effects of such international anti-corruption agreements in the field of investment treaty arbitration. Focus will be placed on Asia. This Asian perspective is pertinent given the continued prevalence of corruption in many Asian jurisdictions, despite their growing economic importance.[1] International agreements on corruption and their implementation in domestic law can have an unintended consequence in the field of investment treaty arbitration. This is because anti-corruption laws can provide states with an effective defence against an arbitral tribunal's jurisdiction and scrutiny. This chapter will conclude with a proposal on how this consequence can be tempered by applying to international investment law the more nuanced approach to illegality established in recent common law jurisprudence.

This chapter is divided into four sections. Section 4.2 surveys multilateral and bilateral international agreements on corruption. Section 4.3 discusses how international agreements on corruption have been implemented in the domestic laws of various Asian jurisdictions. It will consider differences in the anti-corruption laws of Asian states and whether such differences give rise to uncertainty as to the scope of corruption crimes. Section 4.4 looks into how host states can use anti-corruption laws as a means of evading scrutiny by arbitral tribunals of confiscatory conduct. Section 4.5 argues that the 'all or nothing' approach to investments tainted with corruption should be replaced with a balancing approach to illegality.

4.2 Corruption in International Law

4.2.1 Multilateral Agreements on Corruption

On a multilateral level, the Organisation for Economic Co-operation and Development (OECD), as well as the United Nations (UN), have adopted conventions aimed at combatting corruption. There are also a few regional multilateral agreements on corruption, with none yet in Asia.

4.2.1.1 OECD Anti-Bribery Convention

In 1997 the OECD passed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). It was the first multilateral agreement addressing corruption. The OECD has 38 member states, most of which are capital-exporting countries. If a broad definition of 'Asia' is adopted, there are only four Asian members within the OECD: Israel, Japan, South Korea and Turkey. The OECD Anti-Bribery Convention became effective in 1999. Member countries were the original signatories. But the convention is open to

accession by any state. As of today, all OECD members have ratified the convention.[2] In addition, six non-members have ratified the convention, but none from Asia.[3]

The OECD Anti-Bribery Convention requires signatories to implement domestic legislation making it a crime directly or indirectly to bribe a foreign official. Signatories are also required to criminalise complicity in such bribery. Articles 1.1 and 1.2 of the OECD Anti-Bribery Convention state:

> 1.1 Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, 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.
>
> 1.2 Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Apart from this, attention is drawn to two further obligations in the OECD Anti-Bribery Convention. First, Article 3 requires each state to establish the liability of legal persons (such as companies) for the bribery of a foreign public official, in accordance with its own legal principles. However, this obligation is qualified. If under the law of a state, criminal liability is not attributable to legal persons, the state is not required to establish such criminal responsibility.[4] Second, under Article 3, countries are obliged to take measures to ensure that a bribe and its proceeds can be seized and confiscated. In this context, the 'proceeds of the bribery' refers to the profits or other benefits derived from the corrupt act.[5]

The domestic legislation called for by the OECD Anti-Bribery Convention is not meant to have effect only within a country's borders. Each member is also to ensure that its laws provide for extraterritorial jurisdiction with respect to corrupt acts. In particular, a member's domestic law has to cover corrupt acts by its nationals abroad.[6]

The OECD Anti-Bribery Convention was a milestone in combatting corruption internationally. It was the first multilateral agreement requiring parties to adopt a domestic legal framework outlawing the bribery of foreign public officials. This was a remarkable accomplishment. However, the OECD Anti-Bribery Convention has its shortcomings. For instance, Dr Wendler has identified two deficiencies.[7] First, the convention only covers *active* corruption, which refers to the act of bribing an official. Passive corruption refers to the receipt of such a bribe. The convention does not require measures to be taken against the recipients of bribes (i.e., public officials acting as influence peddlers). The convention thus only concerns the supply side of corruption (active corruption) and does not deal with the demand side (passive corruption). Second, there is a significant loophole. Under the Convention, a corruption payment is legal if it is permitted by the law of a foreign official's country.[8] This gives states a discretion to exempt payments that may be widely considered to be corrupt elsewhere. The exception allows members to decide which payments fall outside the Convention's ambit. It is also possible for domestic anti-corruption law to

exclude ‘facilitation payments’ (see below). The OECD Anti-Bribery Convention is therefore far from perfect. From an Asian perspective, it has limited relevance since only two jurisdictions squarely in Asia (Japan and South Korea) have so far ratified it.

4.2.1.2 UN Convention Against Bribery

The UN has also played a key role in multilateral efforts to fight corruption. In 2003 the UN General Assembly adopted the UN Convention Against Corruption (UNCAC). The instrument became effective in 2005. To date, 189 states have ratified UNCAC. Signatories include virtually all Asian countries.[9] Like the OECD Anti-Bribery Convention, UNCAC requires state parties to criminalise corruption. UNCAC does not define corruption. Instead, it tackles different forms of corruption.[10] UNCAC differentiates between (1) bribery of national public officials (Article 15) and (2) bribery of foreign public officials (Article 16).

Regarding Article 15, state parties are required to criminalise the active and passive bribery of national public officials. Article 15 states:

> 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.

By contrast, Article 16 concerns the bribery of foreign public officials. Unlike Article 15, Article 16 does not require states to criminalise the passive bribery of foreign public officials. It states:

> 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.

The reason for Article 16 limiting itself to the active bribery of foreign public officials is presumably because, by definition, a foreign public official would be

beyond a given state's jurisdiction based on nationality or territory. It would be for the relevant foreign state to criminalise the passive bribery of its public officials. Thus, states are only obliged by Article 16.2 to 'consider' a corresponding offence to active bribery and there is no binding obligation to criminalise the passive bribery of foreign public officials.[11] In short, UNCAC encourages state parties to establish broad jurisdiction over corruption offences. As a basic rule, state parties must ensure their jurisdiction over corruption committed inside their territory.[12] UNCAC goes further and allows extra-territorial jurisdiction. A state may exercise jurisdiction over corruption committed outside its territory if the perpetrator or the aggrieved party is a national of the state.[13] UNCAC thus goes further than the OECD Anti-Bribery Convention. UNCAC criminalises the bribery of foreign *and* national public officials. It covers active *and* passive bribery.[14] It does not accept payments to foreign officials which are legal by a foreign official's domestic law.[15]

4.2.1.3 Regional Multilateral Agreements

There are multilateral agreements dealing with anti-corruption at a regional level. For instance, in 1996 the Organization for American States (OAS) adopted the Inter-American Convention Against Corruption (IACAC). As of today, 34 countries have ratified the IACAC. All parties are OAS members (i.e., countries located in North, Central and South America). Much as the UNCAC and the OECD Anti-Bribery Convention, the IACAC identifies corrupt acts that its signatories are required to criminalise.[16] In Europe, the Council of Europe adopted two Anti-Corruption Conventions in 1999: (1) the Criminal Law Convention on Corruption and (2) the Civil Law Convention on Corruption. The Criminal Law Convention on Corruption obliges states to criminalise a wide range of different forms of corruption (including the active and passive corruption of domestic and foreign officials),[17] while the Civil Law Convention on Corruption focuses on the civil law consequences of corruption.[18] For Africa, the African Union adopted the Convention on Preventing and Combating Corruption (AUC) in 2003. That lists corrupt practices which the parties are required to criminalise.[19]

By contrast, in Asia, there is no multilateral agreement that exclusively deals with corruption. This lack of a regional instrument on corruption for Asia is unfortunate, given that corruption is perceived to be as widespread in many Asian jurisdictions. Such perception of corruption can impact adversely on foreign investors' willingness to transact business in Asia.

Nonetheless, there are anti-corruption provisions in some trade agreements between Asian countries (see Sect. 4.3). Asian countries also launched an anti-corruption policy initiative, known as the 'ADB/OECD Anti-Corruption Initiative for Asia–Pacific', in 1991. The initiative operates under the joint secretariats of the OECD and the Asian Development Bank (ADB). It currently comprises 34 Asian economies,[20] of which 28 have adopted an 'Anti-Corruption Action Plan for Asia and the Pacific' (Action Plan).[21] The Action Plan sets out a range of policy measures aimed at reducing corruption in Asia. But it is merely a 'plan' and not a binding

instrument. It is merely soft law. It does not require members to incorporate identified corruption crimes into domestic law. The Action Plan is therefore a blunt sword when compared to the multilateral agreements in other continents.

4.2.2 Free Trade Agreements

Apart from multilateral agreements specifically targeting corruption, there are international agreements that contain anti-corruption provisions even though their main purpose is the liberalisation of transnational trade. Typically, states conclude free trade agreements (FTAs) to liberalise the cross-border flow of goods, services and capital between themselves. Countries reduce or eliminate tariffs as set out in the FTAs and address 'behind the border' issues going beyond the commitments adopted through World Trade Organization agreements. Traditionally, FTAs were bilateral. Recently, there has been a trend towards regional FTAs (RTAs). FTAs and RTAs will usually guarantee minimum standards of treatment by a state towards investors from a counterparty. But increasingly FTAs and RTAs also include provisions on a range of issues (environmental standards, labour rights, anti-corruption, etc.) instead of being restricted to purely economic measures.

Two instances of trade agreements containing anti-corruption provisions will be examined here. The first is the Japan Philippines Economic Partnership Agreement (JPEPA), a bilateral FTA between Japan and the Philippines signed in 2006. The second is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a multilateral agreement among states in the Asia–Pacific and elsewhere signed in 2018.

4.2.2.1 Japan Philippines Economic Partnership Agreement

JPEPA entered into force in 2008. It was the Philippines' first bilateral FTA. It was modelled on EPAs between Japan and other states.[22] JPEPA goes beyond the content of a traditional FTA. It deals not just with the elimination of tariffs and other barriers, but also initiates cooperation in various economic activities, including investment.[23] The objectives of JPEPA, as enumerated in Article 1, illustrate the agreement's comprehensive nature. The investment chapter of JPEPA contains typical provisions found in a BIT. It provides that investors from Japan and the Philippines are to be accorded non-discriminatory treatment[24] and most-favoured nation status.[25] JPEPA also protects investors from both states against arbitrary expropriation[26] and guarantees fair and equitable treatment.[27]

JPEPA has a provision on corruption. Article 8 states:

> Each 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 .

The obligation in Article 8 is less detailed than comparable provisions in UNCAC or the OECD Anti-Bribery Convention. The obligation to 'prevent and combat corruption' is vague and aspirational in nature.[28] The provision does not specify what 'measures and efforts' should be undertaken.

Article 8 contains additional limitations. First, the obligation to combat corruption only concerns 'matters covered by this Agreement'. This limitation may be acceptable given JPEPA's broad scope. Second, the obligation to combat corruption only applies 'in accordance with [a party's] laws and regulations'. The extent of the phrase is unclear. For example, does the first part of Article 8 require a country proactively to legislate 'measures and efforts … to prevent and combat corruption' if the country has no laws and regulations dealing with corruption, or if its existing laws and regulations are insufficient to deal effectively with corruption? Alternatively, does the second part of Article 8 mean that a country is only obliged to deal with corruption 'in accordance with its laws and regulations' as they are at the time of JPEPA, no matter how inadequate such laws and regulations may be 'to prevent and combat corruption regarding matters covered by this Agreement'? If the first construction of Article 8 is the correct one, by what standards are a country's efforts to legislate against corruption to be evaluated? By what standard is one to gauge whether there has been a violation of the Article 8 obligation under the JPEPA? As seen above, there is no universally accepted international, much less Asian, standard of what anti-corruption legislation should look like.

Still, despite its vagueness, Article 8 is not irrelevant. It signals that Japan and the Philippines view the eradication of corruption as a legitimate and common policy goal. The provision posits that 'measures and efforts' to reduce corrupt practices are in both countries' interests. The specific content of anti-corruption measures, however, remains at each party's discretion.

Other EPAs concluded by Japan contain provisions similar to JPEPA Article 8. For example, Japan has entered into EPAs with Thailand (2007),[29] Indonesia (2007),[30] India (2011),[31] and the UK (signed 2020, not yet in force). All contain anti-corruption clauses. The UK–Japan Comprehensive Economic Partnership Agreement (UKJCEPA) stands out as it refers to multilateral anti-corruption agreements. UKJCEPA Article 17.9 states:

> The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment. Recognising the need to build integrity within both the public and private sectors and that each sector has complementary responsibilities in this regard, the Parties affirm their adherence to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris on 17 December 1997 [the OECD Anti-Bribery Convention] and the United Nations Convention against Corruption, adopted at New York on 31 October 2003.

Ostensibly, UKJCEPA Article 17.9 goes further than JPEPA Article 8 in referring to the OECD Anti-Bribery Convention and UNCAC. But the references are of little substantive effect since Japan and the UK are already parties to both instruments.[32] UKJCEPA has not altered the two countries' obligations regarding corruption. It does not create an additional obligation to criminalise corruption under domestic law.

Nevertheless, as the International Trade Committee of the UK House of Commons observed, Article 17.9 is at least a 'welcome statement of intent'.[33]

4.2.2.2 Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Although Asia lacks a regional agreement that directly tackles corruption, two FTAs recently concluded among Asia–Pacific jurisdictions, the Regional Comprehensive Economic Partnership (RCEP) and the CPTPP, touch on corruption.

RCEP is an FTA among the ten members of the Association of Southeast Asian Nations (ASEAN) as well as Australia, China, Japan, New Zealand and South Korea.[34] RCEP was signed in 2020 and has been ratified by 14 countries. India was involved in lengthy negotiations but did not accede, although this may eventuate.[35] RCEP has been hailed as a major step towards liberalising trade in Asia. But it has been criticised for a lack of ambition.[36] Even though RCEP has an investment chapter with the usual protections granted to foreign investors (FET, anti-expropriation, etc.), it lacks a comprehensive investor–state dispute settlement mechanism. RCEP merely commits to further negotiations on this point. Meanwhile, between pairs of signatory states, there are in force at least one ISDS-backed BIT or FTA.[37]

RCEP provides for anti-corruption in Article 17.9 which reads:

1. Each Party shall, in accordance with its laws and regulations, take appropriate measures to prevent and combat corruption with respect to any matter covered by this Agreement.
2. No Party shall have recourse to dispute settlement under Chapter 19 (Dispute Settlement) for any matter arising under this Article.

Article 17.9 does not impose specific obligations on state parties to criminalise corruption. RCEP signatories simply voice their general support for anti-corruption policies. Nor does RCEP prescribe concrete anti-corruption measures that have to be implemented in the domestic laws of parties. Further, the anti-corruption provision is expressly excluded from the dispute settlement mechanism in RCEP's Chapter 19.[38] Thus, no legal remedies are available within the RCEP framework if a state decides not to act against corruption.

More promising as an effective counter to corruption is the CPTPP, an FTA among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. It was signed in 2018 without the US, although the latter played a strong role in negotiating the predecessor agreement (known as the Trans-Pacific Partnership Agreement (TPP)) with the same anti-corruption provision. The CPTPP has now been ratified by all signatories except Brunei.[39] In addition, the UK concluded negotiations to join the CPTPP in March 2023.[40]

As its name suggests, the CPTPP is a wide-ranging agreement.[41] It includes a chapter on investment which, besides the usual investor protection provisions, contains an investor–state dispute settlement mechanism.[42] The CPTPP can be considered as the most ambitious anti-corruption agreement in Asia to date. Its Chapter 19 is exclusively devoted to 'Transparency and Anti-Corruption'. The

CPTPP requires each party to accede to UNCAC.[43] More remarkably, the CPTPP defines the anti-corruption measures that each party must implement in its domestic law. Article 26.7.1 reads:

> 1. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as criminal offences under its law, in matters that affect international trade or investment, when committed intentionally, by any person subject to its jurisdiction:
>   (a) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or 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 or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of his or her official duties;
>   (c) the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or 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; and
>   (d) the aiding or abetting, or conspiracy in the commission of any of the offences described in subparagraphs (a) through (c).

Thus, Article 26.7.1 imposes an obligation to criminalise the active and passive bribery of national public officials and the active bribery of foreign officials. But Article 26.7.1 may only be of limited practical benefit because it essentially replicates existing UNCAC obligations.[44] It does not impose additional obligations on CPTPP signatories, all of which have ratified UNCAC.

CPTPP Article 26.9.1 concerns the enforcement of anti-corruption measures:

> In accordance with the fundamental principles of its legal system, no Party shall fail to effectively enforce its laws or other measures adopted or maintained to comply with Article 26.7.1 (Measures to Combat Corruption) through a sustained or recurring course of action or inaction, after the date of entry into force of this Agreement for that Party, as an encouragement for trade and investment.

This obligation is new.[45] The parties to CPTPP are required to enforce their domestic anti-corruption legislation by prosecuting individuals and businesses involved in corruption.[46] Unfortunately, the obligation to enforce anti-corruption laws in Article 26.9.1 is expressly excluded from the dispute settlement mechanism in CPTPP.[47]

In any event, the CPTPP constitutes a major step toward reducing corruption in the Asia–Pacific. One commentator has argued that its anti-corruption chapter contains the 'most detailed anti-corruption provisions in all FTAs and other trade agreements'.[48] The importance of CPTPP in Asia should grow if China's request to join is accepted.[49]

4.2.2.3 Summary on Treaty Provisions

There are multiple international agreements requiring state parties to criminalise corruption. Some agreements (UNCAC and the OECD Anti-Bribery Convention) deal exclusively with corruption. But anti-corruption provisions can also be found in FTAs and RTAs. The instruments vary in scope, content and clarity.[50] Some only have generic obligations to take measures against corruption without defining the coverage of such measures. Others are more detailed. The latter instruments deploy a similar rule-making approach. They do not give a general definition of corruption. They merely identify certain conduct (such as passive or active bribery involving public officials) as corrupt. The instruments then impose an obligation on states to criminalise the conduct so identified. Following ratification, it is left to individual member states to incorporate the crimes into their domestic law.

4.3 Domestic Implementation

International agreements against corruption only bind state parties. Individuals and companies can only be prosecuted after states have implemented anti-corruption laws domestically. The international agreements canvassed in Sect. 4.2 are consequently not directly applicable to individuals or companies. This section considers how international obligations to fight corruption have been translated into the domestic laws of Asian jurisdictions. The analysis will focus on the treatment of facilitation payments as a form of corruption.

States have performed their obligations for domestic implementation to varying degrees. Differences in domestic implementation may be because of a lack of will among a country's legislators. But it can also be because the obligation to legislate is vague and there is insufficient guidance on domestic implementation. The treatment of facilitation payments in domestic law is an example of the variation in domestic implementation.[51] Facilitation payments are amounts paid to a public official to expedite bureaucratic procedures (i.e., to cut through red tape).[52] The person making the facilitation payment is in principle entitled to the desired outcome, but not necessarily to the speed or priority with which the person's application is to be processed as a result of the facilitation payment. Such payments are typically small amounts in everyday situations. Examples are payments to facilitate the issue of work permits, expedite the grant of import or export licences, or reduce waiting time for a permit.[53] For this reason, facilitation payments are sometimes colloquially referred to as 'coffee money', 'grease money' or 'oiling the wheels', given the purpose of such payments.[54] Neither the OECD Anti-Bribery Convention nor UNCAC expressly deal with facilitation payments.[55] Hence, it is necessary to construe how the instruments intend facilitation payments to be treated in domestic legislation.

The OECD Anti-Bribery Convention proscribes payments 'to obtain or retain business or other improper advantage in the conduct of international business'.[56] The expression 'other improper advantage' is not defined.[57] It is accordingly unclear

whether the expedited treatment of an application by a public official as a result of a facilitation payment is to be considered an 'improper advantage'. The commentary to the OECD Anti-Bribery Convention states:

> Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.[58]

Given the commentary, it appears that the OECD Anti-Bribery Convention does not require signatories to outlaw facilitation payments.[59] This does not mean that the OECD condones facilitation payments. To the contrary,[60] in a recommendation of 2009, the OECD referred to the 'corrosive effect of small facilitation payments'.[61] The OECD has recommended that member countries regularly review their policies on small facilitation payments. But it has stopped short of calling for the criminalisation of such payments.[62] Some member states exclude defined facilitation payments to foreign public officials from the scope of criminalised behaviour (e.g., Australia; see below).

Under UNCAC, the position of facilitation payments is less clear-cut. There is controversy over whether UNCAC requires states to prohibit facilitation payments. Two opposing positions are held by states and scholars. The first considers facilitation payments to be illegal.[63] The argument is that UNCAC does not contain an express exception for facilitation payments.[64] This is taken to mean that expedited treatment due to a facilitation payment constitutes an 'undue advantage in relation to international business' within UNCAC Article 16.1. Payments to obtain privileged treatments should therefore be considered as a form of bribery. Note in this connection that UNCAC has no official guide similar to the Commentary on the OECD-Anti Bribery Convention which exempts facilitation payments from UNCAC's scope.[65]

The second position considers facilitation payments to be legal.[66] This is because UNCAC does not expressly prohibit facilitation payments. Proponents of this view rely on UNCAC's negotiation history. The wording 'in order to obtain or retain business or other undue advantage in relation to the conduct of international business' in Article 16.1 was based on a US proposal. The *travaux préparatoires* indicate that the proposed text was highly controversial, with some states demanding its complete removal, and other states demanding 'reasonable limitations' to the offence.[67] The wording in UNCAC is similar to a provision in the US Foreign Corrupt Practices Act (FCPA) dating back to 1977, which is understood as exempting facilitation payments.[68] Thus, UNCAC (the argument runs) should be interpreted consistently with the FCPA as permitting facilitation payments. Against this backdrop, it remains unresolved whether UNCAC requires states to outlaw facilitation payments.

The same holds true for the CPTPP. The wording in the CPTPP is identical to that in UNCAC. The CPTPP is therefore equally inconclusive. In addition, the CPTPP's negotiation process bears some similarity to what happened with UNCAC. The US argued for the inclusion of an anti-corruption chapter in the TPP.[69] This was before

the US withdrew from TPP during President Trump's Administration. The remaining countries retained the proposed anti-corruption provisions in CPTPP which was signed in 2018 without the US. Consequently, the anti-corruption provisions in the CPTPP were arguably inspired by the FCPA and US practice and so do not require the criminalisation of facilitation payments.

Since international law does not give clear guidance on facilitation payments, it can hardly be surprising that domestic laws differ to an extent in their approach.[70] A study by Clifford Chance found that, of the 13 Asia–Pacific jurisdictions surveyed, 11 prohibit facilitation payments.[71] Thus, facilitation payments are prohibited in Mainland China, Hong Kong, Taiwan, India, Indonesia, Japan, Malaysia, the Philippines, Singapore, South Korea and Vietnam. But Thailand and Australia allow facilitation payments in some respects.

In Australia, the Criminal Code Act provisions implementing the OECD Anti-Bribery Convention exclude certain facilitation payments. A person is not liable for the offence of bribing a foreign official if four conditions are met:[72]

(a) the value of the benefit was of a minor nature; and
(b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
(c) as soon as practicable after the conduct occurred, the person made a record of the conduct; and
(d) any of the following subparagraphs applies:
  (i) the person has retained that record at all relevant times;
  (ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;
  (iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

The Australian legislation has been criticised as being too vague. It does not specify what is 'minor' in respect of a government action or the value of a bribe.[73] The ambiguity leads to legal uncertainty for Australian businesses operating abroad[74] and the OECD has noted that there is 'general confusion about the facilitation payment defence' in Australia.[75]

In Thailand, the law on facilitation payments is more complex. According to Chance, Thai law differentiates between the making of a facilitation payment (active corruption) and the receipt of such payment (passive corruption).[76] In some instances, making a facilitation payment may be legal under Thai law. Thus, under Thai law, a person paying a bribe may only be criminally liable if the payment causes a public official to perform his or her duties wrongfully.[77] In other words, the maker of a facilitation payment will not be criminally liable if the public official carries out his or her duty normally (albeit more expeditiously) due to the payment. By contrast, receiving the payment is illegal under Thai law regardless of whether the payment leads to a wrongful performance by a public official.[78] Thai law is consequently uncertain about facilitation payments, the uncertainty stemming from a distinction

between a public official performing a requested action normally (i.e., in accordance with one's statutory duty) or not. The requirement of wrongful performance can constitute an unnecessary, time-consuming and expensive hurdle to proving a crime in an individual case. This renders law enforcement more difficult and unpredictable.

4.4 Corruption in International Investment Arbitration

A consequence of anti-corruption domestic laws is that states can (and do) rely on them to avoid an arbitral tribunal's jurisdiction or raise defences in investor–state disputes. The problem is that a state may raise corruption as a defence even when its own public officials have engaged in the alleged corruption and have not been prosecuted for such corruption by the state. There may be no time limit to a state invoking corruption to avoid an investment. This means that a state can avoid an investment agreement years after the same was obtained through a bribe, even though the investor has since invested a considerable amount of money in the state and benefitted the state. The individuals involved in the initial bribery for the investor and the state may have retired long ago or completely disappeared from the scene with any ill-gotten gains. Meanwhile, those currently managing the investor and those presently acting for the relevant government might have no inkling of the murky origins of an investment agreement. Another problem is that a host state can be perversely incentivised to ensure an official solicits a bribe, to enable the state to mount a defence of corruption against subsequent investor claims.

In those circumstances, one may wonder whether it is just and fair for international law to treat initial corruption as a basis for the state to claim that (1) protections in a bilateral or multilateral agreement do not cover an investment at all or (2) an arbitral tribunal has no jurisdiction to consider the parties' dispute. The outcome would be that a corrupt state can take over an investor's business with impunity. To put matters in perspective, this section will discuss two scenarios as exemplified by two well-known cases: *World Duty Free v. Kenya* and *Metal-Tech v. Uzbekistan.* Section 4.5 will suggest what might be done to tackle the potential unfairness highlighted.

4.4.1 World Duty Free v. Kenya

World Duty Free v. Kenya[79] is a paradigm case on the effects of corruption in international investment law, albeit with consent to arbitration having been given under a one-off contract rather than a BIT or FTA. An investment contract was concluded in April 1989 between Kenya and World Duty Free.[80] The contract was obtained through corruption. World Duty Free paid bribes to the then Kenyan President, Daniel arap Moi. In return, World Duty Free was granted the concession for constructing and operating duty-free stores at two Kenyan airports.[81] World Duty Free later alleged that

Kenya had illegally expropriated its property when Kenya ordered a government takeover in 1998.[82] Word Duty Free commenced ICSID arbitration proceedings against Kenya, seeking damages and restitution. The arbitration was based on an arbitration clause in the investment agreement between World Duty Free and Kenya.[83]

The award considered the consequences of corruption under international public policy,[84] Kenyan law and English law.[85] Kenya submitted that World Duty Free's claim should be dismissed because the investment agreement was tainted by corruption and 'does not have force of law'.[86] The tribunal agreed. It dismissed World Duty Free's claims because they were based on an agreement obtained through corruption.[87]

The tribunal began its analysis by considering the stance of international public policy on corruption. This entailed the tribunal investigating whether there was an 'international consensus as to universal standards and accepted norms of conduct that must be applied in all for a' when dealing with corruption.[88] Referring to conventions against corruption such as those described in Sect. 4.3 of this chapter,[89] the tribunal concluded:

> 157. In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.

What does such a conclusion mean in practical terms?

The parties' agreement stipulated that 'any arbitral tribunal constituted pursuant to this Agreement shall apply English law'. By another article, the agreement stated that it 'shall be governed by and construed in accordance with the law of Kenya'. The parties' agreement was consequently ambiguous on whether the tribunal should apply English or Kenyan law in determining the effects of corruption on a contract. The tribunal resolved this difficulty by observing that there was no difference between Kenyan and English law insofar as the effects of corruption were concerned. Accepting the evidence of Kenya's legal expert (Lord Mustill), the tribunal held that an agreement obtained through bribery was voidable under English and Kenyan law.[90] It rejected World Duty Free's criticism of this 'all or nothing' approach. In the tribunal's view, there was no room for the tribunal to endorse a nuanced approach balancing corruption against the host state's own misconduct.[91] The tribunal cited a 'long line of unbroken English authorities stretching back more than two hundred years' in support of its stance.[92]

Several observations might be made.

First, although the tribunal rightly found that bribery was generally proscribed by international public policy, the international conventions do not (as seen in Sect. 4.3) speak with one voice. There are differences and obscurities among international conventions and bilateral agreements as to what forms of bribery should be criminalised and what types of bribery may be tolerated.

Second, although the tribunal concluded that claims based on contracts obtained through bribery 'cannot be upheld' as a matter of international consensus, the tribunal

applied domestic law (English and Kenyan law) to determine what the effect of bribery should be. It will be seen in Sect. 4.5 that English law has moved from the 'all or nothing' approach in vogue at the time to a 'range of factors' approach. Under the latter approach, a contract tainted by illegality will not necessarily be treated as voidable or unenforceable in whole or part. Thus, if *World Duty Free* were to be decided today, the outcome may be different.

Third, the tribunal's observation that an 'all or nothing approach' was justified because the law would thereby be protecting the public or 'the mass of taxpayers and other citizens making up one of the poorest countries in the world' is unpersuasive. Where a corrupt government remains in charge of a state, how precisely will allowing a state to expropriate a foreign investment, to the benefit of those in power, protect the citizens of that state? Why should a state's corrupt government officials be entitled to enrich themselves further at the expense of the investor? In the absence of evidence that a state has implemented measures to ensure that similar corruption will not take place in the future, an 'all or nothing approach' will only beget greater corruption.

Fourth, the claimant suggested that Kenya had waived any right to treat the investment agreement as void for corruption. It was argued that the President's wrongdoing should be attributed to Kenya and that Kenya had failed to act promptly to avoid the deal once it became aware of the corruption. The tribunal made short shrift of the argument:

> 184. The Claimant's submissions on waiver and affirmation depend on the allegation that Kenya knew of the bribe long before December 2002. As already indicated above, there was no mention of the payment in the Agreement (or its amendment); nor in any contemporary document exchanged between the Claimant and Kenya over the subsequent eleven years before this proceeding was commenced in June 2000. More significantly, the Claimant itself made no mention of the payment in the early part of this proceeding or throughout the other legal proceedings in the Isle and Man and Kenya. The Tribunal finds that the payment was first made known by the Claimant to Kenya in December 2002, thirty months after the Claimant's Request for Arbitration. It had not previously been known to Kenya. There can be no affirmation or waiver by Kenya without knowledge; and as Lord Mustill stated in his opinion, '[a] party cannot waive a right which he does not know to exist'.
>
> 185. 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 principal) of a state officer engaged as its agent in bribery .... In the Tribunal's view, this submission is ill-founded under Kenyan law: the President held elected office under the Kenyan Constitution, subject to the rule of law (including the 1956 Act).

The tribunal's analysis suggests that the corruption of an official, no matter how high up in authority, can never form a basis for attribution to a state in light of the rule of law.[93] But it is submitted that this is unrealistic. If the President's knowledge cannot be attributed to the state, there would have to be a change in regime before an investor can rely on waiver or affirmation. In the meantime, the corrupt state's cronies would be helping themselves to the investor's business. Such a situation can hardly be conducive to the rule of law.

4.4.2 *Metal-Tech v. Uzbekistan*

The second scenario on corruption is exemplified by *Metal-Tech v. Uzbekistan*[94] decided in 2013. The case differs from *World Duty Free v. Kenya* in that the claim was based on a BIT between Israel and Uzbekistan, with the applicable substantive law being primarily international rather than national.[95]

Metal-Tech, an Israeli company, entered into a joint venture agreement with two Uzbek state-owned enterprises for the building and operation of a molybdenum production plant.[96] After the conclusion of the joint venture agreement in 2000, Metal-Tech entered into consulting agreements for the payment of USD4.4 million to individuals with close ties to the Uzbek government.[97] In 2006 the joint venture (Uzmetal) was subjected to criminal proceedings by the Uzbek authorities on the ground that Uzmetal's officers had abused their authority.[98] Uzbekistan's government also adopted a resolution abrogating Uzmetal's right to export raw material.[99] Subsequently, the two state-owned entities initiated bankruptcy proceedings against Uzmetal resulting in the liquidation of the joint venture as well as the transfer of its assets to the two state-owned companies.[100] In 2010 Metal-Tech submitted a request for arbitration to ICSID claiming violations of the Israel–Uzbekistan BIT (including expropriation) and seeking financial compensation from Uzbekistan.[101] The tribunal found that the consulting agreements were shams intended to clothe bribes to persons connected to the Uzbek government with a veneer of legitimacy. The bribes were paid with a view to obtaining government approval for Metal-Tech's investment.[102] On this basis, the tribunal concluded that it lacked jurisdiction because Metal-Tech's investment was tainted with corruption.

More precisely, Article 8.1 of the Israel–Uzbekistan BIT states:

> Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes ... for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party *concerning an investment* of the latter in the territory of the former.[103]

It followed from this that the arbitral tribunal's jurisdiction hinged on whether there was an 'investment' within the terms of the BIT. Article 1.1 of the BIT defined covered investments as follows:

> The term 'investments' 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, but not limited to: ....[104]

Thus, just as with many other BITs, Article 1.1 of the Israel–Uzbekistan BIT incorporated an express legality requirement.[105] The tribunal found that Metal-Tech's investment did not meet this legality requirement since it was tainted with corruption and contrary to Uzbekistan law as a result.[106] Metal-Tech's holding in Uzmetal did not therefore constitute an investment within Articles 1.1 and 8.1 of the Israel–Uzbekistan BIT.[107] The investment falling outside the BIT, the tribunal lacked jurisdiction to deal with Metal-Tech's complaints, including that of expropriation.[108]

Several observations might be made. First, the tribunal cited *World Duty Free* with approval and relied heavily on it as support for the principle that corruption was contrary to international public policy.[109]

Second, the tribunal distinguished between resorting to bribery to obtain an investment agreement with a state and engaging in bribery in the performance of an investment agreement. Only the former situation would result in an investment not being in accordance with domestic law.

Third, the tribunal was obviously uncomfortable with the outcome of its decision. Due to corruption in the obtaining of the investment, the investor lost all safeguards under the Israel–Uzbekistan BIT. In contrast, the host state could avoid arbitral scrutiny entirely and take over the investor's business, even though persons connected with the host government were themselves tainted by the corruption. This was despite there being scant material before the tribunal showing that the host state had dealt with the problem of corruption, by prosecuting responsible individuals and putting in place procedures to ensure that a similar incident would never happen again. The tribunal's unease is reflected in the way that it dealt with costs. It ordered that the parties should bear their own costs even though the state had prevailed. It stated:

> 422. More important, the Tribunal's determination is linked to the ground for denial of jurisdiction. The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.

The tribunal justified the overall outcome as 'the promotion of the rule of law'. It stated:

> 389. .... While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.[110]

Again, the rationale is unconvincing. How does allowing the wrongdoers to continue behaving as previously reinforce the rule of law?

What *World Duty Free* and *Metal-Tech* illustrate is that international law on corruption can have an unintended and seeming unfair side-effect in the field of international investment arbitration. International agreements require states to criminalise corruption under their domestic law, which states then do. But in some states, those in control are themselves corrupt and do nothing to enforce their domestic anti-corruption laws against themselves. Instead, they make it plain to foreign investors that the price of

doing business in their country is a bribe. Some foreign investors take the plunge and engage in bribery to secure business. They may reason that, if they do not do so, someone else will. Having obtained an investment deal with a state, a foreign investor legitimately invests in the country and builds up a successful business. The state's corrupt government then decides to take over the investment, alleging that the same is not entitled to protection under a multilateral or bilateral investment agreement due to its origins in a bribe. Because of the bribe, the investment is not entitled to the protections granted by international investment agreements. A variant scenario arises when investment treaties explicitly provide that an investment is only covered if made 'in accordance with the host state's laws'. An investment having originated with a bribe will not meet such a requirement.

What emerges is that international obligations on corruption and domestic laws based thereon allow corrupt host states to defend themselves quite effectively against an arbitral tribunal's scrutiny, especially if treaties contain express legality provisions. The host state avoids oversight by an arbitration tribunal, while the foreign investor is denied recourse to an arbitral tribunal. This outcome seems unjust, especially where the representatives of the host state have benefitted from a bribe. Invoking the protection of the local citizenry or the law as justifications for a tribunal declining jurisdiction are far from compelling as suitable responses to the unfairness identified.

4.5 Towards a Nuanced Approach

The view that any investor who is involved in corruption automatically loses any protection under international investment agreements has attracted heavy criticism.[111] It is submitted that the orthodox 'all or nothing' approach should be revisited. It is time for a more nuanced approach to dealing with agreements tainted with corruption in international investment arbitration. The approach proposed here is based on the UK Supreme Court's decision in *Patel v. Mirza*[112] on what should be the civil law consequences of an illegal agreement.

Patel gave Mirza GBP620,000 for the purpose of subscribing to Bank X's shares in an initial public offering.[113] The understanding was that, in subscribing to the shares, Mirza would be relying on insider information. As matters transpired, the insider information did not materialise and Mirza did not use Patel's money to subscribe to Bank X's shares. Nor did Mirza repay the GBP620,000 to Patel. Consequently, Patel sued Mirza for restitution of the money. In his defence, Mirza argued that he did not have to repay the money due to the illegality underlying the agreement with Patel, the purchase of shares based on insider dealing being a criminal offence. The Supreme Court had to decide whether illegality barred the claim for repayment. The Supreme Court held, by a majority of 6 to 3, that Patel was entitled to the return of the GBP620,000.

The starting point of the Supreme Court's analysis was the law on illegality as it then stood. Like the tribunal in *World Duty Free*, the Supreme Court referred to Lord Mansfield in *Holman v. Johnson*:[114] 'No court will lend its aid to a man who founds

his cause of action upon an immoral or an illegal act'. However, simply rendering a contract unenforceable if it is found to be tainted with illegality can lead to capricious results. For example, it would lead to Mirza having a windfall gain of GBP620,000 even though he was complicit in the insider dealing. The majority therefore espoused a multi-faceted balancing approach to illegality:

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system … In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.[115]

According to the majority, a range of factors should be considered in deciding whether it would be proportionate to refuse relief to which a claimant may otherwise be entitled. Relevant factors include 'the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability'.[116] Based on this approach, the majority concluded that Patel should be allowed to enforce his claim.[117] He should not be barred from claiming his money only because the money he sought to recover was paid for an unlawful purpose. The enforcement of Patel's claim would not undermine the integrity of the judicial system.

The minority favoured retaining the orthodox rule. It instead espoused the application of a reliance test. According to that test, a claimant may not rely on one's illegal act to find a cause of action. But if the claimant can rely on matters other than the illegal act in support of its cause of action, the claimant may be entitled to a remedy. Thus, it was open to Patel to rely on a cause of action for restitution. Lord Sumption observed:

> 249. In one sense, the contract between these parties may be said to have been frustrated by the failure of the inside information to materialise, or to have resulted in a total failure of consideration because as a result the shares were never purchased. But that cannot be an adequate explanation of the reason why someone in Mr Patel's position may be entitled to restitution .... That concept permits the recovery of money paid even before (indeed, especially before) the time for performance has arrived, and therefore in many cases before the contract was frustrated or the question of failure of consideration could arise. The ground of restitution in these circumstances can only be that the contract was illegal and that the basis for the payment had failed.
>
> 250. Of course, in order to demonstrate that the basis for the payment had failed, Mr Patel must say what that basis was, which would necessarily disclose its illegality. In my opinion, the reason why the law should nevertheless allow restitution in such a case is that it does not offend the principle applicable to illegal contracts. That principle, as I have suggested above, is that the courts will not give effect to an illegal transaction

> or to a right derived from it. But restitution does not do that. It merely recognises the ineffectiveness of the transaction and gives effect to the ordinary legal consequences of that state of affairs. The effect is to put the parties in the position in which they would have been if they had never entered into the illegal transaction, which in the eyes of the law is the position which they should always have been in.

Patel v. Mirza has been followed in Hong Kong. In March 2023[118] the Hong Kong Court of Appeal preferred the 'range of factors' approach over the 'reliance' test. Singapore's Court of Appeal, in contrast, has so far rejected the 'range of factors'.[119] Civil law jurisdictions, however, may not be so amenable to a balancing approach. Take Japan as an example. Article 708 of the Civil Code of Japan unequivocally states:

> A person that has paid money or delivered thing for an obligation for an illegal cause may not demand the return of the money paid or thing delivered; provided, however, that this does not apply if the illegal cause existed solely in relation to the beneficiary.

The proviso to Article 708 will generally not apply to bribery, since in such cases there would be an illegal cause originating from the person bribing and the person bribed.

This brings one to the crucial question. Can the more nuanced approach favoured by the majority in *Patel v. Mirza* be transposed to international investment arbitration?

In relation to the *World Duty Free* scenario, it is submitted that the answer should be 'yes'. Rather than an 'all or nothing' approach to jurisdiction, an arbitral tribunal should instead balance all relevant factors to assess whether an investor should be entitled to a remedy in whole, in part, or not at all. The decisive question for the arbitral tribunal would be whether allowing a remedy, despite the investment having been initially obtained through bribery, would be just, fair and in the public interest. The range of factors which an arbitral tribunal might consider would include:

(1) The investment brought in by the investor;
(2) The economic impact on the investor of denying a remedy;
(3) The extent to which the investor has legitimately carried out and developed its investment after obtaining the same;
(4) The seriousness of the corruption involved;
(5) The positions of the public officials involved in the bribery and the extent to which (if at all) their conduct may be attributed to the state;
(6) The extent to which such public officials initiated and benefitted from the corruption;
(7) The present circumstances of such public officials and, especially, whether the state has made serious attempts to prosecute them;
(8) The measures implemented by the state to ensure that similar incidents do not recur in the future;
(9) The time that has elapsed since the corruption;
(10) Whether the state acted against the investor and the relevant public officials within a reasonable time of learning of their involvement in the corruption.

Adopting such an approach as a matter of international public policy may be criticised as giving rise to uncertainty. This would be in the sense that, corruption

having been found, it will not necessarily follow that an investor will be barred from a remedy. But it is submitted that this situation will be little different from what happens in disputes concerning fair and equitable treatment where a tribunal applies a proportionality approach.

The *Metal-Tech* scenario is less conducive to a 'range of factors' approach. That is because an investment will either be a covered one or not under an investment agreement. Depending on the precise wording of an investment agreement, if an investment is not covered, the tribunal will have no jurisdiction. This would be regardless of the merits of the investor's case evaluated from the viewpoint of a range of factors. In this scenario, it is submitted that arbitral tribunals should rely on a more robust analysis of the facts in assessing whether:

(1) The state has acted timeously to avoid an investment agreement or should be deemed to have waived the right to avoid; and
(2) The extent to which the knowledge of the bribed official should be attributed to the state.

The underlying notion is the prevention principle, namely, that a party should not be permitted to rely on its own wrong to benefit itself. The higher the bribed person's position in or connection to a state, the more likely it should be that a tribunal concludes that the state knew or ought to have known of the corruption at an early stage. In that case, the greater the likelihood of the tribunal finding that the state failed to act in a timely fashion to prevent the known corruption, so that the state must be deemed to have waived the right to avoid the investment transaction. On that basis, the tribunal would have jurisdiction and can then apply a 'range of factors' approach to fashion a proportionate remedy.

Within investment treaty law, the nuanced approach espoused here has recently been signalled in *Vladislav Kim and others v. Uzbekistan.*[120] In the case, corruption was alleged but was ultimately found not to have been established. Uzbekistan, however, also relied on allegations that, contrary to Article 12 of the Kazakhstan–Uzbekistan BIT, the investment had not been 'made in compliance with [Uzbekistan's] legislation'. It was suggested that from the beginning the investors had contravened provisions of Uzbekistan securities law, including through false disclosures and fraudulent concealments. The tribunal held that, in evaluating whether an alleged illegality has the consequence of ousting jurisdiction, a tribunal should be 'guided by the principle of proportionality'.[121] It had to 'balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation'.[122] The rationale for this was that '[t]he denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State'.[123] The balancing in *Vladislav Kim* is analogous to the 'range of factors' approach in the sense that whether the illegality of an investment has resulted in 'a compromise of a correspondingly significant interest of the Host State' is clearly one factor that a tribunal can take into account. But it need not be the only factor that a tribunal

considers when weighing a proportionate response to illegality, including bribery and corruption, in the making of an investment.

4.6 Conclusion

The fight against corruption remains a priority for policymakers, government authorities and lawyers globally in Asia. International law has been instrumental in encouraging states to ramp up their anti-corruption efforts. In Asia, unlike in most other continents, no comprehensive multilateral agreement on corruption exists, although the recently concluded (and increasingly important) CPTPP contains ambitious anti-corruption provisions.

International agreements on corruption require states to criminalise certain practices as corrupt. The crimes as defined in international agreements are not directly applicable to businesses and individuals. Instead, the corruption crimes identified in the international agreements need to be translated into the domestic law of each state. States vary in their domestic implementation of corruption crimes. This can be illustrated by comparing the treatment of facilitation payments across jurisdictions in Asia.

The international law on corruption has an unintended side-effect in the field of international investment arbitration. Host states can defend themselves against an arbitral tribunal's jurisdiction by alleging breaches of anti-corruption laws by foreign investors at the outset of their investment. To limit the abuse of this possibility, it is submitted that a more nuanced approach to the treatment of corruption in international investment law is warranted.

Notes

1. Asian jurisdictions differ considerably with respect to levels of real or perceived corruption. The Corruption Perception Index 2022 by Transparency International illustrates the disparity: while Bangladesh ranked 145 out of 180 countries, Singapore ranked 5 out of 180 (i.e., Singapore is the country with the fifth lowest level of perceived corruption globally).
2. OECD 2018.
3. Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa.
4. See OECD 1997, para. 19.
5. See OECD 1997, para. 20.
6. See Article 4.2 of the OECD Anti-Bribery Convention: 'Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.'.
7. Wendler 2022, p. 45.
8. OECD 1997, para. 7.
9. The exception is North Korea. See United Nations Office of Drugs and Crime (UNODC) 2021.
10. See Babu 2006, p. 6.

11. Wendler 2022, p. 49.
12. UNCAC Article 4.1.
13. UNCAC Article 4.2.
14. UNCAC imposes no binding obligation to criminalise passive bribery of foreign public officials.
15. Wendler 2022, p. 50.
16. IACAC Article VI.
17. Cf. Criminal Law Convention on Corruption, Articles 2 to 5.
18. These provisions of the Civil Law Convention on Corruption should be noted: Article 1 requires state parties to implement domestic legislation 'for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage'. Article 2 defines 'corruption' as 'requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof'. It is therefore unclear whether the convention catches facilitation payments. By Article 5 parties are obliged to legislate 'for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities'. But Article 6 provides that a state's domestic law should also enable compensation 'to be reduced or disallowed having regard to all the circumstances, if the plaintiff has by his or her own fault contributed to the damage or to its aggravation'. Article 7 obliges states to limit proceedings for the recovery of damages 'to be subject to a limitation period of not less than three years from the day the person who has suffered damage became aware or should reasonably have been aware, that damage has occurred or that an act of corruption has taken place, and of the identity of the responsible person'. Further, 'such proceedings shall not be commenced after the end of a limitation period of not less than ten years from the date of the act of corruption'. Under Article 8, a state party is required to 'provide in its internal law for any contract or clause of a contract providing for corruption to be null and void'.
19. Cf. AUC Article 4 ff.
20. Afghanistan, Australia, Azerbaijan, Bangladesh, Bhutan, Cambodia, the People's Republic of China, Cook Islands, Fiji Islands, Georgia, Hong Kong (China), India, Indonesia, Japan, Kazakhstan, Korea, Kyrgyz Republic, Macao (China), Malaysia, Mongolia, Nepal, New Zealand, Pakistan, Palau, Papa New Guinea, the Philippines, Samoa, Singapore, the Solomon Islands, Sri Lanka, Thailand, Timor-Leste, Vanuatu, and Vietnam (OECD n.d.).
21. ADB/OECD 1991.
22. Japan prefers to designate trade agreements as 'economic partnership agreements' (EPAs) rather than 'free trade agreements'. See further generally on Japan's FTAs and BITs, including provisions relevant to corruption, Chap. 11 in this volume.
23. Medalla et al. 2010.
24. JPEPA Article 89.
25. JPEPA Article 90.
26. JPEPA Article 95.
27. JPEPA Article 91.
28. Yan 2022, p. 141.
29. Article 7 of the Japan–Thailand EPA (2007): 'Each Party shall ensure that measures and efforts are undertaken to prevent and combat corruption of its public officials regarding matters covered by this Agreement in accordance with its laws and regulations.'.
30. Article 8 of the Japan–Indonesia EPA (2007): 'Each Party shall, in accordance with its laws and regulations, take appropriate measures to prevent and combat corruption and bribery regarding matters covered by this Agreement.'.
31. Article 7 of 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.'.

32. For the current signature status of UNCAC, see https://www.unodc.org/unodc/en/corruption/ratification-status.html. For the current status of the OECD Anti-Bribery Convention, see https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf. Both accessed 1 May 2023.
33. House of Commons International Trade Committee 2020, para. 57.
34. Mullen 2022.
35. The following countries have ratified RCEP (as of May 2023): Singapore, China, Japan, Brunei, Cambodia, Laos, Thailand, Vietnam, Australia, New Zealand, South Korea, Malaysia, Indonesia, and the Philippines. See https://www.dfat.gov.au/trade/agreements/in-force/rcep; accessed 1 May 2023.
36. See Bradsher and Swanson 2020: '[RCEP] has little impact on legal work, accounting or other services that cross borders, and does not venture far into the often-divisive issue of ensuring greater intellectual property protections. The RCEP also skirts broad issues like protecting independent labor unions and the environment and limiting government subsidies to state-owned enterprises'.
37. Cf. RCEP Chap. 10. Dymond et al. 2021. See Nottage and Jetin 2021.
38. Cf. RCEP Article 17.9.
39. See generally on the ratification of CPTPP, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership, accessed 1 May 2023.
40. See https://www.gov.uk/government/collections/the-uk-and-the-comprehensive-and-progressive-agreement-for-trans-pacific-partnershipcptpp, accessed 1 May 2023.
41. CPTPP contains chapters on financial services, telecommunications, electronic commerce, government procurement, competition policy, state-owned enterprises, intellectual property, labour and the environment.
42. Cf. CPTPP Article 9.18 ff. Some members have opted out bilaterally by side letters, notably New Zealand with a few states. See https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/#bookmark0, accessed 1 May 2023.
43. Cf. CPTPP Article 26.6.4.
44. Villarino 2020, p. 58.
45. Villarino 2020, p. 59.
46. But CPTPP Article 26.9.2 grants some discretion in enforcement. It reads: 'In accordance with the fundamental principles of its legal system, each Party retains the right for its law enforcement, prosecutorial and judicial authorities to exercise their discretion with respect to the enforcement of its anti-corruption laws. Each Party retains the right to take bona fide decisions with regard to the allocation of its resources.' See Note 8 to CPTPP Article 26.9.2: 'For greater certainty, the Parties recognise that individual cases or specific discretionary decisions related to the enforcement of anti-corruption laws are subject to each Party's own domestic laws and legal procedures.'.
47. Cf. CPTPP Article 26.12: 'No Party shall have recourse to dispute settlement under this Article or Chapter 28 (Dispute Settlement) for any matter arising under Article 26.9 (Application and Enforcement of Anti-Corruption Laws).' See further Villarino 2020, pp. 62 ff.
48. Lo 2017, p. 206.
49. See Cutler 2023. CPTPP members now have to figure out what to do about China.
50. See Wendler 2022, pp. 50 ff.
51. Clifford Chance 2023.
52. See Transparency International UK 2023.
53. Cf. Denolf 2008, p.251.
54. See Parliament of Australia Joint Standing Committee on Treaties 1998, para. 9.4; Follett 2015, p. 123.
55. Cf. Follett 2015, p. 123.
56. See Article 1.1.

57. See OECD 1997, para. 5: '"Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.'.
58. OECD 1997, para. 9.
59. Follett 2015, pp. 123 ff; Wendler 2022, p. 45; Denolf 2008, p. 250.
60. Follett 2015, p. 123.
61. OECD 2009, Article VI.
62. Ibid.
63. Denolf 2008, p. 250; Sandage 2014, p. 11; United Nations 2012, p. 3.
64. The position arguing for the illegality of facilitation payments under the UNCAC is described in Follett 2015, p. 124. However, it should be noted Follett does not share this position; see below.
65. Cf. Follett 2015, p. 124.
66. Follett 2015, p. 124; cf. also Nicholls 2005, p. 229.
67. United Nations Office of Drugs and Crime (UNODC) 2010, p. 172, fn. II, as cited in Follett 2015, p. 124.
68. Follett 2015, p. 124.
69. Bello and Villarino 2020, pp. 58 ff.
70. Follett 2015, p. 124.
71. Chance 2023, p. 11.
72. The precise wording of Schedule 1 Section 70.4.1 of the Australian Criminal Code Act 1995.
73. O'Neil 2019, p. 3.
74. O'Neil 2019, p. 3.
75. OECD Working Group on Bribery, p. 10.
76. Chance 2023, p. 11.
77. The following is according to Chance 2023, p. 11: 'the benefit to the official, member of State Legislative Assembly, member of Provincial Assembly or member of Municipal Assembly so as to induce such person to do or not to do any act, or to delay the doing of any act *contrary to one's own duty*, shall be imprisoned not out of five years or fined not out of ten thousand Baht, or both' (emphasis added).
78. Section 149 of the Thai Criminal Code states (unofficial translation): 'Whoever, being an official, member of the State legislative Assembly, member of the Changwat Assembly or member of the Municipal Assembly, wrongfully demands, accepts or agrees to accept for himself or the other person a property or any other benefit for exercising or not exercising any of his functions, *whether such exercise or non-exercise of his functions is wrongful or not*, shall be punished with imprisonment of five to twenty years or imprisonment for life, and fined of two thousand to forty thousand Baht, or death' (emphasis added).
79. *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006. The tribunal was composed of H.E. Judge Gilbert Guillaume (President), Hon. Andrew Rogers QC and V.V. Veeder QC.
80. *Word Duty Free v. Kenya*, para. 62.
81. *Word Duty Free v. Kenya*, para. 136.
82. *Word Duty Free v. Kenya*, paras. 70 ff.
83. Cf. *World Duty Free v. Kenya*, para. 6.
84. *World Duty Free v. Kenya*, paras. 138–157.
85. *Word Duty Free v. Kenya*, paras. 158–187.
86. *Word Duty Free v. Kenya*, para. 137.
87. *World Duty Free v. Kenya*, para. 157.
88. *World Duty Free v. Kenya*, para. 139.
89. *World Duty Free v. Kenya*, paras. 143–146.
90. *World Duty Free v. Kenya*, para. 183: 'In the Tribunal's view, the avoidance of the Agreement by Kenya was made unequivocally and timeously; and accordingly Lord Mustill's statement of general principle is here satisfied on the facts: Where a contract is voidable, the injured party must take positive action to set it aside … It is no legal bar to avoidance of the contract

that the innocent party may previously have committed a breach of that contract. Subject to the Claimant's several submissions based on waiver or affirmation, the Tribunal decides that Kenya validly avoided the Agreement under both English and Kenyan law.'.

91. *World Duty Free v. Kenya*, paras. 180–181:

    180. It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings. It is not therefore surprising that Mr. Ali feels strongly the unfairness of the legal case now advanced by Kenya.
    181. The answer, as regards public policy, is that the law protects not the litigating parties but the public; or in this case, the mass of taxpayers and other citizens making up one of the poorest countries in the world.

92. *World Duty Free v. Kenya*, para. 177.
93. On the attribution of responsibility to states, see Chap. 6 in this volume.
94. *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013. The tribunal was composed of Gabrielle Kaufmann-Kohler (President), John Townsend and Claus von Wobeser.
95. Agreement Between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments of 4 July 1994.
96. *Metal-Tech v. Uzbekistan*, para. 19.
97. *Metal-Tech v. Uzbekistan*, paras. 28–30.
98. *Metal-Tech v. Uzbekistan*, para. 37.
99. *Metal-Tech v. Uzbekistan*, para. 38.
100. *Metal-Tech v. Uzbekistan*, paras. 43–51.
101. *Metal-Tech v. Uzbekistan*, para. 55.
102. *Metal-Tech v. Uzbekistan*, paras. 197–227, 311–327.
103. Emphasis added.
104. Emphasis added.
105. For example, in some of Japan's treaties but not consistently, see Chap. 11 in this volume.
106. *Metal-Tech v. Uzbekistan*, para. 372. The Uzbekistan Criminal Code criminalises the receipt of a bribe by a public official (Article 210), the giving of bribe to a public official (Article 211) and acting as an intermediary to bribery (Article 212).
107. *Metal-Tech v. Uzbekistan*, paras. 372–373.
108. *Metal-Tech v. Uzbekistan*, paras. 372–373.
109. *Metal-Tech v. Uzbekistan*, paras. 242–243, 291–292.
110. *Metal-Tech v. Uzbekistan*, para. 389.
111. See Wendler 2022, p. 501, fn. 2867, citing a large number of commentators.
112. *Patel v. Mirza* [2016] UKSC 42.
113. *Patel v. Mirza*, para. 11.
114. *Holman v. Johnson* (1775) 1 Cowp 341, 343, cited in *Patel v. Mirza*, para. 1.
115. *Patel v. Mirza*, para. 120.
116. *Patel v. Mirza*, para. 107.
117. *Patel v. Mirza*, para. 121.
118. *Monat Investment Ltd v. All Person(s) in Occupation of Part of The Remaining Portion of Lot No. 591 in Mui Wo D.D. 4 No.16 Ma Po Tsuen, Mui Wo, Lantau Island & Anor* [2023] HKCA 479.

119. See *Ochroid Trading Limited and another v. Chua Siok Lui and another* [2018] SGCA 5, paras. 113–125.
120. *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017. The Tribunal was composed of David Caron (President), L. Yves Fortier KC and Toby Landau KC. See further Weeramantry and Packer 2023, pp. 442–445.
121. *Vladislav Kim v. Uzbekistan*, para. 396.
122. *Vladislav Kim v. Uzbekistan*, para. 396.
123. *Vladislav Kim v. Uzbekistan*, para. 396.

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Anselmo Reyes practises as an arbitrator. He is currently an international judge at the Singapore International Commercial Court and Guest Professor at Doshisha University (Kyoto). He was Professor of Legal Practice at Hong Kong University from October 2012 to September 2018. Before that, he was a judge of the Hong Kong High Court from 2003 to 2012, when he was in charge of the Construction and Arbitration List (2004–2008) and the Commercial and Admiralty Lists (2008–2012). He was Representative of the Hague Conference on Private International Law's Regional Office Asia Pacific from April 2013 to July 2017. He became an International Judge of the Singapore International Commercial Court in January 2015 and an Overseas Bencher of the Inner Temple in October 2015.

Till Haechler holds an MLaw degree from the University of Zurich and an LLM from the University of Hong Kong. He was a trainee at the Zurich office of Lenz & Staehelin and is a bar exam candidate at the Supreme Court of the Canton of Zurich.

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Chapter 5
Multi-Tiered International Anti-Corruption Cooperation in Asia: A Review of Treaties and Prospects

Yueming Yan and Tianyu Liu

Abstract Effective international cooperation is essential for combating the pervasive and far-reaching problem of transnational corruption. This chapter focuses on the anti-corruption commitments and cooperation among Asian countries in the context of international investment. It firstly examines the legal framework against corruption in Asia at both the international and regional levels, encompassing both 'hard law' and 'soft law' instruments. In addition, the chapter presents a comprehensive analysis of the anti-corruption provisions in international investment agreements concluded by Asian countries. The review of these agreements reveals that provisions of direct anti-corruption obligations imposed on investors are still elusive among Asian investment agreements, whereas provisions that demonstrate states' general commitments to combatting corruption are more common. The chapter highlights the importance of more nuanced treaty-making practices in addressing corruption, as well as the need to align commitments made under investment agreements with those of other international instruments aimed at tackling corruption.

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Y. Yan (✉)
Faculty of Law, Chinese University of Hong Kong, Hong Kong, China
e-mail: yuemingyan@cuhk.edu.hk
URL: https://www.law.cuhk.edu.hk/app/people/prof-yueming-yan/

T. Liu
Leiden University Law School, The Hague, Netherlands
e-mail: t.liu.4@umail.leidenuniv.nl
URL: https://www.linkedin.com/in/tianyuliu521/?originalSubdomain=cn

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5.1 Introduction

Addressing corruption is important in international investment as it erodes the economic and social fruits of investments. In the context of an increasingly intertwined global economy, the acknowledgement that it is inadequate to effectively regulate corruption on a purely national basis has encouraged states jointly to curtail corruption at the level of international investment law.[1]

By joining international anti-corruption treaties, such as the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OECD Anti-Bribery Convention), states have made commitments to prevent and eradicate corruption. Under the 2003 United Nations Convention Against Corruption (UNCAC), state parties have obligations to complete criminalisation of corrupt acts and implement quite detailed domestic measures. Additionally, international investment agreements (IIAs) are another important vehicle that can help solidify the growing consensus about the illegality of corruption in international investment. Some states have incorporated anti-corruption provisions (ACPs) in their newly signed IIAs, including free trade agreements (FTAs), bilateral investment treaties (BITs), economic partnership agreements (EPAs) and other treaty structures, to encourage more responsible and 'clean' international investments and fulfil their international obligations under the international anti-corruption conventions.[2]

The chapter shows how the existing international anti-corruption instruments and IIAs concluded among Asian countries[3] address corruption issues. As the form and language of these emerging ACPs in the IIAs present diversity, the chapter empirically builds a typology of the observed ACPs, which can shed light on the approaches espoused by Asian countries to address corruption concerns through their IIAs. Also, it discusses whether this multi-tiered legal framework can effectively resolve corruption-related problems in international investment.

5.2 International Legal Framework Against Corruption in Asia

Asian countries have made anti-corruption commitments at various levels. This section focuses on the international legal framework against corruption and examines the commitments made by countries and regions in Asia, both in 'hard law' and 'soft law' instruments.

There is a lack of binding, regional-based conventions on anti-corruption in Asia. The UNCAC is the most significant international treaty that many Asian countries should comply with. This chapter emphasizes the importance of properly implementing the international obligations and commitments outlined in the UNCAC. Failure to do so may result in international litigation proceedings and responsibilities,

as demonstrated by the recent *Equatorial Guinea v. France* case before the International Court of Justice (ICJ) as mentioned below,[4] although states must separately consent to ICJ jurisdiction.

In addition, regional initiatives such as the Association of Southeast Asian Nations (ASEAN, discussed below) have established anti-corruption working groups, offices and other similar mechanisms, and have developed various guidelines and standards for preventing and deterring corruption.[5] However, these instruments remain non-binding in nature. In this chapter we argue that Asian countries should take proactive measures to further enhance these non-binding commitments and ensure that their actions align with these commitments. Additionally, promoting the 'hardening' of these soft law commitments is necessary to strengthen anti-corruption efforts in the region.

5.2.1 International Conventions

The international community did not prioritise combating and deterring corruption, particularly transnational corruption, until the late twentieth and early twenty-first centuries. The earliest transnational efforts against corruption can be traced back to the adoption of a regional anti-corruption treaty initiated by member states of the Organization of American States (OAS), that is, the Inter-American Convention against Corruption. This convention was adopted on 29 March 1996 and entered into force one year later. Following this, several anti-corruption conventions, either on a regional basis or on a global basis, began to emerge (see Table 5.1).

As shown in Table 5.1, the majority of current multilateral anti-corruption treaties have regional reach. The UNCAC, on the other hand, is the only global anti-corruption convention with legally binding effects that extend to almost every corner of the globe. The number of state signatories is currently at its peak of 189, which was reached on 18 November 2021 after being open to signatories since 2003. In Asia, a regional anti-corruption convention effective among Asian countries or jurisdictions is lacking, but almost all Asian countries have ratified the UNCAC (see Table 5.2). Consequently, the UNCAC is the most important 'hard law' regarding anti-corruption conventions that Asian countries are obliged to abide by.

5.2.1.1 Preventive Measures and Criminalisation

Ratifying or accessing the UNCAC has been a crucial aspect of international cooperation. By becoming a party to the UNCAC, states are required to implement numerous preventive measures against corruption that target both public sectors and private entities. These measures include developing anti-corruption policies (Article 5), establishing anti-corruption agencies (Article 6), promoting transparency and integrity of public sectors (Articles 7–8), and enhancing accounting and auditing standards in the private sectors (Article 9).

Table 5.1 International and regional anti-corruption conventions

Signed/Adopted	Effective date	Parties (as of March 2023)
1. Inter-American Convention against Corruption		
29 March 1996	6 March 1997	33
2. OECD Anti-Bribery Convention		
17 December 1997	15 February 1999	44
3. Council of Europe Criminal Law Convention on Corruption[6]		
27 January 1999	1 July 2002	47[7]
4. Council of Europe Civil Law Convention on Corruption		
4 November 1999	1 November 2003	35
5. Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union		
26 May 1997	28 September 2005	26
6. United Nations Convention against Corruption		
31 October 2003	14 December 2005	189
7. African Union Convention on Prevention and Combating Corruption		
1 July 2003	5 August 2006	48

Moreover, the UNCAC mandates that state parties criminalise a broad range of corrupt acts, such as bribery of national and foreign public officials and officials of public international organisations (Articles 15–16), bribery in the private sector (Article 21), embezzlement (Articles 17, 22), trading in influence (Article 18), abuse of functions (Article 19) and illicit enrichment (Article 20). Additionally, measures deliberately carried out in support of corruption, such as money laundering (Article 23), concealment (Article 24) and obstruction of justice (Article 25), must be criminalised as offences under domestic laws.

In comparison to other regional anti-corruption conventions, the UNCAC's emphasis on establishing preventive measures is a groundbreaking initiative aimed at eradicating corruption at its roots. Meanwhile, the criminalisation of a wide range of corrupt acts under the UNCAC has the potential to encourage the development of robust domestic anti-corruption laws and regulations.

5.2.1.2 Obligations of Cooperation

Due to the inherent concealment feature of corrupt activities and the rising incidence of transnational corruption in international business, concrete measures of international cooperation are vital against transnational corruption. The UNCAC recognises this as one of its three purposes and explicitly states it in the convention's first article.

> Article 1. Statement of purpose
>
> The purposes of this Convention are:
>
> …

Table 5.2 Ratification status of the UNCAC in Asia

Country	Signature	Ratification, Acceptance, Approval, Accession (a), Succession (d)
Sri Lanka	15 Mar 2004	31 Mar 2004
Mongolia	29 Apr 2005	11 Jan 2006
China, People's Republic of	10 Dec 2003	13 Jan 2006
Indonesia	18 Dec 2003	19 Sep 2006
Philippines	9 Dec 2003	8 Nov 2006
Maldives		22 Mar 2007 (a)
Cambodia		5 Sep 2007 (a)
Bangladesh		27 Dec 2007 (a)
Korea, Republic of	10 Dec 2003	27 Mar 2008
Malaysia	9 Dec 2003	24 Sep 2008
Brunei Darussalam	11 Dec 2003	2 Dec 2008
Timor-Leste, Democratic, Republic of	10 Dec 2003	27 Mar 2009
Vietnam	10 Dec 2003	19 Aug 2009
Lao People's Democratic Republic	10 Dec 2003	25 Sep 2009
Singapore	11 Nov 2005	06 Nov 2009
Thailand	9 Dec 2003	1 Mar 2011
Nepal	10 Dec 2003	31 Mar 2011
India	9 Dec 2005	9 May 2011
Myanmar	2 Dec 2005	20 Dec 2012
Bhutan	15 Sep 2005	21 Sep 2016
Japan	9 Dec 2003	11 Jul 2017 (A)

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery.

To fulfil this objective, the UNCAC includes a specific chapter (Chapter IV) entitled 'International Cooperation', which covers cooperation in areas such as extradition, transfer of sentenced persons, mutual legal assistance in investigations, prosecution, judicial proceedings, transfer of criminal proceedings and law enforcement. Additionally, the UNCAC has separate provisions on cooperation in other chapters, such as Article 37 (cooperation with law enforcement authorities), Article 38 (cooperation between national authorities) and Article 39 (cooperation between national authorities and the private sector).

However, it should be noted that states are only obligated to cooperate in criminal matters. For civil and administrative matters and issues related to private sector entities, states are only *encouraged* to cooperate. This provision is considered weak since cooperation with private sectors, such as banks, is essential in identifying corrupt transactions during investigation and prosecution proceedings.[8]

It is crucial for Asian countries to take their obligations under the UNCAC seriously, particularly those related to cooperation. While obligations of criminalisation within domestic legal frameworks are equally important, failure to cooperate may have significant transnational effects. Non-compliance of obligations in the UNCAC could further lead to international litigation proceedings and state responsibilities. The recent case of Equatorial Guinea's initiation of proceedings before the ICJ against France is an example of this. Equatorial Guinea claimed that France failed to comply with the cooperation obligation on asset recovery as outlined in the UNCAC.[9] Arguably, this case is the first to be raised under the compromissory clause in UNCAC Article 66 (allowing a state to request arbitration, and otherwise approach the ICJ, unless the other state has made a reservation). This case will have far-reaching implications on how member states should collaborate with each other to repair harm caused by corruption.[10]

5.2.2 *Other International Instruments*

Apart from the UNCAC, there are numerous supplementary non-binding instruments, guidelines and standards related to anti-corruption that are applicable to, or can serve as references for, states in Asia. These documents have been adopted under various frameworks or initiatives and cover different jurisdictions within Asia.

5.2.2.1 OECD

The OECD has taken significant steps towards combating corruption through its adoption of the OECD Anti-Bribery Convention,[11] as well as a range of recommendations focused on various aspects of corruption deterrence and integrity promotion.[12] To monitor the implementation and enforcement of these instruments, the OECD has also established the OECD Working Group on Bribery.[13]

A few Asian nations, notably Korea and Japan (plus Israel and Turkey, on a wider definition of Asia), as OECD member states, have ratified the OECD Anti-Bribery Convention and adhered to all the related documents on anti-corruption. Meanwhile, some non-member Asian countries have committed to one or more of the OECD recommendations on anti-corruption and integrity. For instance, Jordan and Kazakhstan are adherents to the OECD Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct (2022). This recommendation seeks to establish clear guidelines and a fair and competitive environment for business regarding their obligations to perform due diligence for responsible business conduct.[14] India, Timor-Leste and Thailand have joined the second part of the OECD Declaration on the Fight against Foreign Bribery—Towards a New Era of Enforcement (2016).[15] These countries have therefore committed to fully implementing their international obligations regarding foreign bribery and corruption, in line with the OECD's anti-corruption efforts.

The OECD has, jointly with the Asian Development Bank (ADB),[16] further established the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific in 1999. This initiative serves as a crucial platform where policymakers, practitioners, experts and private sector representatives can share their knowledge and experiences in promoting anti-corruption and business integrity.[17] This initiative has involved 34 countries in Asia and the Pacific, including Asian jurisdictions such as China and Hong Kong, India, Indonesia, Japan, the Philippines, Singapore, Thailand and Viet Nam.

To help governments in the region implement anti-corruption measures voluntarily, this initiative has adopted the ADB/OECD Anti-Corruption Action Plan, establishing a comprehensive set of principles and standards towards police reform.[18] The initiative is vital for Asian countries to collaborate and comply with their UNCAC obligations, as it aims to effectively implement the international standards outlined in the UNCAC through capacity building, mutual assistance and regional cooperation.[19]

Additionally, countries such as Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Turkmenistan and Uzbekistan have also participated in the OECD Anti-Corruption Network (ACN) for Eastern Europe and Central Asia. The OECD/ACN serves as a platform for promoting anti-corruption activities, sharing information, developing best practices and coordinating donors, and operates through various means such as general meetings, conferences, sub-regional initiatives and thematic projects.[20]

5.2.2.2 G20

The G20, an influential group of the world's largest economies including China, India, Indonesia, Japan, Korea and Turkey, has taken steps to combat corruption through a series of anti-corruption instruments. These countries have made a strong commitment to tackle corruption within their own jurisdictions and through international cooperation. In 2010, the G20 established the Anti-Corruption Working Group, which regularly releases Anti-Corruption Action Plans to guide anti-corruption efforts.[21] The latest of these plans is the G20 Anti-Corruption Action Plan 2022–2024, which emphasises the importance of practical cooperation among countries, particularly in relation to enforcing anti-corruption laws.[22]

Since 2009, G20 leaders have made commitments against corruption in various aspects, with a focus on criminalising bribery through domestic legislation, strengthening international cooperation against corruption, explicitly referencing the UNCAC and/or the OECD Anti-Bribery Convention, calling for the denial of safe havens for corruption, and involving the participation of multiple stakeholders. Table 5.3 indicates the main coverage of the G20 Leaders' Declarations.

Further analysis of the G20 anti-corruption commitments reveals several noteworthy observations. Firstly, despite the G20 recognising the need to tackle corruption from multiple angles, it is important to acknowledge that all of the anti-corruption policies and commitments outlined in these declarations remain non-binding. This raises questions about the actual impact of these commitments in combating corruption.

Secondly, while some of the G20 commitments overlap with existing universal anti-corruption legal frameworks such as the UNCAC and OECD Anti-Bribery Convention, others represent a good complement to these frameworks. The 2021 G20 Rome Leaders' Declaration, for instance, recognises the need to fight against 'any new and sophisticated forms of corruption',[23] which is an important acknowledgement of the evolving nature of corrupt activities. Additionally, the G20 has recognised the interplay between corruption and other issues, such as gender (2019 Declaration),[24] wildlife and natural resources (2017 Declaration),[25] and human rights (2016 Declaration).[26] However, while these acknowledgements are important, concrete and effective, measures to prevent bribery and corruption in these areas are still missing.

Thirdly, it is worth noting the G20's references to the UNCAC and the OECD Anti-Bribery Convention in their efforts to combat transnational corruption. For instance, the 2020 Declaration placed emphasis on the need for domestic legislation and other relevant measures to align with Article 16 of the UNCAC, which addresses bribery of foreign public officials and officials of public international organisations. This recognition of the existence of cross-border corruption highlights the importance of international cooperation in the fight against corruption. Moreover, the G20's acknowledgment of the UNCAC and OECD Anti-Bribery Convention demonstrates their commitment to building on the existing legal frameworks to combat corruption and ensure a level playing field for businesses operating in different countries.

Table 5.3 Anti-corruption commitments in G20 declarations

Year of declaration	Domestic legislation	International cooperation	Refer to UNCAC	Refer to OECD antibribery convention	Call for denial of safe haven for corruption	Involvement of relevant stakeholders
2009			✓	✓		
2010 (Toronto)		✓	✓			
2010 (Seoul)						
2011	✓	✓				
2012	✓	✓	✓	Engage with the OECD Working Group on Bribery 'on a voluntary basis'	✓	✓
2013	Commitment to ensure the independence of the judiciary and enforce legislation to protect whistleblowers	✓	✓	✓		
2014		✓			✓	
2015		✓			✓	
2016		✓	✓	Also refer to 'other applicable international conventions'		
2017	2017Commit to organize public administrations to be more resilient	✓	✓			Recognise the linkages between corruption and wildlife, sports and natural resources sectors

(continued)

Table 5.3 (continued)

Year of declaration	Domestic legislation	International cooperation	Refer to UNCAC	Refer to OECD antibribery convention	Call for denial of safe haven for corruption	Involvement of relevant stakeholders
2018	✓	✓	✓	✓		
2019	✓	✓	✓	✓	✓	Recognise and work on the linkages between corruption and gender
2020	✓	✓	Emphasise enforcing foreign bribery legislation in line with Art.16 of the UNCAC	✓		✓
2021	Also commit to fight 'any new and sophisticated forms of corruption'	✓	✓	✓	✓	✓
2022	Recognise the important role of auditing, public participation and anti-corruption education	✓	✓	✓	✓	✓

5.2.2.3 ASEAN

As a significant intergovernmental organisation in Asia, ASEAN has made considerable efforts to promote anti-corruption measures. Although there is no binding, hard law, anti-corruption agreement that applies to all ten member states, there are several instruments that have stressed the importance of combating corruption from various aspects. The ASEAN Political-Security Community Blueprint 2025 is a prime example of this, highlighting the commitment to 'instil[ling] the culture of integrity and anti-corruption and mainstream the principles thereof into the policies and practices of the ASEAN Community'.[27]

Moreover, the ASEAN Blueprint 2025 emphasises the implementation of international cooperation in accordance with the UNCAC, and the need to enhance regional collaboration on anti-corruption, as well as to work at the national level through appropriate agencies or organisations. The ASEAN Blueprint 2025 also recognises the crucial role of financial intelligence units in preventing and combating corruption, calling for increased cooperation among these units in the collection, analysis and dissemination of information regarding potential money laundering. The Blueprint's focus on international cooperation and the role of financial intelligence units underscores ASEAN's commitment to combating corruption and promoting transparency in the region.

The Memorandum of Understanding (MoU) on Cooperation for Preventing and Combating Corruption (2004) is another crucial instrument that deserves attention. It lays out two key objectives: first, to promote the establishment and strengthening of collaborative efforts among ASEAN member states to prevent and combat corruption; and second, to enhance capacity and institutional building in anti-corruption measures.[28] The MoU serves as a framework for ASEAN member states to cooperate in the fight against corruption, providing a platform for the exchange of information and best practices, as well as capacity building and technical assistance. By working together through this MoU, ASEAN member states can develop more effective strategies to prevent and combat corruption, ultimately contributing to the promotion of good governance and sustainable development in the region.

ASEAN has consistently reaffirmed its commitment to combating corruption on numerous occasions, including at the Eighth ASEAN–US Summit[29] and the East Asia Summit.[30] The East Asia Summit Leaders' Declaration on Anti-Money Laundering and Countering the Finance of Terrorism,[31] as well as the ASEAN–China Strategic Partnership Vision 2030,[32] have also emphasised the importance of anti-corruption efforts. While ASEAN's continuing support for anti-corruption efforts is commendable, crucially again these commitments and references remain in the realm of abstract and non-binding soft law, which lacks the necessary teeth to ensure effective implementation and enforcement. Without tangible, concrete measures to back up these statements, they may remain mere lip service, and the fight against corruption may continue to face significant challenges in the ASEAN region.

5.2.2.4 Belt and Road Initiative

The Belt and Road Initiative (BRI) is a major economic strategy developed by China since 2013, which has significant implications for Asia. Although there are few instruments in place, the Beijing Initiative for the Clean Silk Road, issued at the Second Belt and Road Forum for International Cooperation in April 2019, is one instrument for dealing with corruption.[33] The Beijing Initiative calls for stronger cooperation towards a 'Clean Silk Road', in line with the spirit of the UNCAC. It proposes several measures, including enhancing the transparency of government information, strengthening the supervision and administration of Belt and Road cooperation projects, preventing and controlling corruption risks, developing codes of conduct and resisting business bribery. Furthermore, it emphasises the need to strengthen the exchange of personnel, information and experience among relevant anti-corruption agencies to combat corruption effectively.[34]

The BRI has, for the first time, recognised the importance of transparency and integrity in addressing corruption and bribery through robust legal systems.[35] However, the Beijing Initiative, which touches on some anti-corruption aspects, is again a soft law instrument that does not impose significant obligations on countries participating in the BRI. Additionally, it has been pointed out that many BRI partner countries lack the regulatory capacity to combat corruption, particularly on large projects where there is an unrestricted flow of money, sometimes back to China.[36]

The United Nations Office on Drugs and Crime (UNODC) has taken a proactive approach to address corruption concerns in the BRI through its project 'Fostering Sustainable Development by Supporting the Implementation of UNCAC in Countries along the Silk Road Economic Belt'. Countries such as Armenia, Azerbaijan, China, Georgia, Iran, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Turkey and Uzbekistan have joined this initiative.[37] The project aims to establish an anti-corruption network to facilitate international cooperation and knowledge sharing in preventing and combating corruption in international investment projects.[38] To this end, two regional workshops have been conducted under this project, which has delved into practical approaches to prevent corruption, such as corruption risk assessment and corruption proofing of legislation.[39] While this initiative is relatively new, more tailored anti-corruption policies are expected to be developed, taking into account the unique features of the BRI.

5.3 Anti-Corruption Movements in International Investment Agreements

IIAs with ACPs constitute a vehicle that solidifies the international consensus on the illegality of corruption in international investment and the need for prevention. The forms, uses of language and potential effects of emerging ACPs in IIAs present diversity. The allocation of the anti-corruption onus by ACPs also varies. While

some provisions implicate the legal consequences of the corrupt act by investors, some focus on the efforts of states. The objective of this section is to explore and demonstrate different categories of ACP-making practices within the region of Asia.

5.3.1 Collecting ACPs

The United Nations Conference on Trade and Development (UNCTAD) IIA Mapping Project indicates that, globally, there have been 45 out of 2584 mapped IIAs that expressly mention the term 'corruption' in at least one of their clauses.[40] Among these 45, ten of the treaties demonstrating the existing treaty-making practices within Asia are concluded by Japan with other Asian states.[41] These Japan-related IIAs do express states' commitments to combat corruption in investment activities; however, their practical impact seems unclear from the abstract language of the provisions. To take a closer look, the 'Measures Against Corruption' articles of the Japan-related IIAs all share common features in their structures and wordings, providing abstract commitments of contracting states. Concrete measures for states or guidelines for tribunals are absent. ACPs of this type are analysed later in this chapter.

However, the UNCTAD database mapping is outdated. Some unmapped, more recent, intra-Asian IIAs have incorporated provisions with explicit references to corruption, to be discussed next. Based on a new pool of Asian IIAs, this chapter builds a typology of ACPs and discusses the characteristics of each type of ACP in the typology.[42]

The new pool of IIAs focused on in this chapter identifies 89 IIAs, signed since 2012, in total. This draws a significant line because it occurred when a series of crises in various aspects of societies worldwide, such as food security, energy, finance and the environment, were pushing and reshaping global development policies. As a result, a new generation of investment policies emerged with an important feature of pursuing responsible investment.[43] In other related areas, such as human rights protection, the IIAs concluded after the adoption of the Sustainable Development Goals Agenda by the United Nations General Assembly in 2015 are regarded as 'new IIAs'.[44] Moreover, a turning point from around 2010 has also been evidenced in the IIA rulemaking of some individual states. As an effort to preserve more regulatory space and promote the health and welfare of the society under the impact of international investment, the US Model BIT published in 2012 confirms the trend of espousing the beneficial, societal functions of international investment in host states.[45] In sum, the investigation of IIAs concluded between or among Asian countries since 2012 aims to show whether and how the IIA rulemaking in the region has responded to the call for promoting more responsible investment by the means of regulating corruption-tainted investment activities.

According to the UNCTAD database, since 2012, there are 89 newly signed IIAs that have been concluded between or among Asian countries. Among them, the full texts of 70 IIAs are currently available for the study of this chapter, which exhaustively searched the IIAs in the pool for any references to 'corruption' in the

texts. It identified 16 ACPs. To clarify, 15 IIAs in the pool have incorporated ACPs; one IIA, India–Kyrgyzstan BIT (2019), contains two types of ACP.

5.3.2 Variations in ACPs

There are four main types of ACP addressing corruption in international investment. These provisions focus on different actors—states or foreign investors—in international investment activities. They also have varied levels of clarity with respect to the measures for host states or to the consequences of any violations by foreign investors or public officials of host states. In general, it seems that the recent, relevant IIA-making practices in Asia have brought more varied types of ACP and more nuances in content.

The first category of ACPs is the 'Direct Investor Obligation' Provision ('Category A'). This type of ACP, in a direct fashion, could be ideally effective in regulating investors' behaviour and facilitating arbitral tribunals' reasonings if any breach of obligations arises. However, in the region, states have not expressed their agreement in IIAs to officially impose any direct obligation of anti-corruption on investors.[46]

In line with the efforts to tilt the imbalanced IIA regimes by limiting protection accorded to foreign investors, some contracting states include provisions that guide tribunals to refuse to provide an investor with treaty protection if there exists the investor's corrupt misconduct. Under these ACPs, the investor's access to dispute settlement mechanisms provided by the IIAs could be precluded. This second type of ACP—namely the 'Preclusion of Access to Arbitration' Provision ('Category B')—can be identified, but it remains very rare in the stock of the intra-Asian IIAs.

Another type of rulemaking practice echoing the call for anti-corruption measures in international investment is the addition of statements of contracting states' commitments to enforcing anti-corruption measures. Unlike the Direct Investor Obligation Provision that attempts to influence the substances of the rights-and-obligations relationship between investors and host states, these statements affirm states' obligation of anti-corruption. There exist various forms of statements made by states globally.[47] Statements that present contracting states' general commitments in abstract language are prevalent in Asia. The Statement of State Commitments Provisions ('Category C') constitutes the third type.

The fourth approach of ACP-making is to express states' anti-corruption concerns by incorporating a Corporate Social Responsibility (CSR) Provision ('Category D'). This normally encourages foreign investors to adopt internationally acknowledged corporate social responsibility principles, though in fact it does not create binding international obligations on the investors.[48] In this chapter we observe that, in Asia, only one CSR provision in an IIA directly refers to 'corruption'.

Table 5.4 presents the number of identified ACPs in each category.

In a nutshell, in concluding the observed IIAs, states in the region have used different approaches for addressing corruption. Among the approaches, the provisions reaffirming states' commitments are the most widely adopted. By contrast,

Table 5.4 A typology of ACPs in Asian IIAs

Types of ACP	Number of ACPs
A. Direct investor obligation	0
B. Preclusion of access to arbitration	2
C. State commitments	13
D. CSR provisions	1
Total	16

other regimes such as investors' obligation and the preclusion of access to investor–state dispute settlement (ISDS) mechanisms are not or scarcely espoused in the current rulemaking practices. States in Asia are cautious about directly imposing an anti-corruption obligation on investors or inviting the 'threat' of refusing remedies.

5.3.3 Category A: Direct Investor Obligation of Anti-Corruption

The first group of ACPs is aimed at enhancing the compliance of foreign investors with anti-corruption norms by directly imposing the obligation on foreign investors. The potential emergence of IIA provisions including investor obligations is of particular significance because it suggests an inclusion of investors' obligation and accountability in ISDS at the normative level and may influence the reasoning of arbitral tribunals in cases involving corrupt allegations raised by host states.[49] It is also expected that IIAs with specific investor obligation provisions could level up the investor's accountability to the plane of international investment law so as to strike a desired balance of the rights-and-obligations relationship between investors and host states.[50]

However, the investor obligation provisions deviate from the traditional IIA regimes which primarily focus on investor protection. It could be painstaking for some states to 'reset' their international investment relations with their contracting partners. In Asia, states have not incorporated ACPs containing the investor obligation of anti-corruption into their IIAs.

With the provision imposing an obligation on foreign investors, some investment agreement models are designed to encourage more responsible IIA rulemaking. For instance, the Model Agreement 2005 issued by the International Institute for Sustainable Development (IISD Model Agreement) stipulates a model provision that directly imposes an obligation of anti-corruption on foreign investors. Article 13 of the IISD Model Agreement provides:

> 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.[51]

This is a strict and comprehensive stipulation of the investor obligation of anti-corruption. A clear value is that the provision incorporates an explicit investor obligation, providing that investors shall not conduct corrupt acts or be complicit in any corrupt activities. Moreover, the period of monitoring provided by the provision is extensive—from the establishment of an investment to the stages afterward. Additionally, after this general expression of the obligation of anti-corruption, the IISD Model further indicates the scope of acts that may constitute corruption. This model provision represents a strict regulatory approach.

What is disappointing is that, up to now, states in the region of Asia have not concluded any IIAs that include any provision directly imposing anti-corruption obligations on investors. This observation about the ACP-making is actually in line with the efforts addressing challenges in other aspects of the reform of IIA regimes. The criticism has been made that the new-generation IIAs still do not incorporate public policy concerns in their substantive provisions. The consideration of public interests has been merely expressed in the forms of exceptions, recommendations and state commitments rather than imposing obligations on states or investors.[52] Nevertheless, as discussed in the following sections, a promising point is that states have started to use other regimes expressed in IIAs to bring in legal consequences for investors' misconduct.

5.3.4 Category B: Preclusion of Access to Arbitration

The carve-out approach is an apparatus used by states to preserve regulatory space so as to strike the balance between investor protection and effective regulation.[53] It is possible to observe provisions addressing corruption issues through limiting foreign investors' access to the ISDS system. ACPs possibly precluding investors' access to dispute settlement regimes represent an approach adopted by a minority of states, at least, in the region of Asia.

Incorporating ACPs stating that wrongdoers of corruption concerning the investment at issue are not entitled to the dispute settlement mechanisms under the IIA is one of the tools adopted by some states in the new generation of IIAs. Regardless of the debate concerning whether the preclusion-of-access approach could overlook the accountability on both the demand and supply sides of a corrupt act, it still represents an innovative step towards imposing an anti-corruption onus on investors. At least, this type of ACP brings in a legal consequence for the investor who committed corruption in relation to the investment.

For instance, the Comprehensive Economic Trade Agreement (CETA) between Canada and the European Union (EU) explicitly adopts the preclusion-of-access approach. Article 8.18(3) of the CETA provides: 'for greater certainty, an investor

may not submit a claim under the dispute resolution section if the investment has been made through corruption'.[54]

Among the 70 intra-Asian IIAs concluded since 2012, very few have adopted ACPs with this feature. An Asian example adopting CETA's method is the Indonesia–Korea Comprehensive Economic Partnership Agreement (CEPA) (2020). In the Indonesia–Korea CEPA, Article 7.19, paragraph 3 provides:

> No claim may be brought under this article, regarding investor-state dispute settlement, in relation to an investment that has been established through illegal conduct including fraudulent misrepresentation, concealment or corruption.[55]

Accordingly, an investor will be barred from resorting to the ISDS mechanism if a corrupt act of the investor tainting the investment during its establishment has been established. This kind of ACP explicitly clarifies the possible legal consequence of a corrupt act by a foreign investor.

In addition to the rulemaking practice between Indonesia and Korea, India's Model BIT[56] and its recent treaty-making practice are worth mentioning as well. In the Indian Model BIT (2015), the scope of ISDS specifically excludes claims in relation to investments that have been tainted by corruption.[57] The ambition of the Indian Model BIT has been reflected in one of the latest BITs signed between India and Kyrgyzstan. Some point out that this series of India's treaty-making practices, to some extent, has been dedicated to carving out regulatory space for the host states by making fewer or weaker commitments to investor protection.[58] Specifically, Article 13.4 of the India–Kyrgyzstan BIT (2019) provides:

> [a]n investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.[59]

Several points of this sort of ACP should be highlighted. First, all the above provisions from different IIAs merely cover corrupt acts that occur during the 'establishment' of the investment. In other words, the corrupt acts of an investor that happen during the operational stages of an investment will not preclude the investor's access to the dispute settlement mechanism.

Second, the practical potential of this type of ACP remains unclear. For states to trigger a possible (counter-)claim under an IIA before an investment arbitral tribunal, the right of the state to initiate a claim and the treaty obligation of the investor, which is allegedly breached, are both required. A provision as such, precluding an investor's claim to the dispute settlement mechanism, does not provide any explicit indication as to whether a claim for the state or an obligation of the investor exists.

Third, the provisions do not contain the criteria regarding the extent to which an investor who has committed corruption could lead to the preclusion. Tribunals may desire a more detailed set of rules to make the decision. The lacuna of the effectiveness of this type of ACP requires further interpretation.

Last, but not least, this category of ACP raises the concern that the effects of the preclusion of access to arbitration could 'over-balance' the right-and-obligation relationship between investors and host states—arguably depriving a foreign investor of

the right to arbitration.[60] This could be an issue especially in the context of corruption, where the accountability could lie on both the demand and supply sides of a corrupt act.[61] Moreover, this approach could deviate from the original desire to lift up corruption problems in international investment to the level of international investment law. If an investor is barred from resorting to an investment tribunal because of his corrupt act, the remaining issues concerning the investment would be downgraded to the domestic level. Closing the 'door' might not necessarily be the correct approach to settling issues.

5.3.5 Category C: State Commitments

Another prevalent type of ACP-making in the intra-Asian IIAs is to incorporate contracting parties' commitments to fight against corruption. Nevertheless, the states that have adopted this approach are not diversified. Japan, the primary user of this type of ACP, has inserted these 'Measures Against Corruption' provisions—demonstrating an abstract commitment of state parties to anti-corruption—in IIAs with other Asian countries or contracting parties globally. The structure and language of all these ACPs are basically the same, as mentioned above. The Japan–Cambodia BIT (2007), representing a new generation of its IIAs,[62] is one of the earliest and typical, providing:

> 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.[63]

This type of provision constitutes one of the attempts in an embryonic stage by states to address corruption issues at the international level. Although the obligation of states has been reiterated, it seems that resolution of relevant corruption issues is shifted to the domestic level and relies on state parties' domestic regulation and enforcement. However, such IIAs could be ambiguous for investment tribunals tackling corruption issues.[64] To be specific, how an arbitrator should decide the consequences of corruption largely remains unclear and contested under the IIAs with such general provisions. As this sort of ACP, containing weak-form state commitments, is one of the major modes of IIA-making, one can reasonably see that there are few ACPs with real teeth upon which regulation can be effective.

In the Regional Comprehensive Economic Partnership (RCEP) (2020)[65] and the Indonesia–Singapore BIT (2018),[66] states also address the significance of anti-corruption in the promotion of international investment and emphasise the onus on the contracting parties to take measures against corruption. The practices, inserting states' general commitments to anti-corruption in investment agreements, reflect one aspect of the performance of the states' international obligations of anti-corruption. However, it is regrettable that IIA rulemaking still prefers ambiguity or silence, largely leaving discretionary decision-making to arbitrators. Up to now, the applicability or effects of these abstract states' statements have not been examined by arbitral

tribunals. It is highly preferable that states should include ACPs with unambiguous standards or concert measures for host states,[67] which has not yet been met in the stock of the young intra-Asian IIAs.

5.3.6 Category D: CSR Provisions

Inserting CSR provisions has been adopted by some states, which is comparatively prevalent among the IIAs in this study's pool. In general, adding investors' CSR to IIA regimes is a distinctive aspect of a growing number of new-generation IIAs.[68] Normally, the CSR provisions are also drafted in a general manner. For example, investors are merely 'encouraged' to 'incorporate into their internal policies those internationally recognised standards, guidelines, and principles of corporate social responsibility'.[69] Thus, the unanswered question is whether anti-corruption is part of 'those internationally recognised standards, guidelines, and principles'. What is more, because of the abstract language of such provisions, it is unclear whether an investor's anti-corruption obligation has been woven into the CSR provisions. A debate is ongoing concerning whether the reference to informal standards and principles could contribute to the imposition of investor obligations at the level of international investment law.[70] However, some believe that all these CSR provisions, often emphasising their voluntary nature, do not introduce any binding obligations on foreign investors to the IIA regimes.[71]

It is true that addressing anti-corruption concerns by the CSR provision is not a common type of IIA-making practice. Some contracting states of the intra-Asia IIAs do explicitly bridge the abstract CSR 'principles' with anti-corruption norms, making it clear that anti-corruption is one of the social responsibilities that a foreign investor should take on. For example, the Indian Model BIT (2015) inserted a CSR provision with some clarifications. In this Model BIT, one can see that the language of the non-binding content is even stricter than the language in other CSR provisions drafted in an abstract way. It provides:

> [I]nvestors and their enterprises … shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.[72]

Moreover, the Indian Model BIT (2015) has influenced the substance of India's recent IIA-making practices. Among the intra-Asian IIAs, there is one IIA—the India–Kyrgyzstan BIT (2019)[73]—that has directly mentioned investor's social responsibility in relation to corruption in its CSR provision. There are two distinctions between the India-style CSR provision and the CSR provisions with broad language. First, given that investors are 'obliged' to endeavour in the Indian Model BIT, it seems that India and its contracting party may intend to 'encourage' investors to incorporate CSR standards as strongly as possible. Second, the Indian Model

BIT and the recent BIT between India and Kyrgyzstan have eradicated the vagueness remaining in other abstract CSR provisions by specifically explaining that the contents of the 'principles' include anti-corruption norms.

In the BIT signed by Singapore with its contracting party outside the region of Asia, it seems that the contracting states can take a 'bifurcated' approach of incorporating a CSR provision, which manifests that states have different requirements of CSR on investors. In the Nigeria–Singapore BIT (2016), Nigeria specifically provides that the principle of CSR includes the principles addressing anti-corruption issues that stand in parallel with issues such as the environment, human rights and public health.[74] In contrast, regarding CSR, Singapore makes an independent statement that adopts the abstract approach without clarifying what the principles that have been endorsed or are supported by Singapore include.

All in all, the 2015 Indian Model BIT attempts to modify the asymmetry of traditional IIA regimes, that is, the investment treaties are always silent on investors' obligations, by requiring investors to voluntarily work on addressing anti-corruption issues. Although the 2015 Indian Model BIT has been an important milestone reflecting treaty reforms, this provision is still in a form of an endeavour clause. In this sense, the provision itself cannot be enforced and does not provide tribunals with any guidelines to deal with problems in regard to investors' relevant corrupt acts. Also, the absence of explicits investor obligations does not help remove the obstacle that the host state lacks grounds for bringing counter-claims targeting an investor's corrupt wrongdoings and holding the investor accountable.

Last, but not least, because the scope of the terms in a typical CSR provision, such as 'standards' and 'statements of principle', seems open-ended, it is possible for contracting states to specify the concrete contents of such 'standards' and 'principle'. In practice, some IIAs provide that investors are responsible for complying with domestic laws or may specifically oblige investors to comply with certain standard of practices. For example, under Article 24 of the Morocco–Nigeria BIT (2016), investors are specifically required to comply with environmental impact reporting practices. Nevertheless, regarding issues of anti-corruption, the IIAs in the pool or the observed CSR provisions have not incorporated specific anti-corruption social responsibility or relevant standards of conduct. Given the example of the Morocco–Nigeria BIT, it would be a promising IIA rulemaking practice for states to specify the CSR provision with detailed anti-corruption standards.

5.4 New Opportunities for Anti-Corruption Cooperation for States in Asia

Despite the current difficult circumstances for corruption in Asia, it is important to acknowledge the persistent efforts made by states regionally over the years to combat this issue. Through the implementation of domestic laws and policies, as well as international and regional cooperation, significant progress has been made

in legislation and policy decisions surrounding anti-corruption, leading to positive effects on corruption prevention overall. However, it is essential to recognise that there is still a long way to go. There are many challenges to overcome, including the lack of regulatory capacity in some countries and the complex nature of corruption, which often involves multiple actors and intricate networks. To build on the progress that has been made, there is a need for continued commitment, innovation and collaboration between states and other relevant stakeholders. Specifically, this chapter has recommended that Asian countries reinforce the legal framework of anti-corruption in the region and insert more commitments to corruption deterrence and prevention into IIAs.

5.4.1 Reinforcing the Legal Framework of Anti-Corruption

Although it is essential for Asian states to ratify and accede to the UNCAC as an initial step towards combatting corruption, the current implementation of this treaty leaves much to be desired. While the UNCAC provides for the criminalisation of numerous corruption offences, such as bribery of foreign public officials and officials of public international organisations, the enforcement and sanctioning of these offences remain inadequate in many states. This is a crucial issue, as effective investigation and punishment of corrupt activities are necessary to deter such behaviour and promote accountability.

To fully comply with the UNCAC, Asian states should expand their definition of public officials to include any person holding a legislative, executive, administrative or judicial office. Unfortunately, many jurisdictions in Asia fall short of this requirement in their current legislation. Additionally, states should consider accelerating enactment of legislation against the bribery of foreign public officials and impose liability, including criminal, civil or administrative sanctions on legal persons (not just individuals) for domestic and foreign bribery. Few states have fully carried out these obligations, leaving significant room for improvement in their anti-corruption efforts. By taking decisive action in these areas, Asian states can demonstrate their commitment to combatting corruption and promoting transparency and integrity in their societies.[75]

Several Asian countries have established specific anti-corruption legislation, either as independent statutes or integrated into their criminal or civil laws. For example, Bangladesh, Bhutan, Cambodia, India, Indonesia, Mongolia, Nepal, the Philippines, Sri Lanka and Vietnam have enacted separate anti-corruption decrees, while China, Japan, Kazakhstan, the Kyrgyz Republic, Pakistan and Thailand have included anti-corruption provisions within their existing legal frameworks.[76] Nonetheless, to enhance anti-corruption efforts in the region, it is necessary to further promote the adoption of international anti-corruption standards into domestic laws, as recommended by the UNCAC. This would facilitate a more comprehensive and unified approach to tackling corruption across different jurisdictions and provide a stronger legal basis for holding corrupt individuals and entities accountable.

In addition, Asian states could explore the possibility of concluding a regional anti-corruption convention to further strengthen their anti-corruption efforts. Such a convention could 'harden' some of the region's non-binding commitments while taking into account the varying legal regimes and practices of each state. By establishing tailored standards that are not lower than those outlined in the UNCAC, a regional convention could provide a framework for increased regional cooperation and facilitate the sharing of best practices in anti-corruption efforts. Moreover, a regional treaty could establish a special mechanism to monitor and evaluate the implementation of its provisions, helping to ensure that the agreed-upon standards are effectively enforced. Through this approach, Asian states could build upon the progress that has already been made and work towards a future where corruption is no longer a major impediment to sustainable economic and social development in the region.

5.4.2 Inserting Anti-Corruption Objectives into IIAs

At present, only a small number of existing IIAs signed between or among Asian states have incorporated ACPs. Direct anti-corruption obligations on investors in the course of obtaining and performing investments are essential to anti-corruption movements in international investment. However, among these ACPs, very few directly focus on investors as the suppliers of corruption, or impose concrete obligations. Although still controversial, investor obligations are likely to hold private wrongdoers accountable and effectively influence investor behaviour. Future IIAs could regulate corruption in international investment by inserting provisions directly imposing anti-corruption obligations on investors.

As one type of ACP-making, some IIAs incorporate CSR provisions intending to encourage more responsible investment. However, only a few observed CSR provisions specifically connect corporate social responsibility with anti-corruption. The language of many CSR provisions is often abstract, so the practical value of which and how tribunals can apply them in cases is unclear. In addition to reaffirming the importance of curbing corruption and states' commitments that have been made in the international anti-corruption conventions, more concrete measures that states can resort to at a domestic level should be specified in the IIAs. Compared to the anti-corruption clauses with abstract language and obscure contents, this can promote the effectiveness of anti-corruption efforts and further encourage states to perform their international anti-corruption obligations under those conventions.

In this study's pool of ACPs, some have the effect that a corrupt act relating to the investment can preclude an investor's access to dispute settlement mechanisms. These provisions with the effect of precluding an investor's access to the ISDS system is strict and may effectively deter corrupt behaviour of private entities. Nevertheless, only two ACPs of this type have been observed in the pool. Even if this approach is likely to be effective, it is noteworthy that there exists a concern about whether completely blocking the investor's access to dispute resolution mechanisms, pushing

the investor to resort to the host state's domestic system, is the right solution to resolve corruption matters in international investment. Moreover, countries should be cautious about the practical effect of such ACPs, which is likely to jeopardise investors' confidence in the investment environment.

Lastly, some Asian countries, such as Japan, insert ACPs announcing state parties' commitments to combat corruption in international investment. These commitments could contain more details about measures for states to take or the consequences of a breach of the commitments. Overall, this type of ACP focuses on states' efforts rather than the activities of foreign investors. For coherence and predictability of investment tribunals' decisions, such ACPs announcing states' international obligations or commitments should be more specific and concrete as to the burdens on states, by, for instance, specifically referring to the UNCAC as the widely acknowledged international anti-corruption instrument, and containing quite detailed anti-corruption measures for state parties.

5.5 Conclusions

Corruption poses significant challenges to various aspects of society, and its presence in Asia is a cause for concern. Nevertheless, countries in the region have made efforts to combat corruption by acceding to international anti-corruption conventions like the UNCAC and the ADB-OECD Anti-Corruption Initiative, and implementing these instruments' obligations and commitments.

However, serious challenges remain in the fight against corruption and to develop innovative and effective solutions to address them. For the greater effectiveness of anti-corruption efforts, it is crucial to address corruption in all its aspects, including international investment activities. States can strengthen their legal frameworks by criminalising a wide range of corruption offences, including bribery of foreign public officials and officials of public international organisations, and by investigating, enforcing and sanctioning these crimes. Asian countries should also consider 'hardening' some of the non-binding commitments in international anti-corruption conventions to strengthen their anti-corruption efforts.

It is also recommended that ACPs be included in future IIAs. In addition, states should incorporate more ACPs with 'real teeth', such as ACPs providing investors' anti-corruption obligations or ACPs with carve-out effects. As explained above, the direct investor anti-corruption obligation expressed in IIAs does not seem appealing to some states and requires a significant breakthrough in the traditional IIA framework, under which investors only enjoy rights but no obligations. Also, the ACPs adopting the carve-out approach, which deprives investors of access to ISDS, lack interpretations and applications in practice. Another more favourable approach is to affirm states' international obligations against anti-corruption. Going beyond merely reiterating abstract commitments by states, this type of ACP should include more detailed requirements and references to international instruments with relevant specific requirements imposed on states.

With more and better ACPs in IIAs, arbitral tribunals will become more likely to play a role in adjudicating cases with corruption issues based on IIAs. For example, investors' anti-corruption obligations may give rise to states' counter-claims concerning relevant corrupt acts of investors. Additionally, investors' 'best-endeavours obligation', as stipulated in some CSR provisions, can constitute another ground for tribunals to consider the consequences of an investor's corrupt misconduct. Through tackling corruption issues at the international level, tribunals can create more possibilities of creating coherent and predictable jurisprudence regarding corruption-tainted investment cases. The value of practically applying the ACPs before tribunals not only lies in ensuring wrongdoers 'pay for' their misconducts but also in encouraging more responsible investment into the future.

All in all, combating corruption is an arduous task, especially in Asia. It requires unwavering political will, zero tolerance for corrupt practices, and increased bilateral and regional cooperation. By taking the steps recommended above, states can move closer towards achieving their anti-corruption goals and promoting a more transparent and accountable society.

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Notes

1. Llamzon 2014.
2. Ranjan 2022; Yan 2022a.
3. This chapter adopts the M49 Standard of the United Nations to decide the scope of Asian jurisdictions. See United Nations n.d.
4. ICJ 2022.
5. ASEAN MoU 2004; G20 2021.
6. To supplement the Criminal Law Convention on Corruption, the Council of Europe adopted the 'Additional Protocol to the Criminal Law Convention on Corruption' on 15 March 2003. This Protocol entered into force on 1 February 2005 and has 46 parties as of March 2023. See Council of Europe n.d.-a.
7. A denunciation was made by the Russian Federation on 20 March 2023, which will become effective on 1 July 2023. See Council of Europe n.d.-b.
8. Wouters et al. 2013.
9. ICJ 2022.
10. Rose 2022. For instance, the final decision of the ICJ is expected to address the application of UNCAC Article 57 in practice.
11. It is worth mentioning that while the UNCAC emphasises the criminalisation of the solicitation or acceptance of a bribery by a foreign public official, the OECD Anti-Bribery Convention is silent on this aspect. But such absence does not mean that 'solicitation or acceptance of a bribery by a foreign public official' was accepted or legal in domestic laws. On the contrary, 189 state parties to the UNCAC shall establish the solicitation or acceptance of a bribery by a foreign public official as a criminal offence in accordance with Article16(2) of the UNCAC.
12. See such instruments as the 2021 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (Working Group on Bribery in International Business Transactions, adopted on 26 November 2009 and amended on

26 November 2021), *2019 Recommendation of the Council on Guidelines on Anti-Corruption and Integrity in State-Owned Enterprise*, and the *2019 Recommendation of the Council on Bribery and Officially Supported Export Credits*. For a full list of the OECD's treaties, recommendations, declarations and decisions on anti-corruption and integrity, see e.g., OECD n.d.-a.

13. OECD n.d.-b.
14. OECD n.d.-c.
15. OECD n.d.-d.
16. Notably, the ADB has established the Office of Anticorruption and Integrity to mitigate the risks of corruption, conduct investigations into instances of corruption, and promote ethical behaviour among all ADB stakeholders. The Office has regularly published reports on its investigation and enforcement activities and its prevention and compliance advisory foundation, highlighting its leading role in ADB's integrity risk management initiatives. See ADB n.d. A noteworthy point is that ADB's Strategy 2030 mandates the adoption of anti-corruption measures across all of its projects and programmes, as well as providing support for government-led efforts to eradicate corruption. The strategy also aims to promote the provision of public services free from corruption, thus enhancing accountability for the services delivered. See ADB 2018.
17. OECD n.d.-e.
18. OECD n.d.-f.
19. OECD n.d.-g.
20. OECD n.d.-h.
21. UNODC n.d.-a.
22. Australia, China, India, Indonesia, Japan and South Korea are members of the G20. See G20 2016a.
23. G20 2021.
24. G20 2019.
25. G20 2017.
26. G20 2016b.
27. ASEAN 2016.
28. ASEAN MoU 2004.
29. ASEAN 2020.
30. ASEAN 2019.
31. ASEAN 2017.
32. ASEAN 2018.
33. *China* Daily 2019.
34. *China* Daily 2019.
35. It is also proposed that instead of using 'Green Silk Road' or 'Clean Silk Road', a more comprehensive notion—'Sustainable Silk Road'—should be implemented so as to cover many social values in relation to the environment, labour, corporate social responsibility and anti-corruption. See Yan 2022b.
36. Tower and Staats 2020.
37. UNODC n.d.-b.
38. UNODC n.d.-c.
39. UNODC n.d.-d.
40. UNCTAD n.d.-a.
41. Ibid. Specifically, the mapped intra-Asian investment treaties containing anti-corruption provisions are Japan–Oman BIT (2015), Japan–Mongolia EPA (2015), Japan–Kazakhstan BIT (2014), Japan–Myanmar BIT (2013), Iraq–Japan BIT (2012), Japan–Kuwait BIT (2012), India–Japan EPA (2011), Japan–Uzbekistan BIT (2008), Japan–Lao People's Democratic Republic BIT (2008) and Cambodia–Japan BIT (2007) (sequenced according to 'Date of Signature'). See also Chap. 11 in this volume.
42. While focusing on the practices in Asian agreements, the typology established in this chapter builds on the criteria and standards clarified in Yan's article on an empirical study of ACPs in investment agreements. See Yan 2020.

43. UNCTAD 2013.
44. OHCHR 2022.
45. Sornarajah 2012.
46. See Sect. 5.3.3 below.
47. Yan 2021.
48. Wettstein 2020.
49. Yan 2020; Marcoux 2019.
50. Ho 2019; Ranjan 2021.
51. IISD 2005.
52. Fauchald 2021.
53. UNCTAD 2015 (World Investment Report) explains that the 'carve-out' aspect is one of the important tools for IIA reforms, which aims at circumscribing (in IIA clauses or reservations) the scope of the treaty, scope of protection investments or investors, scope of application of key clauses and the scope of access to ISDS.
54. CETA Article 8.18, para. 3.
55. Indonesia–Korea CEPA (2020) Article 7.19(3)(c).
56. See respectively Chaps. 9, 10 and 14 in this volume.
57. Indian Model BIT (2015) Article 13.4.
58. Raju 2016.
59. India–Kyrgyzstan BIT (signed 14 June 2019).
60. Yan 2021.
61. See Chaps. 4 and 7 in this volume.
62. See Chap. 11 in this volume.
63. Japan–Cambodia BIT (2007) Article 10.
64. Llamzon 2014.
65. RCEP Article 17.9 para. 1.
66. Indonesia–Singapore BIT (2018) Article 13 para. 1.
67. Llamzon 2014; Yan 2021.
68. UNCTAD 2022.
69. Indonesia–Singapore BIT (2018) Article 12.
70. See generally Marcoux 2021 and Ishikawa 2022 (reviewed in Nottage 2023).
71. Shelton 2000.
72. Indian Model BIT (2015) Article 12 ('Corporate Social Responsibility').
73. India–Kyrgyzstan BIT (2019) Article 12.
74. Nigeria–Singapore BIT (2016) Article 11, para. 2.
75. ADB-OECD 2010, pp. 12–13.
76. ADB-OECD n.d.

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Yueming Yan is Assistant Professor at the Faculty of Law, Chinese University of Hong Kong (CUHK). Her research areas cover international economic law, sustainable development, China's law and empirical legal studies. She has published in the Journal of International Economic Law and the Asian Journal of WTO & International Health Law and Policy. Before joining CUHK Law, she was Visiting Assistant Professor at Singapore Management University Yong Pung How School of Law. Yueming is currently serving as Co-Chair of the Asia–Pacific Interest Group of the American Society of International Law. Yueming received her PhD from McGill University.

Tianyu Liu obtained her LLB degree with honours from Tsinghua University School of Law. She obtained her LLM with the Global Leaders Scholarship at Duke University School of Law, where she was a board member of the International Law Society. She has been interned at law firms specialising in dispute resolution and international arbitration and worked as a research assistant at Singapore International Dispute Resolution Academy. She has many interests in public international law and is reading an advanced LLM in International Dispute Settlement and Arbitration at Leiden University in The Hague. Her research currently concerns investor–state arbitration and investment treaties.

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Chapter 6
Corruption in International Investment Arbitration

Michael Hwang and Aloysius Chang

Abstract Corruption takes on several forms, including bribery, trading in influence and facilitation payments, with some forms facing universal condemnation but not others. The topic of corruption and its many forms is gaining increasing importance in the field of investor–state dispute settlement, where three broad categories of issues are relevant: evidentiary issues, attribution of responsibility and legal consequences. As corruption is notoriously difficult to prove, many unique legal issues arise with regard to the evidence required to prove the relevant allegations. Even where there is evidence of the alleged corruption at hand, there is the added complexity of the need to establish whether the relevant act is attributable to the party alleged to have committed it—particularly host states. Once corruption has been proven and properly attributed, the legal consequences of that finding of fact must be determined, which may differ depending on various factors, including the extent to which the parties were complicit in the corruption and the nature of the corruption.

6.1 Introduction

The topic of corruption is gaining increasing importance in the field of investor–state dispute settlement (ISDS), which has been facing intense scrutiny and criticism with regard to its role in international crime and corruption, whether perceived or otherwise.[1] While allegations of corruption throw up difficult factual and legal issues, the emergent trend in ISDS is that corruption allegations are almost never determinative of the outcome, with very few cases thus far having made express findings of corruption that had an impact on the ultimate outcome of the case.[2] However, corruption allegations are being alleged with increasing frequency and often with preclusive effect,[3] with around 30 awards involving allegations of corruption being rendered

M. Hwang (✉)
Michael Hwang Chambers LLC, Singapore
e-mail: michael@mhwang.com
URL: https://www.mhwang.com/

A. Chang
Independent Practitioner, Singapore

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since 2010,[4] and some recent cases have even featured high level corruption scandals at the heart of the dispute.[5] This makes it crucial for investors and host states alike to be familiar with the contours of corruption issues in ISDS. This chapter therefore seeks to provide a concise snapshot of the potential issues that both investors and host states may face when either raising or being confronted with an allegation of corruption.

6.2 The Meaning of Corruption

Before getting to the discussion proper, it is necessary to set out the meaning of 'corruption' and its most common instance, 'bribery'. Corruption is derived from the Latin word *corrumpere*, meaning 'to break', and encompasses all situations where 'agents and public officers break the confidence entrusted to them'.[6] It is defined in the *Oxford English Dictionary* as the 'perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, esp. in a state, public corporation, etc.'. 'Bribe' is defined as 'to influence corruptly, by a reward or consideration, the action of (a person) to pervert the judgment or corrupt the conduct by a gift'.[7] These definitions have been described as correctly emphasising 'the essence of corruption in its legal sense'.[8]

International consensus on a broad definition of both public and private sector corruption can be found in Articles 15 (bribery of national public officials), 16 (bribery of foreign public officials and officials of public international organisations) and 21 (bribery of the private sector) of the UN Convention Against Corruption (UNCAC, open for signature in 2003). These definitions are materially similar to the corresponding provisions of major international and national anti-corruption regimes, such as the Council of Europe Criminal Law Convention on Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[9] (OECD Convention, 1999) and the United States' Foreign Corrupt Practices Act 1977 (FCPA).[10] In short, in the context of *public* sector corruption (which is the relevant form of corruption in investor–state arbitration), there is consensus that: (i) corruption by a bribe *payer* is the act of intentionally promising, 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;[11] while (ii) corruption by a bribe *recipient* is the act of intentional 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.[12]

Other forms of corruption include 'trading in influence', which involves a person having 'real or supposed influence' over public bodies or officials, and trading the 'abuse' of such influence (as opposed to the payment of bribes) in return for an 'undue advantage' from a person seeking this influence.[13] Another form of corruption is extortion, which involves a situation in which a private party is compelled to pay an

official to be treated fairly (as opposed to 'better than fair' treatment), because the official's capacity to withhold a service or benefit otherwise required by law exceeds the private party's capacity to sustain the loss of that service or benefit.[14] The most common form of extortion is that of facilitation payments (aka 'speed' or 'grease' payments), which should be noted as not facing universal condemnation, in that such payments are condemned in some legal regimes,[15] but not in others.[16]

6.3 Corruption in the Investor–State Relationship

Allegations of corruption in the investor–state relationship usually throw up difficult factual and legal issues that the tribunal must resolve. In general, where corruption allegations are afoot, three broad categories of issues will arise:

(a) *Evidentiary Issues*: whether a tribunal may conduct its own investigations into *prima facie* suggestions of corruption, and what the applicable burden and standard of proof are.
(b) *Attribution of Responsibility*: whether the corrupt act in question may be attributable to the party that allegedly committed it.
(c) *Legal Consequences*: what legal consequences will flow from a finding of corruption, where corruption is raised either as a defence by the host state or as a ground for a claim by the investor, or where the corruption at hand is jointly attributable to both parties.

6.3.1 Evidentiary Issues

A party who seeks to prove corruption generally faces an uphill task, as corruption is 'notoriously difficult to prove'.[17] The most common form of corruption in investment treaty disputes tends to be bribery, which is perpetrated by parties who have gone out of their way to avoid identification or detection.[18] There is typically little or no direct physical or documentary evidence of corruption,[19] and any independent evidence necessary to corroborate a party's allegations of corruption will have to come from the officials or politicians that have been bribed, which is highly unlikely in the face of criminal liability in their home countries.[20] Further, the complainant must not only establish the alleged improper conduct, but also a causal link to the relevant investment in the sense that such improper conduct had contributed to obtaining (or not obtaining) a right or benefit related to the investment.[21]

These difficulties are exacerbated by the nature of the arbitral process, as arbitral tribunals do not have the same subpoena and enforcement powers of a national court to compel the production of evidence.[22] This is especially acute where the corruption alleged involves a third-party intermediary who is not a party to the arbitration. The typical complainant is therefore compelled to rely mostly on the strength of its

witnesses' oral testimony, which may have little to recommend itself over the wrong-doers' evidence, or on circumstantial evidence. The inordinate difficulties faced by complainants in proving corruption naturally raise questions about: (a) which parties should be charged with the burden of proving corruption; and (b) what is the proper evidentiary standard that must be applied in ascertaining whether there was any corruption.

Even where neither party advances allegations of corruption, there are also evidentiary issues that raise broader questions on the role of the arbitral tribunal in the fight against transnational corruption. One issue in particular is whether there ought to be some form of proactivity on the part of the arbitral tribunal where the evidence discloses a *prima facie* suggestion of corruption.

6.3.1.1 Investigations by the Tribunal

Parties in international arbitration are generally nervous of raising the issue of corruption, or leading evidence that the arbitral tribunal may reasonably construe as 'red flags' of corruption, due to the possible mutuality of wrongdoing in corruption. It may then be up to the arbitral tribunal to independently raise the issue of corruption when the signs are too obvious to ignore.

Arbitrators are incentivised, and may indeed be obliged, to initiate *sua sponte* investigations into *prima facie* suggestions of corruption, because turning a blind eye to corruption may lead to any eventual award being unenforceable as well as the eroding of the integrity of the institution of international arbitration.[23] National courts have come to a similar conclusion by holding that an arbitral tribunal's duty to investigate is a proactive one and arises not only where there are allegations of corruption in the parties' dispute, but also where the evidence in the case indicates possible corruption.[24] As corrupt dealings by one or both parties would often have a dispositive effect on the enforceability of the claims submitted to the arbitral tribunal (e.g., where the concession was obtained through bribery), an investigation into *prima facie* suggestions of corruption would generally be *relevant* to the resolution of the parties' dispute and would therefore not violate the principle of *ultra petita*.[25] However, this does not mean that an arbitral tribunal is entitled to launch into a completely independent investigation of its own;[26] rather, when faced with a stench of corruption that is too pungent to ignore, the arbitral tribunal should make appropriate inquiries, and allow (or even direct) parties to define the parameters of such an inquiry and then present the case for and against a specific finding of corruption.[27]

The practice of arbitral tribunals has thus far been inconsistent. Some tribunals have preferred a more hands-off approach, preferring instead to allow the adversarial process to take its course absent some compelling indication of corruption.[28] Others have taken a more inquisitorial stance, ranging from addressing corruption allegations that the parties have decided to not rely upon in their own pleadings,[29] to issuing procedural orders *propio motu* for the purpose of obtaining additional information in relation to the suspected corruption at hand.[30]

It is however important to note that there are inherent limits to an arbitral tribunal's power to initiate investigations, such as the inability to directly compel the giving of evidence.[31] Arbitrators may prefer to instead find other, more indirect ways of dealing with the corruption factor. For example, where a particular argument rests on an assumption that corrupt activities were performed, the arbitrators may highlight that to the parties and suggest to them to amend their pleadings accordingly. This would then bring the issues of corruption squarely before the arbitral tribunal, obviating the need for a *sua sponte* investigation.[32]

6.3.1.2 Burden of Proof

It is a prevailing principle in the adjudication of international disputes that each party bears the burden of proving the facts on which it relies (*actori incumbit probatio*).[33] Therefore, when corruption is pleaded as a defence in ISDS, the burden is on the host state to prove the alleged corruption. Correspondingly, when corrupt solicitation and/or extortion is pleaded by investors, the burden is on the investors to prove the alleged corrupt activities.[34]

The more controversial issue is whether it would be appropriate, in certain instances, to reverse the burden of proof (i.e., requiring a party to disprove its involvement in corrupt activities) upon a *prima facie* showing of corruption (e.g., through 'red flag' evidence).[35] The main justifications for such a reversal of the burden of proof are: (i) the high difficulty in proving corruption in international arbitration due to its inherently clandestine and complex nature[36] vis-à-vis the relative ease by which a truly innocent party can produce countervailing evidence;[37] and (ii) the arbitral tribunal's lack of the same subpoena and enforcement powers of a national court to compel the production of evidence.[38]

Such direct burden-shifting has some support in international commercial arbitration, albeit with much caution and the need for special circumstances.[39] In ISDS, tribunals have recognised that burden shifting may be warranted in certain circumstances.[40] In the corruption context, some tribunals have requested that the investor (and not the host state alleging corruption) prove that it obtained the investment legally,[41] while others have applied the *actori incumbit probatio* principle flexibly[42] or determined on the basis of the evidence before it whether corruption had been established with reasonable certainty without resorting to rules of burden of proof.[43]

However, such reversal of the burden of proof has also been met with considerable criticism on the basis of its incompatibility with principles of natural justice and due process, and the risk of a slippery slope leading to a similar reversal for other issues for which proof is difficult to obtain.[44] The rule that a party must prove the facts on which it wishes to rely may be too important to be derogated from, as it is intrinsically tied to the integrity of the fact-finding process in international arbitration.[45] The answer to the evidentiary problems in proving corruption may lie more in the realm of the *quality* of evidence required to prove corruption instead, to which we shall now turn.

6.3.1.3 Standard of Proof

The standard of proof is concerned with the threshold of evidence necessary to establish a certain fact, contention or proposition, and is assessed not just on the party who bears the burden of proof, but rather on the overall accumulated evidence put forward by one or both parties.[46] The standard of proof in international arbitration is often assumed[47] to be on a balance of probabilities (i.e., more likely than not) or its civil law counterpart of '*intime conviction*' ('inner conviction').[48]

In cases dealing with corruption issues, however, there is a prevailing arbitral practice of subjecting complainants to a higher standard of proof that appears to approximate the 'beyond reasonable doubt' standard in criminal law.[49] This practice appears to mirror the standard of proof utilised in national law where serious allegations of wrongdoing are involved in civil proceedings, such as bribery or fraud,[50] though this has been doubted in recent national jurisprudence.[51] In ISDS, the tension between the two approaches is brought to the fore by the fact that there has been no consistent approach with regard to the standard of proof for serious allegations of wrongdoing,[52] with some tribunals even taking the view that such evidentiary issues are open questions under the *lex causae* of international law, thereby leaving tribunals with 'relative freedom in determining the standard necessary to sustain a determination of corruption'.[53] The application of too strict a standard of proof may result in certain risks, such as the award being subsequently set aside by a court or annulment tribunal applying a different standard.[54]

The better approach is to simply have one single standard of proof in ISDS, that of a balance of probabilities, considering that the arbitral tribunal is dealing with the consequences of corruption on a matter of civil liability, not criminal liability, and that a criminal standard of proof would in most cases be impossible to satisfy, which would then be exploited by the corrupt person to avoid liability.[55] The latter point is especially relevant in disputes relating to 'intermediary' or 'agency' agreements (e.g., payment of 'facilitation fees') due to the fact that procurement of the necessary evidence will have to come from the officials or politicians whom the intermediary has bribed, which is unlikely to occur in the face of potential prosecution.[56]

The balance of probabilities standard, however, should be understood and applied in a nuanced fashion in conjunction with the *quality* of the evidence required to cross the threshold. This means taking into account the particular circumstances of each case, including the seriousness of the allegations of corruption and their legal consequences if proven,[57] the inherent likelihood or unlikelihood of corruption in the specific circumstances of the case, and the intrinsic difficulty of proving corruption. Simply put, the more inherently unlikely a certain alleged fact is, such as seeing a lion as opposed to a dog in a park, or high-level corruption across multiple government agencies, the more cogent the evidence would need to be in order to satisfy the arbitral tribunal that the fact is indeed made out on a balance of probabilities.[58] However, this will have to be balanced against the 'intrinsically difficult nature' of demonstrating the clandestine activities of the corrupt.[59] Such a flexible understanding of the balance of probabilities approach will enable arbitral tribunals to better match the evidentiary process with the ingenuity of those that conceal corruption. It has been observed that,

in practice, what matters more than the standard of proof in relation to allegations of corruption is the tribunal's approach to the assessment of the evidence.[60]

The flexibility of the balance of probabilities standard, combined with the wide discretion given to arbitral tribunals to determine the admissibility, relevance, materiality and weight of the evidence adduced,[61] therefore allow an arbitral tribunal to consider indirect or circumstantial evidence, as well as draw adverse inferences, in determining whether the allegations of corruption have been proven to its satisfaction. ISDS tribunals are not unfamiliar with the use of circumstantial evidence.[62] Examples include excessively high consultation fees paid to an intermediary along with little to no proof of any consultation services being provided in return, or remuneration assessment being based on the value of the contract awarded to the principal as opposed to the quantity or quality of services rendered.[63]

The presence of 'red flags' (i.e., potential indicia of corruption), such as those set out in the US Department of Justice's *A Resource Guide to the US Foreign Corrupt Practices Act* (2012), the Woolf Committee's *Report on BAE Systems* (2008), TRACE International's *Due Diligence Guidebook* (2010) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011), may also prove useful.[64] Where necessary, expert testimony assessing the various indicia of corruption may be adduced to assist the tribunal in better determining their evidential value.[65]

In exercising its broad discretion in evaluating evidence, a tribunal may also draw adverse inferences from: (i) an impugned party's failure without sufficient justification to provide evidence requested by the tribunal;[66] and (ii) a party's failure or inability to adduce counter evidence where *prima facie* evidence of its involvement in corruption has been produced.[67] However, as silence can often be motivated by innocent reasons, adverse inferences should be drawn only if it is the natural inference from the facts, and only the most cogent or compelling inferences ought to be given dispositive effect.

6.3.1.4 Indirect Evidence of Corruption from Other Proceedings

Corruption allegations are generally not made in a vacuum. There are rare cases where a party freely admits the facts that establish corruption during the arbitral proceedings.[68] Oftentimes, however, evidence of the corrupt act in question may be indirect and derived from other legal or similar proceedings that are already afoot, such as national court decisions,[69] evidence presented to national authorities (including national prosecutors and courts),[70] or even a national anti-corruption commission's report.[71] Questions then arise as to the admissibility of such indirect evidence to prove the corruption allegations and what effect it should have.

The general practice amongst international arbitral tribunals is that the tribunals would, in the absence of special circumstances, refrain from excluding evidence on technical grounds of inadmissibility, and evaluate the relevance, credibility and weight of the evidence instead.[72] This opens the door for tribunals to consider indirect evidence of corruption derived from other legal proceedings, including national ones.

However, in ISDS, tribunals must ultimately make independent assessments of key facts, irrespective of the findings of national authorities. Holding otherwise would imply giving host states, who have consented to reciprocal protection of investments in accordance with law, the power to withdraw their consent unilaterally.[73]

International arbitral tribunals have in practice considered indirect evidence of corruption from other proceedings, but with varying degrees of importance. On one end of the spectrum are national anti-corruption commission reports and evidence from pending criminal investigations and legal proceedings, which have generally been held to be inconclusive as proof of any alleged corruption.[74] On the other end of the spectrum is evidence adduced in completed legal proceedings (e.g., witness evidence) and national court judgments (e.g., criminal convictions). On the former, witness statements and oral testimony from other legal proceedings would generally amount to hearsay evidence,[75] which, while generally admissible in arbitral proceedings, may be ascribed little weight due to the inability to test it by cross-examination. On the latter, the traditional common law rule is that a judgment *in personam* delivered in civil or criminal proceedings is generally inadmissible against a stranger (or against a party to those proceedings for a stranger) as evidence of the facts found or legal conclusions drawn in that judgment;[76] but international tribunals nonetheless appear to be willing to consider national court judgments in determining the existence of the alleged corruption.[77] In any event, such national court judgments are unlikely to have preclusive effect in ISDS proceedings, as the doctrine of *res judicata* generally requires commonality of parties and subject matter in the earlier and current proceedings, and ISDS proceedings are ordinarily concerned with issues encompassed by the investment treaty (or other arbitration agreement), and not those that previously arose in the national court litigation.[78]

It is worth noting that the *absence* of criminal investigation or prosecution may equally be taken into account by the arbitral tribunal. For example, the host state's failure to bring any prosecution or investigation against any of the individuals allegedly involved in the corrupt act, along with an inability to provide a convincing explanation of its efforts in relation thereto, may negatively impact the credibility of the host state's allegations on corruption.[79]

6.3.2 Attribution of Responsibility

Where the corruption at hand is alleged to have been committed by the investor at hand, the attribution of responsibility to the investor is generally not an issue and is often a mere question of fact. More problematic is when the corruption at hand is alleged to have been committed by the host state, at least in part, through an individual or entity that it is attributable to, since host states can only act through individuals and entities. This section will therefore deal with the issue of attribution of responsibility under international law rules.

So far, very few investment cases have engaged in a discussion on state responsibility for corruption in any significant way. In the context of corruption solely on the

part of the state, it has been recognised that: (i) the corrupt solicitation of a bribe (i.e., extortion) by a state agency would amount to a violation of the obligation of fair and equitable treatment owed to the investor pursuant to the BIT, as well as a violation of intentional public policy; and (ii) where the host state exercises its discretion on the basis of corruption, that would result in a 'fundamental breach of transparency and legitimate expectations'.[80] A rare example can be found in *Chevron v. Ecuador*, where the corrupt issuance of a judgment by the host state's judiciary against the investor was found to be 'cloaked with governmental authority' and therefore attributable to the host state.[81]

In the context of the invoking of corruption as a defence by the host state, it has also been recognised that, even if an investor may have violated important national laws when making its investment, the host state may, at least in principle, be estopped from invoking that illegality had it been aware of it but nonetheless proceeded in tacit approval, or at least acquiesced, to it.[82] There is also some suggestion that that the corruption of public officials or their intermediaries can be attributed to host states for purposes of allocating the costs of arbitration.[83]

6.3.2.1 Attribution for State-Only Corruption

The primary legal regime for state responsibility in international law is the United Nations International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles),[84] which were adopted without a vote by the United Nations General Assembly in August 2001. The ILC Articles set out the principles that are to apply to all manner of internationally wrongful acts, without setting down any specific rules in substantive areas of international law. The ILC Articles have been treated by international courts and tribunals as a functional equivalent of the customary international law on state responsibility.[85] While the ILC Articles were drafted with inter-state relations as the basic archetype, they arguably apply in the context of investment arbitration as well.[86]

Under the ILC Articles, a state is 'internationally responsible' for every one of its 'internationally wrongful' acts.[87] There is an internationally wrongful act of a state when conduct consisting of an action or omission: (i) is attributable to the state under international law; and (ii) constitutes a breach of an international obligation of the state.[88] Whether an act of a state is 'internationally wrongful' is an issue governed by international law, and is unaffected by how national laws may characterise the act.[89] In the context of ISDS, the internationally wrongful act would be a breach of the host state's obligations under the relevant investment treaty.

As a state can only act through its agents, one of the most important questions in invoking state responsibility is whose conduct is attributable to the state. With regard to state organs, the conduct of *any* state organ is to be considered an act of that state under international law.[90] With regard to non-state organs, only certain conduct is attributable to the state.[91] For example, for persons or entities exercising elements of governmental authority, their conduct is to be considered an act of the state under international law *provided that* the person or entity is acting in that capacity in the

particular instance,[92] while for a person or a group of persons, his or their conduct is to be considered an act of state under international only if he or they are *in fact* acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.[93]

Generally, the fact that the conduct of the state organ or person or entity empowered to exercise elements of governmental authority in question exceeds the authority or contravenes instructions does not affect its attribution to the state under the ILC Articles, so long as that person or entity was acting 'in that capacity'.[94] The commentary to the ILC Articles stated that 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'.[95] Therefore, in situations where public officers have solicited or extorted bribes while acting with apparent authority, such corrupt acts should, if proven, engage the responsibility of the host state.[96] However, even where the corrupt conduct is attributable to the host state, there are several doctrines in international law that may operate to preclude the investor from invoking the host state's responsibility, such as the doctrines of consent, waiver, acquiescence and estoppel.

Where the investor has *participated* in the corruption (e.g., by offering and paying a bribe to the public official involved), in full knowledge that the public official is acting illegally and with private enrichment in mind, the attribution rules under the ILC Articles would arguably not apply.[97] There are various arguments for this result under the ILC Articles, such as the investor's participation amounting to its consent to the host state's otherwise internationally wrongful conduct,[98] or that the investor would have known that the public official was not acting 'in that capacity' and could not therefore have been engaging in an act of state vis-à-vis the investor.[99] In such scenarios, the investor may need to look to other applicable rules of attribution in order to preclude the host state from invoking the corruption defence (discussed further below).

If attribution of the allegedly corrupt act to the host state is established, the other half of the equation is in establishing that the relevant act amounts to a breach of an international obligation of the state, which would include an obligation under the relevant BIT or other treaty. These obligations would include the obligations of fair and equitable treatment, providing full protection and security, refraining from arbitrary/discriminatory action, and refraining from uncompensated takings without public purpose (elaborated below).

6.3.2.2 Attribution for State-Complicit Corruption

More difficult is the question of attribution of state responsibility for corruption committed by both the host state and the investor. This will generally arise only where the state attempts to run a defence against the jurisdiction of the tribunal and/or the merits of the claim (elaborated further below), and the investor seeks to argue for the preclusion of the host state's ability to run such a defence on account of the state's complicity in the corruption in question.

The first difficulty is that investment tribunals often adopt a 'zero-tolerance' policy towards corruption-tainted investments. Thus, where the investment has been found to be tainted by corruption as a fact, that results in a complete defence against the investor's claim, even where a public official of the host state had been complicit in the corruption at hand, such as by soliciting or extorting the bribe in question.[100] This has been said to result in an 'attribution asymmetry', where a public official's actions in soliciting or extorting bribes from foreign investors is *not* attributable to the host state once that solicitation meets acceptance by the investor (e.g., by paying the bribe).[101] This may result in a perverse incentive for host states to strategically engage in or tolerate corruption in order to deploy it as a shield in the event of future ISDS proceedings.

The second difficulty is that the attribution rules under the ILC Articles would arguably not apply in determining the question of whether the host state ought to be precluded from asserting the corruption defence. This is because the investor here is not raising the corrupt conduct in question to ground its claim against an 'internationally wrongful act', but rather to argue against the raising of a positive defence by the host state on the account of the host state's own unilateral conduct.[102] It has been argued that the ambit of the rules of attribution under the ILC Articles are limited to establishing that there is an act of state for the purposes of international responsibility.[103] On this view, they do not extend to other purposes for which it may be necessary to define the state or its government, such as other international law processes by which particular organs are authorised to enter into commitments on behalf of the state, which depend not on the rules of state responsibility, but rather the international law rules relating to the expression of the will of the state. Even if the ILC Articles do apply, attribution under them would arguably not be possible once the investor has participated in the corruption in question (as discussed above). It may therefore be necessary to look to other rules of attribution that would support an argument for the preclusion of the raising of the corruption defence.

The main international law doctrines that the investor would be seeking to invoke to argue for the preclusion of the corruption defence would be: (i) recognition; (ii) acquiescence; and (iii) estoppel (elaborated further below), all of which concern the unilateral conduct of the state. In the event that the ILC Articles are inapplicable, the relevant attribution rules may instead be found in the ILC's 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations' (ILC Guiding Principles), which were adopted by the ILC following the ILC's and Special Rapporteur Victor Rodriguez Cedeño's detailed study of the subject of unilateral state conduct.

Under Principle 1 of the ILC Guiding Principles, it is stated that 'Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations' and that when the conditions for this are met, 'the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected', though both the Preamble of the ILC Guiding Principles and Cedeño clarified that the ILC Guiding Principles are applicable not just to positive forms of unilateral state conduct, such as recognition, but also to negative forms of

unilateral state conduct, which arguably include inaction in circumstances which may amount to acquiescence and/or estoppel.[104] Principle 6 provides that unilateral state conduct may be addressed not just to other states or the international community as a whole, but also 'to other entities', which should, in the investment treaty context, include investors who have been conferred the right to bring international law claims under the investment treaties.

Regarding attribution, the ILC Guiding Principles are narrower in the scope of attributable conduct than the ILC Articles. Principle 4 of the ILC Guiding Principles states that unilateral declarations 'bind the State internationally only if it is made by an authority vested with the power to do so', with heads of state, heads of government and ministers for foreign affairs being competent to formulate such declarations 'by virtue of their functions', and other persons representing the state in specified areas being also authorised to bind the state through their declarations 'in areas falling within their competence'. Arguably, however, even statements made by officials that are *ultra vires* or illegal under municipal law can be attributed to and bind the state as unilateral declarations of intent, so long as they are made in furtherance of the duties assigned to the official by the state,[105] and even if the addressee of the unilateral declaration knows that the official giving the declaration is in fact not competent under his municipal law to make such declaration or is otherwise acting illegally in doing so. While a state can invoke the violation of its domestic law as invalidating its unilateral declaration, similar to how a state's consent to a treaty may be invalidated under Article 46 of the 1969 Vienna Convention on the Law of Treaties, it is clear that such violation must be 'objectively evident' and be concerned with an 'internal law of fundamental importance', which relates only to the procedural provisions of internal constitutional law.[106] This will not be the case in every instance of corruption committed between the investor and the host state, as the corrupt act will usually concern a violation of substantive anti-corruption policy and rule of law considerations.

Under the ILC Guiding Principles, attributable conduct would include the solicitation and extortion of bribes by high-ranking government officials in return for the procurement of the investment, as in the case of *World Duty Free v. Kenya* where the Kenyan president (and other high ranking officials) had solicited and received bribes from the investor in return for the investment contract.[107] It may also include other types of conduct, such as a deliberate choice to not prosecute or otherwise punish the corrupt government officials in question, though it will be generally difficult to establish such conduct to be a clear statement of acquiescence in corruption (elaborated below).

6.3.3 Legal Consequences

The legal consequences of corruption allegations in ISDS are affected by a multitude of factors, most especially *who* pleaded the corruption and *when* the corruption allegedly occurred. In essence, corruption is usually used a *shield* by the host state

(to defend against an investor's claim), while investors generally use it as a *sword* (to ground a claim for a breach of the investment treaty or agreement). More complicated is the situation where the host state attempts to use corruption as a shield and the investor seeks to preclude the host state from doing so on the account of the host state's complicity in the corruption at hand. This section provides a brief sketch of the general legal consequences of a finding of corruption, as well as the emergent trends of modern ISDS practice, thereby setting the stage for more detailed case studies in the ensuing country reports in this volume.

As a preliminary note, it should be observed that issues in ISDS are generally governed by public international law (unless the arbitration stems from an investment contract).[108] Thus, unlike commercial arbitration, there is generally no need to delve into a choice of law analysis to determine the applicable law for the legal consequences flowing from corrupt conduct, though national law may sometimes come into play where the protection over the investment is subject to compliance with the host state's laws (elaborated below).

6.3.3.1 Investor Corruption

Corruption is raised mostly by host states as a complete defence to investors' claims, usually in one of three ways: (i) denial of jurisdiction; (ii) denial of admissibility; or (iii) invalidation of the investment agreement. Other consequences may come in the form of: (i) providing the host state with a defence on the merits of the case; (ii) being a relevant factor in the assessment of damages and apportionment of costs; and (iii) various procedural and evidential consequences.

Denial of Jurisdiction

The jurisdiction of an investment treaty tribunal generally depends on whether the claimant-investor satisfies four necessary jurisdictional requirements that establish the existence of adjudicative power: (i) *ratione voluntaris* (whether there was unqualified consent to arbitrate the claim in question); (ii) *ratione personae* (whether the claimant is a covered investor under the treaty); (iii) *ratione materiae* (whether the subject matter of the claim is within the scope of the treaty, i.e., whether there is a covered investment); and (iv) *ratione temporis* (whether the treaty was in force when the dispute arose).[109]

Where corruption is raised by host states as a jurisdictional objection, it is most commonly for the purpose of contesting the tribunal's jurisdiction *ratione materiae* on the basis that the investment was corruptly made and therefore not covered by the bilateral investment treaty (BIT) or other investment treaty. BITs commonly contain provisions providing that a protected investment is one that is made 'in accordance with the law' (i.e., a 'legality clause'), which excludes from the treaty's protection coverage any and all investments that violate the host state's laws.[110] Some recent BITs even have 'legality plus' clauses, which accompany the legality clause by explicitly excluding investments obtained through corruption from the treaty's scope

of protection.[111] As this is a jurisdictional requirement, claims concerning an investment that was made in violation of a legality clause face dismissal by arbitral tribunals for want of jurisdiction *ratione materiae*,[112] though this generally does not extend to trivial breaches of local law.[113] As the laws of most host states criminalise corruption, where an investment is procured by corruption—in particular bribery—such an investment will most likely violate the host state's law and be denied protection under a BIT with a legality clause.[114] Performance corruption,[115] on the other hand, is unlikely to lead to jurisdictional issues and may instead be addressed during the admissibility, merits and/or damages phases of the arbitration.[116] In cases where it is unclear whether the corruption at hand was foundational or performance-related in nature, the tribunal may, as a case management decision, opt to hear the corruption allegations in one set of proceedings (i.e., without bifurcating the proceedings to hear jurisdictional issues separately), so as to allow a full investigation into the facts of the matter.[117]

The most prominent example of denial of jurisdiction in the corruption context is *Metal-Tech v. Uzbekistan*.[118] The tribunal considered that Uzbekistan's consent to arbitration was limited under Article 8(1) of the 1994 Israel–Uzbekistan BIT to only those disputes concerning 'lawfully implemented investments', defined under Article 1(1) of the BIT as 'any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made'. Due to the tribunal's finding that the investor had engaged in 'sham' consultancy agreements that were designed to facilitate bribery, in contravention of the anti-corruption laws of Uzbekistan, the tribunal found that the investor was not compliant with Article 1(1) of the BIT and its investment did not fall within Article 8(1) of the BIT. This rendered the tribunal without subject matter jurisdiction over the dispute.[119]

Where there is no legality clause in the investment treaty, the position is far less clear. Some tribunals have taken the position that all investment treaties contain an implicit legality clause.[120] Yet this has been criticised on several fronts, including the lack of a clear basis for such an implication.[121] Other tribunals have taken the view that where there is no legality clause, corruption allegations are best addressed as questions of admissibility (discussed further below).[122] Yet other tribunals may deal with an apparently jurisdictional issue together with the merits, so that a broader investigation into the history of the investment may be conducted for the purpose of obtaining positive evidence of the alleged corruption.[123] In such scenarios, corruption allegations will no longer serve as a jurisdictional 'trump card' in the hands of the host state.

The host state may also raise corruption to contest the tribunal's jurisdiction *ratione personae*, by seeking to establish that the investor does not have the requisite nationality to qualify as a foreign investor. In *Siag v. Egypt*,[124] a case under the 1989 Italy–Egypt BIT, the claimants alleged that Egypt had expropriated their investment as principal shareholders of a hotel management company that had purchased from the government a large parcel of ocean-front land on the Gulf of Aqaba on the Red Sea in order to develop a tourist resort. Egypt objected to the tribunal's jurisdiction partly on the basis that one of the claimants (previously holding Egyptian nationality) had corruptly acquired his purported Lebanese nationality via bribery and should

therefore be treated as never having lost his Egyptian nationality, which would have rendered the tribunal without jurisdiction *rationae personae* over the dispute. The tribunal eventually dismissed the jurisdictional objection on the ground of insufficient evidence.

A host state may also raise corruption to contest the tribunal's jurisdiction *ratione temporis*, by seeking to establish that the dispute had arisen before the relevant treaty had entered into force, for instance by impugning the integrity of a local judgment that purported to end an earlier dispute at a time prior to the treaty having come into force. In *Lucchetti v. Peru*, a case under the 2001 Peru–Chile BIT, the Chilean investor (the majority shareholder of a Peruvian company) constructed a plant for the manufacture and sale of pasta on property that it owned in the municipal district of Chorrillos, Lima. In 1997, the Council of the Municipality of Lima and related parties issued a series of decrees that declared the investor's construction licence as null and void. In response, the investor instituted Peruvian legal proceedings against the entities that issued the decrees, which resulted in a series of Peruvian court judgments that allowed the investor to proceed with construction and operation of the pasta plant. However, in August 2001, the Council of the Municipality of Lima again revoked the investor's operating licence through a decree that expressly noted that the judicial decisions rendered in favour of the investor were fraudulently and corruptly obtained, and the investor's plant was consequently forced to close. Subsequently, the Peru–Chile BIT came into force on 3 August 2001. The investor filed for ICSID arbitration under the Peru–Chile BIT, but Peru contested the tribunal's jurisdiction *ratione temporis* by arguing that its dispute with the investor had already arisen at the time the BIT came into force. The investor sought to counter this by pointing to the Peruvian judgments made in its favour, which were final and thus *res judicata*, thereby effectively terminating the initial dispute between the investor and the Municipality of Lima. However, Peru responded by arguing *inter alia* that the Peruvian judgments were obtained through corrupt conduct and therefore could not be deemed to have ended the dispute between the parties that began in 1997. The tribunal eventually held that it did not have jurisdiction on other grounds without dealing with the corruption allegations, but opined that if the corruption had been proved, it would have provided an established fact that would have substantiated dismissal of the case on *ratione temporis* grounds.[125]

Where corruption is proven, it is notoriously difficult for the investor to bring a successful counter-defence to prevent the dismissal of jurisdiction, especially in the context of a legality clause in the investment treaty in question. Most investors will seek to argue that the host state is precluded from relying on the corruption defence on the grounds of estoppel or acquiescence due to its own complicity. Others may seek to argue that the issue should be treated as a question of admissibility rather than jurisdiction, which would allow the tribunal to engage in a balancing act between the investor's wrongdoing against the state's misconduct.

Denial of Admissibility

The admissibility of a claim is a question on whether the tribunal should rule that the claim ought not to be heard by the tribunal (or at least not yet),[126] and arises only *after*

the tribunal has established the existence of its jurisdiction.[127] Under national law, the equitable maxims *ex turpi causa non oritur actio* and *nemo auditur turpitudinem suam allegans* (an unlawful or morally reprehensible act cannot serve as the basis of an action in law), which are expressions of the 'clean hands doctrine',[128] procedurally bar a claimant's claims due to its illegal or improper conduct in relation to those claims. While there is no express reference to the admissibility or preclusion of claims under the ICSID Convention, the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules, the clean hands doctrine is recognised by some tribunals as a rule of international law (though its precise contours are unclear).[129] It also has been argued that ISDS tribunals, as creatures of public international law, 'should be viewed as having inherent or incidental jurisdiction to find that claims are inadmissible for abuses of process or other serious forms of misconduct'.[130]

Where corruption allegations are treated as questions of admissibility, the jurisdictional trump card no longer exists. Both host states and investors are then free to raise general principles of law in their defence, which can lead to a 'battle of principles'.[131] The host state, on one hand, is likely to raise principles such as good faith,[132] the clean hands doctrine[133] and international public policy.[134] The investor, on the other hand, is likely to respond with principles such as recognition, estoppel and acquiescence (discussed further below). Where such principles are pitted against each other, the tribunal will need to weigh the wrongdoings of all parties and perform a balancing exercise in deciding whether the investor's claims are admissible. Even where the claims are admissible, the investor may still have to grapple with the consequences of its own participation in the corruption in the merits and/or damages phases of the arbitration (discussed further below).

Invalidation of Investment Agreement

In cases where the arbitration is based on a contract rather than an investment treaty, host states may also raise corruption as a defence by seeking the invalidation of the investment agreement on the ground of illegality. In *World Duty Free v. Kenya*, a contract-based ICSID arbitration, the tribunal held that the host state was legally entitled to avoid the entire investment contract on the basis that the upholding of claims based on contracts obtained through corruption was contrary to international or transnational public policy as well as the applicable laws of the contract (English and Kenyan law). The tribunal rejected the investor's argument that the tribunal should undertake a discretionary balancing exercise in which the investor's misconduct was weighed against that of Kenya's, noting that while the tribunal was '*sympathetic*' to the investor's argument, the House of Lords in *Tinsley v. Milligan* had overruled such a discretionary test.[135] In *Niko v. B&P*, another contract-based ICSID arbitration in which corruption allegations impugning the procurement of the contract were also made, the tribunal clarified that, as a general principle of public international law, contracts obtained *by* corruption are voidable at the option of the host state, but contracts *of* corruption are void ab initio.[136]

However, there might remain some room for some form of recourse for the investor even if the investment agreement had been tainted by corruption, as a non-contractual claim in unjust enrichment may nonetheless be available in situations

of host-state complicit corruption (discussed further below). The *World Duty Free v. Kenya* tribunal had notably left open the possibility of some form of restitution even following the avoidance of the contract, though not through the return of the bribe to the investor.[137] It has been argued that in the light of the decision of *Patel v. Mirza*,[138] the *World Duty Free v. Kenya* tribunal's reasoning might have taken a different direction if it were decided today, though the conclusion might not be different.[139]

Failure of Investor's Claims on the Merits

Assuming that the investor's claim is not defeated either on grounds of lack of jurisdiction or inadmissibility, the host state may argue that the claim should fail on the merits, because the regulatory action interfering with the investment that the investor is complaining of as violating investment protection standards can be justified as a response to illegal conduct by the investor. Investment arbitration tribunals have held that a host state may be justified in revoking the investor's investment if it was done as a response to the investor's illegal conduct, thereby absolving the host state from any liability stemming from an alleged violation of investment protection standards.[140] In the corruption context, a host state that has been the victim of investor corruption can similarly argue that it is not liable for a breach of investment protection standards because its actions in revoking the investment were justified as a response to the investor's corrupt conduct.

Other Consequences

Corruption on the part of the investor, like other instances of investor misconduct, may potentially have other legal consequences, such as: (i) providing the state with a defence on the merits of the case, including one based on a lack of due diligence, negligence or wilful blindness on the part of the investor with regard to signs of crime or misconduct;[141] (ii) serving as a relevant factor in the assessment of damages, for instance finding that the investor was partly responsible for the damages in question due to its misconduct, thereby lowering the amount of damages to be awarded;[142] and (iii) serving as a factor in the apportionment of costs.[143]

In terms of procedural issues, where corruption allegations have been made by the host state, the tribunal may choose to bifurcate proceedings in order to first resolve the corruption allegations, which may have a dispositive effect.[144] In terms of evidentiary issues, corruption allegations may result in the tribunal considering indirect or circumstantial evidence or the drawing of adverse inferences (see above).

6.3.3.2 Host State Corruption

Where the investor raises corruption, it is often in the form of an allegation of *attempted* extortion or solicitation of a bribe by the host state's public officials, in violation of an investment treaty.[145] This is so because the investor is implicated in the corruption once it pays the bribe, which would lead to the above-mentioned legal consequences for the investor. Further, the implication of the investor would

arguably bar it from invoking the attribution rules of the law on state responsibility (see above). The ways in which the investment treaty may be violated by the host state's corrupt act are discussed below.

Obligation of Fair and Equitable Treatment

Where the host state attempts to solicit or extort a bribe from an investor, or engage in other types of corrupt conduct, that may result in a breach the host state's obligation of fair and equitable treatment. Where the BIT contains a 'fair and equitable treatment' clause,[146] which has the primary aim of promoting a stable and predictable investment environment in a host state,[147] the host state may, depending on the specific wording of the clause, have certain obligations such as: (i) transparency and treatment in accordance with the investor's legitimate expectations; (ii) compliance with contractual obligations; (iii) procedural propriety and due process; (iv) good faith; and (v) freedom from coercion and harassment.[148] Such obligations would naturally be breached where a person or entity attributable to the host state were to solicit, demand or extort a bribe from an investor, or were to threaten to impose disadvantageous treatment against the investor in the event a bribe is not paid.

In *EDF v. Romania*, the investor argued that an alleged demand for a USD2.5 million bribe by the Chief of Cabinet to the Prime Minister of Romania, coupled with the state's subsequent refusal to extend an investment contract, amounted to a violation of the fair and equitable treatment clause in the relevant BIT. Although the tribunal held that there was insufficient evidence to prove such allegations, the tribunal stated that a request for a bribe by a state agency is a violation of the fair and equitable treatment obligation owed to the investor pursuant to the BIT, as well as a violation of international public policy, and that the exercise of a state's discretion on the basis of corruption was a 'fundamental breach of transparency and legitimate expectations'.[149]

In *Rumeli v. Kazakhstan*, the investor argued that systemic corruption in the Kazakh judiciary and the solicitation of a bribe by a Kazakh judge in return for preventing the seizure of the investor's investment had resulted in violations of the 1992 Turkey–Kazakhstan BIT. While the tribunal dismissed the corruption allegation on the ground of lack of evidence, it seemed to accept, or at least did not reject, the notion that the fair and equitable treatment obligation could be breached by the host state's judiciary rendering judgments against the investor due to corruption.[150] Such an argument was accepted in *Chevron v. Ecuador*. The tribunal held that a USD9.5 billion judgment rendered by an Ecuadorian judge against the investor was procured through fraud, bribery and corruption (and which was left unremedied by the host state's appellate, cassation and constitutional courts), and thereby constituted, among other things, a breach of the fair and equitable treatment clause under the US–Ecuador BIT.[151]

Obligation to Provide Full Protection and Security

Corrupt conduct on the part of the host state may also violate its obligation to provide full protection and security. Most BITs contain a clause stipulating that the host state is obliged to grant full protection and security in its territory for investors and their

assets. This is commonly understood to impose an obligation upon the host state to actively protect the investment from adverse actions by the host state itself, by its authorities or by third parties,[152] which is an obligation of due diligence,[153] and has been recognised to extend to providing protection from physical violence against the assets and individuals connected with an investment as well as the protection of investors' commercial and legal rights.[154] It has been argued that a host state might breach the obligation to provide full protection and security due to a lack of appropriate due diligence that resulted in the investor being a victim of corruption.[155]

Obligation to Refrain from Arbitrary or Discriminatory Action

By taking or threatening to take adverse action against a person who refuses to pay a bribe, a host state may also violate its obligation under most BITs to refrain from 'arbitrary' or 'discriminatory' action. 'Arbitrary' actions have been explained by international tribunals to mean those that fly in the face of the rule of law, that is, where there is a 'wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'.[156] A 'discriminatory' act is one that results in the treatment of an investor that is different to that accorded to other investors in a similar or comparable situation.[157]

A discriminatory act often involves a breach of the host state's national treatment obligations. Most BITs contain a national treatment clause in which the host state is obliged to accord to foreign investors (and/or covered investments) treatment that is no less favourable than it accords, in like circumstances, to its own investors (and/or to investments in the territory of its own investors), with respect to certain aspects of investments (e.g., establishment, expansion, management, disposition).[158] Such an obligation may be breached by a host state where it had sought to induce certain business outcomes for the purpose of corruptly favouring specific domestic businessmen.[159]

Obligation to Refrain from Uncompensated Takings without Public Purpose

The extortion of a bribe from an investor by a host state may result in it violating its obligation to refrain from uncompensated takings without a public purpose. Most BITs contain an expropriation clause that provides that the host state cannot expropriate a covered investment either directly or indirectly except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation; and (d) in accordance with due process of law.[160]

6.3.3.3 Complicit Corruption by the Host State

Investors who are faced with host states asserting corruption committed by both sides as a defence against the investor's claims will in turn seek to argue that the host state is precluded from relying on such a defence. This may be maintained on the basis of the host state's own complicity in the corruption at hand as a legal consequence of the host state's own unilateral conduct, most commonly under the doctrines of recognition, acquiescence and estoppel,[161] which are considered to be

part of the corpus of 'general principles of law recognised by civilised nations' under Article 38(1)(c) of the 1945 Statute of the International Court of Justice (ICJ Statute).[162] All of these three doctrines have the same effect of precluding a state from contradicting or objecting to a given factual or legal situation that it had earlier accepted as legitimate.[163]

Recognition

Recognition has been defined as a unilateral expression of will by a state 'acknowledging the existence of a de facto or de jure situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself',[164] so that the recognising state is obliged to act in a manner that is consistent with its affirmation in relation to the addressee of the act. For binding recognition to arise, there must be: (i) an act or declaration evincing recognition that is made publicly and manifests the will of the state to be bound; and (ii) knowledge or cognisance on the part of the addressee of the act and its content.[165] Where the intended purpose of recognition is to regard as legitimate (or to permit) an illegal or otherwise invalid act, one of the recognition's potential effects is to deprive the recognising state of the right to subsequently argue the invalidity and/or illegality of the recognised acts.[166]

In the investment treaty context, recognition would most likely be raised in a situation where high-ranking government officials of the host state had engaged in bribe solicitation and extortion in return for the right to invest in the host state. For example, in *World Duty Free v. Kenya*, the Kenyan president (and other Kenyan officials) were found to have solicited and received bribes from the investor as '*payment for doing business with the Government of Kenya*'[167] during a time when it was widely acknowledged that the Kenyan government was highly corrupt.[168] Where the host state could in the circumstances of the case be fairly described as a kleptocracy, conduct such as solicitation and extortion from high-ranking government officials could possibly be argued as representing the host state's de facto will to recognise a corruptly procured investment as being valid and entitled to the protections under the relevant investment treaty, notwithstanding their illegality under the host state's municipal laws.[169]

Acquiescence

Acquiescence is similar to recognition, except that it is derived from silence rather than affirmative action or active conduct. Acquiescence has been said to be equivalent to 'tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.[170] The 'silence' here usually involves the inaction of a state, including unreasonable delay,[171] that leads to the loss of a right or claim if, under the circumstances, the state could reasonably be expected to act in a certain manner.[172] Naturally, such circumstances will arise only where the acquiescing party had knowledge of the facts against which it refrained from making a protest against the acts of corruption. On one view, the acquiescence argument is far more persuasive in the context of investment treaties without explicit legality clauses, due to the lack of a jurisdictional trump card in the hands of the host state (discussed above).[173]

In the context of corruption in ISDS, acquiescence would most likely be raised in a situation where the host state's public officials were made aware of the corruption of its other public officials but took no effective steps to prosecute or otherwise punish those officials. That is arguably something that the host state could reasonably be expected to do in the light of international anti-corruption norms and national anti-corruption rules. Such inaction may be viewed 'as disinterest at best and complicity with corrupt acts at worst'.[174] Indeed, it has been recognised in the investment treaty context that a host state should be precluded from raising violations of its own laws as a jurisdictional defence when it knowingly overlooked them and endorsed an investment that was not in compliance with its laws,[175] and the failure of the host state to prosecute or punish illegal acts by its own public officials has also played a role in other cases where the tribunal either refused or expressed reluctance in entertaining defences of corruption or other forms of illegal conduct.[176] However, it may be difficult to assert that the host state's decision to not prosecute was clearly a form of acquiescence, considering that state prosecutors possess considerable discretion, and that there may be valid reasons why a host state failed to prosecute, such as insufficient evidence to meet the criminal standard of proof and the availability of resources in mounting a high-profile, high-stakes public prosecution of governmental officials.[177] Investors will therefore need to show something more, perhaps in the form of a government cover-up or widespread systemic corruption,[178] in order to show political will behind the decision to not prosecute.

It should be noted that there can be no acquiescence if the host state had no knowledge of the corruption at hand, or where the host state had not yet reached the point where it would have been expected to prosecute or otherwise punish the public officials in question (e.g., where the corruption was discovered only recently). In *World Duty Free v. Kenya*—while the tribunal found the fact that no proceedings had been initiated by the host state to prosecute its former head of state for soliciting and accepting bribes or to recover the bribe that was paid, even after the host state was made aware of the bribe paid, was 'highly disturbing'—the tribunal ultimately held that there could be no 'affirmation or waiver' because the host state had only known of the bribery during the arbitration itself, around 30 months after the claimant filed its request for arbitration.[179] However, it should be noted that it is not the length of time that is relevant, but rather whether the host state had failed to act in circumstances where it would be expected to do so.[180] In view of this, where corruption allegations concerning the activities of public officials arise, tribunals should inquire as to whether concrete steps will be or have been taken by the host state to prosecute or otherwise punish the public officials at hand, and if not, the reasons behind the decision to not do so.

Separately, it has been argued that the failure to investigate and prosecute not only forms the basis of acquiescence, but also a separate violation of substantive international anti-corruption law by the host state.[181] On this view, the host state has a positive duty to prevent and redress corruption committed by its public officials under national law and international anti-corruption treaties (e.g., UNAC and OECD), and a failure to act will trigger state responsibility. Such a duty is made clear in some

of the more recent BITs, which have included express provisions to this effect.[182] The legal consequences that flow from such provisions, however, remain unclear.[183]

Estoppel

Estoppel is a principle that precludes one from asserting a particular state of things against another if one had previously, by words or conduct, unambiguously represented to the other the existence of a different state of things, and if the other had, on the faith of that representation, so altered his position that the establishment of the truth would injure him.[184] There are two competing notions of estoppel under public international law, one restrictive and the other expansive, which have both been relied upon by ISDS tribunals.[185] Under the restrictive approach, the essential elements of estoppel are: (i) a statement of fact or conduct that is clear and unambiguous; (ii) this statement or conduct must be voluntary, unconditional and authorised; and (iii) reliance in good faith upon the statement or conduct, either to the detriment of the party so relying on the statement or conduct or to the advantage of the party making the statement or conduct.[186] Under the expansive approach, the third element of the test is discarded in favour of a more flexible approach based on the underlying principle of *allegans contraria non audiendus est* ('a person adducing to the contrary is not to be heard').[187] Investment tribunals have recognised estoppel as a viable counter-defence against jurisdictional defences run by the host state.[188]

In the investment treaty context, estoppel would most likely be raised in a situation where high-ranking government officials of the host state had engaged in bribe solicitation and extortion in return for the right to invest in the host state, as in the situation in *World Duty Free v. Kenya*. While difficult, the corrupt conduct of high-ranking government officials that are attributable to the state could arguably amount to a clear, voluntary and unambiguous statement from the host state that the investment in question is legally valid. Should the investor subsequently rely on such a statement to its detriment by incurring the investment costs (and to the host state's advantage by reaping the investment's economic benefits), the host state ought to be estopped from raising defences based on its own corrupt conduct. One of the key questions in such scenarios is whether the conduct of the official in question is attributable to the host state,[189] which has unfortunately been given scant attention by investment tribunals thus far.[190]

Estoppel may also be raised in a situation where the host state has condoned its own government officials' corruption by failing to prosecute or otherwise punish those government officials or failing to even investigate the circumstances suggesting the government officials' participation in the corruption at hand. This point was raised in the *Wena Hotels v. Egypt* case, where the tribunal raised suspicions that the host state had knowledge of the corruption at hand but had decided, for whatever reason, not to prosecute the government official in question, and was therefore 'reluctant to immunize' the host state from liability in the arbitration.[191] In circumstances where the host state has made known its awareness of the corruption to the investor, but subsequently fails to prosecute or punish the government official in question, that may arguably amount to a clear statement that the investment is legally valid notwithstanding the corruption at hand that the investor had relied upon to its detriment.

However, as mentioned above, it may be difficult to assert that there was indeed such a clear statement as the decision to prosecute or punish is not necessarily a political one.

Investors may, however, find it hard to establish detrimental reliance in most situations involving agency corruption, such as the payment of bribes by intermediaries (often known as 'consultants') without the investor's knowledge to government officials for the procurement of the investment contract or licences to operate in the country. This is because the relevant facts that reveal the corruption by agents will usually be known only during the course of the arbitration, by which time the investor would have already raised all of its claims. This makes it difficult for the investor to establish that it had suffered any of its alleged damage as a result of it relying, to its detriment, on the host state's participation in the corruption.

Costs, Damages and Restitution

Host states that have been found to be complicit in the corrupt act in question (e.g., by failing to investigate and prosecute) may find themselves subject to a contributory fault regime and/or saddled with negative costs orders from the tribunal.

Where there is an express legality clause in the investment treaty, the investor is unlikely to overcome the jurisdictional barrier posed by such a clause.[192] However, it may be able to persuade the tribunal to hold the host state at least partially responsible for its complicity in the corruption by issuing a costs award that takes into account the host state's involvement in the corruption in question. This occurred in both *Metal-Tech v. Uzbekistan* and *World Duty Free v. Kenya*, where the tribunals (to varying degrees) recognised the parties' mutual involvement in the corruption and thereby ordered the parties to bear their own legal fees and to share in the arbitration costs.[193]

An innovative costs award can be found in *Spentex v. Uzbekistan*, in which the majority of the tribunal urged the respondent to make certain reforms in its anti-corruption policy and to make a monetary contribution to an international programme targeting corruption.[194] The tribunal accomplished this by including in the costs order a choice of two options: (i) Uzbekistan donates USD8 million to one of the United Nations' anti-corruption funds within 90 days in addition to covering its own legal fees and 50% of the costs of the proceedings; or (ii) Uzbekistan pays 75% of more than USD17 million of the claimant's legal fees and 100% of the costs of the proceedings in addition to its own legal fees. While Uzbekistan has reportedly since made a contribution to the United Nation's anti-corruption programme and has initiated joint projects aiming at combating corruption in the country, questions have been raised (in particular by the dissenting arbitrator, Professor Brigitte Stern) as to whether the *Spentex* tribunal, by issuing such a costs order, had ventured beyond the boundaries of its competences.[195] Separately, it has also been observed that, since the BIT did not contain an explicit legality clause and the tribunal ultimately considered the jurisdiction–admissibility distinction to be irrelevant, the *Spentex* costs order opens the door for future tribunals to make similar costs awards regardless of the basis on which the claims had been refused to be heard.[196]

It is worth noting that negative costs orders may not only feature in cases where the corruption defence was successfully raised; costs orders have also been used by

tribunals as warnings against host states spuriously raising the corruption defence. In *Cortec v. Kenya*, the tribunal disapproved of Kenya's conduct in failing to support its corruption allegations with credible evidence; this resulted in the tribunal reducing the costs award by 50%.[197] In *Tethyan v. Pakistan*, the tribunal disapproved of Pakistan's '*entirely meritless*' defences, including unproven allegations of corruption, and ordered Pakistan to bear the full costs of both the arbitration and the claimant's legal fees and expenses.[198]

Where there is no express legality clause in the investment treaty, or where the corruption at hand amounts to performance corruption, the corruption allegations are likely be treated as an admissibility issue (as discussed above). In such circumstances, the arbitration may proceed to the merits stage of the proceedings, which gives rise to the possibility of awarding damages based on a contributory fault regime.[199] In the context of performance corruption, it has been argued that the tribunal should apportion fault between the investor and the host state in consideration of three factors: (i) the nature of the corruption (e.g., a mere 'grease payment' would not weigh as heavily on an investor as opposed to a bribe for an illegal benefit); (ii) the prevalence in the host state of the type of corruption (e.g., the payment of bribes would not weigh as heavily against an investor where corruption is endemic to doing business in the host state); and (iii) the degree to which the host state was actively involved in the corruption (e.g., an investor that initiated a bribe is much more at fault than an investor that faced an extortion for a bribe from the host state).[200]

In contract-based disputes where the investment contract has been invalidated on the grounds of illegality (as discussed above), a non-contractual claim in restitution may, in some circumstances, still be available to account for the extent to which the host state was unjustly enriched at the expense of the investor.[201] On one view, the investor should be entitled to '*an allowance in money for the work done, corresponding to the value of the infrastructure project*'.[202] This approach finds support in the UNIDROIT Principles of International Commercial Contracts[203] as well as recent English law.[204]

6.4 Conclusion

The legal issues that may be raised in ISDS proceedings with allegation corruptions are complex and may arise in a myriad of factual scenarios and varying degrees of moral turpitude. Evidential issues concerning burden and standard of proof frequently come to the fore due to the difficulties of obtaining direct evidence of corrupt dealings. This may even prompt a more proactive approach from the tribunal, though any such approach will be subject to limitations inherent in the arbitral process. However, it is not enough to simply establish proof of corruption, as the presence of a host state as a party and the involvement of corrupt public officials will necessarily require a tribunal to engage in questions of attribution of responsibility. Even where the issues of evidence and attribution of responsibility are overcome, there remains the difficulty of deciding what legal consequences should apply to a finding of corruption,

which is especially thorny in situations where both parties had been complicit in the corruption. While the issue of corruption in ISDS proceedings is a fast-moving subject that continues to throw up vexing questions for parties and tribunals alike, it is hoped that this chapter has managed to capture a concise snapshot of the zeitgeist of current ISDS practice on corruption allegations.

Notes

1. See e.g., Hamby 2016; Ross 2016.
2. See Llamzon 2014, paras. 7.03–7.09.
3. Llamzon 2014, paras. 7.33–7.34.
4. Caprasse and Tecqmenne 2022, p. 520.
5. See e.g., *Elliott Associates L.P. v. Republic of Korea*, PCA Case No. 2018-51, UNCITRAL, Award (20 June 2023) (*Elliott v. South Korea (Award)*); outcome reported in Moody 2023.
6. Nicholls et al. 2011, para. 1.01.
7. Nicholls et al. 2011, para. 1.02.
8. Nicholls et al. 2011, para. 1.03.
9. As of September 2023, 45 countries have ratified or acceded to the convention, including Japan and South Korea.
10. On these two treaties, see further especially Chaps. 4 and 5 in this volume.
11. See Article 15(a), UNCAC.
12. See Article 15(b), UNCAC.
13. See Article 18, UNCAC.
14. Reisman 1979, p. 38.
15. See e.g., the UK Bribery Act 2010.
16. See e.g., the OECD Convention and the FCPA (and Chap. 4 in this volume).
17. *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (*EDF v. Romania (Award)*), para. 221.
18. Mills 2003, p. 295.
19. Scherer 2002.
20. Nicholls et al. 2011, para. 9.134.
21. See *Tethyan Copper Company Pty Ltd v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons) (19 November 2017) (*Tethyan Copper v. Pakistan (Dismissal)*), para. 6.
22. See e.g., *Chevron Corp & Texaco Petroleum Co v. Republic of Ecuador*, UNCITRAL, Second Partial Award on Track II (30 August 2018) (*Chevron Ecuador (Partial Award)*) (tribunal repeatedly sought to secure the attendance of the allegedly bribed individual at the hearing but ultimately failed to do so).
23. Cremades and Cairns 2003, pp. 65, 85. See also *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC* [2018] SGHC 101 (*China Machine v. Jaguar Energy*), para. 224 (Singapore High Court accepted that an arbitral tribunal has 'the duty and mandate to investigate matters raised which, if proven, would render the award unenforceable for being contrary to public policy').
24. See e.g., *Lao Holdings NV and Sanum Investments Ltd v. Government of the Lao People's Republic* [2021] SGHC(I) 10, para. 153 ('*arbitral tribunals have a pro-active role and cannot simply ignore evidence of corruption*'); *China Machine v. Jaguar Energy*, para. 226; *Kenya Airports Authority v. World Duty Free Company Limited t/a Kenya Duty Free Complex* [2018] eKLR (High Court of Kenya), para. 35; see also Kendra and Coleman 2018 (and Chap. 12 in this volume).
25. See Hwang and Lim 2012, para. 17.

26. See *Consultant v. State Agency and others*, Final Award, ICC Case No 7047 (1994), in van den Berg 1996, pp. 79–98.
27. Hwang 2018, pp. 405–419.
28. See *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008), para. 95.
29. *Infinito Gold Ltd v. Republic of Costa Rica*, ICSID Case No. ARB/14/15, Award (3 June 2021), paras. 178–181.
30. See *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (3 October 2013) (*Metal-Tech v. Uzbekistan (Award)*), paras. 86, 274; *Niko Resources (Bangladesh) Ltd v. Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX") and Bangladesh Oil Gas and Mineral Corporation ("PETROBANGLA")*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Procedural Order 13 (26 May 2016).
31. See *F-W Oil Interests, Inc v. The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006) (*F-W Oil v. Trinidad and Tobago (Award)*), para. 211; cf. Article 4(9), IBA Rules on the Taking of Evidence in International Arbitration (17 December 2020) (IBA Rules 2020).
32. Hwang 2018, pp. 412–419.
33. See e.g., *Churchill Mining PLC and another v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12-40, Award (6 December 2016) (*Churchill v. Indonesia (Award)*), para. 238.
34. While there may a preliminary issue of the law applicable to the issue of the burden of proof, this is unlikely to be an issue in practice due to the broad consensus across national jurisdiction on the principle *actori incumbit probatio* and its likelihood of being a general principle of law pursuant to Article 38(c) of the ICJ Statute: see Caprasse and Tecqmenne 2022, pp. 531–533. See also Rule 36(2), ICSID Arbitration Rules 2022; Article 27(1), UNCITRAL Arbitration Rules (2021).
35. See e.g., Valle and Carvalho 2022, p. 845.
36. See e.g., *EDF v. Romania (Award)* (the investor alleged that it was the victim of senior Romanian officials' demands for bribes made during private conversations but could only rely on the testimony of its employees who allegedly received the bribe requests, which were countered by denials by the host state's witnesses (the same persons accused of soliciting bribes) and was deemed by the arbitral tribunal to be insufficient to prove corruption).
37. Lamm et al. 2010, p. 701.
38. See e.g., Mills 2003; Rose 2014.
39. See ICC Case No. 6497 (1994).
40. *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990) (*AAPL v. Sri Lanka (Award)*), para. 56; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 177.
41. See *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA Arbitration, Award (26 January 2006) (*Thunderbird v. Mexico (Award)*); *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006) (*Inceysya v. El Salvador (Award)*) (in the context of a legality clause).
42. See *Spentex Netherlands B.V. v. Republic of Uzbekistan*, ICSID Case No. AR/13/26, Award (27 December 2016) (*Spentex v. Uzbekistan (Award)*), reported in Djanic 2017 (tribunal applied the principle as a starting point but also considered the manner in which the parties had cooperated during the fact-finding process).
43. See e.g., *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006) (*World Duty Free v. Kenya (Award)*), para. 166; *Metal-Tech v. Uzbekistan (Award)*, para. 243.
44. See Hwang and Lim 2012, para. 37; Partasides 2010.
45. See *Himpurna California Energy Ltd (Bermuda) v. PT (Persero) Perusahaan Listruk Negara (Indonesia)*, Final Award (4 May 1999), paras. 219–220 (tribunal noted that while it is aware that the arbitral process is not one that is divorced from reality, such grave accusations must be proven and that 'rumours or innuendo' will not do).

46. *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) (*Rompetrol v. Romania (Award)*), para. 178.
47. While there may be a preliminary issue of the law applicable to the standard of proof, most investment tribunals are likely to reason that they are not bound by any specific rule of evidence and may independently determine the applicable standard of proof: see Caprasse and Tecqmenne 2022, pp. 531–532.
48. Nigel Blackaby et al. 2009, p. 387.
49. See Valle and Carvalho 2022, pp. 845–846.
50. Reiner, p. 336.
51. See e.g., *In re B (Children) (FC)* [2008] UKHL 35, para. 13; *Tang Yoke Kheng (trading as Niklex Supply Co) v. Lek Benedict* [2005] 3 SLR 263, para. 14.
52. Compare *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award (6 August 2019), paras. 109–110 (discussed further in Chap. 12 in this volume), *Getma International and others v. Republic of Guinea*, ICSID Case No. ARB/11/29, Award (16 August 2016) (*Getma v. Guinea (Award)*), para. 184, *EDF v. Romania (Award)*, para. 221 and *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) (*Siag v. Egypt (Award)*), paras. 325–326 (requiring 'clear and convincing evidence'), with *Churchill v. Indonesia (Award)*, para. 244 (discussed further in Chap. 10 in this volume), *Libananco Holdings Co Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 September 2011) (*Libananco v. Turkey (Award)*), para. 125, and *Rompetrol v. Romania (Award)*, paras. 180–183 (requiring 'balance of probabilities'). See also *The Republic of Croatia v. MOL Hungarian Oil and Gas PLC*, PCA Case No. 2014-15, Final Award (23 December 2016) (*Croatia v. MOL (Final Award)*), para. 124 ('it seems clear that there is judicial acceptance of the proposition that the test in matters of corruption should be somewhere between the simple balance of probabilities and absolute certainty').
53. *Metal-Tech Uzbekistan (Award)*, para. 239. See also *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Dissenting Opinion of Professor Francisco Orrego Vicuña (1 June 2009), p. 4; *Niko Resources (Bangladesh) Ltd v. Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX") and Bangladesh Oil Gas and Mineral Corporation ("PETROBANGLA")*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on the Corruption Claim (25 February 2019) (*Niko v. B&P (Corruption)*), para. 806.
54. See e.g., Perry 2019. (But see Chap. 15 in this volume, where instead the authors argue for the higher standard to be applied so the corruption allegation is examined more closely, otherwise the tribunal might find no corruption and compensation under the award could then be paid only for later domestic proceedings applying the higher standard to find corruption by the investor).
55. See Caprasse and Tecqmenne 2022, p. 541.
56. Nicholls, para. 9.134; see also Perry 2019.
57. See *In re Doherty (Original Respondent and Cross-appellant) (Northern Ireland)* [2008] UKHL 33.
58. See *Churchill v. Indonesia (Award)*, paras. 240–244; *Rompetrol v. Romania (Award)*, paras. 182–183; *Libananco v. Turkey (Award)*, para. 125. (See further Chap. 7 in this volume, arguing for a differentiated approach more generally regarding allegations of systemic corruption by the host state).
59. Partasides 2010, para. 53.
60. Caprasse and Tecqmenne 2022, p. 543.
61. See e.g., Article 9(1), IBA Rules 2020; Article 27(4), UNCITRAL Arbitration Rules (2013); Rule 36, ICSID Arbitration Rules 2022.
62. See e.g., *Spentex v. Uzbekistan (Award)*, reported in Djanic 2017; *Getma v. Guinea (Award)*, para. 183; *Metal-Tech v. Uzbekistan (Award)*, para. 243; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (23 April 2012), para. 303.

63. See e.g., *Spentex v. Uzbekistan (Award)*, reported in Djanic 2017; ICC Case No. 8891 (1998). See also Scherer 2002.
64. See also Valle and Carvalho 2022, pp. 850–853 (providing a list of the most common red flags listed by compliance literature, including the 2019 Basel Toolkit).
65. Lamm et al. p. 704.
66. See Article 9(5), IBA Rules on the Taking of Evidence in International Arbitration (2020). See also *Niko v. B&P (Corruption)*, para. 219.
67. Partasides 2010, paras. 62–77.
68. See e.g., *World Duty Free v. Kenya (Award)*; *Metal-Tech v. Uzbekistan (Award)*; *Azpetrol International Holdings B.V. and others v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award (8 September 2009).
69. See e.g., *Elliott Associates v. South Korea (Award)* (Tribunal relied on the factual findings of the South Korean courts with respect to criminal charges); *Inceysa v. El Salvador (Award)* (investor relied on the Supreme Court of El Salvador's decision sustaining the legality of certain administrative acts).
70. See e.g., *Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, BAPEX, and PETROBANGLA*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction (19 August 2013) (*Niko v. B&P (Jurisdiction)*), para. 425 (tribunal acknowledged that national authorities were best placed to investigate and collect proof of corruption relevant to the case).
71. See e.g., *EDF v. Romania (Award)* (the host state relied on the Romanian Anti-Corruption Authority's resolutions concluding that there was insufficient evidence to substantiate the claimant's allegations of corruptions); *China Machine v. Jaguar Energy* (an international commission's report was cited by one party in the arbitration as evidence that the other had bribed government officials).
72. See Born 2014, pp. 2310–2311; Brower 1994, p. 48.
73. See e.g., *Inceysa v. El Salvador (Award)*, paras. 209–213 (tribunal held that the state party's determinations as to the legality or illegality of an investment is not determinative of the issue for the purposes of establishing the tribunal's jurisdiction under the investment treaty). (See also Chap. 16 in this volume discussing the question whether arbitral tribunals should defer to national court decisions on corruption and illegality).
74. See e.g., *Croatia v. MOL (Final Award)*, para. 85; *Niko v. B&P (Jurisdiction)*, para. 426; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 December 2008), paras. 174–176. See also *China Machine v. Jaguar Energy*, para. 227.
75. Malek 2018, para. 28–03.
76. Malek 2018, paras. 43-77–43-79.
77. See e.g., *Croatia v. MOL (Final Award)*, para. 85; *Niko v. B&P (Jurisdiction)*, para. 429.
78. See Born 2014, p. 3774. See also *Tethyan Copper v. Pakistan (Dismissal)*, para. 394 (tribunal ruled out the relevance of a criminal conviction on the ground that it was unrelated to the claimant's investment).
79. See e.g., *Sanum Investments Ltd v. Government of the Lao Peoples Democratic Republic*, PCA Case No. 2013–13, Award (6 August 2019) (*Sanum v. Laos (Award)*), paras. 111, 158 (and Chap. 12 in this volume); *Vladislav Kim & Others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017) (*Kim v. Uzbekistan (Jurisdiction)*), para. 575; *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000) (*Wena Hotels v. Egypt (Award)*), paras. 111–116; *Glencore International AG & CI Prodeco SA v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019), para. 738.
80. *EDF v. Romania (Award)*, para. 221.
81. *Chevron Ecuador (Partial Award)*, para. 8.50.
82. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007) (*Fraport v. Philippines (Award)*), para. 346. (Discussed further in Chap. 13 in this volume. See also Chap. 7, developing an innovative argument that investors might be able to assert duress in situations of systemic corruption).

83. *Metal-Tech v. Uzbekistan (Award)*, para. 422 (discussed further in Chap. 4 in this volume).
84. See United Nations 2001.
85. See Hobér 2008, p. 550.
86. See Crawford 2010, p. 129; Llamzon 2014, paras. 10.13–10.14. For a recent ISDS example involving allegations of state-only corruption, see *Elliott Associates v. South Korea (Award)*.
87. Article 1, ILC Articles.
88. Article 2, ILC Articles.
89. Article 3, ILC Articles.
90. Article 4(1), ILC Articles. For a recent case in which a corporation was considered to be a de facto state organ, see *Elliott Associates v. South Korea (Award)*, paras. 438–446.
91. See Articles 4–11, ILC Articles.
92. Article 5, ILC Articles.
93. Article 8, ILC Articles.
94. Article 7, ILC Articles.
95. ILC Draft Articles Commentaries, p. 46 (fn. 150).
96. See e.g., *Chevron v. Ecuador (Partial Award)*, paras. 8.43–8.52 (tribunal held that the conduct of a judge in corruptly rendering a judgment against the investor was attributable to the host state).
97. An exception to this would be where the investor was coerced or under duress to participate in the corruption, as this would preclude consent being freely given and act as a vitiating factor (see Commentary (6) to Article 20, ILC Articles).
98. Devendra 2019, pp. 273–275.
99. Llamzon 2014, para. 10.58; cf. Crawford and Mertenskötter 2015, pp. 27–42.
100. See e.g., *Metal-Tech Ltd v. Uzbekistan (Award)* (critically discussed further in Chap. 4 and generally in Chap. 1 in this volume).
101. Llamzon 2013, p. 76.
102. See Lim 2012, pp. 613–618; cf. Raeschke-Kessler and Gottwald 2008, pp. 596–597and Llamzon 2013. (Compare also the argument about duress developed in Chap. 7 in this volume).
103. Lim 2012, p. 617.
104. See Lim 2012, pp. 635, 639–650.
105. Lim 2012, pp. 652–654.
106. Lim 2012, pp. 654–656.
107. *World Duty Free v. Kenya (Award)*, para. 130 (discussed further in Chap. 4 in this volume).
108. See generally Begic 2005.
109. Newcombe 2011, pp. 192–193.
110. See *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 February 2008) (*Desert Line Yemen (Award)*), paras. 104–105. (For examples in some Asian treaty practice, compare Chap. 11 on Japan and Chap. 14 on Korea in this volume).
111. Reichenbach 2022, para. 21.14 (citing Article 14(2), 2016 Iran-Slovakia BIT and Article 17(4), 2016 Morocco-Nigeria BIT).
112. See e.g., *Inceysa v. El Salvador (Award)* (investor fraudulently misrepresented itself in a bidding process for government contracts); *Fraport v. Philippines (Award)* (investor knowingly and intentionally circumvented local law on ownership rights of a public utility) (discussed further in Chap. 13 in this volume).
113. *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), para. 86 (minor administrative defects in the investor's underlying documents for the registered investments were held to not deprive it of the BIT's protection); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades (6 August 2007), para. 37; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014), para. 199.
114. Lamm et al. pp. 699–731.

115. This refers to corruption that occurs during the performance of the investment that had been lawfully founded (e.g., bribery to accelerate routine paperwork, to expand the investment, or to evade applicable environmental or labour regulations).
116. Reisman 2021, p. 5; Reichenbach 2022, para. 21.12. See e.g., *Worley International Services Inc. (USA) v. The Republic of Ecuador*, PCA Case No. 2019–15, Final Award (22 December 2023), paras. 421–490 (tribunal majority held that the Claimant's corruption during the operation of its investment rendered its claims inadmissible).
117. Arbitral tribunals are generally empowered to rule on a jurisdictional plea either as a preliminary question or in an award on the merits (see e.g., Article 16(3), UNCITRAL Model Law on International Commercial Arbitration 1985; Article 23(3), UNCITRAL Arbitration Rules 2021; Rule 43(4), ICSID Arbitration Rules 2022).
118. *Metal-Tech v. Uzbekistan (Award)* (discussed further in Chap. 4 in this volume).
119. Ibid., para. 373.
120. See e.g., *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award (16 May 2014) (*Minnotte v. Poland (Award)*), para. 131; *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), para. 308; *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award (12 September 2018), paras. 135–140.
121. See Reichenbach 2022, paras. 21.31–21.35.
122. See e.g., *Spentex v. Uzbekistan (Award)*, reported in Djanic 2017.
123. Arbitral tribunals are generally empowered to rule on a jurisdictional plea either as a preliminary question or in an award on the merits (see e.g., Article 16(3), UNCITRAL Model Law on International Commercial Arbitration 1985; Article 23(3), UNCITRAL Arbitration Rules 2021; Rule 43(4), ICSID Arbitration Rules 2022).
124. *Siag v. Egypt (Award).*
125. *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB 03/4, Award (7 February 2005), para. 57.
126. Paulsson 2005, p. 617.
127. See Douglas 2009, paras. 301–312.
128. Lamm et al. pp. 723–236.
129. See e.g., *Spentex v. Uzbekistan (Award)*, reported in Djanic 2017; *Churchill v. Indonesia (Award)*, para. 493 (discussed further in Chap. 10 in this volume); *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014), para. 130; *Hesham Talaat M Al-Warraq v. Indonesia*, UNCITRAL, Final Award (15 December 2014), paras. 645–646; but cf. *Niko v. B&P (Jurisdiction)*, para. 477; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award (18 July 2014), paras. 1357–1363; *Guyana v. Suriname*, Permanent Court of Arbitration, Award (17 September 2007), para. 418.
130. Newcombe 2011, p. 195.
131. Reichenbach 2022, para. 21.40.
132. See e.g., *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) (*Plama v. Bulgaria (Award)*), para. 144 (tribunal adopted good faith as a free-floating principle of international law that condemns corruption). But cf. criticisms in Reichenbach 2022, para. 21.41.
133. See e.g., *Plama v. Bulgaria (Award)*, para. 143; *Khan Resources Inc.,* et al. *v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012), para. 383; *World Duty Free v. Kenya (Award)*, para. 179.
134. See e.g., *Spentex v. Uzbekistan (Award)*, reported in Djanic 2017 (tribunal found that the respondent's corruption allegations were made out on the facts and therefore refused to hear the investor's claims on the basis that the bribery constituted a violation of international public policy); *Plama v. Bulgaria (Award)*, para. 144 (tribunal ruled that the claim was inadmissible because granting treaty protections to the investment would be 'contrary to the basic notion of international public policy—that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal').

135. *World Duty Free v. Kenya (Award)*, para. 177, citing *Tinsley v. Milligan* [1994] 1 AC 340 (*Tinsley v. Milligan*). (See further on this case in Chap. 4 in this volume).
136. See *Niko v. B&P (Jurisdiction)*, paras. 435–446.
137. *World Duty Free v. Kenya (Award)*, para. 186.
138. *Patel v. Mirza* [2016] UKSC 42 (*Patel v. Mirza*), para. 120. The UK Supreme Court effectively rejected the rigid illegality doctrine in *Tinsley v. Milligan* in favour of a broader enquiry (as elaborated in Chap. 4 in this volume).
139. Vail 2016.
140. See e.g., *Thunderbird v. Mexico (Award)* and *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) (*Genin v. Estonia (Award)*) (and Chap. 12 on Laos in this volume).
141. See e.g., *Minnotte v. Poland (Award)*, para. 163; *Genin v. Estonia (Award)*, paras. 348–373; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010).
142. See e.g., *MTD Equity Sdn Bhd & MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), paras. 242–243.
143. See e.g., *Cementownia 'Nowa Huta' SA v. Turkey* (UNCITRAL (NAFTA)), Award (13 August 2009), para. 177 (investor ordered to bear all costs of the arbitration and the host state's legal fees and expenses due to its abuse of process); *Churchill v. Indonesia (Award)*, paras. 543–557 (investor ordered to pay the fees and expenses of the tribunal, ICSID administrative fees, and 75% of the expenses incurred by the host state for the proceedings due to the proven allegations of forgery and fraud) (discussed further in Chap. 10 in this volume).
144. See e.g., *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 15 (12 January 2015) (tribunal bifurcated proceedings to deal with forgery allegations first) (discussed further in Chap. 10 in this volume).
145. See e.g., *F-W Oil v. Trinidad and Tobago (Award)* (investor alleged host state demanded payment of a USD1.5 million bribe as a condition for continuing negotiation of an operating agreement; allegation ultimately abandoned); *Rumeli Telekom AS & Telsim Mobil Telekomikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (*Rumeli v. Kazakhstan (Award)*) (investor alleged systemic corruption of the Kazakhstan judiciary and the solicitation of a bribe by a Kazakh judge); *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Decision on RSM Production Corporation's Application for a Preliminary Ruling of 29 October 2009 (7 December 2009) (investor alleged that Grenada's denial of an exploration licence and termination of an agreement were motivated by a bribe that was paid or was to be paid to the then Attorney General of Grenada by a third-party corporation); *EDF v. Romania (Award)* (investor alleged that host state failed to extend contractual arrangements beyond their ten-year term because it had refused to pay a USD2.5 million bribe). (Compare also the *Elliott Associates v. South Korea* claim discussed in Chap. 14 in this volume).
146. See e.g., the US Model BIT (2012) (contains a 'minimum standard of treatment clause' that provides that each party 'shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment').
147. Haugeneder and Liebscher 2009.
148. Haugeneder and Liebscher 2009.
149. *EDF v. Romania (Award)*, para. 221.
150. *Rumeli v. Kazakhstan (Award)*, paras. 652–653. (On judicial corruption generally, see also Chap. 10 on Indonesia in this volume).
151. *Chevron v. Ecuador (Partial Award)* at Part VIII.
152. Haugeneder and Liebscher 2009.
153. Blackaby et al. 2009, para. 8.115; see also *AAPL v. Sri Lanka (Award)*, para. 77.
154. See e.g., *AAPL v. Sri Lanka (Award)*; *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), para. 408; *National Grid PLC v. Argentine Republic*, UNCITRAL, Award (3 November 2008), para. 189; *Biwater Gauff (Tanzania) Ltd v. United*

Republic of Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 729. But cf. *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 484.
155. Klaw 2015, p. 82.
156. *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (1989) ICJ 15, para. 128.
157. *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award (10 February 2009), para. 121.
158. See e.g., Article 11.3, 2012 US–South Korea FTA.
159. See e.g., *Elliott Associates v. South Korea (Award)*, paras. 627–668 (investor's national treatment claim ultimately failed due to the impugned measures being subject to an express reservation to the national treatment clause set out in the treaty).
160. See e.g., Article 6(1), US Model BIT 2012.
161. See generally Lim 2012, pp. 639–650.
162. See e.g., Cheng 1987, pp. 155–158.
163. MacGibbon 1958, p. 512.
164. Cedeño 2003, para. 67.
165. Cedeño 2003, para. 113.
166. See Antunes 2000, p. 33.
167. *World Duty Free v. Kenya (Award)*, para. 130.
168. See e.g., Mutua 1994, pp. 50–56; Wrong 2009.
169. Lim 2012, pp. 662–664.
170. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (1984) ICJ Report 246, para. 130.
171. See e.g., *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)* (1992) ICJ Report 240, para. 32 (recognition of possibility of delay resulting in a state's claim being rendered inadmissible).
172. ILC Articles Commentaries, p. 122 (Commentary on Article 20 at para. 6).
173. Reichenbach 2022, paras. 21.28, 21.57 (citing *Wena Hotels v. Egypt (Award)*).
174. Llamzon 2014, para. 10.87.
175. *Fraport v. Philippines (Award)*, para. 346.
176. *See Southern Pacific Properties v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), para. 127; *Wena Hotels v. Egypt (Award)*, para. 116.
177. See *Kim v. Uzbekistan (Jurisdiction)*, para. 406.
178. Compare also the argument for duress, in this context, developed in Chap. 7 in this volume.
179. *World Duty Free v. Kenya (Award)*, paras. 180, 184. (Compare the findings in *Sanum v. Laos*, discussed in Chap. 12 in this volume).
180. Tams 2010, p. 1043.
181. Llamzon 2015, p. 275.
182. See e.g., Article 17(5), 2016 Morocco–Nigeria BIT ('The States Parties to this Agreement, consistent with their applicable law, shall prosecute and where convicted penalize persons that have breached the applicable law implementing this obligation').
183. See Reichenbach 2022, para. 21.29.
184. See generally Brown 1996.
185. See Reichenbach 2022, paras. 21.21–21.23.
186. *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (1962) ICJ Report 6, p. 32; *Pope & Talbot v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), para. 111.
187. MacGibbon 1958, p. 470.
188. See e.g., *Fraport v. Philippines (Award)*, para. 346; *Desert Line v. Yemen (Award)*, paras. 119–120; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007), paras. 191–193; *Niko v. B&P (Jurisdiction)*, para. 455.

189. See e.g., *Kim v. Uzbekistan (Jurisdiction)*, para. 540 (tribunal's minority entertained the estoppel argument but found no evidence showing that the host state had the 'requisite knowledge' of the corrupt conduct or that the investors had detrimentally relied on a representation or conduct of the respondent).
190. See Reichenbach 2022, paras. 21.66–21.67 (citing the diametrically opposing results in *Spentex v. Uzbekistan (Award)* and *Kim v. Uzbekistan (Award)*).
191. *Wena Hotels v. Egypt (Award)*, para. 116.
192. See generally Reichenbach 2022.
193. *Metal-Tech v. Uzbekistan (Award)*, paras. 398, 422; *World Duty Free v. Kenya (Award)*, paras. 190–191.
194. See *Spentex v. Uzbekistan (Award)*, reported in Djanic 2017.
195. See Tussupov 2022, pp. 84–85.
196. Reichenbach 2022, para. 21.62.
197. *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018), paras. 390–401.
198. *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (12 July 2019), paras. 1842, 1845, 1853–1854.
199. See Reisman 2021. See also Reichenbach 2022, para. 21.58.
200. Reisman 2021, pp. 14–19.
201. See Partasides 2017, p. 754.
202. Elgueta 2016.
203. See Article 3.3.2(1), UNIDROIT Principles of International Commercial Contracts 2016 ('Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances').
204. *Patel v. Mirza*, para. 121 (restitution *prima facie* available even vis-à-vis illegal contracts).

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Michael Hwang currently practises as an independent international arbitrator and mediator based in Singapore with a selective practice as Senior Counsel of the Supreme Court of Singapore. He served as Chief Justice of the Dubai International Financial Centre (DIFC) Courts from 2010 to 2018. Michael's other past appointments include: Judicial Commissioner of the Supreme Court of Singapore; Singapore's Non-Resident Ambassador to Switzerland and Argentina; President of the Law Society of Singapore; Commissioner of the United Nations Compensation Commission; Vice Chairman of the ICC International Court of Arbitration; Vice President of the International

Council of Commercial Arbitration (ICCA); Visiting (and later Adjunct) Professor of the National University of Singapore. He was educated at undergraduate and postgraduate levels at Oxford University, where he was a College Scholar. He has been conferred an Honorary LLD by the University of Sydney. He presently serves a Judge of the Bahrain Court of Cassation hearing cases conducted in English.

Aloysius Chang is an international dispute resolution lawyer based in Singapore, where his practice focuses on international arbitration. He previously practised international arbitration with major international law firms in Singapore and served as a law clerk to one of Asia's foremost international arbitrators. His experience includes a placement with Fountain Court Chambers in London, where he worked with barristers and King's Counsel on various matters before the English courts. He graduated with an LLB (Hons) from the National University of Singapore and later obtained an LLM in International Law from the University of Cambridge under a British Chevening Scholarship. He is admitted to practice in Singapore and in England and Wales.

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Chapter 7
Rebalancing Asymmetries Between Host States and Investors in Asian Investor–State Dispute Settlement: An Exception for Systemic Corruption

Martin Jarrett

Abstract Consider the following case. An investor is building an apartment complex. Halfway into developing this multi-million-ducat investment, a government department starts demanding bribes, which is business as usual for it. The investor initially resists, but eventually caves in. Years later, the host state seeks to use the investor's participation in this corruption against it in an investment-treaty arbitration. The applicable investment treaty stipulates that only lawfully made investments are protected, with the result that the investor must fail. Any arbitral tribunal would be uncomfortable with this outcome. The degree of wrongfulness of the investor's conduct pales in comparison to the host state's, noting that the host state has let many of its governmental departments become dens of corruption. But the arbitral tribunal's hands are apparently tied. The terms of the applicable investment treaty are clear: the investor's claim must be denied, with an asymmetric outcome that effectively benefits the state. This chapter unties arbitral tribunals' hands. It lays down another path for these tribunals to follow in such cases, one which avoids this outcome, yet remains honest to the tenets of international investment law.

7.1 Introduction

Proof that an investment has been infected with corruption will probably deliver a death blow to any investment-treaty claim relating to such investment.[1] Various arbitral tribunals[2] and scholars[3] have recognised that this outcome creates an asymmetry in international investment law. This asymmetry arises because when an investor engages in a corrupt act with a state official, there is always state involvement in the corruption, yet the state is not sanctioned for such wrongful conduct in investment-treaty arbitration.[4]

M. Jarrett (✉)
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
e-mail: jarrett@mpil.de
URL: https://www.mpil.de/en/pub/institute/personnel/academic-staff/mjarrett.cfm

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What is not as well recognised is that this asymmetry can worsen (or potentially disappear) depending on the form of the corruption in question.[5] For example, if an investor devises a plan to corrupt an until-then honest state official who works in a corruption-free government department, this is rather different from a situation where the investor confronts a state official who only performs his or her job on the payment of bribes. In the first case, denying the investor's claim[6] is probably a proportionate response, but it looks rather disproportionate in respect of the second case.[7] But the jurisprudence on corruption in international investment law does not usually distinguish between forms of corruption:[8] if there is any corruption, the ordinary result will be a denial of the investor's claim.[9]

What is the relevance of this jurisprudence for investment-treaty arbitrations involving Asian states? Because of the prevalence of corruption among state officials working in Asian governments,[10] and the relatively high amounts of foreign direct investment that finds its way into Asian economies,[11] Asian states stand to benefit from this jurisprudence in future investment-treaty arbitrations. A foundation stone of this chapter is that where investor–state corruption takes the form of systemic corruption, they should not so benefit. Going forward on that foundation, a proposal is put forward on how, even when the investor has participated in systemic corruption, arbitral tribunals might avoid inflicting a death blow on the investor. Very concisely, the key to that result is to show that arbitration agreements for investment-treaty arbitrations are subject to the doctrine of duress, and that doctrine might be invoked to nullify the legal effects of the investor's participation in an instance of systemic corruption.

To arrive at that destination, the first port of call is to show how systemic corruption differs from other forms of corruption, particularly because the state should be apportioned most of the blame for it. Illuminating this difference is the concern of Sect. 7.2. On account of this difference, it follows that systemic corruption should be treated differently in investment-treaty arbitrations; in other words, investors should not be denied on the basis of systemic corruption. How arbitral tribunals can avoid such denials is assessed in Sect. 7.3. To that end, it is demonstrated how investment-legality requirements can be applied differently. Section 7.4 considers the issue of how arbitral tribunals might respond to investors' participation in systemic corruption, including, for example, by referring them to anti-corruption agencies. Section 7.5 contains the conclusion.

7.2 The (Limited) Wrongfulness of Investor Participation in Systemic Corruption

This chapter demonstrates how the asymmetry[12] that arises when arbitral tribunals deny investors' claims on account of their participation in systemic corruption can be eliminated. That change in the jurisprudence, however, will live or die according to the reasons that underpinned it. In Sect. 7.2.2, these reasons are put forward, but,

before getting there, a prerequisite is to have an understanding of what systemic corruption is.

7.2.1 The Nature of Systemic Corruption

'Systemic corruption' is a well-known concept in both government-produced literature[13] and scholarship, but there is no authoritative definition of the term.[14] Indeed, it is apparent that many authors presume that their audience have an instinctive understanding of what systemic corruption is or are otherwise ready to work with fairly basic definitions, such as 'corruption is not the exception to the rule, but *the* rule'.[15] Michael Johnston, however, has ventured into some turbulent waters by attempting to corruption[16] and has put forward this definition for systemic corruption:[17]

> Systemic corruption is not a special category of corrupt practice but rather a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which many people have few practical alternatives to dealing with corrupt officials.

This definition identifies two defining characteristics of systemic corruption: first, corrupt practices by the state official are routine[18] and, second, the other party has no or little alternative but to participate in the corrupt practice. These two characteristics distinguish systemic corruption from its counterpart, what might be called isolated corruption, which is sometimes called individual corruption.[19] As its name suggests, it arises when the state official engages in corruption as a one-off occurrence or otherwise infrequently: the corruption is the product of the individuals concerned, not the system that they are part of.[20] Finally, systemic corruption should be distinguished from institutional corruption, the basic idea of which is that an institution becomes corrupted because its members habitually (and lawfully) act contrary to its purpose.[21]

What does systemic corruption look like, particularly in respect of investment-treaty disputes? Consider a case where the investor is constructing an apartment complex, which is its investment. The land has been purchased for 1,000,000 ducats. The investor now sets about procuring the various permits that it needs to build the apartment complex and transform it into a profit-making investment. These permits need to be procured from various governmental departments. In some of these departments, the culture of corruption is such that bribes are not asked for, but simply expected. If they are not paid, then the application for the relevant permit is not acted on. This is the advice of the investor's local consultant. The investor pays the bribes. Its permits are granted. The investor spends 6,000,000 ducats on its investment, of which about 200,000 ducats is dedicated to paying bribes.

7.2.2 Systemic Corruption: Wrongfulness of the Conduct of States

If good evidence of this corruption was produced in an investment-treaty arbitration involving this apartment complex, it would be likely that the arbitral tribunal would deny the investor's claim.[22] And while the corruption in this case might be seen as low-level corruption, as opposed to some high-level corruption involving high-ranking state officials or their associates,[23] the general position in international investment law is that all corruption should be met with a response of this nature.[24]

This approach is fairly simplistic. As long recognised in the political-science literature on corruption, not all corruption is created equal,[25] which is also the case with legal concepts under which many different crimes fall, such as theft: shoplifting is a different beast compared to creating a long-running Ponzi scheme. The problem for arbitral tribunals in investment-treaty arbitrations is that they only see that they have one tool to sanction corruption, namely denying the investor's claim. Such a response might be, at times, disproportionate to the wrongfulness of the corruption. But if an arbitral tribunal ever came to doubt the proportionality of declining jurisdiction, it could comfort itself with the thought that it was upholding the rule of law. This sentiment is most evident in the first investment-treaty arbitration where the arbitral tribunal declined to exercise jurisdiction on account of corruption,[26] specifically *Metal-Tech v. Uzbekistan*:[27]

> As a result of the foregoing analysis, the Tribunal lacks jurisdiction over Metal-Tech's treaty claims … the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts … *The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law*, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.

But are arbitral tribunals promoting the rule of law with this approach? Apparently the theory is that when an arbitral tribunal declines jurisdiction over an investor's investment-treaty claim, that investor and other investors are disincentivised from engaging in corruption in respect of their investments in the future. As every act of corruption undermines the rule of law,[28] then with this disincentivisation, the end result should be a stronger rule of law.

This is not a strong argument in respect of systemic corruption. In this context, it must be remembered that systemic corruption is a product of the state, hence the designation 'systemic' corruption. When an arbitral tribunal declines jurisdiction over an investment-treaty claim on account of systemic corruption, what incentive does the state have to change its systems? None. In fact, this outcome (declining jurisdiction) might act as an incentive to continue its corrupt practices[29] because it means that it does not have to face investment-treaty claims that have been infected with *its* systemic corruption.

A final point is that the theory is naive about the realities of combatting systemic corruption. Evidence shows that systemic corruption is very difficult to root out.[30] A root-and-branch transformation of government bureaucracy is needed,[31] something

which a decision in an arbitral award cannot hope to achieve. Because of this, the practice of denying investment-treaty claims based on systemic corruption looks like, at best, virtue signalling and, at worst, further entrenching corruption.

Practically speaking, therefore, this rule of law–based argument fails. Nonetheless, there is still the moral contention;[32] specifically: all corruption is wrongful[33] and so the arbitral tribunal should do what it can to sanction it. It is considered that all corruption is wrongful, but where most (or all) fault lies depends on the form of the corruption in question. In respect of systemic corruption, most fault has to be placed at the feet of the state.[34] As its name suggests, systemic corruption is a product of the 'system' within a state, as opposed to the greed of particular individuals.[35] Because of this comparatively higher degree of fault compared to the investor, the state should not benefit from an arbitral tribunal's response to a finding of corruption, thereby meaning that there is no good moral basis underlining the practice of declining jurisdiction.

But there is still the lingering issue of the investor's participation in the corrupt dealing. Is this conduct also wrongful? Starting from the foundation that all corruption is wrongful,[36] it follows that any participation in a corrupt dealing is wrongful. An investor might respond, however, that 'the system made me do it',[37] which is effectively a duress-derived argument that it was coerced into the corrupt dealing. Duress is a moral game-changer: if a person's act is the product of coercion, he or she will be relieved of moral responsibility for it.[38] Accordingly, this the-system-made-me-do-it argument has some potential in the moral sphere.[39] The question is now whether it can be used in the legal sphere, specifically for the purpose of giving arbitral tribunals an alternative to ruling that the investor's investment-treaty claim should be rejected (on account of its participation in an instance of systemic corruption).

7.3 Current Jurisprudence on Application of Investment-Legality Requirements in Cases Involving Corruption

Before assessing whether an investor might make use of a duress-based argument to keep its investment-treaty claim alive, that assessment must be properly contextualised. To this end, it is helpful to begin by outlining the current doctrine that informs how arbitral tribunals respond to situations where there is proven investor–state corruption.

7.3.1 Current Doctrine on Corruption in Investment-Treaty Arbitration

Investor–state corruption becomes particularly relevant in investment-treaty arbitration via 'investment-legality requirements'. They are found in the definitions of 'investment' in most investment treaties, although some do not have them.[40] In this latter case, arbitral tribunals have nonetheless sometimes found ways to read them in, meaning that investment-legality requirements are an omnipresent feature of investment-treaty arbitrations. In respect of these implicit investment-legality requirements, there is a question regarding whether they are relevant to jurisdiction, admissibility of the claim or its merits.[41] The same question does not arise in respect of explicit investment-legality requirements because it is clear that they are conditions of states' consent to arbitration.[42]

As an explicit investment-legality requirement will likely be applicable in any investment-treaty arbitration, they will be in focus for the remainder of this chapter. Although their exact wording varies between investment treaties,[43] they usually stipulate that an investment must be made in accordance with host state law. Whenever an investor has participated in corruption in developing its investment, it should always fail to satisfy this requirement, noting that even the most corrupt states have laws against corruption.[44]

To take some of the bite out of investment-legality requirements, some jurisprudence has been developed that softens their sharp edges.[45] Perhaps because of the wrongfulness associated with corruption, these softeners have not been applied in cases involving corruption, with the possible exception of the case of *Gavrilović v. Croatia*. 'Possible' because the arbitral tribunal was reluctant to call the relevant conduct 'corrupt', but rather preferring to see it as an 'irregular dealing' between the investor and Croatia (including a government minister), apparently fearing that it might assume the role of a criminal court if it did make a finding of corruption.[46] In any case, the investment-legality requirement was not breached because the state (through its courts and a government minister) orchestrated the dealing.[47] Presumably another factor that influenced the arbitral tribunal was that even though the various state officials involved in this dealing were abusing their offices, they did not (apparently) directly benefit from the dealing. Rather, the benefit of the investor's part in the dealing went to Croatia (for its war effort against Serbia).[48]

The point is that if there is investor–state corruption, the investment-legality requirement will operate to bite the investor, unless the case can be brought within the narrow exception carved out by *Gavrilović v. Croatia*. As noted in Sect. 7.1, this doctrine is bound to deliver asymmetrical outcomes, particularly in cases involving systemic corruption, because the wrongfulness of the investors' participation in such corruption is limited. But how can this outcome be avoided? The plain words of investment-legality requirements stipulate that investment must be lawfully made, which is clearly breached if an investor participates in corruption. It could be argued that 'law' in an investment-legality requirement assumes a different meaning in systemically corrupt societies; that is, that it should mean 'the law in action' as

opposed to 'the law in the books', though it is considered that this argument has no prospects of success. The better approach is not to concentrate on the meaning of the words in investment-legality requirements, but rather to think more broadly about their application.

7.3.2 The Application of Explicit Investment-Legality Requirements in Cases Involving Systemic Corruption: Non-ICSID Arbitrations

Enter the doctrine of duress. Its promise is that it can stop the application of investment-legality requirements in cases involving systemic corruption. Very concisely, it can operate in this way because it can undo the legal effect of an act that was the product of duress. Applied to cases involving investor–state systemic corruption, the argument would be that if the investor's participation is the product of duress, then it should not have any legal effect, meaning that it could not breach any investment-legality requirement.

To make this argument work, two pillars need to be put in place: (i) investment treaty–based arbitration agreements are subject to the doctrine of duress and (ii) an investor's participation in systemic corruption could be the product of duress. Whether each of these pillars can be laid is assessed in the next three sub-sections.

7.3.2.1 The Applicability of the Doctrine of Duress to Investment Treaty–Based Arbitration Agreements

The basic issue is: are investment-treaty-based arbitration agreements subject to duress? In order to start answering that question, it needs to be determined what the applicable law is on the validity of such arbitration agreements. From here on, this will be referred to as the law of the arbitration agreement. If the doctrine of duress is part of this law, then it follows that investment treaty–based arbitration agreements are subject to it.

The process of making this determination starts with recognising that there are two types of investment-treaty arbitrations, namely ICSID and non-ICSID.[49] There are two different regimes that underlie each of them. As regards ICSID arbitrations conducted under the ICSID Arbitration Rules (2022),[50] they are entirely underpinned by the international legal regime,[51] most especially the ICSID Convention, with other international law playing a supplementary role. For present purposes, this means that the law of the arbitration agreement for ICSID Convention arbitrations is international law. The follow-up question is then whether there is a doctrine of duress in international law that might be applicable, which is a question addressed later on.

Turning to non-ICSID arbitrations, they are grounded in domestic law,[52] specifically the law of their arbitral seats. The law of an arbitration agreement for a particular arbitration, however, can be different from its arbitral seat.[53] As an example, in *Ecuador v. Occidental*, which is a case that derived from the London-seated *Occidental v. Ecuador (I)*, the English High Court held that while English law was the law of the arbitration, the law of the arbitration agreement was international law.[54] Whether this still represents good law is open to doubt,[55] but it illustrates the point that domestic law or international law might be applicable.

How can a final determination be made? It is ultimately a matter of applying the choice-of-law rules on the law of arbitration agreements in the law of the forum; for example, and with reference to *Ecuador v. Occidental*, an English court (the forum) would apply English law to make this determination. The good news is that the basic choice-of-law rule in almost all jurisdictions is that if the parties explicitly choose a governing law for their arbitration agreement, that will be the law of the arbitration agreement.[56] The bad news is that such a choice is seldom expressed in investment treaty–based arbitration agreements, either directly in the treaty or indirectly via the arbitration rules that the investor is allowed to select for its claim.[57] If there is no explicit choice made, then it is somewhat of a lottery as to which law will end up being applicable because a number of different methods (to make this determination) have developed across different jurisdictions.[58] While many jurisdictions opt for the law of the arbitral seat and see it as the primary indicator of the parties' intention regarding the law of the arbitration agreement, other jurisdictions look to the substantive law governing the relationship between the parties.[59]

What does all of this mean for present purposes? In respect of non-ICSID arbitrations, either domestic law (law of the arbitral seat) or international law (substantive law between the investor and the state) might be applicable as the law of the arbitration agreement. Does it matter whether one or the other is applicable? Probably not, because both almost certainly contain a doctrine of duress. This is certainly the case if domestic law is applicable: the rules on the validity of arbitration agreements are informed by the corresponding rules in contract law (which are operative in the relevant jurisdiction);[60] all well-developed bodies of contract law contain a doctrine of duress,[61] thereby entailing the conclusion.[62]

To get to the same conclusion in respect of international law is somewhat trickier. It might be thought that if international law is the law of the arbitration agreement, then the Vienna Convention on the Law of Treaties (VCLT) is applicable, which indeed contains duress-related provisions.[63] The reason for the apparent application of the VCLT is that the validity of an investment *treaty*-based arbitration agreement is in question. But this is a misapprehension. An investment treaty–based arbitration agreement is a *separate agreement* that derives from a treaty, much in the same way that arbitration agreements are separate from the contracts that they are often found in.[64] This separateness excludes the application of the VCLT because it only applies to state–state treaties,[65] with the result that other international agreements between states and other subjects of international law are explicitly excluded from its scope.[66]

Because the VCLT is not applicable, recourse should be made to other sources of international law, namely custom and general principles of law. The latter is

particularly helpful for present purposes. Generally speaking, a principle qualifies as a general principle of law if it is a feature of well-developed domestic legal systems,[67] particularly if it forms part of private law.[68] As previously noted,[69] a doctrine of duress is a part of every body of contract law, meaning that it fits well within this definition. It follows that duress is a general principle of law, thereby making it part of international law for the purposes of the law of an arbitration agreement (governed by international law). And this conclusion does not only concern non-ICSID arbitrations, but also ICSID arbitrations. In this context it should be noted that while Article 25 of the ICSID Convention generally controls issues of jurisdiction, it only performs that role in respect of the jurisdictional requirements that it mentions,[70] such as 'legal dispute', 'investor' and 'investment'.[71] The question of the application of other jurisdictional requirements, such as investment-legality requirements, is governed by general international law.[72]

7.3.2.2 Temporal Application of the Doctrine of Duress

Putting all of this analysis together, the conclusion is that all investment treaty-based arbitration agreements are subject to a doctrine of duress. The next question is whether the doctrine can save investors' corruption-infected claims. Answering that question has several dimensions, one of which is whether an investor's participation in systemic corruption can legally be seen as a product of duress, while another aspect looks at whether the doctrine temporally applies. The second aspect is examined in this sub-section.

The issue of the temporal application of the doctrine of duress arises because of how an investor would use it. To recap, if an investment-legality requirement is activated by an investor's participation in systemic corruption, then the arbitration agreement will be terminated; but, to avoid that outcome, the investor will argue that it should be revived because its conduct was the product of duress. A potential problem with this argument is that the relevant conduct (systemic corruption) occurs before the arbitration agreement is formed. It might be questioned whether the tentacles of the doctrine of duress spread this far. When duress applies preformation, it ordinarily acts to render contracts void,[73] not revive them.[74] The revival of contracts is something that can be achieved if there is duress in the post-formation phase.[75]

To respond to this problem, a basic precondition is to know the content of the applicable doctrine of duress—its temporal application has to be determined. As explained in Sect. 7.3.2.1, in respect of investment treaty–based arbitration agreements, this doctrine could come from domestic law or international law. Considering that arbitration agreements for ICSID arbitrations are governed by international law, and most investment-treaty arbitrations are ICSID arbitrations,[76] it will be assumed that international law is applicable. This creates some difficulty because there is no authoritative source on the content of the international doctrine of duress, as it applies to agreements between states and other subjects of international law. To fill the void, domestic doctrines of duress can be looked to, but their content will also differ between jurisdictions. Because it is representative of the doctrine of duress

throughout the common law world, reference will be made to English law. This is not to suggest that English law serves as the dominant body of law upon which Asian legal systems were built, although, acting with French law and German law, English law has been influential in Asia. But moving beyond that point, the broader purpose here is to demonstrate that arbitration agreements do not exist in a legal vacuum, but rather have some governing law that regulates their application. To achieve this purpose, English law serves as an illustrative tool.

Under the English doctrine, could an 'unformed agreement' be revived? Without direct jurisprudence on this point, no firm conclusions can be drawn, but such revival may be possible. Investment-legality requirements can be seen as conditions precedent to investment treaty-based arbitration agreements. If one party coerced another party not to perform a condition precedent, with the result that the contract was not formed, it is difficult to see how this is different from a situation where an existing contract is terminated with duress, noting that such a contract will be revived under English law.[77] A further enhancement to this argument is the opening comment of Lord Burrows in his doctrinal exposition on the English doctrine of duress in *Pakistan International Airlines v. Times Travel*, which was that 'duress may take various forms'.[78]

Finally, it might be argued that, at the time of the investor's participation in the systemic corruption, an arbitration agreement may have already formed, assuming that the investor is already developing its investment. This argument butts up against the conventional wisdom that investment treaty–based arbitration agreements form when the investor initiates arbitration.[79] Another view, and the one that is a foundation of the theory developed in this chapter, is that, at this moment, the investor's obligation under such arbitration agreements is perfected, with the result that the state's obligation becomes due for performance. This 'moment of perfection' should not be confused with the 'moment of formation'.[80] If the contract is a unilateral contract,[81] which investment treaty-based arbitration agreements arguably are,[82] formation occurs when the promisee (the investor) starts performing.[83] When does an investor start performing? The foundational case of *Carlill v. Carbolic Smoke Ball Co* is instructive. The offeror promised as follows: if any person used its 'smoke ball' and became infected with influenza, then such person could make a claim against the offeror for GBP100.[84] In a subsequent case, *Soulsbury v. Soulsbury*, it was held that as soon as a promisee inhaled a smoke ball, the contract was formed.[85] What is the equivalent of inhaling a smoke ball when thinking about investment treaty-based arbitration agreements? It is the act of making an investment in the host state. It is the first step that has to be made in order for the state to perform its obligation.

7.3.2.3 Is Investor Participation in Systemic Corruption a Product of 'Duress'?

Accordingly, even if it was conceived that the doctrine of duress only applies to revive contracts that are already formed, it is likely that, when an investor makes an investment, an investment treaty–based arbitration agreement is already formed. But

the temporal application of the doctrine of duress is not the real challenge, however. The real challenge is determining whether a state's conduct relating to an investor's participation in systemic corruption can be substantively described as 'duress'.

Again, the question hinges on the content of the international doctrine of duress, which it has been assumed that English law might provide some inspiration for. In *Pakistan International Airlines v. Times Travel*, Lord Burrows posited that duress comprised three elements.[86] When they are reformulated for cases where the investor argues that an investment treaty-based arbitration agreement should be reactivated, this three-element test provides that the state must make (i) an illegitimate threat towards the investor that (ii) causes the investor to perform the relevant invalidation act and (iii) the investor had no reasonable alternative but to perform such an act.

Regarding the first element, 'illegitimate threat', one basic rule is that if the threat is unlawful, then it is always illegitimate.[87] Thus, if a state official indicates that he or she will only perform his or her duty upon the payment of a bribe by the investor, then this element will be satisfied. But it will be a rare case where a state official openly asks for a bribe. In systemically corrupt government departments, it is likely that a bribe will be expected,[88] meaning that the state official will not have to ask for it. When an investor encounters such an environment, does the state official 'make' an illegitimate threat? There are two options here. First, if the investor can show that it honestly and reasonably believed that, unless it paid a bribe, the state official would not act, then this might constitute 'making' an illegitimate threat. Because this idea stretches the notion of 'making', a second option would be to add that the investor has to 'pay under protest';[89] in other words, the investor has to indicate that it does not wish to participate in systemic corruption. As regards the second element, the causal link between the investor's act of participating in systemic corruption and the illegitimate threat, this will ordinarily be satisfied because investors will not pay bribes unless they are made to.[90] For the case where an investor intends to get the government service that it seeks via corruption, this element will act to disqualify it from relying on duress.

Turning to the third element, specifically that the investor had no reasonable alternative, its application will be generally contestable. Its application involves a balancing act.[91] If the illegitimate threat is unlawful, this element requires the weighing of different factors, particularly the value of the potential loss (of not submitting), the chances of nullifying the threat with legal action and the amount of the bribe.[92] For investors, the value of the potential loss will hinge primarily on the amount that it has invested; in other words, an investor who has already invested 1,000,000 ducats faces greater pressure than the investor who has invested 1,000 ducats. Additionally, the centrality of the permit for the investor's plans will be relevant: a permit for the investor to perform the basic investment activity has a different meaning compared to one that makes doing business easier.

As regards the second factor, this examines whether the investor could have successfully applied for an injunction-like order against the state (to make it withdraw its demand for the investor's participation in the corrupt dealing). The ideal venue for this purpose would be the courts in the host state, but certain realities stand in the way of this ideal. Factually speaking, if the investor faces systemic

corruption in one government department, then it might reasonably assume that the courts also lack independence.[93] Theoretically, the investor might also have the option of initiating emergency arbitration against the state to obtain such an order, but this option is not available under the ICSID Arbitration Rules (2022), nor the UNCITRAL Arbitration Rules (2021),[94] which are the most commonly applicable rules for investment-treaty arbitrations. And while many arbitral institutions offer emergency arbitration, one of the popular arbitral institutions,[95] namely the International Chamber of Commerce, has specifically excluded the possibility of emergency arbitration in respect of investment-treaty cases.[96]

7.4 The Lingering Issue of the Investor's Corrupt Conduct

In summary, investment treaty–based arbitration agreements are subject to a doctrine of duress and investors might use it to save their investment-treaty claim, if such claim will otherwise be disqualified on account of its participation in systemic corruption. This outcome addresses the asymmetry that arises when a state effectively benefits in investment-treaty arbitration from systemic corruption in its governmental departments. Nonetheless, the fact is that there is no sanction brought down on the investor. How might arbitral tribunals deal with the lingering issue of the investor's corrupt conduct?

There is always the option of considering the investor's corrupt conduct on its merits,[97] although it is considered that this should be a stop-gap solution. The basic reason underlining this view is that arbitral tribunals are not the ideal corruption fighters,[98] which is, in turn, a premise informed by two other reasons. First, there is the issue as to whether arbitration is a suitable venue to adjudicate on criminal (or quasi-criminal) matters, particularly given the public interest in such matters, remembering that the general public is the ultimate victim of corruption. Second, because of the secretive nature of corruption, it is especially difficult to prove—and this problem is only exacerbated in arbitration because arbitral tribunals lack powers to compel the production of evidence.

It has to be emphasised that arbitral tribunals should not stop adjudicating on corruption. When systemic corruption has been proven, arbitral tribunals should take action. The point is rather that the toolkit of arbitral tribunals needs to be expanded (to take such action). It is submitted that the best way for an arbitral tribunal to deal with instances of systemic corruption is to refer them to the proper law-enforcement body, which will probably be the anti-corruption body in the investor's home state. It is important to emphasise that the most important building-block for this idea is already in place: the prevalence of extrajurisdictional laws prohibiting corruption in international business. Under these laws, the home states of investors criminalise the corrupt conduct of their investors in host states.[99] The impetus for the development of these laws was the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[100] All OECD members states, plus Argentina,

Brazil, Bulgaria, Peru, Russia and South Africa, have ratified this treaty.[101] Accordingly, whenever an investor from one of these states, which includes all of the major capital-exporting states, invests abroad, that investor can be prosecuted for its corrupt conduct in its home state.

The policy underlying this submission that allegations of corruption should be referred to anti-corruption specialists—rather than letting arbitral tribunals guess how to sanction, it is better to hand over the task to people who know how to do it. New legal infrastructure would have to be constructed for that purpose in order to ensure that arbitral tribunals feel secure in making such referrals,[102] specifically some kind of 'referral mechanism'. That has to be the procedural innovation of the future.

7.5 Conclusion

If that future never eventuates, arbitral tribunals for investment-treaty arbitrations will have to use the only tool that they currently have, the investment-legality requirement. This works like a sledgehammer—it can drive a crucifixion-sized nail into the heart of an investment-treaty claim. But this punishment should fit the crime, which it probably does not if the investor's crime is its participation in systemic corruption. The problem for arbitral tribunals is that investment-legality requirements are rigid. Although some arbitral tribunals have sought to temper them by subjecting them to a test of proportionality,[103] which requires that the consequence (denying the investor's claim) must be proportionate to the unlawful conduct, this limitation has not found its way into the wording of investment-legality requirements. Formally speaking, investment-legality requirements are simple: if there is unlawful conduct in the establishment of an investment, then arbitral tribunals are given a sledgehammer with which they can strike at the investor's claim.

What this contribution has shown is that arbitral tribunals do not always have to pick up the figurative sledgehammer on proof of systemic corruption. This is because, like any arbitration agreement, investment treaty–based arbitration agreements need a governing law. That law will usually be international law, which must contain a doctrine of duress, as it is a general principle of law. Accordingly, investment treaty–based arbitration agreements are subject to the doctrine of duress. The content of this international doctrine of duress is unclear. To fill the void, indicatively, English law was referred to. As demonstrated in Sect. 7.3.2.3, a feasible argument could be constructed that the investor's participation was the product of duress. If that argument was successful, then the legal effect of the investor's conduct would be nullified, specifically the breach of the investment-legality requirement. With its nullification, the investor could continue to push its investment-treaty claim.[104] With that outcome, the asymmetry that results when a state succeeds in an investment-treaty arbitration on account of the investor's participation in systemic corruption would be addressed.

An obvious limitation to this proposal is that the case must involve systemic corruption. Does this limit the effectiveness of the proposal put forward in this chapter? No. Almost by definition, systemic corruption has to be far more commonplace than opportunistic corruption. Moreover, arbitral tribunals have good reason to punish investors' participation in opportunistic corruption because an investor chooses to participate. Accordingly, in rebalancing the asymmetry caused by the application of investment-legality requirements, there is still room for arbitral tribunals to apply investment-legality requirements in cases involving corruption where the investor is deserving of punishment.

Notes

1. Llamzon 2014, para. 7.10.
2. See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades (19 July 2007) (*Fraport v. Philippines*), para. 37; and *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013) (*Metal-Tech v. Uzbekistan*), para. 389.
3. Brower and Ahmad 2018, para. 18.02.
4. Reid and Zamour 2022, p. 275.
5. But see Bishop 2010, p. 66.
6. 'Denial of the investor's claim' refers to, one, an arbitral tribunal's declining of jurisdiction and, two, rejecting the investor's claim on the merits on account of corruption. Exactly which of these two options the arbitral tribunal takes depends on whether the investment-legality requirement in question is relevant to jurisdiction or merits; see further Sect. 7.3.1 below.
7. Bishop 2010, p. 66.
8. The major exception here is the case of *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award (25 July 2018) (*Gavrilović v. Croatia*). There, as the arbitral tribunal found that high-level Croatian officials had orchestrated the corruption, it did not make an adverse finding against the investor.
9. Christofi 2021, p. 135.
10. In the most recently released Global Corruption Barometer on Asia (covering Bangladesh, Cambodia, China, India, Indonesia, Japan, Malaysia, Maldives, Mongolia, Myanmar, Nepal, the Philippines, South Korea, Sri Lanka, Taiwan, Thailand and Vietnam), the first 'key finding' was that 'nearly three out of four people think that government corruption is a big problem in their country'; see Transparency International 2020, p. 5. See also Chapter 1 in this volume.
11. UNCTAD 2022a, b.
12. By way of note, this asymmetry is an interesting counterpoint to the asymmetry that is often highlighted in international investment law, specifically that only investors can bring claims (but states ordinarily cannot counterclaim); see generally Kürtz 2020. For scholarship that challenges this asymmetry narrative, see Ishikawa 2022 (reviewed by Nottage 2023).
13. See, for example, Public Safety Canada 2022, p. 2.
14. Although it has been defined for legal purposes under Australian (federal) law, see Law Enforcement Integrity Commissioner Act 2006 (Cth), s 5 ('"systemic corruption" means instances of corrupt conduct (which may or may not constitute serious corruption) that reveal a pattern of corrupt conduct in a law enforcement agency or in law enforcement agencies').
15. Persson et al. 2013, p. 449 (original emphasis). See also Stefes 2007, p. 6 and Johnston 1998, p. 85.
16. See Kurer 2015, p. 30.

17. Johnston 1998, p. 89.
18. Kahana and Qijun 2010, p. 83.
19. Ceva and Bagnoli 2021, p. 4.
20. Klitgaard 2004, p. 1.
21. Lessig 2021, p. 553. See also generally Thompson 2018.
22. Llamzon 2014, para. 7.10.
23. It is recognised that systemic corruption can be both low level and high level; see Stefes 2007, p. 6.
24. Jarrett 2023, pp. 228–230.
25. Klitgaard 1988, p. 46. See also Chap. 1 in this volume.
26. Reid and Zamour 2022, p. 273.
27. *Metal-Tech v. Uzbekistan*, para. 389 (emphasis added).
28. See Fuller 1969, p. 81.
29. Bulovsky 2019, p. 132.
30. Stefes 2007, p. 8.
31. See Rothstein (2018), p. 45 ('The main goal should be to convince the population that the basic social contract is about to change and to give them a stake in the existence of a well-functioning public sector that can deliver important goods to them in an honest and competent manner.').
32. See, for example, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019) (*Glencore v. Columbia*) where the arbitral tribunal described corruption as 'morally odious'; see *Glencore v. Columbia*, para. 663.
33. Karklins 2005, pp. 6–8. Note, however, that some political scientists contend that some forms of corruption are beneficial for economic growth; see Aidt 2019, p. 618.
34. Reflects standard view that if a person causes a consequence, he or she is ordinarily morally responsible for it; see generally Sartorio 2007, p. 750.
35. Puckett 2010, pp. 818–819.
36. Karklins 2005, pp. 6–8.
37. Phrase taken from title of Karklins's book; see Karklins 2005.
38. Sartorio 2022, p. 355.
39. See further Ceva and Bagnoli 2021.
40. According to UNCTAD statistics, approximately 66% of all investment treaties contain explicit investment-legality requirements; see UNCTAD, Mapping of IIA Content. See also Chap. 1 in this volume.
41. There are at least four investment-treaty arbitrations where this was a live issue; in chronological order: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) (*Plama v. Bulgaria*); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017) (*Bear Creek v. Peru*); *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018) (*Cortec v. Kenya*); and *Fynerdale Holdings BV v. Czech Republic*, PCA Case No. 2018–18, Award (29 April 2021) (*Fynerdale v. Czechia*). In the first two, the illegality was held to be relevant to the merits, while, in the latter two, it was held to be relevant to jurisdiction; see *Plama v. Bulgaria*, paras. 126–130; *Bear Creek v. Peru*, paras. 318–324; *Cortec v. Kenya*, para. 319; and *Fynerdale v. Czechia*, para. 554 (by majority).
42. Obersteiner 2014, p. 268.
43. For an overview of the various types of 'in accordance with host state law' clauses, see Reinisch 2018.
44. Rothstein 2018, p. 39.
45. For an overview of these 'softeners', see generally Risso and Amaro 2020.
46. See *Gavrilović v. Croatia*, para. 399.
47. Ibid. paras. 383 and 396.
48. See ibid. para. 325.

49. Kriebaum et al. 2022, p. 342.
50. Only these ICSID arbitrations are governed by international law; see ibid. p. 345.
51. See Steingruber 2012, para. 12.37.
52. Commission and Moloo 2018, para. 1.04. Note that as domestic law is formally applicable, it will often be the case that international law is applicable because the domestic law is informed by the New York Convention; see Paulsson 2016, p. 33.
53. Blackaby et al. 2015, p. 157.
54. See *Republic of Ecuador v. Occidental Exploration and Production Company* [2005] EWHC 774 (Comm); *Occidental Exploration & Production Company v. The Republic of Ecuador* [2005] EWCA Civ 1116, para. 13.
55. A new test for determining the law of the arbitration agreement was subsequently pronounced in *Sulamerica v. Enesa Engenharia.*
56. Born 2021, p. 617.
57. Although, interestingly, if the LCIA Rules are applicable, then they include a deeming provision to the effect that the law of the arbitral seat is the law of the arbitration agreement; see LCIA Rules, Article 16(4). LCIA Rules are also potentially applicable in investment-treaty arbitrations; see Onwuamaegbu 2018, para. 3.03.
58. For an overview of these methods, see Blackaby et al. 2015, pp. 158–165.
59. A smaller minority (including Switzerland) default to whichever law validates the arbitration agreement, while another even smaller minority of jurisdictions (which are French law dominated) jump directly to divining the 'common intentions of the parties' as the applicable law of the arbitration agreement; see generally Scherer and Ole Jensen 2021.
60. Born 2021, p. 895.
61. Smith 1997, p. 343. For an example of the global acceptance of duress as an invalidating factor, see UNIDROIT Principles of International Commercial Contracts (2016), Article 3.2.6. Additionally, the doctrine forms part of bodies of contract law in various Asian jurisdictions; see Beale 2022, pp. 510–513.
62. Indeed, duress is already used to challenge the validity of arbitration agreements; see Born 2021, pp. 871–872.
63. See VCLT, Arts. 51 and 52.
64. On the separability principle, see generally Blackaby et al. 2015, pp. 104–107.
65. VCLT, Article 1.
66. VCLT, Article 3.
67. Statute of the International Court of Justice, Article 38(1)(c).
68. Crawford 2019, p. 32.
69. See note 61.
70. For a list, see Schill et al. 2022, p. 100.
71. Note that although some authorities advocate the view that Article 25 contains an implicit legality requirement, the better view is that it does not; see ibid. pp. 258–262.
72. Ibid. p. 99.
73. In English law, duress-procured contracts or changes to contracts are voidable, not void; see McKendrick 2013, para. 8.203.
74. Lucy 2007, p. 345.
75. See *Pakistan International Airlines v. Times Travel* [2021] UKSC 40, para. 62.
76. UNCTAD 2022a, b, p. 1.
77. Ibid.
78. Ibid.
79. Schreuer 2012, p. 836.
80. McKendrick 2013, para. 8.16.
81. 'Unilateral contract' as conceived under English law, which comprises a promise (offer of arbitration) and an act (acceptance of offer of arbitration by performing various acts, such as making an investment and initiating arbitration); see Martin and Law (2006), p. 555. It is noted that in other legal systems 'unilateral contract' assumes a different meaning; for example, in Japanese law, it refers to a gift; see Sono et al. 2018, para. 47.

82. See Steingruber 2012, para. 11.45 and Paulsson 1995, p. 232.
83. Davison-Vecchione 2014, p. 22; although the jurisprudence is not uniform on this point. For example, in Australian contract law, the case law points in different directions; see *Veivers v. Cordingley* [1989] 2 Qd R 278 (indicating that part performance forms a unilateral contract) and *Mobil Oil Australia Ltd v. Wellcome International Pty Ltd & Anor* [1998] FCA 205 (indicating that part performance does not form a unilateral contract). For a critique of *Mobil Oil v. Wellcome*, see Clark 2000.
84. *Carlill v. Carbolic Smoke Ball Company* [1892] EWCA Civ 1, p. 256.
85. *Soulsbury v. Soulsbury* [2007] EWCA Civ 969, paras. 49–50.
86. *Pakistan International Airlines v. Times Travel*, para. 78 (citations omitted).
87. Ibid. para. 82.
88. Kahana and Qijun 2010, p. 83.
89. For inspiration behind this second option, *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti (The Siboen and Sibotre)* [1976] 1 Lloyds Rep 293, p. 336 (per Kerr J: 'One relevant factor would be whether the party relying on duress made any protest at the time or shortly thereafter').
90. This assumes that the test of causation is the 'but for' test. English courts have held that this test is applicable to test causation; see *Kolmar Group AG v. Traxpo Enterprises Pty Ltd* [2010] 2 Lloyd's Rep 653, para. 92.
91. For an example of how it is done, see *Carillion Construction Ltd v. Felix (UK) Ltd* [2000] ADR. L. R. 11/06, paras. 41–43.
92. See, for example, *Modular Windows v. Command Construction* (1984), 11 CLR 131, para. 28.
93. Systemic corruption is ordinarily the symptom of deeper problems that spread their tentacles throughout society; see Johnston 1998, 88.
94. Under the ICSID Arbitration Rules and UNCITRAL Arbitration Rules, only 'expedited arbitration' can be pursued, which is quite different from 'emergency arbitration'; see Sim 2021, para. 2.39.
95. For a list, see ibid. para. 2.55.
96. See ICC Rules of Arbitration 2021, Art 29(6)(c).
97. See Jarrett 2023, p. 231.
98. Rose 2014, p. 186.
99. Pacini et al. 2002, p. 390.
100. See generally Miller 2000, p. 139.
101. OECD 2018.
102. Particularly bearing in mind the duty of confidentiality that arbitral tribunals are subject to.
103. Subjecting investment-legality requirements to the principle of proportionality was developed by the arbitral tribunal for *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017). For an analysis of that arbitral tribunal's approach to investment-legality requirements, see Mouawad et al. 2021, pp. 71–75.
104. Note that when an investor uses duress to strike down a state's attempt to terminate their arbitration agreement, the investor does not seek to void this arbitration agreement, but rather void its termination. That duress can be used for the purpose of re-establishing a contractual relationship is well established in the case law; see, for example, *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co., Ltd.* [1979] QB 705 (where a duress-induced amendment to a contract was voided) and *Pao On v. Lau Yiu* [1979] 3 All E.R. 65 (where a duress-inducted amendment to a contract was not voided, but the Privy Council recognised that, if duress was proven, it could have operated in this way). See further England and Rafferty 1980, pp. 633–638.

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Martin Jarrett is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. He is also employed as an Adjunct Lecturer at the Goethe University Frankfurt. His research focuses on international arbitration and international investment law, particularly questions of investor misconduct. In addition to his academic work, he works as a consultant to various intergovernmental organizations.

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Part III
Country Reports

Chapter 8
Foreign Investment, Investment Treaties and Corruption in China and Hong Kong

Vivienne Bath and Tianqi Gu

Abstract This chapter focuses on the interaction of domestic regulation of corruption in China and Hong Kong and the increasing number of international arbitration cases brought by and against China. In conjunction with the enormous growth in foreign investment in China since it opened up at the end of the 1970s, China has developed a comprehensive network of international investment agreements (IIAs). Hong Kong is also a party to about 30 IIAs in its own name. Government and business corruption and bribery have been a problem in both jurisdictions. China and Hong Kong have taken active steps to criminalize, and to investigate and prosecute, corruption and to participate in major international initiatives relating to corruption. While corruption has, so far, made a limited appearance in the small number of investor–state dispute settlement (ISDS) cases brought by investors against China and cases brought against other states by Chinese and Hong Kong investors, based on existing material, a number of tentative conclusions and recommendations can be made. China should move towards a higher level of transparency, both in relation to ISDS cases and to its domestic criminal law system; both China and Hong Kong should play a more active role in prosecuting bribery by enterprises outside China, including by joining the OECD Convention on Combating Bribery of Foreign Officials; and, finally, China should consider including provisions relating to corruption in its future IIAs in order to demonstrate its commitment to the international war on corruption in business.

V. Bath (✉) · T. Gu
University of Sydney Law School, Sydney, NSW, Australia
e-mail: vivienne.bath@sydney.edu.au
URL: https://www.sydney.edu.au/law/about/our-people/academic-staff/vivienne-bath.html

T. Gu
e-mail: Tianqi.gu@sydney.edu.au
URL: https://www.linkedin.com/in/tianqi-gu-115921228/?originalSubdomain=au

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8.1 Introduction

Since the People's Republic of China (China) opened up to investment in 1979, foreign direct investment (FDI) into mainland China has rapidly increased. In 2020 and 2021, China was the second largest recipient of FDI in the world (after the United States), followed by the Hong Kong Special Administrative Region (Hong Kong) in third place.[1] China's outbound investment has also increased over the last 20 years. In 2020, China was the second-largest investor in the world, dropping to fourth place in 2021. Hong Kong was the seventh largest in 2021, falling from fourth in 2020. Hong Kong is the host of many major companies and is the beneficiary of—and intermediary for—Chinese investment, both outbound and inbound.[2]

China has a comprehensive network of international investment agreements (IIAs), comprised of bilateral investment treaties (BITs), investment chapters incorporated in free trade agreements (FTAs) and other bilateral and multilateral agreements. Hong Kong has signed about 30 IIAs in its own name. The number of investor–state dispute settlement (ISDS) cases against China, however, is surprisingly few, while no cases at all have been brought against Hong Kong. In contrast, Chinese and Hong Kong investors are becoming increasingly active in initiating ISDS.

Government and business corruption has been a problem in both jurisdictions. In the case of Hong Kong, since its establishment in 1974 the Independent Commission Against Corruption (ICAC) has been the centre and the symbol of the determination of the Hong Kong government to fight corruption in the public sector.[3] China is a party to major international initiatives relating to corruption, and has, at a central level, established a complex and detailed legislative and administrative regime involving both government and the Chinese Communist Party (CCP) for the purpose of fighting corruption in central and local governments, CCP entities and businesses. Reports suggest, however, that fighting corruption in the Chinese civil service is an ongoing battle, even at the highest levels.

This chapter provides an overview of foreign investment in China and Hong Kong; looks at the regulation of corruption and bribery; discusses China and Hong Kong's IIAs; looks at ISDS cases in China and Hong Kong; and concludes with observations and recommendations.

8.2 Foreign Investment in China and Hong Kong

8.2.1 Introduction: China

In 1978, in the aftermath of the Cultural Revolution, Deng Xiaoping moved away from the anti-foreign and closed door policies of his predecessors and introduced initiatives to attract foreign capital and foreign expertise through the initiation of the so-called Open Door policy.[4] China has gradually liberalized its economic controls and its approach to foreign investment in several carefully calibrated stages, as well

as building a legal and judicial system to support the opening up of the economy and the growth of the private sector. China is now the recipient of the second largest amount of FDI globally.[5]

The most significant factor in the rise of China and the growth of its economy was China's accession to the World Trade Organization (WTO) in 2001.[6] Although the WTO focuses on trade, rather than investment, as a latecomer to the WTO, China was obliged to negotiate the terms of its admission with major trading states such as the United States (US).[7] As a result of this, China made some significant concessions regarding the liberalization of FDI in the country, which were reflected in its 2002 Foreign Investment Catalogue.[8] This combination of China's opening up to investment and its improved international trading conditions was very advantageous to China. Its GDP grew from USD191.15 billion in 1980 to USD1.22 trillion in 2000. By 2010 it had reached USD6.09 trillion and in 2021 was USD17.73 trillion. FDI—both inbound and outbound—also grew significantly.

China's success in terms of international trade and FDI is not, however, free from controversy. The highly controlled way in which China has opened up its economy and the continuing role of the government and the CCP in all levels of the economy has been the subject of constant criticism, particularly from developed country investors.[9] Although China has benefitted enormously from the global trading system, it has also been the respondent in 49 cases in the WTO, as well as bringing 23 cases of its own and appearing as a third party in 195 cases.[10] Hong Kong has been a complainant in two cases and a third party in 22 cases.[11]

From the beginning of the twenty-first century, with the advent of the 'going global' policy,[12] the Chinese government has encouraged Chinese enterprises to make investments outside the country. China's very extensive investments overseas are focused in the areas of energy and mineral resources, although there is also significant investment in logistics, real estate and transport.[13] The fact that China is both a major recipient and a major contributor of FDI worldwide is highly relevant to the development and content of its network of IIAs and the engagement of both the Chinese government and Chinese enterprises in an increasing number of investment disputes.

8.2.2 The Legal Regime Relating to Investment

FDI in China was heavily regulated from the outset. The original legal regime subjected the establishment of a foreign investment enterprise in China to numerous government approvals and licences relating to the project and the project documents, and the registration of the investment enterprise and on-going operations. The presence of a foreign company in China, other than through a Chinese foreign investment entity (FIE), was limited to the establishment of a representative office or, in rare instances (such as operations run through a non-legal person joint venture in the oil or gas sector), through registration of the company itself. The scope of the business

of an FIE was narrowly drafted and limited to the activities for which the investors set up the company. Any change required a further government approval.[14]

In 2015 the government introduced the 'market access negative list' system. Pursuant to these reforms, the requirement for approval to be obtained for the establishment of all FDI was abolished. Under the new system, with some exceptions, investments can be made by way of registration.[15] Approvals are still, however, required for an investment in an industry set out on a negative list issued annually by the government. The negative list also sets out the sectors in which foreign investment is prohibited. Once established, FIEs—at least in theory—operate on the same terms (national treatment) as domestic Chinese investors. Requirements for operating permits or approvals apply to domestic and FIEs equally. In 2020, the Foreign Investment Law (FIL)[16] and its ancillary legislation came into effect and the 1979 Law on Chinese-Foreign Equity Joint Ventures, 1988 Law on Chinese-Foreign Contractual Joint Ventures and the 1986 Law on Foreign-Capital Enterprises were repealed, with a five-year grandfathering period for the existing FIEs to bring themselves into line with the new law.[17]

The Chinese government has reiterated its ongoing support for FDI through the issue of more liberalized negative lists and encouraged lists for foreign investment.[18] Despite the substantial amount of FDI in China, however, the slowdown in the Chinese economy in 2022,[19] the tightening of CCP controls over the economy and business under President Xi Jinping, a much stronger emphasis on national security as part of Chinese policy and cooler relations between China and the US and other developed countries,[20] have caused investors to be concerned about operations in China and the potential increased risk of disputes. Foreign government concerns have also been raised by China's outbound investment policies.

8.2.3 China's Outbound Investment: Regulation

The Chinese government initially limited and controlled outbound FDI (OFDI). Although the registration of OFDI is still required, criteria for government approvals have been considerably relaxed over the years.[21] OFDI by state-owned enterprises (SOEs) is subject to at least two layers of regulation prior to registration,[22] but is still encouraged. The government and the CCP favour OFDI which supports China's aspirations of increasing both its international influence and its economic security.[23] China's relatively aggressive approach to the acquisition of energy and mineral resources and, particularly, the acquisition of companies with advanced technology, has, however, received a less than positive approach from the developed world. The US, Australia, Canada, Germany, the UK and others have introduced legislative and regulatory responses aimed at preventing acquisitions by foreign companies which are seen as presenting a danger to domestic national security interests.[24] With more investment in both directions comes the prospect of more investment disputes. It is therefore no surprise that China and Chinese-owned companies have become much more active in the ISDS space in recent years.

8.2.4 Hong Kong

As well as hosting a significant number of major corporations and businesses, Hong Kong has had a major role as an intermediary for Chinese trade, first while it was a British colony, and, since 1997, as a Special Administrative Region of China. It continues to play a major role as an intermediary destination for Chinese inbound and outbound investment, as well as so-called 'round robin' investment, where funds flow out of, and then back into, China.[25]

Hong Kong has always been open to foreign investment and investors. The Stock Exchange of Hong Kong is an important capital-raising venue, including for Chinese companies and foreign-owned Chinese businesses. Major Hong Kong companies are investors in China and other countries. Hong Kong's role as an intermediary destination is assisted by its tax regime, which allows for the flow-through of dividends from subsidiary to offshore investors, its historically well-regarded legal system and the reputation of its judiciary. However, foreign confidence has been shaken to some extent by direct Chinese intervention in Hong Kong in 2020 through the passage of the Hong Kong National Security Law.[26]

8.3 Governance and Corruption: The Regulation of Corruption and Bribery in China and Hong Kong

8.3.1 China's International Rankings

Despite its deep integration into the world economy, China is still viewed internationally as falling short in curbing corruption. Since 1995, China has consistently scored below 50 in the Transparency International Corruption Perception Index, which annually measures 180 jurisdictions across the world by their perceived levels of public sector corruption on a scale from 0 (highly corrupt) to 100 (very clean). Despite slight improvements, in 2023, China still had a score of 42 and a ranking of 76th, indicating that corruption is still considered to be a serious problem in the Chinese public sector.[27] China's global ranking in the WJP Rule of Law Index in 2023 was particularly poor (97 out of 142), although there were some positive indications in relation to absence of corruption (57 out of 142).[28]

8.3.2 International Participation

China has ratified UN anti-corruption conventions including the United Nations Convention against Transnational Organized Crime (UNTOC) (2000), in which state parties committed themselves to criminalize corruption in their national laws,[29] and the UN Convention against Corruption (UNCAC) (2003), which obliges parties to

establish criminal and other offences in domestic law to cover a wide range of acts of corruption.[30]

China is not a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[31] pursuant to which states criminalize and prosecute bribery by their own nationals and companies overseas. However, China has engaged with the OECD Working Group on Bribery as an observer.[32] China also participates in the International Association of Anti-Corruption Authorities (IAACA),[33] the Asian Development Bank (ADB) and the OECD-jointly led Anti-Corruption Initiative for Asia–Pacific, and has endorsed the Anti-Corruption Action Plan for Asia–Pacific in 2001.[34] This non-legally binding instrument also requires participants to ensure the existence and effective enforcement of legislation combatting corruption. In conjunction with China's 'Beijing Initiative for a Clean Silk Road',[35] which aims, among other things, to combat corruption on the Belt and Road, China has signed a memorandum of understanding on cooperation in combatting corruption with the UN.[36]

8.3.3 Domestic Legislation Combatting Bribery

China has adopted an extensive range of legislative measures to deal with corruption and bribery. These are directed at both bribery of government officials and corruption in the corporate sector. Bribery and corruption are dealt with primarily as criminal offences, although minor cases may also be handled administratively.

Criminal offences capture a wide range of acts of commercial and official bribery, focused on the bribery of—and bribe-taking by—state functionaries,[37] non-state functionaries and people who can leverage the influence of state functionaries, as well as bribery of foreign public officials and international public organization officials.[38] These offences are found primarily in the 1997 Criminal Law. Penalties are severe for both bribers and bribees. Bribery of or by employees of SOEs and commercial enterprises (commercial bribery) is also a criminal offence (Articles 163 and 164). Amendment XII to the Criminal Law, which came into effect on 1 March 2024, further extends the scope of corruption offences, particularly in the private sector. In 2011, the crime of bribery of foreign public officials and officials of international public organization officials for improper commercial interests was included in Article 164.[39] This amendment, although limited in scope, potentially applies to acts by Chinese persons or entities (including foreign owned entities established under Chinese law) outside China.[40]

China's 1993 Anti-Unfair Competition Law, as amended, prohibits both paying and accepting bribes in trade in goods or in order to obtain trade secrets (Articles 7 and 9). Other laws also penalize commercial bribery, including the Company Law,[41] the Foreign Trade Law,[42] the Drug Administration Law,[43] and the Construction Law.[44]

8.3.4 The CCP Anti-corruption Campaign

President Xi Jinping launched a sweeping anti-corruption campaign immediately after he became General Secretary of the CCP and President of China in 2012. This nationwide campaign was focussed on corruption within the CCP cadre system, particularly the high-level ranks, and has been implemented based on more than 50 newly issued CCP anti-corruption and internal control regulations. Under the CCP Central Commission for Discipline Inspection (CCDI) and the State Supervision Commission (now effectively integrated and referred to collectively as the 'Supervision Commission'), the campaign has been carried out with considerable vigour.

As part of its programme of tightening control over the overseas activities of SOEs and the ongoing anti-corruption campaign, China has also intensified its inspections of SOEs with a particular focus on corruption risks in their overseas operations. Since 2013, the Supervision Commission has conducted over 20 inspection tours of central SOEs.[45] Numerous large SOEs, including PetroChina and CNOOC, were found to be exercising lax control over offshore subsidiaries, which posed a risk of overseas corruption.[46]

8.3.5 Enforcement in China

The Supervision Commission (and the CCDI) took over investigation of corruption from the Supreme People's Procuratorate (SPP) and its associated bodies in 2018.[47] According to the reports of the SPP and the Supreme People's Court (SPC) in 2023, in the period 2018 to 2022, 119,000 cases of corruption, bribery and other duty-related crimes, involving 139,000 people, were concluded; 104 former officials at or above the provincial or ministerial level were prosecuted.[48] These cases include investigations and punishments of officials of the CCP, government organs, the People's Liberation Army and senior SOE executives. Senior officials are thus not immune to anti-corruption campaigns, although it is believed by various sources that political considerations play an important role in some of the investigations and prosecutions.[49] Corruption also affects the courts. Recent cases include the conviction of former justice minister Fu Zhenghua for corruption[50] and of former SPC judges Meng Xiang and Shen Deyong, for bribery,[51] while there are ongoing investigations into the legal and judicial system.[52]

There were 571 bribery criminal decisions published on the SPC's website, China Judgments Online[53] from 2007 to 2022, the majority of which date from after 2012 when the far-reaching anti-corruption campaign was launched. Cases involving foreign investment or even foreigners involved in bribery appear to be either rare or not published.

Bribery in China involving foreigners and foreign companies does, however, certainly occur. The US Securities and Exchange Commission (SEC), one of the

enforcement agencies of the US Foreign Corrupt Practices Act of 1977,[54] has pursued 37 foreign corruption cases where companies issuing stock in the US allegedly bribed Chinese government officials and employees of SOEs to facilitate operations in China.[55] It appears that the Chinese government has not pursued most of these cases.

China has, however, pursued legal action against foreigners and foreign investors in a number of well-publicized cases resulting in show trials. A particularly well-publicized case was the Rio Tinto case[56] where, in 2010, the Shanghai Intermediate People's court sentenced four executives of Anglo-Australian mining company Rio Tinto, including one Australian citizen, to lengthy prison terms for accepting bribes from Chinese companies and stealing commercial secrets. The criminal charges were filed almost immediately after Rio Tinto withdrew from a proposed acquisition deal with Chinalco, a state-owned Chinese aluminium producer, and after the collapse of the annual iron ore price negotiations between Chinese buyers and foreign sellers.[57] A justification for the lengthy sentences was in fact the 'enormous economic losses to relevant iron and steel enterprises of China',[58] resulting from the termination of the iron ore price negotiations. In 2014 the Changsha Intermediate People's Court convicted the Chinese subsidiary of UK pharmaceuticals corporation GlaxoSmithKline and several executives of bribing doctors in Chinese public hospitals.[59] According to Chinese authorities, the case should serve as a 'wake-up call' to foreign investors that Chinese laws apply to all companies operating in China equally, which is fundamental for a fair investment environment.[60]

While Amendment VIII to the Criminal Law raised hopes that China would begin to crack down on overseas bribery, there had until late 2023 been no published decisions on the crime of bribery of foreign public officials and international public organization officials since the creation of the offence. A recently published intermediate court decision applying this provision, however, hints at change.[61] Bribery by Chinese investors in foreign countries is reportedly not uncommon. By the end of 2022, the World Bank had blacklisted 172 Chinese companies for corruption, fraud, collusion and coercion, banning them from participating in World Bank-financed contracts for a certain period.[62] Although China has not previously actively pursued convictions for overseas bribery, SOEs and their executives, as well as CCP members, who are overseas may be subject to investigation as a result of the ongoing CCP anti-corruption campaign (Sect. 8.3.4). The success of the Beijing Initiative for a Clean Silk Road's commitment to more transparency and a bolstering of anti-corruption activities remains unclear.[63]

An overall issue in relation to corruption investigations and court cases is that publicly available information on the scope and nature of investigations is very limited.[64] When an investigation results in a determination that the person should be prosecuted, the case is handed over to the SPP for prosecution, as a result of which the person under investigation pleads guilty or is almost invariably convicted after a short trial.[65] Details on the charges and the evidence are kept secret. This lack of transparency is aggravated both by the lack of checks and balances in the Supervision Law on the power of the Supervision Commission and the fact that both the CCDI and the Supervision Commission (pursuant to the Supervision Law 2018, Article 2) are regulated by internal Party rules rather than law.

8.3.6 Summary: China

China has set up a domestic system criminalizing and punishing corruption and the acceptance of bribes by government officials, CCP members and others. The number of investigations and prosecutions continues to be high, which suggests both that investigation and enforcement are ongoing and that long-term success in combatting corruption continues to be evasive. Based on publicly available data and cross-searching on China Judgements Online, however, it appears that CCP anti-corruption cases have, on the whole, not resulted in substantial numbers of investigations into and accusations against non-official bribers, including foreign investors.

In addition, political elements to some prosecutions of high-level officials, as well as what appear to be politically motivated detentions of foreigners (such as the two Canadians arrested and held during the detention of Huawei executive Meng Wanzhou in Canada),[66] raise serious concerns about the neutrality and independence of the Chinese justice system in sensitive and political cases.

8.3.7 Hong Kong

Hong Kong has a generally good reputation internationally regarding the regulation and prosecution of corruption and bribery. It was ranked 14th in the 2023 Corruption Perceptions Index issued by Transparency International[67] and 9th out of 142 in the 'free of corruption' ranking in the WJP Rule of Law Index 2023 (and 23rd overall).[68] Hong Kong is subject to UNCAC through China's accession.[69]

Hong Kong's reputation is largely based on ICAC and the legislation which supports it. ICAC was established by the Independent Commission Against Corruption Ordinance (ICAC Ordinance)[70] in 1974 in response to widespread corruption within the Hong Kong civil service (particularly the police) and has extensive powers to investigate and cause the prosecution of public sector corruption in Hong Kong.[71] The ICAC Commissioner has a broad general duty under s12 of the ICAC Ordinance to investigate corrupt practices and prevent corruption. It is also responsible for investigating breaches under the Prevention of Bribery Ordinance (Cap 201), which covers bribery of Hong Kong public servants, and in connection with public tenders and auctions, and also deals with corrupt agency transactions in business.[72]

The Ordinance is territorial in scope, and does not refer specifically to foreign officials, although they may potentially breach the Ordinance while taking a bribe in Hong Kong as an agent for their employer.[73] Transparency International has in fact commented critically on Hong Kong's lack of laws (and enforcement) in relation to bribery of foreign officials.[74]

ICAC is a member of a number of regional and international groups dealing with corruption, including IAACA, Asia–Pacific Economic Cooperation—Anti-Corruption and Transparency Experts' Working Group, ADB/OECD Anti-Corruption Initiative for Asia–Pacific and the Economic Crime Agencies Network.[75]

8.4 International Treaties and Arbitration: China and Hong Kong in the International Sphere

8.4.1 China: Introduction to Treaties; China in the International Sphere

Since 1982, when China signed its first BIT with Sweden, it has been active in negotiating and signing BITs with both developed and developing states.[76] As of February 2024, China had signed 124 BITs, of which 107 were in force.[77] It signed a succession of treaties throughout the 1980s, 1990s and the first decade of the twenty-first century, by which time several early treaties were up for renegotiation. China became a party to the ICSID Convention in 1993[78] and is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[79]

More recently, China has moved towards negotiating bilateral and regional FTAs, many of which include chapters on investment. In many cases, the existing BIT has remained in force, which means that there may be several layers of commitments relating to investments. At the time of writing, China has signed 29 treaties with investment provisions, of which 24 are in force. The majority of these are bilateral agreements.[80]

In addition to China's IIAs, it has become increasingly active in the international sphere, including through its participation in the UNCITRAL discussions on reform of the ISDS system.[81] China did not raise the question of corruption in its substantive submission in 2019, but did support higher standards regarding the conduct of arbitrators.[82] In addition, when China was the Chair of the G20 in 2016, the G20 Guiding Principles for Global Investment Policymaking were issued, which, among other things, supported the promotion of responsible business conduct and corporate governance (Article 8).[83]

Several Chinese arbitration institutions have issued rules on International Investment Arbitration.[84] Although it seems unlikely that foreign sovereign states would be enthusiastic about submitting investor–state disputes conducted under the auspices of a Chinese arbitral institution, as opposed to a truly international one, submission may be required as part of transactions involving Chinese companies. An example is found in a loan agreement between Kenya and the China Export Import Bank in 2014.[85] A new Foreign State Immunity Law also came into effect on 1 January 2024. This law adopts a restricted theory of immunity in relation to sovereign states and their entities when they are sued in China.[86]

8.4.2 Hong Kong: Introduction to Treaties

Hong Kong became a party to several BITs and trade agreements when it was a British colony, and has entered into several agreements in its own name (starting with a BIT with the UK in 1998)[87] since it became a Special Administrative Region of China. It currently has 20 effective BITs with a range of mainly developed countries, as well as with South Korea, Mexico and several Middle Eastern states.[88] In addition, it has entered into nine agreements with investment provisions (including agreements with China and Macao).[89]

Hong Kong nationals may also be able to bring claims against host states by utilizing investor protections in China's BITs. The first claim brought by a Chinese investor, for example, was the case of *Tza Yap Shum v. Peru*,[90] brought against Peru by a Hong Kong resident (and Chinese national) under the China–Peru BIT. PCCW, a subsidiary of a Hong Kong telecoms company, has recently brought a case against Saudi Arabia under the China–Saudi Arabia BIT.[91]

The structure and content of Hong Kong's treaties vary considerably, depending on the other party. For example, Hong Kong's recent BIT with Mexico (2020)[92] includes provisions on environment, health and other regulatory objectives, as well as corporate responsibility. The 2019 Investment Agreement between Australia and Hong Kong (replacing the 1993 BIT in the aftermath of the Philip Morris case)[93] includes provisions making clear that an investor–state arbitration cannot be brought regarding Australia's legislation on tobacco products,[94] as well as similar provisions to the Mexico BIT.[95]

Hong Kong is a party to both the ICSID Convention and the New York Convention.[96] The Hong Kong International Arbitration Centre (HKIAC) hears a large number of international arbitrations, and two investor–state arbitrations were submitted to the HKIAC in 2018.[97] Of these, one was brought under the Korea–US FTA and details of the other are unknown.[98]

8.4.3 Discussion: Treaty Content

China's approach to treaties has been, as one would expect, closely tied to its aims in relation to FDI. China's much-analysed treaties are as a result generally divided into several generations, each with different features.[99] The earlier treaties were generally very limited in content. In particular, they did not provide for pre-establishment national treatment, contained only a short list of investor protections (generally relating to direct expropriation and most favoured nation treatment) and allowed ISDS only in connection with disputes relating to the quantum of investment. The severely limited scope of these older treaties resulted in the failure of the AsiaPhos case against China in 2023 (Sect. 11.5.1) and have also proved problematic for the ever-increasing number of Chinese investors attempting to rely on the treaties.[100]

However, China's later treaties in the last 20 years have provided investors of both (or all) states involved with greater protections.[101] For example, Chap. 10 of the Regional Comprehensive Economic Partnership (RCEP) (although RCEP does not include an ISDS provision) contains a broad definition of investment (including a requirement that a covered investment 'where applicable' be admitted subject to host Party laws);[102] includes 'establishment' and 'acquisition' in the National Treatment (Article 10.3) and most-favoured nation provisions (Article 10.4);[103] refers to 'customary international law' in relation to the treatment of investment provision (Article 10.5); provides for a negative list in relation to Non-Conforming Measures (Article 10.6); and includes indirect expropriation in the definition of expropriation (Article 10.13 and Annex 10B).

8.4.4 Treaty Content on Corruption

China's treaties have tended to follow the traditional BIT model, which focuses on investment protection and does not include provisions dealing with human rights, environmental conditions, health and other social issues.[104] Recent treaties, however, are more likely to include provisions relating to the right of host countries to protect public health and the environment.[105] The inclusion in IIAs of provisions relating specifically to corruption is generally a relatively recent phenomenon, and builds on the gradual move towards the inclusion of references in IIAs acknowledging the importance of environmental, health, corporate governance and social welfare.[106] It appears that the RCEP, which was signed in 2020, is the only treaty to which China is a party which contains a provision which specifically covers corruption. Article 17.19 requires each party to take appropriate measures to prevent and combat corruption in relation to matters covered by the RCEP, in accordance with its own laws and regulations. The Article is, however, excluded from the dispute settlement chapter. (The RCEP, unusually, also contains a provision in the Denial of Benefits clause in the Investment Chapter (Article 10.14.7) which allows a party to deny the benefits of the RCEP where an investor has made an investment in breach of the host state's laws or regulations which implement the Financial Task Force (FATF) Recommendations. In the investment context, these relate mainly to the confiscation of the proceeds of money-laundering and crime.)[107]

In contrast, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a multilateral FTA signed by 11 countries around the Pacific Rim, contains a complete chapter on transparency and anti-corruption. Chapter 26 imposes obligations on member states in relation to both legislation on corruption and enforcement. In September 2021, China formally applied to accede to the CPTPP.[108] These purportedly comprehensive CPTPP anti-corruption provisions, however, will not necessarily compel China to switch to a more rigorous approach to foreign-investment-related corruption: the CPTPP does not impose anti-corruption obligations that are materially stricter than the existing obligations of China under other international legal instruments on corruption, particularly UNCAC. Although

the CPTPP state-to-state dispute settlement mechanism applies to Chap. 26 and thus arguably makes the obligations more enforceable than those under UNCAC, most CPTPP anti-corruption obligations require states to *endeavour* to adopt appropriate or necessary measures. Article 26.9, which includes provisions designed to improve enforcement, is specifically excluded from the CPTPP dispute settlement mechanisms (Article 26.12).

Signing up to the CPTPP provisions would therefore probably not widen China's potential liability in the event of a claim by an investor that its investment had been expropriated or otherwise severely affected by reason of China's failure to meet its commitments under Chap. 26. It would, however, demonstrate China's commitment to criminalizing and eliminating bribery and corruption domestically. It would also show China's support for anti-corruption efforts of governments of other state parties and potentially send a message to its own outbound investors that it is serious about opposing corruption overseas.

8.4.5 Treaties and Domestic Law and Courts

Chinese treaties generally include, in the definition of 'investment' or elsewhere in the treaty, provisions which limit treaty protection to investments made in accordance with the law of the host country.[109] This may be helpful (although not essential) to a claim that a tribunal does not have jurisdiction where an investment is established unlawfully due to corrupt or illegal behaviour and is thus not an investment for the purposes of the treaty, or as a matter going to jurisdiction because there is no consent to arbitrate a dispute relating to such an investment.[110] Corruption may also become relevant in relation to the admissibility of claims relating to corruption or consideration of the merits of a particular claim. Domestic law is clearly relevant here, although an international investment tribunal is not bound to apply decisions of a domestic court, and makes its own determinations on the law to be applied, and thus the relevance, content and impact of domestic law.[111]

The impact of corruption in a Chinese treaty-based case has not been tested. It is not clear, however, that under domestic law corruption would necessarily automatically invalidate government approvals or render an investment contract void. Under the FIL (Article 36), if a foreign investor invests in a prohibited field or sector, the relevant department must order it to stop its activities and dispose of the shares or assets (as well as confiscating any illegal gains). If it invests in a restricted field or sector, it will be ordered to make corrections and only if it fails to do so will the provisions above apply. An SPC Interpretation of the FIL[112] clarifies this by providing that an investment contract in a prohibited sector, or a restricted sector made without approval (which may be retrospectively obtained), will be held to be invalid (Articles 4 and 5). It does not address the issue of an approval obtained by bribery. However, the Administrative Licensing Law (Article 69) provides that an administrative approval (which could include an approval to invest in a restricted sector, or a licence required for operations) obtained by fraud, bribery or any improper means *shall* be revoked,

without any protection for the interests of the licensee—unless revocation would cause ‘great damage to the public interest’.

Article 52(5) of Contract Law and its successor, Article 153 of China’s Civil Code, includes violation of ‘the mandatory provisions of laws and administrative regulations’ as one of the statutory grounds for avoiding a contract. A civil juristic act that offends public order or good morals is void. The meaning and scope of these provisions, however, is far from clear and subject to judicial interpretation.[113] Although these provisions could apply to bribery, it appears that, under domestic law, the presence of bribery may not necessarily result in invalidity of the underlying approvals or contracts, although Chinese law gives the courts and government officials considerable power and discretion to deal with bribery.

A related issue is the potential role of domestic court decisions (whether criminal, civil or administrative) in ISDS claims. Despite the comprehensive network of anticorruption rules in China, there are a number of potential problems for parties in ISDS cases seeking to rely on domestic court decisions, including claims of lack of independence of the courts, lack of transparency in court cases and difficulties faced by a tribunal in the assessment of evidence underlying a court decision. This indicates that if the corruption defence is raised, a tribunal will need to assess all such allegations ab initio and determine for itself to which extent the domestic conviction can be relied upon as proof of corruption and what the appropriate standard of proof should be in the relevant circumstances.[114]

8.5 Disputes and Cases: China and Chinese Investors

8.5.1 Disputes Involving China and Chinese Investors; Hong Kong

Until quite recently, very few investor–state arbitrations had been instituted against China. At the time of writing, the UNCTAD Investment Policy Hub[115] records nine cases which have been brought against China (excluding cases against Hong Kong, Macao and Taiwan). Of these, one was settled,[116] two were decided in favour of China (both on jurisdictional grounds)[117] and one was discontinued[118] while the remainder are pending.[119] It also records 19 cases where China was the home state of the investor. Of these, two were decided in favour of the investor against the host state (Peru and Nigeria);[120] three were decided in favour of the host state (Mongolia, Belgium and Ghana);[121] one was settled after a win by the investor at the jurisdictional stage (Yemen);[122] one was discontinued (Greece)[123] and other cases are pending, while new cases continue to be brought.[124] Unfortunately, much of the detail of the submissions and decisions in these cases is not publicly available.

8.5.2 Comments

As an initial point, what is clear from the cases against China in which some material is publicly available (Ansung, Hela Schwartz and AsiaPhos)[125] is that the Chinese government, once engaged in arbitration, is a determined antagonist. For example, China succeeded in defending the case brought by Ansung on the basis that the case was time-barred under the China–Korea BIT and was successful against AsiaPhos on the basis that the arbitration clause in the China–Singapore BIT is limited to disputes involving the amount of compensation. In Hela Schwartz, China attempted (unsuccessfully) to bifurcate proceedings so that jurisdiction could be argued separately and in advance of the merits.[126] This suggests that, in the case where a corruption defence was available, China would argue that the tribunal had no jurisdiction where possible.

The second point is that, as noted above, in practice there is limited transparency regarding the ongoing conduct of the arbitrations. In Ansung, for example only the award is available on the ICSID website. In Hela Schwartz, in contrast, the procedural orders in the arbitration are available (pursuant to Procedural Order 1, Article 27, which provides that the parties consent to ICSID publication of the award and any order or decision made in the proceedings) and provide some insight into the nature of the dispute. Information on cases can otherwise be derived only from public filings (e.g., AsiaPhos Limited, which is listed in Singapore), press reports and other online reports.

China is not a party to the Mauritius Convention on Transparency[127] and its treaties generally do not include provisions on transparency of arbitral proceedings. Provisions of the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration[128] were referred to in the China–Australia Free Trade Agreement (CHAFTA), although they have not been adopted.[129] Specific provisions relating to transparency regarding ISDS are, however, incorporated in the CHAFTA itself (Article 9.17). (The 1988 Australia–China BIT, which is still in force, does not contain any provisions relating to transparency of arbitration.) Several Hong Kong treaties, for example with Australia (Article 30), do include provisions on transparency.

It is therefore not clear whether corruption is or was relevant in any of the existing cases against China. Publicly available material on *Goh v. China* (brought under the Singapore BIT), however, indicates that the claimant alleges that local officials engaged in embezzlement unlawfully seized his property after he was imprisoned by colluding with state banks and corrupt judges, leading to the loss of his investments in Qingdao.[130] In view of the significant role played by governments at all levels in China in regulating the entry and operation of foreign investment, corruption could well play a role in future cases.

The third point is that, although investors are becoming more willing to bring cases against China, there are still very few cases, and even fewer are brought by major international companies. There are a range of theories as to why this is so.[131] In the authors' opinion, the small number of ISDS cases brought, particularly by major companies, is influenced by two primary factors: the limited scope in older

treaties for ISDS to be brought at all, and, secondly, the desire of major investors to keep open opportunities to invest and operate in China. The fact that cases brought so far have appeared mainly to involve more recent treaties and smaller claimants (with the possible exception of Hela Schwartz) or individuals seems to support this.

Finally, it is not clear whether or how an ICSID or other ISDS award can be enforced against the Chinese government itself.[132] China maintains a commercial exception to the New York Convention[133] and has historically ascribed to the absolute view of sovereign immunity.[134] The new Foreign State Immunity Law, however, now applies the restrictive approach to immunity in relation to foreign states involved in litigation in China, which suggests that China is moving towards a less absolute approach. Its approach to enforcement of an adverse decision in ISDS (in its own courts or elsewhere), however, remains unclear.

Chinese outbound investors have become considerably more active in bringing arbitral claims themselves, few of which (it appears) involve corruption, although *Wang Jing v. Ukraine*[135] presents interesting issues of treason, national security and breach of anti-trust rules.[136] The *Sanum v. Laos* cases, which involved investors from Macao and were brought under the China–Laos BIT over Chinese objections, are discussed in more detail in Chap. 15. *Alpene v. Malta*[137] is a case brought under the China–Malta BIT but does not appear to have any relationship with China or Hong Kong other than the incorporation of Alpene in Hong Kong. This case presents allegations of corrupt behaviour by the agents of Malta.

In the case of the two cases based on Hong Kong treaties, neither *Philip Morris v. Australia*[138] or Shift Energy *Japan KK v. Japan*[139] appear to raise issues of corruption.

8.6 Conclusions and Recommendations

There are several tentative comments and recommendations arising from this discussion regarding China and Hong Kong, their investment treaties and corruption.

First, China and Hong Kong have, in accordance with their international obligations, established detailed systems of laws and regulations to deal with corruption at a domestic level, relating to official corruption and to commercial corruption involving companies and businesses. However, in China, the commanding position of the CCP (through the CCDI) in investigations, the focus on CCP rules and CCP members and the potential role of domestic and international politics in prosecutions raise concerns about the implementation of this system and the independence of the courts in politically sensitive cases, which are very likely to be material in an ISDS case.

The second issue is that of transparency. In the small number of ISDS cases brought against China so far, there has been little transparency in relation to the claims or the evidence. Certainly, some of the lack of information may be due to the claimants in the various cases. However, it would cast more light on the facts and the progress of claims, as well as the reasons for decisions, if China applied the UNCITRAL Rules on Transparency and, to the extent possible, allowed for the publication of documents

in hearings and for open hearings. At the domestic level, even though Chinese courts should, under the Criminal Procedure Law,[140] hold open trials, Chinese practice and recent legal authority have used business secrets, personal information, national security and other excuses to ensure that trials that may be sensitive are closed to the public gaze.[141] A more open approach, both domestically and internationally, to the administration of justice would allow parties on all sides to assess and discuss the issues that are raised.

Third, neither China (with one recent exception) nor Hong Kong have, so far, vigorously pursued criminal convictions through the court system for bribery outside China. In view of the amount of overseas investment made by Chinese (and Hong Kong) companies, both state-owned and private, it is recommended that China becomes a party to the OECD Convention (on behalf of Hong Kong as well as the mainland) and demonstrate its commitment to fighting corruption internationally and openly, following the example of Argentina, Brazil, Bulgaria, Peru, Russia and South Africa.[142]

Finally, at the international level, China's treaties do not currently have any provision regarding corruption, other than in the RCEP, although China's application to join the CPTPP would require it to sign up to the detailed corruption chapter in that treaty. Given the importance of investment to China, both inbound and outbound, China should consider, as it has done regarding provisions on the environment and other social welfare considerations, including in its treaties provisions encouraging the adoption and implementation of provisions relating to corruption in international investment. While this may not require a change to China's domestic law, it would send the message to China's partners and its own outbound investors that China takes seriously the elimination of corruption both inside and outside China.

Notes

1. UNCTAD 2022, p. 9.
2. Ibid., p. 21.
3. ICAC website, https://www.icac.org.hk/en/home/index.html, accessed 24 April 2023.
4. Howell 1991, p. 119 ff.
5. UNCTAD 2022, p. 9; USD181 billion in 2021. Hong Kong outbound investment was USD141 billion.
6. WTO 2001, Protocol on the Accession of the People's Republic of China.
7. Office of the United States Trade Representative (USTR) 2001.
8. State Council of China 2002, Guobanhan [2002] No. 17.
9. Milhaupt and Zheng 2015.
10. WTO, Disputes by member: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm accessed 5 February 2024.
11. Ibid.
12. Shen and Mantzopoulos 2013.
13. AEI China Global Investment Tracker: https://www.aei.org/china-global-investment-tracker/ accessed 24 April 2023.
14. Bath 2011.

15. Opinions of the State Council on Implementing the Market Access Negative List System 2015; Standing Committee of the National People's Congress 2016, Decision on Revising the Laws on Foreign-invested Enterprises and associated regulations.
16. Foreign Investment Law of the People's Republic of China 2019.
17. Ibid., Article 42.
18. Zhou 2022; National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM) 2022, Catalogue of Industries for the Encouragement of Foreign Investment (2022 version); NDRC and MOFCOM 2021, Special Administrative Measures (Negative List) for Foreign Investment Access (2021 Edition).
19. World Bank 2022a.
20. *The Economist* 2022a and b.
21. NDRC et al. 2017, Guiding Opinions on Further Guiding and Regulating the Direction of Outbound Investment; NDRC 2017, Administrative Measures for Outbound Investment by Enterprises; MOFCOM 2018, Interim Measures for the Record-filing (Verification and Approval) and the Reporting of Outbound Investment Projects.
22. For example, Ministry of Finance 2017, Interim Measures for the Administration of Central State-owned Capital Operating Budget Expenditure; State-owned Assets Supervision and Administration Commission of the State Council (SASAC) 2017, Measures for the Supervision and Administration of Overseas Investments by Central Enterprises.
23. Ibid.
24. For example, Foreign Investment Reform (Protecting Australia's National Security) Act 2020 (Australia); Executive Order 14083 of September 14, 2022 (United States); K2Integrity 2021 (The United Kingdom, Germany and Canada).
25. Xiao et al. 2022.
26. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region 2020; US Department of State 2022.
27. Transparency International 2023 accessed 5 February 2024.
28. World Justice Project 2023, https://worldjusticeproject.org/ accessed 5 February 2024.
29. UNTS Vol 2225 p. 209, New York, entered into force 29 September 2003.
30. UNTS Vol 2349, p. 41, New York, entered into force 14 December 2005.
31. OECD, https://www.oecd.org/corruption/oecdantibriberyconvention.htm accessed 24 April 2023.
32. OECD 2021.
33. IAACA, https://www.iaaca.net/about-iaaca/membership accessed 5 June 2023.
34. OECD, http://www.oecd.org/corruption/anti-corruption-initiative-for-asia-pacific.htm accessed 5 June 2023.
35. *China Daily* 2019.
36. United Nations Office on Drugs and Crime 2019.
37. 'State functionary' is broadly defined in the Criminal Law to include personnel of state organs, state-owned companies or enterprises or institutions, and people's organizations, as well as personnel appointed or sent by these entities to non-state-owned entities to carry out public service. Criminal Law, Article 93.
38. Other crimes include crimes of acceptance of bribes by an entity, offering bribes to or by an entity, and bribing as an intermediary. The crime of holding unidentified property is a useful charge brought against state functionary bribees in China's judicial practice. Criminal Law, Articles 163 and 164, and Chap. VIII.
39. Amendment VIII to the Criminal Law of the People's Republic of China (2011).
40. State Council of China 2013.
41. Article 147.
42. Article 33.
43. Article 141.
44. Articles 17 and 18.
45. CCDI n.d.
46. See e.g., CCDI 2015a; CCDI 2015b.

47. See combined CCDI and Supervision Commission, https://www.ccdi.gov.cn/.
48. SPC 2022; SPP 2022; *People's Daily Online* 2023.
49. See, for example, comments on conviction of Fu Zhenghua (former justice minister) in Lemaître in 2022.
50. Zheng 2022.
51. Zhuang 2023a, 2023b.
52. Rui 2021; Li 2018.
53. Zhongguo Caipan Wenshu Wang (China Judgements Online) at https://wenshu.court.gov.cn accessed 15 December 2022.
54. 15 U.S.C. §§ 78dd-1.
55. US Securities and Exchange Commission 2022.
56. See Bath 2012; State Council of China 2010.
57. Jiang 2018; Bath 2012, p. 8.
58. English version of judgment (translated by *The Australian*), p. 57, cited in Bath (2011), note 114.
59. BBC 2014.
60. State Council of China 2014.
61. Yin 2024.
62. World Bank 2022b.
63. Tower and Staats 2020.
64. See Chow 2015 on the lack of transparency in anti-bribery investigations.
65. The conviction rate for criminal offences in 2020 and previous years is reportedly higher than 99.95%. See Safeguard Defenders 2021.
66. *The Economist* 2021; Chow 2015. See also Li 2018 on corruption problems in the Chinese court system.
67. Corruption Perceptions Index 2023.
68. World Justice Project 2023, Hong Kong.
69. Department of Justice, Government of the Hong Kong Special Administrative Region 2022, External Affairs https://www.doj.gov.hk/en/external/treaties.html, accessed 24 April 2023.
70. Laws of Hong Kong, cap. 204.
71. Manion 2004, pp. 28–83; ICAC website.
72. The ICAC also administers the Elections (Corrupt and Illegal Conduct) Ordinance, which is not discussed here.
73. See discussion in van de Pol et al. n.d.-a.
74. Transparency International 2020, p. 92.
75. ICAC website, International Collaboration and Capacity Building, https://www.icac.org.hk/en/icd/work/iccb/index.html, accessed 24 April 2023.
76. Bath 2020; see generally Vaccaro-Incisa 2021.
77. UNCTAD Investment Policy Hub.
78. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, https://icsid.worldbank.org/about/member-states/database-of-member-states, accessed 24 April 2023.
79. (New York, 1958), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, accessed 24 April 2023.
80. UNCTAD Investment Policy Hub.
81. UNCITRAL Working Group III.
82. Ibid., Submission from the Government of China 2019, A/CN.9/WG.III/WP.177.
83. G20 Trade Ministers Meeting Statement, Annex III 2016.
84. Bath 2020, p. 374 ff. Note, however, that although draft amendments are currently under consideration to change this, Article 2 of the Arbitration Law 2017 currently limits arbitration to disputes 'between citizens, legal persons and other organizations of equal status in law', which would exclude investor–state arbitration. Herbert Smith Freehills 2022.
85. The Export–Import Bank of China and the Government of the Republic of Kenya 2014, Article 15.

86. PRC Foreign State Immunity Law, translation by China Law Translate, https://www.chinalawtranslate.com/en/foreign-immunities-law/, accessed 5 February 2024.
87. Signed 30 July 1998; entered into force 12 April 1999.
88. UNCTAD Investment Policy Hub.
89. Ibid.
90. ICSID Case No. ARB/07/6.
91. *PCCW Cascade (Middle East) Ltd. v. Kingdom of Saudi Arabia* ICSID Case No. ARB/22/20.
92. Article 1.
93. Hepburn and Nottage 2016.
94. Note 14 to Section C.
95. Articles 15 and 16.
96. See notes 78 and 79.
97. HKIAC website, Statistics, https://www.hkiac.org/about-us/statistics.
98. UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/896/seo-v-korea.
99. See detailed discussion in Li and Bian 2020, p. 505 ff.
100. See, for example, *Beijing Shougang Mining Investment Co Ltd et al. v. Mongolia and Beijing Everyway Traffic* (PCA Case No. 2010-20) and *Beijing Everyway Traffic and Lighting Technology Company Limited v. Republic of Ghana* (PCA 2021-15), in both of which the tribunals held that they had no jurisdiction under a similar provision. Djanic 2023a.
101. See Haftel et al. 2022 on the approach of developing states with a substantial amount of investment abroad to treaty terms.
102. Expanded on in Article 10.10, allowing the imposition of special formalities.
103. Not applicable to Cambodia, Lao PDF, Myanmar and Vietnam.
104. Chi 2015; Ofodile 2013.
105. Lo 2020. See also RCEP Annex 10B.4, which excludes non-discriminatory regulatory actions 'applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilization' from the scope of indirect expropriation.
106. Yan 2020, 2022.
107. FATF 2022, R.3.
108. ABC 2021.
109. UNCTAD mapping brings up 101 entries for China and Hong Kong which include this in the definition. Yin, however, comments that in the case of some more recent treaties, such as those with Germany and Uganda, this provision does not appear. Yin 2020 p. 487.
110. Le Moullec 2022, pp. 22, 25; Yin 2020, p. 487.
111. See, for example, the decision in the tribunal in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29) (2018); request for annulment refused 2020.
112. Issued 26 December 2019; effective 1 January 2020.
113. SPC 2016; Contract Law Interpretation (I); Contract Law Interpretation (II), Article 14; Guiding Opinions. For a discussion of China's progressive restriction of the statutory grounds for voiding contracts, see detailed discussion in Xi 2022, pp. 81–90.
114. See, in contrast, Yin's view that the host state raising a corruption defence should be obliged to show that allegedly corrupt officials have been prosecuted. Yin 2020, p. 505.
115. UNCTAD, Investment Policy Hub. Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/. All as of April 2023.
116. *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15) (2011; China-Malaysia BIT).
117. *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25) (2014; Korea-China BIT); *AsiaPhos Limited et anor v. People's Republic of China* (ICSID Case No. ADM/21/1) (2020; Singapore-China BIT).

118. *Macro Trading Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/20/22) (2020; China-Japan BIT).
119. *Hela Schwarz GmbH v. People's Republic of China* (ICSID Case No. ARB/17/19) (2017; China-Germany BIT); *Jason Yu Song v. People's Republic of China* (PCA Case No. 2019-39) (2019; China-United Kingdom BIT); *Goh Chin Soon v. People's Republic of China* (ICSID Case No. ARB/20/34 discontinued) (PCA Case No. 2021-30) (2020, China-Singapore BIT); *Montenero v. China* (2021; China-Switzerland BIT).
120. *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) (2007; China-Peru BIT); (*Zhongshan Fucheng v. Nigeria* (ad hoc) (2018, China-Nigeria BIT).
121. *Beijing Shougang et al. v. Mongolia* (PCA Case No. 2010-20) (2010, China-Mongolia BIT*); Ping An Life Insurance et al. v. Kingdom of Belgium* (ICSID Case No. ARB/12/29) (2012, BLEU-China BIT); *Beijing Everyway Traffic and Lighting Technology Co Ltd v. Republic of Ghana* (PCA 2021-15) (2023, China-Ghana BIT).
122. *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30) (2014 China-Yemen BIT).
123. *Jetion and T-Hertz v. Greece* (ad hoc) (2019, China-Greece BIT).
124. See UNCTAD Investment Policy Hub. See also Bohmer 2022 (Ecuador); Djanic 2023a, b; *(Trinidad and Tobago) and PowerChina HuaDong Engineering Corporation et al. v. Vietnam* (ICSID Additional Facility—Arbitration Rules) (2022) ARB (AF) 22/7 (ASEAN-China Investment Agreement).
125. See notes 117 and 119.
126. *Hela Schwarz GmbH v. People's Republic of China*, Procedural Order No. 3.
127. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), https://uncitral.un.org/en/texts/arbitration/conventions/transparency, accessed 30 November 2022.
128. Effective 1 April 2014.
129. See Chap. 9 and Side Letter on Transparency Rules Applicable to Investor State Arbitration (providing for discussions relating to the incorporation of the Transparency Rules).
130. Bohmer 2020.
131. Lindmark et al. 2022.
132. Ku 2022.
133. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.
134. Set out in China's submission in *Democratic Republic of the Congo v. FG Hemisphere Associates* [2011] HKCFA 41.
135. *Wang Jing, Li Fengju, Ren Jinglin and others v. Republic of Ukraine* (2020), brought under China-Ukraine BIT.
136. Global Security 2021.
137. ICSID Case No. ARB/21/36; Malta Independent 2021.
138. *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12).
139. *Shift Energy Japan KK v. Japan; claim unsuccessful*. Bohmer 2023.
140. Criminal Procedure Law of the PRC (1979), Article 188.
141. Bath 2012.
142. OECD, https://www.oecd.org/corruption/oecdantibriberyconvention.htm.

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Vivienne Bath is Professor of Chinese and International Business Law at Sydney Law School, Associate Director—International of the Centre for Asian and Pacific Law at the University of Sydney and a member of the China Studies Centre at the University of Sydney. Her teaching and research interests are in international business and economic law, private international law and Chinese law. She has studied in Australia, the United States, China and Germany and has extensive professional experience in Sydney, New York and Hong Kong, specialising in foreign investment and commercial transactions in China and the Asian region.

Tianqi Gu is a PhD candidate at the Sydney Law School, working on Reforms on Chinese State-Owned Enterprises and Chinese Outbound Investment. She holds an LLB from Dalian Maritime University (China), and LLMs from University College London and the University of Sydney respectively. She is also the holder of an Australian Government Research Training Program Scholarship.

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Chapter 9
Corruption and Investment Treaty Arbitration in India

Prabhash Ranjan

Abstract There has been a stupendous expansion of investor–state dispute settlement (ISDS) cases involving foreign investors challenging sovereign state action as breaches of the investment treaty. This expansion has resulted in a wide range of non-investment concerns being brought before ISDS tribunals. One such non-investment concern is corruption. ISDS tribunals are increasingly required to deal with the allegation that the foreign investor was involved in corrupt activities in the host state while making or working on the investment. Against this global backdrop, this chapter looks at this issue in the Indian context. The chapter studies India's new investment treaty practice, which has developed in the last few years as a response to a large number of ISDS claims brought against India. India's new investment treaty practice has provisions aimed at dealing with foreign investors' corrupt practices, which is a step forward considering that India's old investment treaties didn't deal with corruption. However, there's a need to strengthen these provisions in a manner that would allow the host state to bring counter-claims against foreign investors. The chapter also discusses the case of *Devas v. India*, where India (mis)handled the issue of the alleged involvement of the investor in corruption.

9.1 Introduction

In recent times, there have been numerous instances where corruption has been an important issue in disputes between foreign investors and states in front of numerous investor–state dispute settlement (ISDS) tribunals.[1] ISDS tribunals have permitted host states to raise corruption as a ground for the denial of benefits to the foreign investor. For instance, in *Metal Tech v. Uzbekistan*, the tribunal held that since the investment was made through corrupt means, it has not been 'implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made' as required by Article 1(1) of the bilateral investment treaty

P. Ranjan (✉)
Jindal Global Law School, O P Jindal Global University (JGU), Sonipat, India
e-mail: pranjan@jgu.edu.in
URL: https://jgu.edu.in/jgls/prof-dr-prabhash-ranjan/

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(BIT).[2] The tribunal ruled that since the investment has not been made in compliance with the domestic laws of Uzbekistan, the tribunal has no jurisdiction over the dispute.[3] Additionally, questions have often arisen about whether investors can be held liable if they are involved in corrupt activities during the making or operation of their investments.[4]

Against this backdrop, this chapter examines the issue of corruption in India's international investment agreements, especially BITs where India has been trying to forge a new path since 2015, including a discussion of one key ISDS case where corruption has been an issue. Combating corruption is a major issue in India as the malaise of corruption has long affected the country. Transparency International ranks India 85 out of 180 countries in its Corruption Perception Index.[5] To fight against corruption, India has enacted several laws including the Prevention of Corruption Act,[6] the Prevention of Money Laundering Act,[7] the Black Money (Undisclosed Foreign Income and Assets) and the Imposition of Tax Act.[8]

The discussion in the chapter is organised as follows. Section 9.2 gives a brief overview of India's BIT programme. Section 9.3 discusses India's new investment treaty practice that includes issues related to fighting corruption under its ambit. Section 9.4 details the high-profile *Devas v. India* case, where corruption has been a major issue. Finally, Sect. 9.5 concludes by emphasising that India needs to ensure stronger corruption-related provisions in its investment treaty practice.

9.2 India's BIT Programme: Towards a Backlash[9]

India's BIT programme started in 1994 with the country signing the first BIT with the United Kingdom (UK). From 1994 until the end of 2010, India signed close to 80 BITs and some free trade agreements (FTAs) containing investment chapters.[10] BITs did not occupy a prominent place in India's economic narrative until the first publicly known BIT arbitral award was issued against India in a case known as *White Industries v. India*[11] where an ISDS tribunal found that India violated its obligations under the (then applicable) India–Australia BIT.[12] Subsequent to the White Industries award, several other foreign investors in 2012 and later brought BIT cases against India, challenging a wide range of measures such as the imposition of retroactive taxes,[13] revocation of spectrum licences,[14] actions of sub-national governments pertaining to withdrawing assurances offered to foreign investors,[15] and denial of refund of taxes.[16]

Due to the cumulative effect of these adverse BIT decisions and ISDS arbitration notices, India began the process of reviewing BITs and debating various aspects of them, which had not been deliberated upon earlier. These aspects included whether BITs have led to higher foreign investment inflows to India;[17] whether BITs encroach upon India's right to regulate in the public interest; whether BITs should contain ISDS provisions;[18] whether the treaty provisions in BITs are too vague and thus susceptible to overly broad interpretations by ISDS arbitral tribunals; and whether the ISDS system works in a transparent way.

The review of BITs led to three tangible outcomes. First, India adopted a new Model BIT in 2016.[19] Second, in the same year, India issued notices of BIT termination to 58 countries, including Australia.[20] After the expiry of the one-year notice period, these BITs ceased to exist from 2017. Since 2016, India has issued notices of termination to another 10 countries, making a total of 68 terminations.[21] Third, India has issued joint interpretative statements with some countries like Bangladesh, Colombia and Mauritius (often used as a conduit for investment into India), as discussed further below, to clarify the meaning of certain provisions in the BIT.[22]

In other words, the BIT claims against India did not trigger the exit of India from the BIT system. India is still a part of the system as evidenced by the fact that India has developed a new Model BIT, which even retains ISDS (albeit subject to many procedural limitations, as well as restricted substantive commitments).[23] Moreover, India wishes to renegotiate BITs with its former BIT partner countries based on the new Model BIT. India claims to be negotiating BITs with as many as 37 countries or blocs such as Switzerland, Argentina, Israel, Russia, Canada and Qatar.[24] However, since the adoption of the Model BIT, India has managed to sign only a few BITs based on the 2016 Model BIT, with countries like Belarus,[25] Taiwan[26] and the Kyrgyz Republic.[27] India has also entered a BIT with Brazil,[28] although this treaty is closer to the Brazilian Model BIT.[29] India, in 2021, decided to launch negotiations with the European Union for an investment protection agreement.[30] India is also negotiating an FTA with the EU.[31] India has kickstarted negotiations with the UK as well for an FTA that would include within its ambit provisions on investment protection.[32] In the last couple of years, India has signed FTAs with Mauritius, the United Arab Emirates and Australia, although these FTAs do not contain investment protection chapters.

The fact that India is negotiating BITs with 37 countries or blocs, but has only managed to sign treaties with just a handful, is significant. It reveals a limited engagement with BITs.[33] It also points to the fact that India's state-centric approach towards BITs is not acceptable to most of the country's negotiating partner countries. For instance, the EU is sceptical towards certain aspects of India's new BIT practice,[34] such as requiring foreign investors to exhaust local remedies for a minimum period of five years before approaching an ISDS tribunal.[35] Arguably, the approach that India is following on BITs can be called what Anthea Roberts and others refer to as 'de-legalisation of international economic law'—a process where countries redirect the decision-making process from 'international' to 'national' at two levels: rules and adjudication.[36] Thus, countries prefer to bind themselves to domestic rules and subject themselves to domestic adjudication in matters of foreign investment, at the cost of international law. Having briefly discussed India's BIT programme, let us now turn our attention to its investment treaty practice and its incorporation of corruption-related provisions.

9.3 India's Investment Treaty Practice

The BITs that India signed before the adoption of the Model BIT in 2016 contained nothing specifically on the issue of corruption. However, several Indian BITs contain a clause stating that investment has to be made in accordance with domestic law. This provision can be employed to argue that if an investment has been made using corrupt means, such investment will not enjoy treaty protection. A similar provision (Article 83.2) excludes ISDS protections for investments not made in compliance with host state laws under the 2011 FTA with Japan, which included, also in many of its treaties from around 2007 (including in that FTA, namely in Article 7), an obligation on host states to take measures against corruption.[37]

India's new investment treaty practice emerged from 2016 onward with a categorical mention of corruption. Before examining the Indian Model BIT and the subsequent Indian BITs, it will be useful to examine the draft Model BIT that India released for comments in early 2015.[38] This draft Model BIT was the precursor to the final Model BIT released in early 2016. Therefore, before understanding how the final Model BIT and the subsequent BITs that India signed deal with the issue of corruption, it will be apposite to look at the provisions in the draft Model BIT on corruption. Examining the draft Model BIT provision is also important because the final Model BIT differed from the draft, as will be explained in the chapter later.

In the draft Model BIT, provisions on corruption are included as part of Chap. III, which contains investor and home state obligations. Chapter III imposes various obligations on the investor with one of them being on corruption enshrined in Article 9 of the draft Model BIT provided as follows.

Article 9: Obligation against Corruption

9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.

9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.

9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.

9.4 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

Thus, Article 9 imposes several obligations on foreign investors to ensure that they do not indulge in acts of corruption. Article 9.1 obligates the foreign investor not to offer, promise or give any undue pecuniary advantage, gratification or gift whatsoever, either directly or indirectly, to a public servant or to the officials of the host state as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantages. This obligation extends to foreign investors both prior to and after making the investment. As the Law Commission of India (LCI) stated, in its 260th report where it studied the draft Model BIT,[39] these obligations on the investor are derived from India's domestic law contained in the Prevention of Corruption Act and from India's obligations under international law, such as those enshrined in the 2003 United Nations Convention Against Corruption.[40]

Article 9.2 bars foreign investors from engaging middlemen (individuals or firms) to intervene or negotiate on their behalf for some benefit in lieu of money or any other inducement. Thus, it is not just the investor who is specifically forbidden from paying bribes but any other person or firm endeavouring to intercede on behalf of the investor.

Article 9.3 bars foreign investors from making 'illegal' contributions to political parties or to candidates contesting for public office. 'Illegal' here means a contribution that is not consistent with the host state's laws. It is important to note that foreign investors are not barred from funding political parties or candidates in India.[41]

The obligation of the investor not to indulge in corruption can also be read as part of Article 12 of the draft Model BIT, which mandates the investor to comply with the laws of the host state.[42] Article 12 indicates the areas where the investor is required to comply with domestic laws, which includes taxation, labour, environmental and human rights law. Although there is no mention of anti-corruption laws in this list, the list is inclusive, and the foreign investor must comply with all domestic laws. Thus, a foreign investor in India will have to comply with Indian laws to combat corruption like the Prevention of Corruption Act and the Prevention of Money Laundering Act.

Article 9, along with other investor obligations, occurs in many places in the draft Model BIT as a condition precedent for the foreign investor to avail the rights guaranteed to foreign investors under the investment treaty. For example, Article 8.3 provides that compliance with Article 9, along with other investor obligations, is compulsory and fundamental to the operation of the treaty. Furthermore, Article 8.3 states that investors must comply with obligations imposed by Article 9, and other provisions given in Chap. III of the treaty, to benefit from the provisions of the BIT. Thus, if the investor is involved in acts of corruption, he or she will lose all the protection available under the BIT.

Likewise, Article 14.3(iii) of the draft Model BIT provides that in case the foreign investor wishes to submit a notice of the dispute to the state for an ISDS proceeding, in the notice, the investor, *inter alia*, will have to demonstrate compliance with Article 9 and other investor obligations.[43] It is not clear how the investor will show compliance with the obligation not to indulge in acts of corruption. Maybe the investor will have to file an affidavit or make a sworn declaration that he or she has not indulged in acts of corruption and that no corruption-related claims are pending against him or her in the host state. It is equally relevant to bear in mind that just because a foreign investor

is accused of corruption does not mean that the investor is involved in corruption and thus has breached Article 9 obligations. The allegations need to be proven in a court of law of the host state to conclusively determine whether the investor is involved in corruption or not.

Another place where Article 9 finds mention is Article 14.10(ii).[44] This article provides that a breach of Article 9 will also be considered by an ISDS tribunal while awarding any compensation to the foreign investor. However, this provision appears to contradict Article 8.3, which, as mentioned earlier, states that the failure of a foreign investor to comply with investor obligations including the ones enshrined in Article 9 will make him or her ineligible to avail of the benefits of the BIT. On this logic, if it is found that the foreign investor has indulged in acts of corruption, then he or she should not be entitled to any compensation because that is a benefit under the treaty. One way to resolve this apparent conflict is by interpreting Article 14.10(ii) to mean that the tribunal will take into account the fact that the investor has indulged in corrupt activities and accordingly grant no compensation. An alternative interpretation that could be offered to synchronise this apparent contradiction is that if the investor is involved in *de minimus* or minor corruption (especially during the performance rather than establishment phase) that will not take away all treaty rights of the investor but only reduce compensation or relief awarded.

A very interesting feature of the draft Model BIT was that it allowed the state to initiate a counterclaim against the foreign investor in case of breach of investor obligations contained in Chapter III including the obligation of not indulging in corruption.[45] In this regard, the state can seek a remedy such as suitable declaratory relief, enforcement action or monetary compensation.

Having discussed the draft Model BIT, let us turn our attention to the final Model BIT to understand whether the final version, on the issue of corruption, differs from the draft—and, if so, how.

9.3.1 Final Model BIT 2016

The final Model BIT that India adopted in 2016 scaled down several of the investor obligations in the sense that the obligations that the final Model BIT imposes are not as onerous as the ones that the draft Model BIT imposed. Chapter III of the 2016 Model BIT contains only two provisions on investor obligations (Article 11, which requires investors to comply with the laws of the host state, and Article 12, which imposes the obligation of corporate social responsibility or CSR) as against the many that the draft Model BIT contained including on the issue of corruption. In this section, we discuss the obligations imposed on the investor related to corruption, which has now become part of India's BITs signed with countries like Belarus, Kyrgyzstan, Taiwan and Brazil. It is interesting to note that the investor obligations on corruption in the final Model BIT are different from those in the draft Model BIT. Unlike the latter, which contained a separate provision imposing an obligation on the investor not to indulge in corruption, in the final Model BIT the same obligation is part of Article

11, which requires the investor to comply with domestic law. Specifically, Article 11(ii) of the Model BIT provides:

> Investors and their investments shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.

An almost carbon copy of Article 11(ii) of the 2016 Indian Model BIT exists in India's BITs with Belarus [Article 11(ii)], Kyrgyzstan [Article 11(ii)], Taiwan [Article 11(b)] and Brazil [Article 11(b)]. Article 11(ii) of the Model BIT subsumes Articles 9 and 12 of the draft Model BIT. It mandates the investor not to pay bribes or indulge in others' acts of corruption.

Additionally, Article 12 of the Model BIT also talks about anti-corruption. Article 12 refers to CSR as:

> Investors 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, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.

A similar provision exists in India's BITs with Belarus,[46] Kyrgyzstan,[47] Taiwan[48] and Brazil.[49]

Thus, Article 12 of the Model BIT states that investors shall endeavour to voluntarily incorporate those standards of CSR that are internationally recognised in their internal policies. One of the issues that these principles may address is anti-corruption. The defining characteristic of Article 12 is that it is voluntary in nature and not binding. If an investor fails to incorporate or address principles related to anti-corruption as part of its internal policies and practices, that will not be a breach of Article 12. An important provision on anti-corruption present in the India–Brazil BIT—absent in India's BITs with Belarus, Kyrgyzstan and Taiwan—is that the former imposes an obligation on states as well to adopting measures to fight corruption and money laundering.[50]

The Model BIT also differs from the draft Model BIT on the issue of dealing with corruption in the following ways. First, the Model BIT has done away with the requirement imposed in Article 14.3(iii) of the draft Model BIT that required foreign investors to furnish a self-certified statement that they have complied with all the investor obligations such as having not indulged in acts of corruption while bringing an ISDS claim against the host state. Second, as against Article 14.11 of the draft Model BIT that allowed the host state to bring counterclaims against the investor, there is no provision in the final Model BIT to bring counterclaims against the investor.[51] The LCI had not recommended doing away with counterclaims. This might raise the question of how the investor obligations given in Articles 11 and 12 can be enforced.

In answering this question it would be pertinent to carefully look at footnote 4 to Article 26.3 of the final Model BIT. Article 26.3 provides: ‘for the calculation of monetary damages, the tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors’. Then, it provides a footnote, which states that: mitigating factors can include, current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor. A similar provision is present in India’s BITs with Belarus,[52] Taiwan[53] and the Kyrgyz Republic.[54]

Scholars argue that the mitigating factors mentioned in the footnote would allow for the reintroduction of counterclaims through the back door.[55] As per footnote 4, the tribunal will have to consider mitigating factors while calculating monetary damages to be paid to foreign investors. Furthermore, footnote 4 gives wide discretion to the ISDS tribunal to determine mitigating factors.[56] Given the breadth of these factors, it would give opportunities to the host state to make submissions about any harm, say environmental harm, that the investor may have caused. Although involvement in corruption is not mentioned in footnote 4 as a mitigating factor, the broad nature of the factors would allow the state to bring counterclaims if the investor is involved in acts of corruption. This argument can be made since the investor has breached domestic laws or other obligations. Thus, in these Indian BITs, the host state could bring counterclaims against the foreign investor indirectly, not directly, for involvement in corruption.

9.3.2 Joint Interpretative Statement (JIS) on the India–Mauritius BIT

A very interesting development in India’s investment treaty practice, as mentioned before, is the decision to sign JISs with countries to clarify the meaning of vague and indeterminate provisions in the BIT. In this regard, India signed a JIS with Bangladesh, Colombia and Mauritius. The JIS with Bangladesh and Colombia aims to spell out the meaning of terms like investment, investor, fair and equitable treatment provision and expropriation. Interestingly, India’s JIS with Mauritius regarding the India–Mauritius BIT[57] is quite different from the one signed with Bangladesh and Colombia in two ways. First, as the article will show, the JIS with Mauritius only clarifies a handful of provisions in the India–Mauritius BIT, like the definition of investor, and thus is narrower in scope. Second, the JIS with Mauritius clarifies the terms of a treaty (India–Mauritius BIT), which entered into force on 20 June 2000 and had already been unilaterally terminated by India on 22 March 2017. In other words, the JIS with Mauritius is for an agreement that has ceased to exist. On the

other hand, India's JIS with Bangladesh and Colombia is for BITs that continue to exist.

It is important to recall that the India–Mauritius BIT has a sunset clause in Article 13(3),[58] which states that in the case of BIT termination the investments approved or made prior to the date of termination will enjoy the treaty protection for a period of ten years. Presumably, the JIS has been signed for investments that were already made before the date of termination of the BIT. Another related question (discussed further below) is whether the JIS will be valid for BIT disputes already raised, that is whether the JIS will have a retroactive effect or will only apply to new disputes with respect to old investments.

The JIS makes it clear that it shall be read with the agreement and shall form an integral part of the treaty. The JIS reaffirms the right of the host states to regulate investments in their territory in accordance with their domestic laws. The JIS also provides that an arbitration tribunal under the India–Mauritius BIT shall not have the jurisdiction to review the merits of a decision made by a domestic court of the host state.

Importantly, for the purposes of this chapter, the JIS is also aimed at combating corruption. Interestingly, India's JIS with Bangladesh and Colombia does not mention anything about corruption. Specifically, the JIS with Mauritius 'acknowledges that the protection under this agreement shall not be extended to investors or investments that have, concluded or pending, judicial or administrative proceedings against them at any stage, where fraud, money laundering, round-tipping or corruption or similar illegal mechanism have been alleged or being investigated into'.

The following points are important here. First, India and Mauritius, who did not say anything about corruption in the BIT signed in 1998, recognise that corruption is an important matter in investment treaty arbitration and that those investors who indulge in acts of corruption should not benefit from the BIT. Second, the treaty benefits can be denied to an investor in case of corruption. Third, to deny treaty benefits, it is not necessary that the charge of corruption against the investor or their investment be proven. A mere allegation of fraud or corruption is sufficient to rob the investor of the BIT's protective framework. This language is unduly harsh for foreign investors. It can be abused by the host state, which could merely allege corruption to ensure that the foreign investor is not able to bring an ISDS claim even in those situations where no corruption has been proven or established.

The JIS also states that an investor under the India–Mauritius BIT does not include persons or entities that are directly or indirectly, owned or controlled, by persons of a non-contracting party, that have been alleged to have indulged in fraud, money laundering, or corruption. Again, to deny treaty benefits what is needed is a mere allegation of corruption, not conclusive proof, or conviction by a court of law.

An important question that arises here is whether state parties can impede the effectiveness of a foreign investor's right to bring an ISDS claim against the host state.[59] An agreement like this means that after the treaty has come into force the home and the host state decide to impose certain limitations on the investor's right to bring claims against the host state. Since it is the states that create investors' rights, they are justified to curb these rights for reasons they collectively deem fit.

After having discussed India's new and emerging investment treaty practice on dealing with the issue of investors' involvement in acts of corruption, let us now turn our attention to a dispute involving a foreign investor and India where the investor purportedly was involved in acts of corruption.

9.4 The Devas Saga: An Act of Corruption?[60]

Corruption has been an issue in two BIT claims brought against India: *CC/Devas v. India*[61] and Germany's Deutsche Telekom (DT), one of the world's leading telecommunication companies which brought the second BIT claim against India due to the cancellation of the spectrum licences—*DT v. India.*[62] However, the interesting part is that the ISDS tribunal in these two cases did not deal with the issue of corruption because India did not raise it sufficiently. To comprehend this better, it is important to closely look at the key facts of the case.

9.4.1 Key Facts

In 2005, Antrix, the marketing arm of the government entity Indian Space Research Organisation (ISRO), signed an agreement with Devas, an Indian multimedia services provider. As per this agreement, Antrix leased to Devas the portion of the electromagnetic spectrum found at 2500–2690 MHz, also known as the S-band, on two satellites that were to be launched by ISRO.[63] The lease was for 12 years. The total amount of S-band capacity leased to Devas was 70 MHz.[64] Out of this 70 MHz of leased capacity, 60 MHz was the broadcast satellite services part and 10 MHz was the mobile satellite services part. The purpose behind leasing the S-band spectrum to Devas was to allow it to provide multimedia services to mobile users across India.[65]

Multiple foreign investors invested in the Devas-Antrix project. This included the three Mauritian investors who brought the *CC/Devas* claim[66] and the Germany-based Deutsche Telekom, one of the world's leading telecommunication companies, who brought the other ISDS claim. In 2006 and 2007, Mauritian investors made a combined investment of about USD30 million.[67] Likewise, in 2008 and 2009, Deutsche Telekom made an equity investment in Devas of USD75 million and USD22.5 million respectively.[68] Indian governmental bodies like the Foreign Investment Promotion Board gave due approval to these foreign investments.[69]

Soon Devas also secured the licences and necessary government approvals to deliver internet services throughout India.[70] As per the agreement between Devas and Antrix, the satellites were to be launched by June 2009. However, Antrix failed to meet the deadline but promised that the launch would happen by the end of 2009 or early 2010.[71] Notwithstanding these delays, the claimants continued meeting their financial obligations and other requirements like injecting fresh capital into the project.[72]

Two other developments took place in parallel. First, from 2005 to 2007, several public officials including senior military officers recommended reserving the S-band spectrum for military and strategic purposes.[73] Second, allegations of corruption against Indian space officials related to the leasing of the S-band to Devas started surfacing in the media.[74] The allegations made included giving the S-band spectrum at throwaway prices; Devas (a company that was set up by former ISRO officials in 2004, just one year before the contract was signed) having secret knowledge about the commercialisation of the S-band spectrum; and allegations that ISRO's serving officials colluded with Devas to facilitate a wrongful gain to the latter.

A committee was constituted to investigate the alleged irregularities in the deal. This committee submitted its report in 2010. It found the Devas system to be technically sound. Yet, the committee recommended that the agreement be revisited considering the limitations on the availability of the spectrum for essential future demands.[75] It is critical to underline that this committee recommended revisiting the agreement, not annulling it.

Meanwhile, allegations of corruption in the deal continued to appear in the media.[76] Subsequently, on 30 June 2010, the Indian Department of Space recommended the annulment of the Antrix–Devas agreement, which was accepted by the Indian Space Commission on 2 July 2010.[77] This decision to annul the contract was made public by the Indian government on 8 February 2011,[78] more than seven months after the decision for annulment was made. Finally, on 17 February 2011, the Cabinet Committee on Security[79] (CCS) annulled the Antrix–Devas agreement.[80] The reason offered was:

> taking note of the fact that Government policies with regard to allocation of the spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways, and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S-band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S-band. In the light of this policy of not providing orbit slot in S-Band to Antrix for commercial activities, the 'Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd.' entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.[81]

On 25 February 2011, Antrix notified Devas about the annulment of the contract due to a *force majeure* event.[82] Following the annulment of the agreement, Devas commenced arbitration against Antrix alleging that the sudden repudiation of the contract by Antrix breached Devas's rights. This arbitration was brought under the International Chamber of Commerce (ICC).[83] The ICC tribunal ruled in favour of Devas ordering Antrix to pay USD562.5 million as damages for wrongfully repudiating the contract.[84] A US district court, in late 2020, dismissing all the contentions of Antrix, confirmed the 2015 commercial arbitral award in favour of Devas.[85]

9.4.2 The BIT Claims Against India

The sudden decision of the Indian government to rescind the contract left the foreign investors of Devas—the Mauritian investors and DT—in the lurch. Consequently, the three Mauritian investors, *CC/Devas*, and DT brought two separate BIT claims against India under the India–Mauritius BIT and India–Germany BIT respectively for compensation for the balance of the lost investment, given that Devas would have obtained the benefit of the ICC award against Antrix.

India argued before the two BIT arbitration tribunals that it cancelled the deal because it needed the S-band satellite spectrum for national security purposes. Specifically, before the *CC/Devas* tribunal, India relied upon Article 11(3) of the India–Mauritius BIT, which provides: the provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind *or take any other action which is directed to the protection of its essential security interests* or to the protection of public health or the prevention of diseases in pets and animals or plants. (Emphasis added) India argued that reserving the S-band satellite spectrum for the needs of defence and the para-military was aimed at protecting its 'essential security interest'. India also argued that the ISDS tribunal should not 'sit as a supranational regulatory or policy-making body to review the policy decisions of the Cabinet Committee on Security as national authorities are uniquely positioned to determine what constitutes a State's essential security interests in any particular circumstance and what measures should be adopted to safeguard those interests'.[86]

The ISDS tribunal did not agree with this argument that the determination of security interests was self-judging.[87] Nonetheless, the tribunal granted a wide margin of deference to India and agreed that the reservation of spectrum for the needs of defence and para-military forces can be classified as an action 'directed to the protection of its essential security interests', coming under the exclusion covered in Article 11(3) of the Treaty.[88] However, the tribunal said that reacquiring spectrum for purposes like railways and other public utility services and societal needs does not qualify as essential security interests.[89]

The S-band satellite spectrum that India took for non-security purposes, that is to satisfy various societal needs, according to the *CC/Devas* tribunal, breached India's FET obligation towards the investor under the India–Mauritius BIT. The tribunal held that although India decided to annul the contract in July 2010, this decision was not relayed to the investors. The claimants learned about the abrogation of the agreement seven months later in February 2011 when it was publicly announced. For these seven months, the claimants were 'completely left in the dark' about the decision and the alleged growing needs of the military about the spectrum.[90] Consequently, the tribunal held that India's conduct constituted a clear breach of the simple good faith required under international law and the FET provision of the India–Mauritius BIT.[91] Thus, India had to compensate the claimants for damages suffered from 2 July 2010 to 17 February 2011, the date of the CCS decision.[92] Accordingly, the tribunal ordered India to pay USD160 million plus accrued interest as damages to *CC/Devas*.[93]

India raised the national security argument before the DT tribunal as well. It relied on Article 12 of the India–Germany BIT, which states that 'nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent *necessary for the protection of its essential security interests*' (emphasis added). However, the DT tribunal, contrary to the *CC/Devas* tribunal, rejected India's argument. The DT tribunal distinguished between Article 11(3) of the India–Mauritius BIT and Article 12 of the India–Germany BIT. In the former, the measure should be 'directed to' the protection of essential security interests, in the latter, the measure should be 'necessary' for the same.

The DT tribunal held that for state action to be 'necessary' for attaining an objective there should be a stricter nexus between the regulatory measure (terminating the contract) and the objective (reacquiring the S-band spectrum for national security purposes).[94] On the other hand, for a state action to be 'directed to' achieving an objective, the nexus between the regulatory measure and the objective may not be stricter or it may be lax. India's measure was not necessary because it referred to various needs for reacquiring the S-band spectrum that ranged from military to non-military without clearly spelling out the actual purpose.[95] This reflected a lack of clarity and purpose behind reacquiring the S-band spectrum and thus the action was not necessary to accomplish essential security interests.

Moreover, after the agreement was cancelled in 2011, there were protracted debates between the different branches of the Indian government on the use of the S-band spectrum for almost four years, which, in turn, reinforces the point about a lack of clarity regarding the usage of the spectrum. Such a protracted debate corroborates the absence of any necessity because if the S-band spectrum had indeed been taken to meet the needs of the military and paramilitary, it should have been allocated for the same immediately, which was not the case.[96] After rejecting India's national security argument, the DT tribunal, like the *CC/Devas* tribunal, concluded that India breached the FET provision of the India–Germany BIT.[97] India's decision to annul the agreement was arbitrary and unjustified because 'it was manifestly not based on facts, but on conclusory allegations, and was the product of a flawed process'.[98] The DT tribunal in its final award issued on 27 May 2020, ordered India to pay the investor damages of USD132 million.[99]

9.4.3 Failure to Raise the Argument of Fraud

In this entire episode, it is curious as to whether India raised the issue of Devas's fraudulent and corrupt practices before the two BIT arbitration tribunals. This contention is very important because the relevant BITs protect only those investments that have been made following the domestic laws of the host state. Article 1(1) of the India–Mauritius BIT provides that 'investment means every kind of asset established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made'. Likewise, Article 1(b) of the India–Germany BIT provides that 'investment means every kind of asset invested in accordance with the

national laws of the Contracting Party where the investment is made'. These clauses are known as presenting an express 'legality requirement', that is the BIT would only protect those investments that have been made in accordance with the laws of the host state or have been made lawfully. If an investment is vitiated by fraud or corruption, it would not be lawful and thus would not enjoy protection under such a BIT.[100]

What is perplexing is that India never raised the issue of fraud or corruption as a jurisdictional objection before the two BIT arbitration tribunals, despite the hearings of the two cases being conducted after the National Democratic Alliance (NDA) government came to power in 2014. The NDA government, on assuming office in 2014, launched criminal investigations into this case. In 2015, the Central Bureau of Investigation (CBI) registered the first investigation report against Devas and its officers under the Prevention of Corruption Act 1988. By then (in August 2014) the hearing on jurisdiction and merits in the *CC/Devas* case had commenced. CBI also filed a charge sheet in 2016 against several officials including ISRO's ex-chairman G. Madhavan Nair accusing them of wrongfully facilitating a gain of around USD67 million to Devas.[101] These officials were accused of committing various offences under the Indian Penal Code such as cheating and violating various provisions of the Prevention of Corruption Act 1998.[102] In early 2017, the Enforcement Directorate (ED) attached nearly USD9.7 million of Devas under the Prevention of Money Laundering Act.[103]

The award against India, as already discussed, was issued in July 2016. Likewise, the hearing and submissions on jurisdiction and liability in the DT case started in late 2014 going up to early 2016. The DT tribunal issued its award in March 2017.

One is unsure why India did not raise the argument of fraud and corruption before the BIT arbitration tribunals. Although there was no judicial ruling at that time corroborating the fraudulent incorporation of Devas, India had launched criminal investigations into the matter including a charge sheet that claimed fraud and corruption. A 2012 report by the Comptroller and Auditor General (CAG) found several anomalies in the Devas–Antrix contract such as the agreement promoting the interest of an individual private entity at the cost of public interest.[104] Prima facie, there was adequate evidence that the incorporation of Devas was done for fraudulent purposes. Yet India did not plead the ongoing criminal investigations against Devas before the two tribunals; nor did it cite the CAG report. There could be several reasons for not raising the corruption argument. For example, it is possible that India might have thought that the evidence they have would not meet the standard of proof that the ISDS tribunal required. The lack of coordination between different government departments involved in the said ISDS claim could also be the reason.

After the *CC/Devas* tribunal had issued its award and initiated the process of determining damages to be paid to the investors, India, in October 2016, requested the tribunal to stay the proceedings pending the resolution by Indian judicial authorities of the charges framed by the CBI against Devas. However, the tribunal denied the request since it was untimely. Furthermore, the *CC/Devas* tribunal said that India did not request relief during the hearings based on the alleged criminal activities of Devas under Indian criminal laws.[105] India made a similar request before the DT

tribunal in October 2016 after the hearing was over. The DT tribunal too rejected India's request because it was both mistimed and lacked merit.[106]

The Swiss Federal Supreme Court, where India unsuccessfully challenged the DT award, also said in its 2018 decision that it was difficult to understand why [India] did not mention [the anomalies in the Devas–Antrix contract and other attendant circumstances], which were indicative, at the very least, of suspicion of commission of criminal offences in its writings in the arbitration file, then during the hearing in April 2016, or its brief after inquiries of June 10, 2016, preferring to wait until October 24, 2016, to inform the tribunal.[107]

Meanwhile, in 2021, the National Company Law Tribunal (NCLT), on a petition filed by Antrix, ordered the winding up of Devas because it held that the latter was incorporated in a fraudulent manner to carry out unlawful purposes. Thus, the NCLT held that Devas should be wound up on the ground of fraud under Sects. 271 and 272 of the Companies Act 2013. This decision of the NCLT was upheld by the National Company Law Appellate Tribunal (NCLAT). Finally, in January 2022, the Supreme Court of India upheld the NCLAT decision of winding up Devas.[108] The Supreme Court held that if the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the agreement, the disputes, arbitral awards, etc., are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India.

9.4.4 Devas's Second BIT Arbitration

After the Supreme Court order, Devas issued a fresh notice of arbitration to India under the India–Mauritius BIT.[109] As already pointed out, India unilaterally terminated the BIT on 22 March 2017. However, as per Article 13(3) of BIT, in case of unilateral termination, the investment that was made before the termination will continue to enjoy treaty protection for the next ten years.

The new BIT claim essentially attempts to implicate India for its undue efforts to frustrate the enforcement of a commercial arbitration award that Devas had won against Antrix in 2015. Devas's principal claim then was that India had unlawfully expropriated its investment through the liquidation of Devas and its takeover by the liquidator, which, in turn, had not allowed the enforcement of the ICC award, which is Devas's largest asset. In another interesting development in August 2022, the Delhi High Court set aside the ICC award[110] in favour of Devas.[111] Since the Supreme Court of India had held that Devas was created for fraudulent purposes and that all the agreements, awards and so on were infected with the poison of fraud, the Delhi High Court ruled that the ICC award was against public policy and should be set aside.

Another interesting question is whether the new BIT arbitration will be affected by the July 2022 India–Mauritius JIS. The JIS is silent on whether it will be applied retroactively. In other words, will the JIS be applicable to BIT disputes that have

already been initiated? While countries have the sovereign right to adopt such JIS, a retroactive application of the same will be unfair as it will curtail the investor's right to bring ISDS claims without serving sufficient notice.[112] In this regard, the India–Mauritius BIT is different from other treaties that talk of joint interpretation. For instance, Article 24(2) of the Dutch Model BIT provides:

> A joint interpretative declaration adopted as result of consultations by the Contracting Parties shall be binding on a Tribunal established under Section 5 of this Agreement. Such joint interpretative declaration is not applicable in cases where a claim has been submitted by an investor under Section 5 of this Agreement.

Thus, the above language makes it clear that the joint interpretation of the treaty by its parties shall not be applicable to ongoing disputes. This proposition is fair because it respects the principle of 'equality of arms' by ensuring a fair balance between the opportunities available to both the investor and the host state to defend their positions in arbitration. Since the host state is a party to the dispute, it would be disingenuous to allow the host state to abuse its position as a party to the treaty to change the treaty once a claim has been brought.[113]

9.5 Conclusion

In the BITs that India signed in the 1990s and 2000s, corruption-related provisions did not feature prominently. This started to change with India's new investment treaty practice that was inaugurated by the 2016 Model BIT. Given the manner in which the issue of corruption has acquired prominence in international investment law debates in general and in ISDS in particular, this is a welcome development. As India endeavours to negotiate new investment treaties, there should be a strengthening of corruption-related provisions. Imposing obligations on the foreign investor not to indulge in corrupt acts should be strengthened by making it possible for the state to bring counterclaims against the foreign investor.

At the same time, it is important that India's investment treaty practice on corruption-related provisions should not be aimed at targeting a particular investor. The India–Mauritius JIS seems to be doing that by impeding the ability of Devas to bring a fresh BIT claim against India. Moreover, corruption-related provisions should not be abused by states to deny legitimate treaty protection to foreign investors. Thus, provisions that would curb the efficacy of investors' right to bring an ISDS claim just because there is an allegation of corruption will amount to an abuse of state power. This is especially so because often corruption allegations are levelled for political purposes such as fixing the politicians or political parties not in office.

The state should press the argument of corruption against the investor if the accusation has been proven or at least realistically alleged in a court of law or before a competent authority. This will at least give a certain degree of credibility to the corruption charge made against the investor. In the absence of a judicial decision or credible prosecution, it is quite possible that states might use 'corruption' as a

smokescreen to deflect from investors' allegations. It is also important to bear in mind that the Indian judiciary is too slow and getting a final decision on a corruption claim might be a time consuming process. Moreover, ISDS tribunals should apply higher standards of proof to corruption allegations—not just for procedural fairness reasons but also to give the corruption agency and courts the maximum opportunity to consider the evidence and merits of allegations. This is particularly important in developing countries where there is excessive pressure on such agencies and courts.[114]

Notes

1. Caprasse and Tecqmenne 2022, pp. 519–548 who observe that 'no less than thirty awards involving allegations of corruption have been rendered since 2010'.
2. ICSID 2013, para. 372.
3. ICSID 2013, para. 373.
4. Vijayvergia and Belmannu 2020, and Ishikawa 2022 reviewed at https://japaneselaw.sydney.edu.au/2023/01/corporate-environmental-responsibility-in-investor-state-dispute-settlement-by-tomoko-ishikawa/. See also Yan 2022 and Chap. 5 in this volume.
5. Transparency International 2023.
6. The Prevention of Corruption Act, 2008: https://legislative.gov.in/sites/default/files/A1988-49.pdf
7. The Prevention of Money Laundering Act, 2002: https://dea.gov.in/sites/default/files/moneylaunderingact.pdf
8. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015: https://legislative.gov.in/sites/default/files/A2015-22.pdf.
9. See also Ranjan 2022a, b, pp. 112–125.
10. For a detailed study of India's BITs, see Ranjan 2019.
11. UNCTAD n.d.-k.
12. UNCTAD n.d.-k, para. 16.1.1 (a). See further Claxton et al. 2021.
13. UNCTAD n.d.-j; UNCTAD (n.d.-e). In 2021, partly in response to the loss in the ISDS cases challenging retroactive taxation, India amended its tax law to put an end to the imposition of retroactive taxes.
14. UNCTAD n.d.-f, Award on Jurisdiction and Merits, 25 July 2016; UNCTAD n.d.-g, Interim Award, 13 December 2017.
15. UNCTAD n.d.-i.
16. UNCTAD n.d.-h. See also Ranjan 2024. REFERENCE - Ranjan P (2024). *India and Investor-State Dispute Settlement: Affronting Sovereignty or Indicting Capriciousness. Routledge, London.*
17. Bhasin and Manocha 2016, p. 275; Singh 2021, pp. 287–313.
18. Bhattacharjee 2012.
19. Ministry of Finance 2016a. Also see Ranjan and Anand 2017, p. 1.
20. Department of Industrial Policy & Promotion 2016.
21. Ministry of External Affairs 2023.
22. See Department of Economic Affairs 2017.
23. Ranjan and Anand in Chaisse and Nottage 2018.
24. Committee on External Affairs 2021, pp. 8–9.
25. UNCTAD n.d.-a.
26. Bilateral Investment Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India (India–Taiwan BIT) (adopted and entered into force 18 December 2018).

27. UNCTAD n.d.-c.
28. UNCTAD n.d.-b.
29. Moraes and Cavalcante 2021, pp. 304–318.
30. European Commission 2021.
31. European Commission 2021.
32. Department for International Trade 2022.
33. Kumar and Anchayil 2022.
34. See Chakraborty 2021.
35. See Ministry of Finance 2016a, Article 15.1.
36. Roberts et al. 2019, pp. 671–73.
37. See Chap. 11 in this volume.
38. Government of India, Ministry of Finance 2016b (hereinafter draft Model Indian BIT).
39. Law Commission of India 2015.
40. UNGA 2003.
41. The issue of foreign corporations funding political parties in India has been a major bone of contention. See Vaishnav 2019.
42. 'Article 12.1—Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following:

    (i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees;

    (ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes;

    (iii) environmental Law applicable to the Investment and its business operations;

    (iv) Law relating to conservation of natural resources;

    (v) Law relating to human rights;

    (vi) Law of consumer protection and fair competition; and

    (vii) relevant national and internationally accepted standards of corporate governance and accounting practices'.
43. 'Article 14.3(iii)—The Notice of Dispute shall:

    a. contain a self-certified statement (1) providing the name and address of the Investor and the Investment; (2) setting forth the legal and factual bases of the claim and the provisions of the Treaty alleged to have been violated; (3) demonstrating compliance with Article 14.3(i) and (ii); (4) demonstrating compliance with Articles 9, 10, 11 and 12 of this Treaty …'.
44. 'Article 14.10 (ii)—Subject to Article 14.11, a tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. In awarding any compensation under this Treaty, a tribunal constituted under this Article shall take into account any breach of the obligations contained in Articles 9, 10, 11 and 12 of Chapter III of this Treaty by the Investor and its Investment'.
45. 'Article 14.11(i)—A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation'.
46. India-Belarus BIT, Article 12.
47. India-Kyrgyz Republic BIT, Article 12.
48. India-Taiwan BIT, Article 12.
49. India-Brazil BIT, Article 12.2(f).
50. See Article 10.1 of the India-Brazil BIT—'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 Treaty, in accordance with its laws and regulations'.
51. Footnote 4 of the final model BIT arguably would allow counterclaims. This point is discussed later in the chapter.
52. See Article 26.3 of India-Belarus BIT, 2018.

53. See footnote 1 of Article 25.3 of the Bilateral Investment Agreement between the Indian Taipei Association in Taipei and The Taipei Economic and Cultural Center in India, 2018.
54. Footnote 4 to Article 26.3 of the India-Kyrgyzstan BIT.
55. Hepburn and Kabra 2017, pp. 98–99.
56. Hepburn and Kabra 2017, p. 99.
57. UNCTAD (n.d.-d).
58. Article 13(3) of the India-Mauritius BIT: 'In respect of investments approved and/or made prior to the date the notice of termination of this Agreement becomes effective, the provisions of the proceeding articles shall remain in force with respect to such investments for a further period of ten years from that date or for any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor'.
59. Burch et al. 2012, p. 1035.
60. This part draws from Ranjan 2022a, b.
61. UNCTAD (n.d.-f).
62. UNCTAD (n.d.-g).
63. UNCTAD (n.d.-g), para. 59.
64. Ibid.
65. UNCTAD (n.d.-f).
66. These three Mauritius investors are CC/Devas (Mauritius) Ltd. (CC/Devas), Devas Employees Mauritius Private Limited (DEMPL) and Telcom Devas Mauritius Limited (Telcom Devas).
67. UNCTAD (n.d.-f), paras. 107 and 108.
68. UNCTAD (n.d.-g), paras. 69 and 70.
69. UNCTAD (n.d.-f), para. 200; UNCTAD (n.d.-g), para. 178.
70. UNCTAD (n.d.-f), para. 109.
71. UNCTAD (n.d.-f), para. 110.
72. Ibid., para. 111.
73. UNCTAD n.d.-g, para. 72.
74. Ibid., paras. 71, 76.
75. Ibid., para. 77.
76. Ibid., para. 78.
77. UNCTAD n.d.-g, para. 82; UNCTAD n.d.-f, para. 468.
78. UNCTAD n.d.-f, para. 142; UNCTAD n.d.-g, para. 86.
79. CCS is a select cabinet committee that, among other matters, deals with all defence-related issues and comprises the Prime Minister, the Minister of Home Affairs, the Minister of External Affairs, the Minister of Finance and the Minister of Defence of the Indian government.
80. Press Information Bureau 2011.
81. Ibid.
82. UNCTAD n.d.-g, para. 92.
83. *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award—14 September 2015. https://jusmundi.com/en/document/decision/en-devas-multimedia-private-limited-v-antrix-corporation-limited-award-monday-14th-september-2015, accessed 17 June 2023.
84. Ibid.
85. *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Judgment of the United States District Court for the Western District of Washington at Seattle—4 November 2020. https://jusmundi.com/en/document/decision/en-devas-multimedia-private-limited-v-antrix-corporation-limited-judgment-of-the-united-states-district-court-for-the-western-district-of-washington-at-seattle-wednesday-4th-november-2020#decision_14552, accessed 17 June 2023. See also Ranjan 2024
86. UNCTAD n.d.-f, para. 214.
87. Ibid., para. 219.
88. Ibid., para. 354.

89. UNCTAD n.d.-f.
90. UNCTAD n.d.-f, para. 468. Also see UNCTAD n.d.-g, para. 388.
91. UNCTAD n.d.-f, para. 470.
92. UNCTAD n.d.-f.
93. UNCTAD n.d.-f, Award on Quantum, 13 October 2020.
94. Ibid., para. 288.
95. UNCTAD n.d.-g, para. 286.
96. Ibid., para. 288.
97. Ibid., para. 390.
98. Ibid., para. 363.
99. UNCTAD n.d.-g, Petition to Recognize and Confirm Foreign Arbitral Award, United States District Court, District of Columbia, 19 April 2021, para. 5. https://jusmundi.com/en/document/other/en-deutsche-telekom-ag-v-the-republic-of-india-petition-to-recognize-and-confirm-foreign-arbitral-award-monday-19th-april-2021, accessed 17 June 2023.
100. The situation is less clear without an express legality provision. (See, with comparative analysis of the pervasiveness of explicit provisions in treaties of some Asian states, the concluding Chap. 16 in this volume).
101. PTI 2016. See also Ranjan 2024.
102. PTI 2016.
103. Ians 2017.
104. Comptroller and Auditor General of India 2012.
105. UNCTAD n.d.-f, Procedural Order No. 7, December 21, 2016, https://jusmundi.com/fr/document/other/en-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-telcom-devas-mauritius-limited-v-republic-of-india-procedural-order-no-7-wednesday-21st-december-2016#other_document_7440, accessed 17 June 2023.
106. UNCTAD n.d.-g, paras. 115–119.
107. Judgement of Swiss Federal Court, 11 December 2018 https://www.italaw.com/sites/default/files/case-documents/italaw10304_0.pdf. See also Anand 2021.
108. UNCTAD n.d.-f, Judgment of the Supreme Court of India, 17 January 2022. https://main.sci.gov.in/supremecourt/2021/22244/22244_2021_41_1501_32547_Judgement_17-Jan-2022.pdf
109. Sanderson 2022. See also Ranjan 2024
110. Fali S. Nariman, India's most distinguished jurist, argues that 'Indian courts' traditional attitude towards arbitration had been indulgent and paternalistic'. See Nariman 2009, p. 367.
111. UNCTAD n.d.-f, Judgement of the Delhi High Court, 29 August 2022. https://www.livelaw.in/pdf_upload/antrix-vs-dewas-delhi-hc-432713.pdf.
112. For more on this see Burch et al. 2012, p. 1013.
113. See also Titi 2020.
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Prabhash Ranjan is a Professor and Vice Dean at the Jindal Global Law School, O P Jindal Global University (JGU). He holds a PhD in law from King’s College London and is a recipient of the British Chevening Scholarship. Prabhash teaches and publishes in the area of international investment law and international trade law. He has been a Visiting Scholar at Brookings India and a Visiting Fellow at the Lauterpacht Centre for International Law, Cambridge University. He was a member of the team that drafted the 260th report of the Law Commission of India on the 2015 draft model Indian bilateral investment treaty.

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Chapter 10
Corruption and Illegality in Asian Investment Disputes: Indonesia

Simon Butt, Antony Crockett, and Tim Lindsey

Abstract Indonesia is notorious for high levels of corruption. This has remained the case in spite of significant reforms made since the collapse of the Soeharto government in 1998. This chapter briefly introduces some of the key law reforms which have sought to address corruption in Indonesia as well as ongoing concerns regarding high levels of corruption in the judicial system, which is one of the factors leading investors in Indonesia to prefer arbitration for resolving disputes. The chapter then considers the legal framework for international commercial arbitration in Indonesia, particularly relating to enforcement of arbitration awards and recent changes to Indonesia's policy relating to investment treaties and investor–state dispute resolution. The chapter includes consideration of two investor–state arbitrations involving Indonesia which featured allegations of corruption.

10.1 Introduction

Indonesia is notorious for high levels of corruption. Transparency International's Corruption Perceptions Index, perhaps the most commonly cited corruption-related survey, consistently rates the country among the world's most corrupt.[1] Post-Soeharto reforms from the late 1990s had some early success at reducing corruption, but it is widely accepted in Indonesia that many of the reforms were flawed or have

S. Butt (✉)
University of Sydney Law School, Sydney, NSW, Australia
e-mail: simon.butt@sydney.edu.au
URL: https://www.sydney.edu.au/law/about/our-people/academic-staff/simon-butt.html

A. Crockett
Herbert Smith Freehills, Hong Kong, China
e-mail: Antony.Crockett@hsf.com
URL: https://www.herbertsmithfreehills.com/our-people/antony-crockett

T. Lindsey
Melbourne Law School, Melbourne, VIC, Australia
e-mail: t.lindsey@unimelb.edu.au
URL: https://law.unimelb.edu.au/about/staff/tim-lindsey

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since unravelled. Indeed, one often hears that, overall, corruption may, in fact, have increased—particularly judicial corruption. To avoid the Indonesian courts, foreign investors routinely include foreign arbitration clauses in contracts with Indonesian partners. However, this is not a complete solution because the enforcement of foreign arbitral awards in Indonesia is, ultimately, still subject to judicial oversight. Although there are certainly examples of successful enforcement, foreign arbitral awards remain vulnerable to challenge in Indonesian courts, which have been inconsistent in their approach to enforcement.

Indonesia has lost very few inbound investor–state disputes.[2] However, following several high-profile investor–state arbitration cases, including some in which allegations of corruption were raised, the Indonesian government has become increasingly wary of investment treaty arbitration. The government has expressed concerns about the threat of claims and the costs associated with resolving disputes under bilateral investment treaties (BITs) that entitle foreign investors to arbitrate investment disputes with the Indonesian government, including in the International Centre for the Settlement of Investment Disputes (ICSID). These concerns have led Indonesia to terminate some older investment treaties and to narrow the scope of protections afforded to foreign investors in newer agreements.

In this chapter, we first offer a brief account of corruption in Indonesia and the difficulties faced by the anti-corruption institutions set up after the fall of Soeharto in 1998. We also discuss judicial corruption in Indonesia—one reason why investors seek to avoid using the Indonesian courts. We then explain the law regulating arbitration in Indonesia, focusing on challenges to arbitral awards and their enforcement, before briefly considering recent changes in the country's policy related to investment treaties and investor–state dispute resolution. The later part of our chapter also considers two investor–state arbitrations involving Indonesia which featured allegations of corruption.

10.2 Corruption

After the collapse of President Soeharto's New Order in May 1998, significant legislative and institutional reforms were initiated, ostensibly to reduce corruption. In this section we offer a brief assessment of the progress of some of the more important reforms before considering corruption in Indonesian law enforcement agencies, including the courts.

10.2.1 The 1999 Anti-corruption Law

This 1999 Law was introduced soon after Soeharto's fall in response to popular calls for firm action against the systemic corruption of his regime. The Law was

intended to make investigating and prosecuting corruption easier than in the past, when convictions were very rare and usually only involved minor offenders.

The 1999 Law, as amended by Law 20 of 2001, remains in force today. It defines corruption broadly, catching a wide range of behaviour, and provides severe penalties, including death.[3] The Law establishes specific offences such as bribery, but Article 2(1) provides a very general catch-all offence. Under this provison, corruption occurs if someone 'unlawfully enriches themselves or another person in a way that could damage the state finances or economy'. The elucidation (explanatory memorandum)[4] to this provision defines 'unlawfully' to include acts that do not breach written law if those acts do not accord with 'justice or social values existing in the community'.[5]

The result is that many defendants are found guilty of corruption despite not breaching any binding legal instrument.[6] Many have been convicted after acting contrary to non-binding guidelines or simply because, in the eyes of the court, they have made a mistake that has caused loss to the state. Indeed, some have even been convicted after having shown compelling reasons for choosing not to comply with such guidelines.[7]

10.2.2 The Corruption Eradication Commission

The Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK) was established by Law 30 of 2002 on the KPK (amended by Law 19 of 2019) to implement the sweeping anti-corruption regime created by the 1999 Anti-Corruption Law. Although it reports to the president and is primarily accountable to the public, the KPK was initially established as an independent state agency. Its continuing credibility relies upon this independence—particularly from police and prosecutors, who are widely believed to be very corrupt, as we explain below.

The 2002 Law gave the KPK a broad power to coordinate and supervise corruption investigations and prosecutions. Using this power, the KPK could take over ongoing high-level corruption investigations and prosecutions[8] or initiate its own.[9] Although the KPK's powers to initiate or take over corruption investigations were broad and virtually unilateral, jurisdictional clashes between the police and KPK have been very common, with both claiming exclusive power to handle particular cases. The institutional rivalry was worsened by the additional powers the KPK initially had that the police did not (including wiretapping without a warrant), which were said to create significant resentment.

In fact, the relationship between the police and the KPK has been fraught, with the KPK targeting senior officers in some of its investigations and prosecutions, and vice versa. This led to significant pushback from the police that threatened the KPK's efficacy. Part of the problem appears to be that no institution, judicial or otherwise, has the power to authoritatively settle these jurisdictional disputes, even though the KPK Law seems to give the KPK power to override the police in most cases. When the KPK and police clash, it has generally been necessary for the president to intervene to break the impasse. However, successive presidents have

done so only reluctantly and after much prevarication. This has allowed police to mete out significant reputational damage to the KPK, including by levelling trumped-up charges against KPK commissioners. As discussed below, legislation passed in 2019 has, unfortunately, effectively neutered the KPK and weakened its capacity to resist its opponents.

10.2.3 The Anti-corruption Court

The KPK Law also established an anti-corruption (Tindakan Pidana Korupsi or Tipikor) court within the Central Jakarta District Court to hear corruption cases that the KPK prosecutes. A panel of five judges presided over each trial, with a majority of them being ad hoc judges.[10] Most Indonesian judges are 'career' judges, beginning their judicial work soon after completing their law degrees and working their way up the judicial hierarchy through a series of phased promotions. Ad hoc judges, by contrast, have not had judicial careers but rather have another type of legal experience, usually as a lawyer or academic. They are then hired as corruption court judges for a limited period, usually five years. Ad hoc judges were joined on each panel by two career judges.

The reason for this ratio was that the career judiciary is, as explained below, considered largely corrupt. As Fenwick says, the establishment of the Tipikor Court was therefore an

> [a]ttempt to circumvent entirely a judicial system known to be complicit in protecting corruptors, and—at the very least—capable of being unresponsive or incompetent in the administration of justice.[11]

It was presumed that having a majority of ad hoc judges, who were not part of the judicial corps, would improve the likelihood of corruption cases being decided on their merits. Because career judges did not constitute a majority, the ad hoc judges would win the day if disagreement occurred along career and ad hoc lines. On the other hand, many ad hoc judges lacked the judicial experience to run trials and write judgments. It was, therefore, felt necessary to have career judges on these panels too. Rights of appeal lay to a High Anti-Corruption Court and from there to the Supreme Court, which both maintained this ratio of ad hoc to career judges.

In 2009, the national legislature, the DPR (Dewan Perwakilan Rakyat, People's Representative Assembly), issued Law 46 on the Tipikor Court, which required the Supreme Court to establish anti-corruption courts within the general courts located in each of Indonesia's provincial capital cities.[12] The amendments also removed the guarantee that ad hoc judges would form a majority on every panel by allowing the judge chairing the panel to determine the ratio of career to ad hoc judges.

These new corruption courts have exclusive jurisdiction[13] over corruption and money laundering cases, and now handle cases brought by public prosecutors, as well as the KPK. They have been widely criticised for being much less effective than the Jakarta Court was on its own and for lacking the same degree of integrity. Indeed,

several of its judges have been found guilty of corruption themselves, as discussed below.

10.2.4 Performance of the KPK and the Anti-corruption Court

The KPK enjoyed significant public support and used its broad powers to secure hundreds of corruption convictions. Among its victims were powerful figures from key government institutions, including lawmakers, serving and retired ministers, and senior law enforcement officers, such as: the former Chief Justice of the Constitutional Court, Akil Mochtar; the former Bank Indonesia Deputy Governor, Miranda Goeltom; and the former head of the Upstream Oil and Gas Regulatory Task Force (SKK Migas), Rudi Rubiandini. The KPK also cut a swathe through the DPR and executive, successfully prosecuting numerous serving and retired politicians and decimating the political party established by former President Susilo Bambang Yudhoyono: Partai Demokrat (the Democrat Party). For a time, the KPK enjoyed a 'perfect' success rate, with prosecutions inevitably resulting in convictions.

This led to huge pushback by the elite from around 2008, and the KPK and the Tipikor court have since been slowly undermined. The 2009 Tipikor Court Law was seen as an attempt to decentralise corruption trials to regional areas, making it difficult to monitor them, enabling, as mentioned, nefarious practices to be introduced by prosecutors, and judges to participate in corruption themselves.

The KPK itself has also been severely weakened, particularly by Law 19 of 2019, the centrepiece of political pushback, which significantly amended the KPK Law. Through it, the political elite finally succeeded in their long-running efforts to hobble the KPK. This Law mandated the termination of investigations after two years, removed the KPK's independence by making it part of the state bureaucracy, established a supervisory board with extensive powers of intervention, and made the KPK subject to investigation (*hak angket*) by the national legislature.[14] The Law also removed the KPK's crucial power to conduct wiretaps without needing external approval. Now approval must be obtained from a supervisory body that many believe will leak to suspects. Moreover, 51 staff were dismissed after taking a mandated civil-service exam containing overtly political questions intended to detect outspoken officers.[15] The KPK still prosecutes, but many, including its own former commissioners, consider it to have been gutted and that its investigations and prosecutions are now often politically motivated.

Finally, although corruption among law enforcement institutions was a key reason for establishing the KPK, it has not yet turned its full attention to corruption within the police and public prosecution (although certainly it has famously pursued a small number of them). From 2010 it began targeting judges (in cases discussed below), including from the corruption courts themselves and, more recently, the Supreme Court. But it has not yet really 'scratched the surface' of corruption in law

enforcement and judicial institutions. This is largely because corruption became so widespread and deeply embedded in these institutions during the Soeharto period that, with some adaptation, it has been able to survive, and even undermine, Indonesia's post-Soeharto reforms.

10.2.5 The Judicial Mafia

In Indonesia, corrupt judges and the corrupt court administrators, prosecutors and police, and even some lawyers who work with them, are commonly referred to collectively as the 'judicial mafia' (*mafia peradilan*) or 'legal mafia' (*mafia hukum*). As the terms imply, these officials are seen as working together, including by referring opportunities for corruption to each other. Patronage networks are said to exist between lower-level and senior law enforcers, whereby subordinates channel a proportion of their illicit payments up to their superiors. Even the recruitment process for police, prosecutors and judges is said to be tainted. Many pay large sums to be employed but then recoup their investment soon after they commence work and begin receiving bribes.[16]

For several decades, most Indonesian courts have been suspected of being involved in corrupt practices, with many judges and court officials willing to accept bribes for favourable decisions. The precise extent of judicial corruption cannot be accurately measured; experienced lawyers have suggested that between 50 and 90% of judges take bribes.[17] Even senior judges have admitted that the problem is very serious,[18] with one former Supreme Court Chief Justice admitting to the existence of the 'judicial mafia'[19] and a former Constitutional Court Chief Justice describing corrupt behaviour as having 'overrun judicial institutions with the buying and selling of decisions'.[20]

The Supreme Court is certainly well aware of the problem and has attempted various anti-corruption measures. In recent years, for example, it launched a 'mystery shoppers' programme, whereby undercover agents pose as litigants to catch judges and court staff extorting bribes.[21] However, whether any judges have been 'caught' as part of this programme has not been publicly revealed. The Court has also introduced a system whereby announcements must be made over a loudspeaker before each court hearing, urging all parties to refrain from bribing judges and to report any attempts to the chief justice of the court, the Supreme Court or the Anti-Corruption Commission.[22] But this has been widely condemned for putting the onus on litigants to help judges refrain from criminal behaviour, when judges themselves should be punishing defendants for engaging in such behaviour.[23]

Indeed, general scepticism of the Supreme Court's anti-corruption efforts was strengthened after one of its judges was caught red-handed allegedly taking a bribe in 2022, with several other Supreme Court personnel alleged to be involved.[24] Many argue that this is just the 'tip of the iceberg'.[25] Others we have spoken to claim that the Supreme Court is as corrupt as any other Indonesian judicial institution, and that

it uses its powers of control and oversight to demand a portion of the bribes extorted by the lower courts.

For many years the phenomenon of judicial corruption in Indonesia was based largely on anecdotal accounts, primarily from lawyers and litigants, who say they either participated in it or lost a case because they refused to. While this may have helped create perceptions about high levels of corruption, it provides little by way of concrete data, and may betray biased perspectives (such as, for example, where a party cries foul after losing, even if they do not know whether the winning party paid a bribe). To be sure, some well-regarded organisations, such as Indonesia Corruption Watch[26] and even a Presidential Taskforce,[27] have produced research that paints a credible picture of the differing 'modus operandi' of judicial corruption in Indonesia, using interviews with various legal-system actors, including judges themselves. These accounts are compelling and identify precise entry points for corruption, but some accounts appear at least partly derivative of each other and, in any event, had not been confirmed by convictions of judges for corruption before 2010,[28] the year the Anti-Corruption Commission began targeting judges in corruption stings.

10.2.6 Judicial Bribery Convictions

From 2010 until 2020, almost 30 judges were convicted of judicial corruption in open court proceedings, the judgments in which are publicly available on the Indonesian Supreme Court's website.[29] All convictions were upheld if appealed. Together, these decisions represent the most reliable dataset for enabling a general description of judicial bribery in Indonesia. Significantly, these convictions required the presiding judges to be satisfied that the defendant had met all elements of the crime of bribery to the Indonesian legal standard: 'legally and convincingly'.

In many cases, the Anti-Corruption Commission caught the judge or court official red-handed receiving the bribe. These decisions contain significant detail about what the judge and co-conspirators did to procure the bribe, how much was sought and received, and the efforts (if any) made to conceal the transaction. Because the Commission's arrests were usually preceded by a period of surveillance, many case files included long verbatim transcripts of recorded telephone conversations and text messages between judges, parties and intermediaries. The judges, some of whom were senior, were found guilty of accepting bribes in relation to a wide variety of cases and disputes, including property transfers, bankruptcy applications, industrial relations matters and even election disputes. However, more judges were convicted for taking a bribe to reduce sentences or acquit defendants in corruption cases than for any other type of case or dispute.

The strength of the legal position of the parties from whom bribes were sought appeared to have little effect. Judges even approached parties in almost-unassailable positions, warning them that, even though the law and facts may have favoured them, an adverse decision could still be handed down. So, for example, a witness in the corruption trial of Semarang judge Asmadinata, testified that Asmadinata had said:

> If the facts are like this … I would acquit. But if the Chairperson is not willing to do this, then we can issue a light sentence of one year … it depends on what the defendant wants to give to us.[30]

The suggestion here was that, even though the defendant in the case Asmadinata was hearing was innocent, Asmadinata sought a bribe to prevent a conviction.

Most of the convicted judges worked in the general courts. However, judges in almost all branches of Indonesia's first instance judicature were represented amongst those convicted, as well as higher courts and the Constitutional Court. Indeed, perhaps the most high-profile case involved Akil Mochtar, serving as Chief Justice of the Constitutional Court when he was arrested in 2013. He was found guilty of accepting bribes to fix outcomes in at least nine subnational elections and convicted of bribery and money.[31] He was sentenced to life imprisonment—which remains the harshest sentence for corruption in Indonesian.[32] Mochtar has never admitted to the crimes and claims that he was framed for them. However, the evidence against him contained in the case file—including over 1100 items, comprising SMS messages, transcribed telephone conversations, bank transfer and receipt records, and testimony from 115 witnesses—was overwhelming.

In some cases, a single judge worked with court staff or others to negotiate, and sometimes to receive, a bribe on the judge's behalf. In many of these cases, the convicted judge had worked alongside other judges on the panel deciding the case to which the bribe was related, but the other judges were not pursued for corruption. These cases raise suspicions about whether the other judges knew about, or even received part of, the bribe, leading some to question why they, too, were not prosecuted. Other cases involved multiple judges who served together on the panel allocated to decide the case concerning the bribing defendant. In such cases, co-conspirators often testified against each other.[33]

In yet another category of cases, multiple judges from different courts conspired to extort bribes. Particularly notable here is the judicial bribery case that ensnared four judges—more than any other single case in Indonesian legal history. On 17 August 2012, the KPK arrested Semarang Anti-Corruption Court (ACC) judge Kartini Juliana Magdalena Marpaung after catching her accepting a bribe from Heru Kusbandono, a then-serving ad hoc ACC judge from Pontianak, West Kalimantan.[34] At the behest of a defendant in a case the Semarang ACC was hearing, Kusbandono had contacted Marpaung and the other two members of the panel deciding the defendant's case to negotiate a bribe for a reduced sentence. The defendant was former Speaker of the Grobogan Regional House of Representatives Muhammad Yaeni, who was being prosecuted for misusing funds for the maintenance of the Grobogan legislature's official cars between 2006 and 2008—a case involving around Rp 1.9 billion in state losses.[35] In other cases, judges who had presided over the trial of a defendant received bribes to assist with an appeal, whether lodged by the defendant or the prosecution. So, for example, judge Pasti Serefina was found to have agreed to help scupper a prosecutorial appeal against a district court decision that she helped to write. For this, she received a promise of Rp 1 billion (only Rp 500 million of which she received) and an increase to the star rating of a hotel her family owned.[36]

10.3 Arbitration

The popular belief that widespread corruption exists in government and, in particular, within the judicial system,[37] is exacerbated by concerns that the Indonesian courts also lack competence in handling commercial matters, particularly in complex cases.[38] To avoid using Indonesian courts, foreign investors usually opt to include arbitration clauses in the contracts they agree with Indonesian partners, whether private sector or government. Of course, arbitration is also available to help resolve disputes between Indonesian parties.

In 1999, Indonesia's first statute dedicated to alternative dispute resolution, including arbitration, was enacted: Law 30 of 1999 on Arbitration and Alternative Dispute Resolution (the 'Arbitration Law').[39] Before this Law, Indonesian courts usually recognised arbitration clauses by referencing the Code of Civil Procedure and Article 1338 of the Civil Code, which states that 'All agreements made in accordance with statute apply like statutes to those who made them'. The courts could hold parties to their contracts, including any agreement to arbitrate if a dispute occurred.

Statutes governing the Supreme Court have, since 1950, declared that parties cannot appeal an arbitral decision to that court.[40]

10.3.1 Enforcement of Arbitral Awards

However, enforcement of arbitral awards, particularly foreign awards, has been problematic,[41] even though Indonesia ratified the ICSID Convention in 1968 and the New York Convention in 1981.[42] Indonesian courts, including the Supreme Court itself, were initially reluctant to enforce such awards, primarily due to confusion, first, about whether these conventions had become part of Indonesian law through ratification, and, second, about how enforcement would take place, given that no procedures had been produced to guide them.[43] Only after the Supreme Court issued a regulation in 1990 containing such procedures did recognition and enforcement of foreign arbitral awards begin.[44]

Despite this, the Indonesian courts developed a reputation for interfering in awards rather than simply enforcing them. For example, in the infamous Decision 499/Pdt/VI/1988 (*E.D & F. Man (Sugar) Ltd v. Yani Haryanto* case), the Supreme Court avoided enforcement of a London arbitral award by deciding that the contract containing the arbitration clauses was void. Because the contract itself was void, so too was any agreement to arbitrate contained within it.

The recognition and enforcement of arbitral awards is now governed by the Arbitration Law. Although not without flaws, this statute has helped make recognition and enforcement of arbitral awards more predictable than previously. The Arbitration Law applies to arbitration specifically anticipated in a clearly expressed written agreement to arbitrate signed by the parties or agreed to after the dispute arises (Articles 1(1), 2, 4(2) and 9). This agreement to arbitrate authorises an arbitrator to make

binding decisions concerning the rights and obligations of the parties (Article 4(1)). Only 'commercial'[45] disputes can be arbitrated (Article 5(1)). Parties can choose domestic or international arbitration (Article 34(1)) and can choose the governing law to resolve their disputes (Article 56(2)). The parties can choose their preferred arbitral procedures, although the Law outlines default procedures if parties make no choice (see Articles 27–51).

The main national arbitration institution is Badan Arbitrase Nasional Indonesia (BANI—Indonesian National Board of Arbitration, now also known as BANI Arbitration Center), established in 1977 by the Indonesian Chamber of Commerce and Industry (Kamar Dagang dan Industri Indonesia, KADIN).[46] Compared to the judiciary, however, BANI hears relatively few disputes.[47] Less than 10% of cases registered by BANI between 2014 and 2018 were international cases (i.e., involving foreign parties).[48] This reflects the fact that foreign parties generally prefer to arbitrate outside Indonesia, for example in Singapore.

The choice of whether to arbitrate domestically or internationally affects how any resulting award is enforced. The Arbitration Law establishes different procedures for the registration and enforcement of domestic awards compared with international awards. Domestic awards must be registered with the registrar of the relevant district court by the arbitrator(s) or proxy within 30 days of the award being handed down (Article 59(1)).[49] Before ordering execution, the district court chief judge must be satisfied that: the parties agreed to arbitrate; that the dispute between them is 'commercial'; and that the award does not 'violate morality and public order' (Articles 4, 5 and 62(2)). If any of these conditions are not met, or Article 59(1) is not followed, then the award is unenforceable (Article 59(4)). Once registered, however, the award binds the parties and cannot be appealed (Article 60 and its elucidation). If one party refuses to comply with the award, the district court chairperson can enforce it upon the request of the other party (Article 61). The award will be enforced as if it were a civil judicial decision (Article 64). However, this is by no means a guarantee of quick or easy enforcement.

By contrast, only the Central Jakarta District Court can hear applications for the recognition and enforcement of international awards. The Law does not establish time limits within which registration applications must be lodged, although registration is required by the arbitrator(s) or proxy (Article 67). Again, to be enforceable, they must relate to 'commercial law' and not violate public order (Article 66(c)). The Arbitration Law imposes two additional requirements for international awards. First, they must have been handed down by an arbitrator or tribunal in a country that is a party to an international agreement about the recognition and enforcement of international awards to which Indonesia is also a party (Article 66(a)). Second, the award must have an exequatur (certificate of approval) from the Supreme Court of Indonesia (for international awards involving the Indonesian state as a party) or the Central Jakarta District Court chairperson (for other international awards) (Article 66(d) and (e)).

A refusal to recognise and enforce any award can be appealed to the Supreme Court (Article 68(2)), which has 90 days to decide the appeal (Article 68(3)). A decision by a Central Jakarta District Court chairperson that recognises and orders

the enforcement of an international award cannot be appealed (Article 68(1)). Once the chairperson has ordered enforcement of the award, the order is conveyed to the district court with jurisdiction over the place of the debtor's domicile or assets for implementation under Indonesian civil procedural law.[50]

10.3.2 Challenging Arbitral Awards

Critically, under Article 3 of the Arbitration Law, a district court has no jurisdiction to adjudicate a dispute involving parties already bound by an arbitration agreement. This is reinforced in Article 11, which states:

(1) The existence of a written arbitration agreement eliminates the rights of the parties to submit the resolution of the dispute or difference of opinion contained in the agreement to the District Court.
(2) The District Court must refuse and must not interfere in any dispute settlement which has been determined by arbitration, except in particular cases determined in this Law.

The Arbitration Law also allows the relevant Indonesian courts to annul a domestic or foreign award on three alternative fraud-related grounds:

1. The documents used during the arbitration hearing are later discovered to be false.
2. After the award has been made, a document that would have been decisive but was hidden by one party is discovered.
3. The award was made based on deception by one party to the dispute (Article 70).

While Article 70 appears to cast these three grounds as an exhaustive list, the General Elucidation to the 1999 Arbitration Law does not. It refers to these grounds 'among others' that are not specified.

In 2014, the Constitutional Court invalidated the elucidation to Article 70, which required that the existence of these types of fraud be proved in separate judicial proceedings.[51] The Supreme Court had long refused to entertain annulment claims without such a judicial decision.[52] It therefore seems that parties can now seek to prove fraud during proceedings for the annulment of an award.

An annulment application must be lodged with the chairperson of the relevant district court within 30 days of an award's registration (Articles 71 and 72(1)). Annulments can then be appealed to the Supreme Court (Article 72(3)).

The 1999 Law also seeks to close off a particular avenue for judicial interference, employed by the Supreme Court in Decision 499/Pdt/VI/1988 (*E.D & F. Man (Sugar) Ltd v. Yani Haryanto* case), discussed above. Article 10 provides that agreements to arbitrate are severable from the main contract in which those agreements are contained. This provision means that the dispute between the parties can still be resolved by arbitration, even if the contract containing the arbitration agreement itself is of questionable validity or is, in fact, invalidated.

Despite the relatively clear wording of these provisions, some courts have simply ignored them entirely. For example, in *Gatari Air Services vs Jasa Angkasa Semesta Tbk*,[53] the South Jakarta District Court ignored Articles 3 and 11, finding it had jurisdiction to decide a dispute regarding a contract containing an arbitration clause without giving reasons for this finding.

10.3.3 Judicial Enforcement of Arbitral Awards

The circumstances in which an Indonesian court can refuse to recognise an arbitral award on public order grounds are uncertain. The Law does not define 'public order', which is thought to leave significant scope for judicial reconsideration, including in relation to arbitral findings of fact.[54]

Even more contentious is whether an award can be annulled on public order grounds. On the one hand, the grounds for annulment set out in Article 70 of the Arbitration Law appear, as mentioned above, to be cast as an exhaustive list and do not mention public order. On the other, as noted above, the General Elucidation to the Law refers to these grounds, 'among others' that are not specified. This is legally controversial because an elucidation must not 'add' to or fundamentally alter the text of the statute it purports to elucidate.[55] By appearing to leave the permissible grounds for annulment open, the elucidation appears to do precisely this.

Commentators have different views about the extent to which the courts avoid recognising or annulling arbitral awards in today's Indonesia. Some emphasise that most awards are now enforced as a matter of course (although the process can be 'extremely difficult and time consuming')[56] and that these exceptions are rarely used.[57] Others point to several decisions in which awards have not been enforced or have been annulled and conclude that, unfortunately, there remains 'great uncertainty as to the ambit of these exceptions and how the Indonesian courts will apply them'.[58]

Yet others still have argued, quite bluntly, that Indonesia's courts are 'hostile' towards enforcing foreign arbitral awards.[59] There is some merit in these claims, at least in terms of historical practice. The Supreme Court has, for example, in various cases, decided that arbitral awards about a contractual dispute cannot be enforced on public order grounds if related litigation about the dispute is pending before Indonesian courts.[60] For example, in 2010, the Supreme Court held, in *Astro Nusantara International BV v. PT Ayunda Prima Mitra*,[61] that public order was breached by an anti-suit injunction, issued by arbitrators, prohibiting the parties from pursuing litigation because their dispute was captured by an arbitration clause in their contract. The Court appeared to take this as an affront to Indonesian sovereignty rather than as an order directed at the parties. Most notorious, perhaps, was the *Karaha Bodas* case,[62] which involved enforcement of an arbitral award issued in Switzerland and adverse to an Indonesian state-owned enterprise. The Central Jakarta District Court held that the General Elucidation to Article 70 allowed it to annul an award for violating public order, and it did so on the basis that a state-owned enterprise should not be held accountable for Indonesian regulatory changes.[63]

On the other hand, some notorious cases, including *Karaha Bodas* itself, have been overturned by the Supreme Court on appeal. In other words, although lower courts have refused recognition or enforcement in some cases, those seeking enforcement often ultimately prevail.[64] However, one significant problem remains: it appears still to be common for parties losing in arbitration proceedings to oppose enforcement before Indonesia's courts, even if they think they will probably lose on appeal.[65] The vagueness of the public policy exception is often said to be the main culprit: its lack of clarity leads some practitioners to argue that it encourages losing parties to take the chance of challenging enforcement, if only to delay the inevitable, particularly if the award involves significant sums of money.[66]

10.4 Bilateral Investment Treaties and Investor–State Arbitration

According to records maintained by UNCTAD, Indonesia has signed 74 BITs and 22 bilateral or multilateral treaties containing investment provisions (TIPs). Some of these treaties have never entered into force (e.g., the 2014 ASEAN–India Investment Agreement) and, as discussed below, Indonesia has terminated some of its older BITs or has sought to renegotiate them.[67]

Many of Indonesia's BITs seek to encourage investment by providing the following to investors of the other state party: fair and equitable treatment; protection and security; most favoured nation provisions; and guarantees against nationalisation or expropriation. Most of the BITs also specify how investor–state disputes should be resolved. The parties should first attempt to resolve the dispute by consultation and negotiation. If this fails, Indonesia's BITs typically provide that the investor may refer the dispute to arbitration or conciliation under the ICSID Convention or, in a smaller number of cases, ad hoc arbitration under UNCITRAL Rules or arbitration under the auspices of other institutions.[68]

These dispute-resolution processes are largely mirrored in Article 32 of the 2007 Investment Law, which states:

1. Investment disputes between the government and investors are to be first settled through deliberation and consensus.
2. If a settlement cannot be reached by deliberation and consensus, the dispute can be settled through arbitration, alternative dispute resolution or the courts, under prevailing laws.
3. Investment disputes between the government and domestic investors are to be settled through arbitration, if the parties have agreed to do so, and if resolution is not achieved through arbitration, then the dispute is to be resolved in court.
4. Investment disputes between the government and foreign investors are to be resolved through international arbitration upon which the parties must agree.

Article 32(4) leaves scope for the Indonesian government to seek to avoid arbitration, at least if no BIT, TIP or other agreement (such as an investment contract) otherwise provides for it. Article 32(4) does not clearly stipulate how disputes between investors and the Indonesian government should be resolved if the parties cannot agree to arbitrate, much less the seat of the arbitration and procedures. It seems possible that one party could stall arbitration by refusing to agree on the particulars, although failure to agree might simply lead to the dispute being settled by the courts via Article 32(2).

The Indonesian government has recently taken steps to encourage the use of mediation in investor–state disputes, including reportedly pursuing a policy to make mediation mandatory before arbitration. The implementation of such a policy appears to be reflected, for example, in the 2019 Australia–Indonesia Comprehensive Economic Partnership Agreement, which provides that the state party to a dispute may initiate mandatory conciliation in the event of a dispute with an investor.[69] Notably, however, Indonesia has continued to include provisions for investor–state arbitration even in these newer agreements.

10.4.1 Termination of BITs

In 2014, Indonesia announced that it intended to 'terminate' *all* its BITs, with the president claiming that they were 'inappropriate and unjust' and the vice president declaring that new treaties 'adjusted to recent developments' were needed.[70] Some have argued that 'terminate' means 'allow to lapse', indicating that Indonesia will not actively rescind them, but that it will seek to renegotiate with more favourable terms upon their expiry.[71] Most of Indonesia's BITs have sunset clauses allowing them to continue in force for up to 15 years after their termination or expiry (in respect of investments made prior to the date of termination).[72] However, it seems that Indonesia has, in fact, sought to bring some bilateral treaties to an end earlier than their expiry date, including the sunset clauses they contain.[73]

At least three factors were probably behind this desire to terminate—all of which relate to the fact that these BITs generally allowed investors to submit a dispute with the Indonesian state to binding arbitration. The first and second reasons are interrelated; 2014 was an election year and economic nationalism[74] is a politically popular view in Indonesia, where foreigners have, for centuries, been portrayed as the primary beneficiaries of national resource exploitation. In this context, it is considered politically advantageous to advocate against foreign investors being able to pursue large amounts from the Indonesian government, particularly after they have already extracted significant amounts of Indonesia's natural resources.

The second reason was that, in 2014, Indonesia appears to have enjoyed the highest levels of foreign investment in its history.[75] Perhaps policymakers felt that they could, therefore, afford to seek to 'terminate' these BITs. After all, any resulting controversy or economic damage could be dealt with by the new government. The

third reason was that the Indonesian government was at the time defending itself in several arbitration proceedings, three of which were highly publicised.

The first of these arbitrations involved a Japanese–American joint venture, PT Newmont Nusa Tenggara, which sought arbitration in 2014 with ICSID in response to mineral ore export bans and pending divestments, although it ultimately withdrew this claim, reportedly after securing a reduced export obligation.[76] But perhaps the most important investment dispute Indonesia has faced, and which was pending in 2014 when the government announced its intention to terminate Indonesia's BITs, is the *Churchill and Planet Mining* case, a USD2 billion claim in the resources sector in which allegations of corruption played a central role. We detail this cause célèbre next, followed by the third high-profile case, which involved an investment in Indonesia's failed Bank Century.

10.4.2 Churchill and Planet Mining (2012)

These related cases involved disputes over the ownership of 34 licences to mine coal in East Kalimantan. Churchill (a UK company) and Planet (an Australian subsidiary) had purchased shares in the Ridlatama group, which claimed to have legitimately obtained the coal mining licences from the East Kutai local government after the previous Indonesian licence holder allowed them to lapse. Churchill had discovered a much larger deposit of coal than expected: 2.73 billion tons. This made the site the seventh-largest undeveloped coal mining asset in the world, with the potential to generate huge revenues.

The previous licence holder, Nusantara Group, claimed that it still held the licences. For its part, Indonesia claimed that the licences had not lapsed, and that the licences Churchill had presented were forgeries, detected following an audit by the National Audit Agency to verify the legitimacy of mining authorisations issued between 2006 and 2008. The audit also found that Ridlatama had not obtained permission from the Forestry Ministry to undertake mining in protected forests, required under Article 38 of the 1999 Forestry Law.

Initially, Churchill's Indonesian partner, Ridlatama, pursued this case through Indonesia's administrative courts, and appealed to the Supreme Court, but failed.[77] In May 2012, Churchill then commenced ICSID arbitration proceedings seeking USD2 billion against the Indonesian government—namely, the president, the East Kutai regent, the Foreign Ministry, the Ministry of Energy and Mineral Resources and the National Investment Coordination Board. Initially, Indonesia challenged jurisdiction because it claimed it had not given express consent to the investment under the UK and Australian bilateral investment treaties upon which Churchill and Planet had relied, respectively. This argument was dismissed by the Tribunal in 2014 in a preliminary decision.

Indonesia ultimately won on the merits, primarily because the panel of arbitrators concluded that the licences probably were forgeries and that Churchill's former

Indonesian partner, the Ridlatama Group, was likely to be responsible. This fraudulent conduct tainted the entire investment and meant that protection under the treaties was unavailable.[78] Specifically, the tribunal said that claims 'based on documents forged to implement a fraud aimed at obtaining mining rights' were inadmissible as a 'matter of international public policy'. The Tribunal also noted that Churchill's due diligence investigations into the authenticity of the licences were insufficient.

Despite ultimately prevailing, it seems clear that the government genuinely thought it could have lost the *Churchill* case. The matter also brought home that the central government might find itself responsible for defending the actions of local governments, including paying out over USD10 million in legal fees.[79] As then-President Susilo Bambang Yudhoyono said at the time:

> This is a lesson for us, [an] incident in a county [*kabupaten*] ... taken to arbitration ... The first defendant, yes, the President. Imagine [a] hundred countries doing things like that, especially when we're on the wrong side and lose, it's a remarkable implication.[80]

The *Churchill* case had a particular impact on the views of the Indonesian government and the public because it followed soon after the equally high-profile cases of *Al Warraq* and *Rafat*.

10.4.3 The **Al Warraq** *and* **Rafat** *Cases (2011)*

In this Singapore-based UNCITRAL arbitration, two foreign investors brought claims against Indonesia under the 1981 Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Investment Agreement).[81] They argued that the government had expropriated their investment—Bank Century, in which they were shareholders—after a corruption scandal. They also argued that Indonesia had acted in breach of its fair and equitable treatment obligations under the OIC Investment Agreement, as Indonesian officials were involved in the alleged solicitation of bribes.

The broader scandal involving Bank Century that formed the background to this claim had consumed Indonesian politics for many months and involved allegations of impropriety in the government bailout of the Bank. Al Warraq and Rafat were accused, with others, of embezzling some of these funds.[82] For this, they were tried *in absentia* in Indonesia, found guilty and sentenced to 15 years' imprisonment. The Indonesian media portrayed them as two fugitives using arbitration to steal even more from Indonesia.

Indonesia ultimately won this arbitration on its merits. The Tribunal dismissed the claimants' bribery allegations due to a lack of evidence and connection between the alleged conduct and the loss of the claimants' investment. The Tribunal also dismissed the claimants' damages claim as it found that they had engaged in six types of banking fraud and breached their obligation not to act in a manner 'prejudicial to the public interest' under Article 9 of the OIC Investment Agreement. A majority of the Tribunal invoked the doctrine of 'clean hands' and held that because the claimants

had violated Indonesian law, they deprived themselves of protections under the OIC Investment Agreement. However, the Tribunal also found that Indonesia had treated the claimants unfairly by not allowing them to be legally represented during their trials, even though they were not present themselves. That said, Indonesia failed in its counterclaim against the claimants regarding their banking fraud because the fraud was committed against the Bank, not the state, and Indonesia's right to recover the losses suffered by the Bank was not demonstrated.[83]

Although, as mentioned, Indonesia ultimately won this arbitration on the merits, the Tribunal did find that Indonesia had treated Al Warraq and Rafat unfairly by not allowing them to be legally represented during their trials. This caused the government significant embarrassment and likely contributed to its decision to start terminating the BITs.

10.4.4 Impact of BIT Terminations

There is much to suggest that, despite Indonesia's policy of reforming its investment treaties, in reality, very little has changed for most foreign investors.

The ASEAN Comprehensive Investment Agreement (2009), and the ASEAN free trade agreements with Australia, New Zealand, China, Japan, Korea and India, provide investor–state dispute settlements (ISDSs) for foreign investors in Indonesia. Investors from many other countries have bases upon which to bring arbitration claims. In any event, as a matter of Indonesian law, it seems clear that disputes between the government and international investors can be settled by arbitration based on the agreement between them. This is expressly provided for in Indonesia's investment statute, as discussed. This view is further supported by a draft regulation on investment dispute resolution between the government and investors, which confirms that foreign investors continue to have access to international arbitration under treaties and investment law.

Indonesia has a good success rate in investor–state arbitration proceedings. Since it ratified ICSID in 1967, it has been involved in just eight ICSID arbitrations, and has only lost one, concerning a contractual dispute relating to the construction of a Jakarta hotel worth less than USD3 million.[84] We expect that Indonesia might continue to back away from its anti-ISDS rhetoric in future as it seeks actively to attract more foreign investment, including back into the politically sensitive mining sector.[85]

It is also relevant that, as Indonesia's economy grows, it may find itself pushing for similar protections in the countries in which it invests, making it more difficult to maintain an objection to those protections being offered in the country itself.

10.4.5 *Treaty Provisions Addressing Corruption*

As noted above, Indonesia has maintained investor access to arbitration in its more recent BITs and TIPs, notwithstanding the domestic political concerns regarding the risk of investor claims. Consistent with the modernisation of investment treaty provisions elsewhere, some of Indonesia's newer treaties expressly deal with the issue of corruption. For example, the 2022 Switzerland–Indonesia BIT contains the following provision:

> **Art. 14 Measures against corruption**
>
> (1) An investor of a Party and its investments shall refrain, before or after the establishment of an investment in the territory of the other Party, from offering, promising or granting an undue pecuniary or other advantage, directly or through intermediaries, to a public official of the other Party, for his benefit or for the benefit of a third party, so that this official or this third party acts or abstains from acting in the performance of official duties, with a view to obtaining any favour in connection with an investment.
>
> (2) An investor of a Party and its investments, in the territory of the other Party, shall not be complicit in an act described in paragraph 1, including inciting or aiding such acts.

The BIT does not specify any consequences of an investor being involved in corruption. Given the mandatory language used, and the fact that this provision immediately precedes the BIT's provisions on investor–state dispute resolution, it should be anticipated that an investor involved in corruption may face arguments from the host state that it is not entitled to pursue claims under this BIT.[86]

By contrast, the 2020 Korea–Indonesia Comprehensive Economic Partnership Agreement does make clear the consequences if an investor seeking to bring claims under the agreement is involved in corruption:

> **Art. 7. 19 Investor–State Dispute Settlement (3(c))**
>
> Without prejudice to the scope of any applicable exceptions, non-conforming measures, principles of international law or the disputing Party's ability to rely on such exceptions, non-conforming measures or principles of international law during the proceedings, no claim may be brought under this Article:
>
> (c) in relation to an investment that has been established through illegal conduct including fraudulent misrepresentation, concealment or corruption. For greater certainty, this exclusion does not apply to investments established through minor or technical breaches of law.

Provisions of this nature are, however, by no means included in all of Indonesia's more recent BITs and TIPS. The 2018 Singapore–Indonesia BIT, for example, instead states in Article 13.1 that '[t]he Parties reaffirm that bribery and other forms of corruption in any investment activities can undermine democracy and rule of law'. Article 13.2 adds that '[n]othing in this Agreement shall prevent a party from undertaking measures to prevent and combat bribery and other forms of corruption, provided that such measures are not inconsistent with this Agreement'. Given the importance of Singapore as a source of foreign direct investment into Indonesia, it

could be argued that this provision reflects a well-informed concern that even anti-corruption measures in Indonesia may be implemented in a manner inconsistent with international standards of investor protection.

10.5 Conclusion

Indonesia has long been regarded as a country with high levels of corruption. Reforms introduced after Soeharto's New Order collapsed in 1998 included a new Corruption Law, which was intended to make investigating and prosecuting corruption much easier than in the past, as well as a powerful new Anti-Corruption Commission and an Anti-Corruption Court. These new institutions had some success, but it is now widely accepted in Indonesia that many of the reforms have been undermined by a series of amendments passed by the political elite.[87] Certainly, it is publicly acknowledged—including by successive presidents and chief justices of the Supreme Court—that corruption and the '*mafia hukum*' remain major problems in the judicial system.

To avoid the Indonesian courts, foreign investors routinely include foreign arbitration clauses in contracts with Indonesian partners. However, because the enforcement of foreign arbitral awards in Indonesia is ultimately still subject to judicial oversight, this is not a complete solution. There are certainly examples of successful enforcement, but foreign arbitral awards remain vulnerable to challenge in Indonesian courts. While the courts now seem more willing to accept these awards, their handling of them remains inconsistent and unpredictable.

As to foreign investor–state disputes, Indonesia has a reasonable record of success. Despite this, the government has now moved to terminate some older bilateral investment treaties that entitle foreign investors to submit investment disputes to arbitration. It has also begun to narrow the scope of protections afforded to foreign investors in newer agreements. This is because of government concerns about the threat of future claims and their cost to the national budget. However, as the Indonesian economy grows, and outbound investment increases, it is unclear whether Indonesia will maintain this stance.

Notes

1. See Transparency International 2022.
2. See UNCTAD n.d.-a.
3. Butt and Lindsey 2018, p. 284. However, the toughest penalty handed down at the time of writing was the life term imposed on former Constitutional Court Chief Justice Akil Mochtar.
4. The Elucidation (*penjelasan*) is the formal explanatory memorandum that accompanies most forms of regulation in Indonesia. For a discussion of the legal authority of elucidations, see Butt and Lindsey 2018, pp. 35–36.
5. This elucidation was declared unconstitutional by the Indonesian Constitution Court in 2006, but the Supreme Court has held that the Constitutional Court's invalidation of the elucidation to

Article 2(1) left a legal vacuum, which the Supreme Court needed to fill. It did so by using the Supreme Court's own jurisprudence on Article 2(1), which incorporated the wide reading of 'unlawfully' that the Constitutional Court had invalidated. Although in this way the Supreme Court subverted the Constitutional Court's decision, the Constitutional Court lacks the power to enforce its decisions and must rely on the government to implement them. Indonesia's Supreme Court and the anti-corruption courts therefore continue to apply 'community standards' when determining whether defendants have committed 'unlawful' acts in the context of Article 2(1).

6. Butt 2009, pp. 181–182.
7. An example of some of the perverse outcomes the Supreme Court approach has produced is the string of cases involving alleged corruption in procuring items needed to run the 2004 national elections, including ballot boxes and ink. Several members of the General Elections Commission (KPU) responsible for this procurement were convicted of corruption, largely for failing to choose the cheapest tenderer, even though whether that tenderer could provide those items in time for the election was highly doubtful. Fearing that no single tenderer could deliver 'on time', the Commission decided to use several tenders and paid the average amount proposed in the tenders it had received. The case transcripts provide no evidence indicating that they personally benefitted from this.
8. These include: where the KPK receives a report or complaint about police or prosecutors failing to pursue a case or protecting the real perpetrator; a corruption investigation or prosecution stalls for no good reason, is marred by corruption itself or is interfered with by the executive, legislature or judiciary; or a circumstance arises that, according to police or prosecutors, makes a particular corruption case difficult to handle: Article 9 of Law 30 of 2002.
9. Article 11 of Law 30 of 2002.
10. Article 58(2) of Law 30 of 2002.
11. Fenwick, 2008, p. 413.
12. Article 3 of Law 46 of 2009.
13. Article 4 of Law 46 of 2009.
14. Anwar 2023, pp. 49–53.
15. Schütte 2021.
16. Goodpaster 2002, pp. 88–89.
17. Butt and Lindsey 2010, pp. 189–190.
18. Rahmi 2017.
19. Parlina and Dipa 2013; Zikry 2013.
20. Hukumonline/Ash 2013.
21. Movanita 2017.
22. Supreme Court 2019.
23. Butt 2023.
24. Aryan 2022.
25. Ramadhan 2022.
26. Wasingatu et al. 2002.
27. Satuan Tugas Pemberantasan Mafia Hukum 2010.
28. From the 1970s to 2010, only a handful of judges were prosecuted, much less convicted, for corruption in decisions that are not publicly available. See Hukumonline/Mys 2005.
29. Putusan (n.d.).
30. Semarang District Corruption Court decision 8/PID.SUS/2014/PN.TIP.SMG [37].
31. Central Jakarta District Court decision 10/PID.SUS/TPK/2014/PN.JKT.PST.
32. In 1977, the head of the State Logistics Depot in East Kalimantan, Budiadji, was convicted of corruption relating to rice sales and sentenced to life imprisonment, but then-President Soeharto reduced the sentence to 20 years and with remissions he was released in 1985: Tempo 2007.
33. As in Bandung District Corruption Court decision 92/PID.SUS/TPK/2014/PN.BDG; Bandung District Corruption Court decision 93/PID.SUS/TPK/2014/PN.BDG; Semarang District Corruption Court decision 128/PID.SUS/2012/PN.TIP.SMG; Semarang Corruption High Court decision 26/PID.TPK/2013/PT.SMG.

34. Tempo 2014.
35. Tempo 2012.
36. Bandung High Corruption Court decision 9/TIPIKOR/2015/PT.BDG [8]. See also Bandung District Corruption Court decision 83/PID.SUS./TPK/2011/PN.BDG [37].
37. Surveys conducted in 2001 by The Asia Foundation and AC Neilsen showed that the judiciary was widely regarded by Indonesians as among their nation's more corrupt institutions. See Butt and Lindsey 2010.
38. See generally, Crouch 2019.
39. Law 30 of 1999 on Arbitration and Alternative Dispute Resolution.
40. See, for example, Law 1 of 1950 on the Supreme Court and Law 1 of 1967 on Foreign Investment, both cited in Budidjaja 2013, p. 187–188.
41. See, generally, Kusumadara 2021, Budidjaja 2021 and Butt and Lindsey 2018.
42. Ratification, respectively, by Law 5 of 1968 and Presidential Decision 34 of 1981.
43. See, for example, Supreme Court Decision 2944K/PTD/1983 (29 November 1984).
44. Supreme Court Regulation 1/1990 on Procedures for the Enforcement of Foreign Arbitral Awards.
45. The elucidation to Article 66(b) of the 1999 Arbitration Law lists a number of examples of activities that may be characterised as commercial, including investment.
46. More recently, other institutions have been established as competitors to BANI. See, generally, Satryani and Sulaiman 2022.
47. Between 2000 and 2008, BANI registered a total of 1008 cases. See, generally, BANI 2019.
48. BANI 2019, p. 4.
49. Although it seems that the courts are willing to allow either of the parties to seek to register the award: Sukirno et al. 2012.
50. Mills 2000, p. 193.
51. Constitutional Court Decision 15/PUU-XI-2014.
52. Supreme Court Decisions 01/ARB.BTL/2006; 855K/lPDT.SUS/2008; 729K/PDT.SUS/2008; 109K/PDT.SUS/2010, cited in Constitutional Court Decision 15/PUU-XI-2014, pp. 46–47.
53. South Jakarta District Court decision 617/PDT.G/2017/ PN.JKT.SEL, of 14 March 2018. This decision was affirmed on appeal to the Jakarta High Court decision 408/PDT/2018/PT DKI, 7 September 2018. That decision was then taken on cassation to the Supreme Court, but no decision is yet available.
54. See, for example, Junita 2012.
55. See Points 176, 178 and 186 of Schedule II of Law 12 of 2011 on Lawmaking.
56. Ganie 2018, p. 1.
57. Mills 2015.
58. Lubis and Burke 2004; Budidjaja 2002, p. 37.
59. Junita 2008, p. 373.
60. *Bankers Trust Company and Bankers Trust International Plc* (Central Jakarta District Court decisions 01 and 02/Pdt/ARB.INT/1999/PN.JKT.PST).
61. 01K/Pdt.Susu/2010 (24 February 2010).
62. This case is discussed at length in Rubins 2005, pp. 373–384.
63. *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co. LLC* (District Court of Central Jakarta decision 86/Pdt.G/2000/PN.JKT.PST). See also Butt and Lindsey 2018, pp. 370–372.
64. Ganie 2018, p. 1.
65. Mon/Hukumonline 2010.
66. Budidjaja 2002, p. 49.
67. See Crockett 2018, p. 165.
68. This paragraph draws on Butt 2011, pp. 117–118.
69. The provision for mandatory conciliation (at the option of the host state) in the Australia–Indonesia agreement can be contrasted with the provision for optional mediation (requiring consent of both parties) in the 2022 Switzerland–Indonesia BIT.
70. *Jakarta* Post 2014.

71. Ewing-Chow and Losari 2014.
72. Trakman and Sharma 2014.
73. Peterson 2015.
74. See, generally, Nottage and Butt 2014; Warburton 2017, 2023.
75. Crockett 2018, p. 176; Pas and Damanik 2014.
76. Crockett 2018, p. 177.
77. Samarinda District Administrative Court decision 31/G/2010/PTUN-SMD; Administrative High Court of Jakarta decision 110/ B/2011/PT.TUN.JKT; Supreme Court decision 367K/ TUN/2011.
78. *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/ 12/40 and 12/14.
79. Singgih 2016. In September 2012, the president issued a presidential decision that stated that, henceforth, disputes that stemmed from administrative decisions made by regional governments would not be capable of submission to ICSID (see Article 1 of Presidential Decision 31 of 2012 regarding disputes which may not be submitted for resolution within the jurisdiction of ICSID). The Decision directs the Minister of Law and Human Rights to take the necessary steps to inform ICSID of this change (Article 3 of Presidential Decision 31 of 2012).
80. Cited in Price 2017, p. 138.
81. UNCTAD n.d.-b.
82. Sihite 2011.
83. IISD 2015.
84. Crockett 2018, pp. 177–178; Nottage and Thanitcul 2016, pp. 27–30.
85. See, for example, Sihombing and Harsono 2022.
86. An investor involved in corruption may face such arguments in any event; see for example, Ana et al. 2023.
87. Anwar 2023, p. 53.

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Simon Butt is Director of the Centre for Asian and Pacific Law at the University of Sydney Law School (CAPLUS). He also serves on the Executive of the Sydney Southeast Asia Centre (SSEAC). Fluent in Indonesian, Simon has consulted on Indonesian law to the private and public sectors, and has provided advice and expert opinions about Indonesian law for litigation in the US, UK, Hong Kong, Singapore and Australia.

Antony Crockett is a Partner with international law firm Herbert Smith Freehills. From 2015 to 2017 Antony worked in Jakarta as a Foreign Legal Consultant with Hiswara Bunjamin and Tandjung (on secondment from his current firm). He holds the degrees LLM (Distinction) from the London School of Economics and Political Science and LLB (Hons) and BSc from the University of Melbourne. Antony specialises in complex cross-border dispute resolution, including international commercial arbitration and investment treaty arbitration. He has acted as counsel to both investors and States in investor-State disputes. Antony is admitted to practice in Australia (Victoria), England & Wales and Hong Kong SAR.

Tim Lindsey AO is Malcolm Smith Professor of Asian Law, Redmond Barry Distinguished Professor and Director of the Centre for Indonesian Law, Islam and Society at the Melbourne Law School. He is a leading Australian expert on Indonesian law, and has provided expert advice to courts, legal practitioners governments, business and international organisations around the world.

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Chapter 11
Foreign Investment, Treaties, Arbitration and Corruption: Comparing Japan

Luke Nottage and Nobumichi Teramura

Abstract Japan emerged from the 1980s as a leading net exporter of foreign direct investment, with very little corruption. Since 2001, it has accelerated ratifications of standalone bilateral investment treaties as well as investment chapters in free trade agreements. Almost all allow foreign investors from the home state to directly initiate investor–state dispute settlement (ISDS) arbitration against host states to get relief from violations of substantive treaty commitments. Japan's investment treaty practice on corruption and illegality is intriguing. First, from around 2007, its treaties have often urged host states to take measures against corruption. This should help Japan's outbound investors. Second, Japan's treaties have been less consistent in expressly limiting their protections to foreign investments made in accordance with host state laws. This can again benefit Japanese outbound investors as claimants, as the absence of a legality provision renders more difficult defences from host states, which typically have more corruption than in Japan. Japan may adopt more and clearer legality provisions if subjected to more inbound ISDS arbitration claims and/or if claims by Japanese outbound investors are mostly against well-governed host states with little scope for corruption. Yet both types of claims remain few. The shift may therefore come more from other counterparty states pushing for such legality provisions and Japan agreeing in its future treaties to demonstrate its overall commitment to combatting corruption, and to preserve the legitimacy of the ISDS arbitration system.

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L. Nottage (✉)
University of Sydney Law School, Sydney, NSW, Australia
e-mail: luke.nottage@sydney.edu.au

N. Teramura (✉)
Institute of Asian Studies, Universiti Brunei Darussalam, Bandar Seri Begawan, Brunei
e-mail: nobumichi.teramura@ubd.edu.bn

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11.1 Introduction

Japan emerged from the 1980s as one of the world's largest outbound investors. Yet inbound foreign direct investment (FDI) flows and stock remain one of the lowest relative to gross domestic product. This is despite formal regulations long being comparatively liberal (Sect. 11.2) and Japan being a stable and transparent democracy, having had very little corruption for many decades (Sect. 11.3).

Japan was slow to expand its international investment agreement or treaty programme, while its treaty drafting practice has been flexible (Sect. 11.4.1), including regarding investor–state dispute settlement (ISDS). However, from the turn of the century it began concluding free trade agreements (FTAs), mostly including investment chapters, to both liberalise and protect cross-border investments with preferred states. In addition, Japan accelerated signings of bilateral investment treaties (BITs) especially since the Second Abe Administration (2012–2020).

From around 2007, most of Japan's international investment agreements started to include express provisions requiring host states to address corruption, albeit quite generally and weakly phrased. This comparatively unusual innovation may help Japan's many outbound investors, especially as they venture into less-well-governed FDI destinations. By contrast, Japanese treaties remain more inconsistent in including and drafting express legality provisions (requiring covered investments to be made in accordance with host state law, or such like, to secure treaty protections). This practice may also assist Japan's outbound investors, and thus indirectly serve the national interests of Japan, as host states abroad are less likely to resist ISDS arbitration claims by alleging that investments were made due to bribery or other serious investor illegality. In addition, not always including an explicit illegality provision should not be too disadvantageous for Japan directly if it instead is the host state in an inbound ISDS claim. This is because Japan has comparatively little corruption and a transparent legal regime for foreign investors, making it less likely that the latter will engage in bribery or other serious misconduct, making an express legality provision crucial for Japan as respondent state (Sect. 11.4.2).

Japan has also been comparatively slow to experience treaty-based ISDS claims, both inbound and outbound, for various reasons (Sect. 11.5). If and when more claims arise, in particular, Japan may become an even more active player at innovating around treaty drafting, which will impact on corruption and ISDS arbitration (Sect. 11.6).

11.2 Foreign Investment

Japan emerged as a major outbound investor in the 1980s, although it had earlier begun making investments in destinations like Australia, mainly to secure long-term supplies of resources. Japan's successful exporters of manufactured goods (such as automobiles and electrical products) led to trade friction with the EU and especially

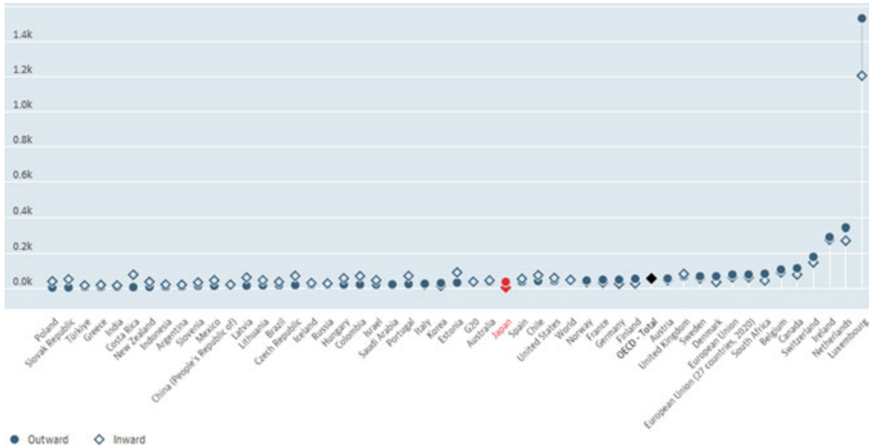

Fig. 11.1 Japan's FDI Stocks (Outbound and Inbound) as Percentage of GDP (2021)[3]

the US. This prompted Japanese firms to set up factories there as well as in lower-cost manufacturing hubs such as Malaysia and Thailand.[1] Cross-border trade and related investment also increased for Japan's financial services providers, for example into Hong Kong and Singapore, as the Japanese economy itself also became more services-oriented and the yen appreciated strongly (until the Plaza Accord of 1985) alongside an asset bubble (until 1990). From the 1990s, Japanese manufacturers and related firms also began investing strongly in mainland China and then Vietnam, as those economies also liberalised. Since the turn of the century, Japan has started to diversify further its FDI destinations, including into the Middle East, Africa and Latin America.[2]

Overall, by 2021, Japan's FDI stocks abroad amounted to 37% of gross domestic product (circle in Fig. 11.1), but inbound FDI stock (triangle in Fig. 11.1) was only 5%.

As the country was rebuilt after World War II with considerable government intervention generally, Japan's FDI regulations remained very restrictive until 1980, centred on *ex ante* licensing for foreign capital.[4] However, the regime was then progressively liberalised, moving to a system based primarily on *ex post* notification of investments. Inbound FDI began to pick up from the late 1990s amidst a banking crisis and significant deregulation of financial markets (Fig. 11.2).[5]

The Koizumi government (2001–2006), in particular, set ambitious targets to further encourage inbound FDI. The aim was to revitalise the Japanese economy that had stagnated over the 1990s after the asset bubble collapsed. But this initiative was somewhat belated and had to compete with other countries' more active and long-standing solicitation of inbound FDI, so results were mixed.

In 2020, the Foreign Exchange and Foreign Trade Act was amended to strengthen FDI screening measures to protect national security, such as the measures introduced in the US and EU. Extra sectors including notably those related to information and

Fig. 11.2 Japan's Inbound FDI as a Percentage of GDP (1970–2021)[6]

communication technology have been added to 'Designated Business Sectors' that require prior rather than *ex post* notification, and these are further divided into 'Non-core' and 'Core' sub-sectors. Foreign institutional investors are permitted 'blanket exemptions' to the new prior notification requirements for both sub-sector investments if the investors do not plan to become board members or otherwise actively manage the target companies. Others, including sovereign wealth funds, might be granted a 'regular exemption' after entering into a Memorandum of Understanding with the Japanese government, but not regarding investments in the 'Core' sub-sector (such as nuclear power) reaching a 10% foreign investment threshold or where the foreign investor is state-owned. For all foreign investments, moreover, the threshold for the Act to apply has been lowered, notably by applying the regime to acquisitions of 1% or more of equity in listed companies, rather than 10%. Despite such tightening and related higher due diligence costs and possible delays for foreign investors, it is unclear whether they will be significantly adversely impacted by the Foreign Exchange and Foreign Trade Act reform.[7]

Another new law, also related to growing national security concerns and with some parallels in other jurisdictions, may also impact on the relative attractiveness of Japan as a destination for FDI. The Economic Security Promotion Act 2022 established systems for the stable supply of critical materials, stable provision of services using critical infrastructure, provision of support for the development of critical technologies and secret patent protection.[8]

Overall, as of 2020, Japan's formal regulatory regime remained relatively more open to FDI than the average in the OECD (0.05 compared to 0.06) on the OECD FDI Restrictiveness Index (Fig. 11.3).[9] The comparatively low levels of inbound compared to outbound investment are due instead to broader regulatory and practical issues, such as labour laws and practices and other structural features of Japan's socio-economic environment.[10]

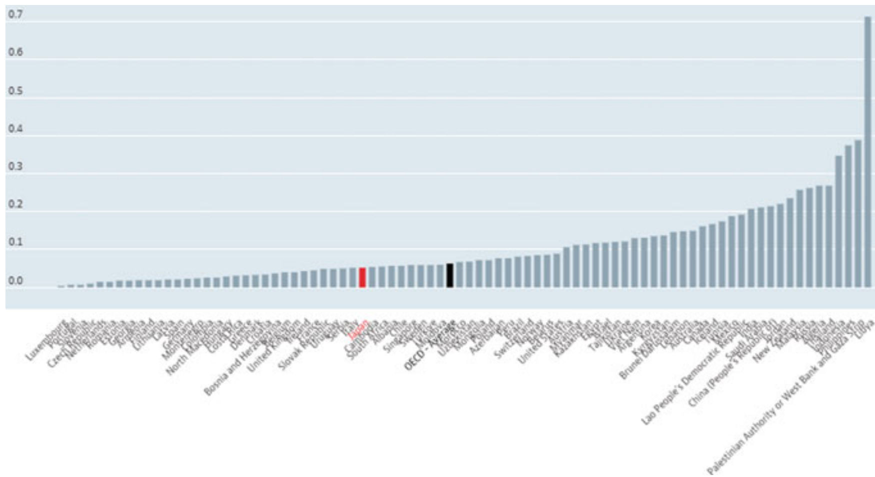

Fig. 11.3 Japan Compared on the OECD FDI Restrictiveness Index (2020)

11.3 Corruption

Corruption and bribery are demonstrably less prevalent in Japan compared to almost all other countries in Asia. For instance, the Corruption Perception Index 2022 ranked Japan as the fifth least corrupt country in the Asia–Pacific region, after New Zealand, Singapore, Hong Kong and Australia (in that order).[11] Moreover, the World Justice Project (WJP) Rule of Law Index evaluated Japan as the country with the third highest rule of law index in the East Asia and Pacific region (following New Zealand and Australia).[12] The Index is based on various factors, such as the absence of corruption in participating countries, measured by assessing whether: (1) 'government officials in the executive branch do not use public office for private gain'; (2) 'government officials in the judicial branch do not use public office for private gain'; (3) 'government officials in the police and the military do not use public office for private gain'; and (4) 'government officials in the legislative branch do not use public office for private gain'.[13] Japan obtained the fourth highest score for the overall absence of corruption factor.[14]

The performance of Japan in those international rankings on corruption is impressive. Yet they nevertheless imply that the country is not corruption-free (as indeed for other high-achievers in Asia and beyond). As mentioned below, there are still significant prosecutions for bid-rigging and around government procurement generally, which can implicate bribery.

11.3.1 Domestic Bribery

We may classify domestic bribery in Japan into bribery of public officials, private commercial bribery and political contribution by foreign citizens or foreign companies.[15] Different statutory norms apply to these three types.

First, on the bribery of public officials, Article 198 of the Penal Code[16] sets out punishments for bribers. It penalises giving, offering and promising bribes to public employees with imprisonment for not more than three years or a fine not more than JPY2,500,000 (equivalent to around USD19,500).[17] 'Public employee' means 'a national or local government official, a member of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations'.[18] This comprises not only current public officials but also resigned and prospective public officials should they be bribed in relation to their duties.[19] Article 197 of the Penal Code provides penalties for bribees who are such public officers. If found guilty of accepting, soliciting or promising to accept a bribe in relation to their professional duties, their term of imprisonment is to be not more than five years.[20] However, longer imprisonment up to seven years will apply if the current public employee has agreed to perform a specific act as per the request of the briber.

The Penal Code is silent on the definition of bribe. However, other statutory norms provide guidance on what may constitute a bribe under Japanese law. For instance, the National Public Service Ethics Act[21] (NPSEA) obliges the national public officials at the headquarters of the government, who are at the rank of assistant director or higher, to report quarterly to the head of their ministry or his or her agent any gift, entertainment and other benefits of more than JPY5,000 (around USD39) in value they have received.[22] Moreover, the National Public Service Ethics Code[23] (the Ethics Code) generally prohibits national public officials from accepting any gifts or benefits from their interested parties, including but not limited to those who conduct businesses under licences or permissions or with subsidies in relation to those public officials' duties.[24] Thus, the provision of any gift or benefit to civil servants could constitute bribery of national public officials under the Japanese legal system.

Second, certain statutes contain rules regulating private commercial bribery in specific circumstances. For instance, Article 967 of the Companies Act provides that a corporate director who has accepted, solicited or promised to receive property benefits in relation to his or her duties is to incur imprisonment for not more than five years or a fine of not more than JPY5,000,000 (around USD39,000). In contrast, the offeror of the bribe is to be imprisoned for not more than three years or fined not more than JPY3,000,000 (around USD23,300). Similar penalties apply to shareholders who have accepted, solicited or promised to accept property benefits concerning their rights as shareholders and those who have committed that offence.[25] Depending on the facts and circumstances, private commercial bribery may fall within other criminal offences, such as breach of trust under Article 24 of the Penal Code.

Third, the Political Funds Control Act[26] prohibits politicians from accepting political contributions from foreign persons, entities, associations or any other organisations whose majority members are foreign persons or entities (excluding Japanese entities listed consecutively for not less than five years).[27] Those who have committed this offence would be punished with imprisonment for not more than three years or a fine of not more than JPY500,000 (around USD3,900).[28] However, no obvious rule imposes a penalty on foreigners and foreign entities who have offered or have promised to offer political contributions to Japanese politicians.

Overall, Japanese law is therefore rigorous concerning the bribery of public officials, private commercial bribery and political contributions by foreign citizens or foreign companies (albeit less comprehensively so, perhaps, for that last type). However, high-profile corruption cases have been reported from time to time. A notorious example historically was the Lockheed bribery scandal over the 1970s and 1980s, in which Kakuei Tanaka was eventually found guilty of accepting bribes over All Nippon Airways' purchase of commercial aircraft from the Lockheed Corporation during his tenure as Prime Minister.[29] In 2021, the Tokyo District Court convicted another parliamentarian, Tsukasa Akimoto, for bribery charges. This concerned 500.com, a Chinese gambling company,[30] which reportedly bribed several parliamentarians to obtain permission to open casinos in Japan.[31] More recently, the *Japan Times* reported on 21 October 2022 that '[t]he Tokyo Olympics bribery scandal, centred on a key former Dentsu executive and Tokyo [Olympics] Organising Committee member, continues to expand with no end in sight'.[32] Therefore, domestic corruption is still occasionally an ongoing problem for Japan.

11.3.2 Foreign Bribery

Japan ratified in 1998 the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). The country then amended the Unfair Competition Prevention Act[33] (UCPA), to criminalise bribery of foreign public officials. In particular, Article 18(1) of the UCPA provides that:

> No person may give, or offer or promise to give, any money or other benefit to a Foreign Public Official, etc. in order to have them act or refrain from acting in relation to the performance of official duties, or in order to have the Foreign Public Officials, etc., use their position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, in order to make any wrongful gain in business with regard to international commercial transactions.

'A Foreign Public Official, etc.' means virtually anyone who engages in public service for a foreign national or local government or international organisation, and who participates in business affairs involving the interest of such a government or organisation.[34] 'International commercial transactions' comprise economic activities beyond national borders such as cross-border trade and foreign investment.[35] Therefore, the UCPA bars Japanese individuals from bribing any persons working for the

public interest of a foreign government or international organisation, in relation to their business operations.

As a penalty for foreign bribery, a person who has violated Article 18(1) of the UCPA is to be punished with imprisonment with labour for not more than five years or a fine not exceeding JPY5,000,000 (around USD38,000) or both.[36] Moreover, if the person is a representative, agent, employee or any other staff member of an entity, and if he or she has committed the offence in relation to the entity's business operation, the entity is also to be penalised with a fine of not more than JPY300,000,000 (around USD2,300,000). These penalty provisions do suggest that Japan adopts a tough stance towards foreign bribery.

In fact, over the years, the courts in Japan have indeed found a number of Japanese businesspersons and entities guilty of committing bribery of public officials—across the Philippines, Vietnam, China, Indonesia, Thailand and Uzbekistan.[37] Nevertheless, the OECD's report in 2019 was critical of Japan's efforts and capacity to detect foreign bribery. It claimed that '[o]nly 46 foreign bribery allegations involving Japanese nationals and companies have been uncovered [between 1999 to 2019]', suggesting that the number is 'particularly low given the size of Japan's economy and its exposure to high-risk countries and sectors'.[38]

In addition, Transparency International's recent 14th report independently assessing enforcement of the OECD Anti-Bribery Convention, based on investigations and cases prosecuted between 2018 and 2021, puts Japan in the bottom tier of 20 out of 47 jurisdictions characterised as having 'little or no' enforcement (including also China and Hong Kong, South Korea and Singapore, among other major exporters).[39]

11.4 Investment Treaty Practice and Innovations[40]

11.4.1 Japan's Investment Treaty Practice Generally

Japan's treaty programme has unfolded in several phases: (i) limited and varied BITs through to around 2001, (ii) more expansive and consistent BITs plus some FTAs (influenced by US-style drafting) from 2002, and (iii) a comparatively active and somewhat more consistent conclusion of both types of treaties especially since 2013. First, between 1978 and 2001, Japan signed only eight standalone BITs—despite its growing outbound FDI presence and the global proliferation of BITs from the 1990s—and it seems to have been more reactive or even 'passive' in responding to drafting proposals from the various counterparties.[41] The paucity and variety of BITs reflected Japan's preference for multilateral initiatives, partly to protect itself against bilateral pressures, notably from the US and then the EU, over their respective trade deficits with Japan. Consistently with this general preference, Japan was one of the relatively few non-European or Central Asian states to sign in 1994 the multilateral (but sector-specific) Energy Charter Treaty (ECT).

As a second phase, after the collapse of negotiations in 2000 for a new World Trade Organization (WTO) round that aimed at adding extra investment commitments multilaterally, following the suspension of negotiations a few years earlier for the OECD's Multilateral Agreement on Investment, Japan started to conclude FTAs. It experimented first with Singapore (signed in 2002), then concluded 12 more through to the end of 2012. Most of these FTAs focused on Asia, where Japan was concentrating much trade and investment, and it also concluded a trilateral investment treaty with China and Korea (supplementing earlier BITs). Japan also kept signing standalone BITs over this period (ten through to 2012, but FTAs with Vietnam and Peru folding in their BITs) with Asia–Pacific states. These BITs also began to include pre-establishment National Treatment (market access liberalisation) commitments, not just protections for investments once made (as in the first phase of BITs). Influenced by the largely US-style of drafting, Japan's 'new generation' BITs were epitomised by the Cambodia–Japan BIT signed in 2007.[42] Japan's more active and consistent negotiation and drafting of international investment agreements, despite not publicising a Model BIT like many other large economies, was also prompted by Japan's balance on investment (earnings from overseas investment) basically equalling its balance on goods (net income from goods and services) by 2001, and then the acceleration of ISDS cases worldwide.

In the third phase after Prime Minister Shinzo Abe won a general election in late 2012, Japan signed even more BITs (18 through to 2022), extending also to emerging or prospective investment destinations in Central Asia, the Middle East and Africa. FTA signings were fewer. Bilateral FTAs were concluded with Australia (2014) and Mongolia (2015), but Japan also then signed mega-regional treaties. These were the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), an FTA with the EU combined with a parallel investment (but only for liberalisation commitments with inter-state arbitration), and the ASEAN + 5 Regional Comprehensive Economic Partnership (ASEAN + 5 RCEP).

In ISDS reform discussions, multilaterally through UNCTAD since late 2018, and to 'modernise' the ECT, Japan has emerged (with other large net capital exporting states) as a proponent of targeted improvements rather than wholescale change. As evident also by not concluding an investment protection agreement with the EU, Japan has resisted even the EU's hybrid 'investment court' procedure, which allows the foreign investor still to initiate a direct arbitration claim against the host state, but with the latter plus home state pre-selecting 'judges' assigned, then randomly, to hear the claim and any appeal for serious error of law or even fact.

Even in the second and third phases, Japan has been quite flexible in its IIA negotiations and drafting. For example, its FTA with the Philippines signed in 2006 did not provide for ISDS, although Japan typically presses for and achieves this procedure, enhancing protections for its outbound investors. This seems to have been due to the latter's early experience of resisting inbound ISDS arbitration claims, which probably also helps explain why Japan's FTA with the Association of Southeast Asian Nations (ASEAN) signed initially in 2008 exceptionally omitted an investment chapter altogether.

Yet Japan by then had signed BITs and/or FTAs, providing for ISDS-backed commitments with almost all other ASEAN member states, and it then negotiated an investment treaty with Myanmar in 2013 (after its partial regime change) as well as later renegotiating the ASEAN FTA to include an investment chapter with ISDS. Similarly, Japan took the long view in negotiating its FTA with Australia, omitting ISDS upon signing in 2014 (largely due to Australian domestic politics) but obtaining ISDS-backed commitments anyway after the CPTPP came into force in 2019. Japan was also likely agreeable to RCEP omitting ISDS (for now), as it is mostly available anyway under at least one investment treaty signed by the country (and indeed among almost all pairs of RCEP member states).[43]

As with substantive provisions, even over the last decade during the third phase, Japan's BITs and FTAs still display significant diversity.[44] For example, most Japanese treaties include pre-establishment (liberalising) National Treatment and Most-Favoured Nation treatment as well as prohibitions on performance requirements; but such liberalisation commitments are missing from the BITs with Papua New Guinea (signed in 2011), trilaterally with China and Korea (2012), Saudi Arabia (2013) and some others. Not all treaties providing for post-establishment protection expressly define investors as including those who 'seek to make' investments (as well as those who are 'making' or have 'made' investments). Japan's recent treaties adopt a broad US-style definition of 'investment', but they differ for example regarding express references to public debt. Commitments around Fair and Equitable Treatment are still worded in various ways (sometimes but not always including references to the customary international law standard). Umbrella clauses are included in the trilateral investment treaty (signed in 2012) and the BIT with Myanmar, but not in Japan's BIT with Saudi Arabia.

Japan's recent treaties more consistently add a US-style definition of indirect expropriation, which first appeared in the BIT with Peru (2008). They also have started to add commitments by host states not to lower regulatory standards when promoting inbound investments, regarding protection of the environment (mentioned in the trilateral treaty with China and Korea) but also often for the protection of public health and safety.

Ishikawa, reflecting also on her experience in Japan's investment treaty negotiations, suggests that such variations, albeit framed around a largely US-style treaty template since the turn of the twenty-first century, may be due to Japan not publishing a Model BIT, but also more importantly due to:[45]

- The relative bargaining power of the negotiating parties, which is influenced by the strength of the government of the time;
- The existence of a pressing need for early conclusion of the treaty; and
- The economic and political situations of both negotiating parties.

Overall, Hamamoto observes that Japan tends now to include 'pro-investor provisions in treaties concluded with states from which Japan receives a small amount of investment'.[46] By contrast, with the CPTPP and the trilateral treaty with China

and Korea for example, MFN clauses are made expressly inapplicable to ISDS, indirect expropriation provisions have detailed restrictions, and umbrella clauses were limited (in the trilateral treaty) and omitted in the CPTPP.

11.4.2 Japan's Treaty Provisions Impacting on Corruption and Illegality

11.4.2.1 Anti-corruption Obligations on States

Despite such ongoing variability in Japan's recent international investment agreements, reflecting arguably the negotiating dynamics and underlying economic interests, it is notable that, beginning around the time of its BIT with Cambodia signed in 2007, we find often a provision along the following lines (Article 10):

> 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.

A mostly identical and occasionally similar provision is contained in Japan's BITs, with 22 out of 26 signed by Japan since 2007, suggesting the country is the party regularly pressing for them. The wording is also in the BITs with Laos, Uzbekistan and Peru (2008), Papua New Guinea and Colombia (2011), Kuwait and Iraq (2012), Myanmar and Mozambique (2013), Kazakhstan (2014), Ukraine, Uruguay and Oman (2015), Armenia, United Arab Emirates, Argentina[47] and Jordan (2018), Cote d'Ivoire and Morocco[48] (2020), Georgia (2021) and Bahrain (2022).[49] The provision is omitted only in the BITs with Saudi Arabia (2013), Iran and Kenya (2016) and Israel (2017), with the first three of these not scoring well on indices measuring corruption.[50]

Similarly for Japan's other international investment agreements, we find such a provision in bilateral FTAs with the Philippines (2006) then Thailand (2007), India and Peru (2011) and Mongolia (2015), and quite similarly in RCEP (Art 17.9) as well as a rather different variant in the investment treaty with the United Kingdom (2020, Art 17.9) and an entire chapter 26 on 'transparency and anti-corruption' in the CPTPP.[51] Yet Japan's preferred anti-corruption provision is completely omitted in its FTAs with Brunei (2007), Vietnam (2008), even Switzerland (2009) and the trilateral investment treaty with China and Korea (2012).

Arguably, negotiating counterparties with higher levels of domestic corruption are reluctant to include this sort of provision when pressed by Japan as they fear that it could bolster ISDS claims by Japanese investors based on violations of FET commitments. Another concern could be that this provision requires them as host states to more actively enforce anti-corruption laws, even though the wording 'measures and efforts' can be interpreted quite restrictively and they depend on what 'laws and regulations' are (re)enacted by the host state.[52] Japan's preferred reading is also somewhat less detailed than even that found in the 2003 Singapore–US FTA (Article 21.5). At

least, however, the anti-corruption obligation in many of Japan's BITs since 2007 is not excluded from the scope of ISDS and/or inter-state arbitration provisions. Nor is it excluded from the inter-state arbitration provisions when included (in a general chapter rather than investment chapter) in FTAs like those with the Philippines (2006, Article 8), unlike provisions on implementing competition law (Article 137) or improving the business environment (Article 143) that may therefore be taken even less seriously.

Japan's preferred anti-corruption provision may also be resisted in treaty negotiations by counterparty states because it does not help much in resisting an ISDS arbitration claim if there is suspected bribery. This is because it does not impose directly any obligations on foreign investors not to engage in corrupt practices, even though some other provisions may arguably require or imply this (e.g. through complying voluntarily with corporate social responsibility standards,[53] or the express legality provisions analysed below). Overall, Japan's comparatively unusual innovation in seeking to incorporate this sort of anti-corruption requirement in almost all its BITs since 2007, as well as (less successfully) in other international investment agreements, is consistent with its position as a large net FDI exporting state.

11.4.2.2 Explicit Legality Requirements on Foreign Investors

Japan's IIA practice regarding express legality provisions is more complex, but also arguably favours its outbound investor interests. ISDS tribunal rulings and authoritative commentary show that such a provision is crucial to defending a claim where the investor has allegedly engaged in bribery or other serious illegal behaviour. Treaties without such provisions make it much harder for the tribunal to decline jurisdiction overall or even deem some claims inadmissible, although there may still be scope to find for the host state on the merits or at least reduce damages or other relief sought due to proven investor misconduct.[54] Yet Japan's IIAs have only gradually started to make such provisions explicit. Instead, we find four types of provisions.

First, BITs from the first phase, such as the pioneering BIT with Egypt (1977, Article 2.1), include instead a provision such as this:

> Each Contracting Party shall within its territory promote as far as possible investment by nationals and companies of the other Contracting Party and admit such investment in accordance with the applicable laws and regulations of the former Contracting Party.

This does not expressly put any obligation on the foreign investor to make (let alone operate) investments in accordance with the host state's laws, including those against corruption, in order to benefit from treaty protection for covered investments. Accordingly, UNCTAD codes this BIT as not containing an express 'in accordance with host State laws' requirement.[55] The same applies for Japan's ensuing three BITs, with Sri Lanka (1982), China (1988) and Turkey (1992).

By contrast, its BIT with Hong Kong (1997) is coded as containing the legality requirement for treaty protection,[56] and this does indeed seem more implicit in a second type of provision found in Article 10:

> This Agreement shall apply to all investments and returns of investors of one Contracting Party made within the area of the other Contracting Party in accordance with the applicable laws and regulations of the other Contracting Party, whether made before, on or after the date of entry into force of this Agreement.

The BITs signed with Bangladesh, Pakistan and Russia (1998) revert to the wording of the 1977 BIT with Egypt. But the BIT with Mongolia (2001)—and many others subsequently, such as that with Korea signed in 2003—include only a provision such as Article 9, constituting a third form of wording:

> The present Agreement shall also apply to all investments and returns of investors of either Contracting Party acquired within the territory of the other Contracting Party in accordance with the applicable laws and regulations of such other Contracting Party prior to the entering into force of the present Agreement.

UNCTAD codes such a provision as not constituting an express 'in accordance with host State laws' requirement.[57] It is admittedly not as arguable as in Article 10 of the Hong Kong BIT, and the UNCTAD coding may be influenced by Article 1(1) of the Mongolia BIT (and others subsequently), not adding an 'in accordance with laws' provision to the definition of covered 'investments'. However, it could be contended that this provision does amount to a legality requirement, because it would make little sense to cover past investments (before the treaty came into force) only if made in accordance with host state laws, yet cover foreign investments made afterwards even in violation of host state laws.

The clearest and most explicit legality provision appears initially in Japan's BIT with Iran (2016), in the third phase outlined in Sect. 11.4.1 above, specifically in the definitional Article 1.1:

> Article 1.1: The term 'investment' refers to every kind of asset, invested directly or indirectly by an investor of a Contracting Party in the Territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party, including the following: ... .

UNCTAD codes this fourth type of provision as an explicit legality provision, and a similar provision is found in most subsequent BITs, namely with Israel (2017), Jordan and Argentina (2018), Morocco (2020) and Georgia (2021). But this formulation is not found in the BITs with Armenia and UAE (2018) and Cote d'Ivoire (2020, Article 27(3), reverting instead to the third type of wording as in the 2001 BIT with Mongolia mentioned above) or Japan's most recent BIT with Bahrain (2022, reverting to the first type above similar to Japan's pioneering 1977 BIT with Egypt).

Legality provisions in Japan's other international investment agreements are also variable or quite often missing altogether. For example, the trilateral investment treaty with China and Korea (2012) has only the first type of formulation. The Energy Charter Treaty (1994) had no explicit provision, although the 2022 'modernised' version being assessed by member states amidst considerable controversy does add that it covers energy-related investments 'made or acquired in accordance with the applicable laws' of the host state.[58]

The first of Japan's many FTAs with an explicit legality requirement is that signed with Indonesia (2007), with Article 58(f) stating that:

> the term 'investments' means every kind of asset invested by an investor, in accordance with applicable laws and regulations, including, though not exclusively …

The FTA with India (2011) instead states in Article 83.2:

> An investor of a Party whose investments are not made in compliance with the laws and regulations of the other Party which are consistent with this Agreement shall not be entitled to submit an investment dispute to conciliations or arbitrations referred to in paragraph 4 of Article 96.

The latter article provides for ISDS. Even if an ISDS arbitration tribunal loses jurisdiction to resolve a dispute where the foreign investment is shown to be tainted by corruption, however, an inter-state arbitration tribunal presumably may consider investment disputes under Chap. 14 (Articles 133–142).

Among Japan's regional FTAs, although adding ISDS is to be further discussed (Article 10.18), RCEP does already include an explicit legality provision in Article 10.1(a):

> covered investment means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter, and which, where applicable, has been admitted, by the host Party, subject to its relevant laws, regulations, and policies.

Overall, how should we assess this greater disparity in Japan's IIA drafting—even in quite recent treaties—regarding a clearly expressed legality requirement? These are most likely to benefit states that are less well governed and suffer more corruption than Japan. Accordingly, we would expect such counterparty states to press for them, although some (more developing) countries may still not be so familiar with the intricacies of international investment treaties and therefore may not be able to realise these provisions' importance or lack the negotiating power to press for them.[59]

It seems that Japan is not so aware of the provision's significance or, more plausibly given its extensive experience in negotiating treaties especially over the last decade or two, that it is not pressing as hard for an explicit legality provision in treaties, even recently. Furthermore, the outcome and patterns outlined above would arguably be in Japan's overall national interest, given that it remains overwhelmingly a net capital (and especially FDI) exporter including into many poorly governed states. The paucity or variability of explicit legality provisions could therefore assist Japan's outbound investors, if host states resist ISDS arbitration claims by alleging that investments were made due to bribery or other serious investor illegality. At the same time, not always including an explicit illegality provision should not be too disadvantageous for Japan if it instead is the host state in an inbound ISDS claim. This is because Japan has little corruption, and a transparent legal regime for foreign investors, so they should less likely engage in bribery or other serious misconduct and Japan will have less need to invoke an explicit legality provision to resist the inbound claim.

11.5 Investment Arbitration Cases Involving Japan

The somewhat cynical perspective on Japan's investment treaty practice regarding the quite limited incorporation of explicit legality provisions depends on the extent to which there are outbound and especially inbound treaty-based ISDS claims. If many foreign investors commence ISDS arbitration claims against Japan, more opportunities arise for the country as host state to want to assert a defence based on bribery or (more likely) other serious illegality on the part of the investor. Such a defence will become much more effective if explicit legality provisions are contained in the relevant treaties.

However, in practice, there is only one known inbound ISDS treaty-based claim against Japan, filed by Shift Energy Japan KK in 2020 under the 1997 BIT with Hong Kong.[60] As this is not one of Japan's newer treaties (increasingly building in transparency provisions around ISDS), but instead only providing for United Nations Commission on International Trade Law Arbitration Rules filings, there is almost no public information available. On 3 February 2021 one commercial reporting service stated that the case seems to be in relation to measures taken by Japan:[61]

> in the renewable energy capacity sector … initiated by two Hong Kong entities active in the solar energy sector. A tribunal is fully constituted to hear the claim …
>
> Japan introduced a subsidy program to support renewable energy with feed-in tariffs in 2012. Since that time, however, the state has gradually scaled back the tariffs' levels – which reached a reported two-thirds of their initial levels following the most recent changes …. Industry reporting suggests that photovoltaic firms operating in Japan have been financially challenged as a result of the steady decrease in the levels of tariffs.
>
> To date, Japan has yet to publicly acknowledge the new arbitration claim or divulge further details about it. It is also unclear if the country faces additional such claims, either in the renewable energy sector or in other contexts.
>
> The country has been one of the more avid pursuers of new investment treaties over the last two decades, signing more than 25 new treaties (and negotiating others) in that span. … Japan has been a conservative voice in the ongoing ISDS reform discussions at [the United Nations Commission on International Trade Law] and in the context of the Energy Charter Treaty modernization negotiations, with the country often downplaying the extent of problems with investment treaties, and stressing the bilateral tools and drafting techniques that can be used by concerned states to address any perceived problems (while opposing a sweeping multilateral set of reforms).
>
> With the country now facing at least one investment treaty arbitration, it remains to be seen what impact, if any, this will have on Japan's treaty practice and its posture in reform discussions.

On 3 March 2021 the service further reported that Japan's first inbound claim was:[62]

> initiated by a pair of claimants related to a Hong Kong entity, Shift Energy. The arbitration is proceeding under the [United Nations Commission on International Trade Law] Arbitration Rules, but it is being administered by [the International Centre for the Settlement of Investment Disputes]. We have further confirmed that a tribunal is already in place to hear

the claims: Andres Rigo Sureda is sitting as chair, while the parties nominated Stanimir Alexandrov (claimants' appointee) and Zachary Douglas (Japan's appointee). The case is still at an early stage and no hearing has yet been held on jurisdictional or merits questions. The claimant is represented by DLA Piper, while Japan relies on counsel from Foley Hoag.

A short commentary on 11 March 2023, focusing on a successful outcome in an outbound claim by a Japanese investor, mentions (without further details) that Japan has successfully defended this inbound claim brought by Shift under the Japan–Hong Kong BIT.[63]

Over the last few years since this case was filed, there seems to have been no further inbound claims and Japan has not backtracked from its comparatively active promotion of ISDS-backed IIAs over the last decade (as outlined in Sect. 11.4.1 above). The Japanese government also does not have a tradition of negotiating investment treaties with foreign investors, as in other (more developing) countries, which might include an arbitration clause generating a contract-based claim. Until there is significantly more FDI into Japan, particularly into sensitive sectors where foreign investors are more likely to suffer loss, and there are more inbound ISDS claims under treaties, we may continue to see Japan not pressing hard for consistent and clear express legality provisions in their IIAs.

However, if counterparties themselves start pressing for such provisions, Japan may well include them given its longstanding tradition of being quite open to proposals and related rewording of its treaty provisions (as also noted in Sect. 11.4.1 above) and/or to maintain public trust in the ISDS-supported system of international investment law. This shift towards more explicit legality provisions will be more likely if Japan's outbound investors bring ISDS cases mostly against more developed states (where corruption is less prevalent than developing countries, so defences based on them are less likely). So far, that pattern holds true for Japan, although UNCTAD reported only six claims brought by Japanese investors by the end of 2022 (Table 11.1).

Four outbound claims are against Spain brought by large Japanese companies under the (original) ECT, also involving claims involving the host state's changes to the regulatory regime for renewable energy, and piggybacking on dozens of claims by other countries' investors.[65] Only two are against states that score more poorly on corruption indices, with the 2017 FTA claim against India being settled (seemingly in May 2020 for around a third of the USD660 million claimed by a large automobile manufacturer),[66] and the BIT claim against China being discontinued (either abandoned or settled).

Otherwise, there have only been a few ISDS arbitrations brought indirectly through Japanese affiliates incorporated in other countries (e.g. through the UK against the Czech Republic and Panama), or settled after filing was expected (such as a dispute under an aluminium processing contract with Indonesia). Japanese companies (especially larger ones), and their legal advisors as well as diplomats, are also much more aware nowadays of the rights given under investment treaties reinforced by ISDS provisions. There has also been a push since 2018 belatedly to raise the profile of international arbitration and even seek to make Japan more of a hub for regional dispute resolution services.[67]

Table 11.1 Japanese Outbound ISDS Claims (29 February 2024)[64]

Year of initiation	Short case name	Summary	Outcome of original proceedings	Respondent state	Home state of investor
2020	Marco Trading v. China	Investment: Investments in a large-scale property development project	Discontinued	China	Japan
2020	Mitsui v. Spain	Investment: Investments in the construction and operation of a solar power plant at Palma del Río in the Córdoba region, via joint venture enterprise Guzmán Energía Summary: Claims arising out of a series of energy reforms undertaken by the Government affecting the renewables sector	Pending	Spain	Japan
2018	Itochu v. Spain	Summary: Claims arising out of a series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers	Pending	Spain	Japan
2017	Nissan v. India	Investment: 70 per cent share in Renault Nissan Automotive India Private Limited, a consortium that built an industrial automotive facility in Chennai, the capital of Tamil Nadu Summary: Claims arising out of non-payment of incentives by the Indian State government of Tamil Nadu, which had been allegedly promised to the claimant under the agreement for building of a car plant, signed with the State government in 2008	Settled	India	Japan

(continued)

Table 11.1 (continued)

Year of initiation	Short case name	Summary	Outcome of original proceedings	Respondent state	Home state of investor
2016	Eurus Energy v. Spain	Investment: Investments in a renewable energy generation enterprise Summary: Claims arising out of a series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers	Decided in favour of investor	Spain	Japan The Netherlands
2015	JGC v. Spain	Investment: Shareholding in two solar thermal power plants in Cordoba, Spain Summary: Claims arising out of a series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers	Decided in favour of investor	Spain	Japan

Nonetheless, the relative paucity of outbound ISDS filings by Japanese investors, compared to FDI volumes and other big outbound investor states, arguably reflects a cautious but evolving assessment of costs and other 'institutional barriers' compared to the benefits of ISDS arbitration.[68] It makes considerable sense to pursue a negotiated settlement 'in the shadow of the law', including a potential direct claim in arbitration, but also through indirect pressure from Japan as home state typically able to invoke an inter-state dispute settlement procedure, as can be seen for example in the context of complex trade and investment tensions with Korea since 2019.[69]

If Japanese outbound investors continue not to file many ISDS claims or use them vigorously to secure settlements with host states, or mainly pursue them against developed states with less corruption, the Japanese government may become more amenable to incorporating more consistent and clear legality provisions in their future treaties (Sect. 11.4.1 above). This is also likely if counterparties start pushing for them more strongly, and Japan perceives such provisions as helpful to safeguard the ISDS-backed regime generally amidst considerable ongoing concern worldwide—including in parts of Asia.

It should also be easier for Japan to include such more explicit and consistent legality provisions given its preference and considerable success in incorporating anti-corruption obligations on states (Sect. 11.4.1 above). Such provisions could also go part of the way towards addressing the concern that host states may deliberately solicit bribes, to assert later corruption in defence of an ISDS arbitration claim thanks especially to an explicit legality provision—yet never investigate and indict the local parties for such corruption.

11.6 Conclusions

Japan is known as one of the largest outbound investors globally, but the country was slow in developing its international investment agreement network until the turn of the twenty-first century. Nonetheless, many of Japan's (relatively few, but growing) BITs and Investment Chapters in FTAs contain an express anti-corruption provision. This probably reflects the country's domestic law that takes a tough stance against corruption and bribery. Such innovation in treaty drafting is in the interests of Japan's many outbound investors with operations in countries that adhere less well to the rule of law.

In contrast, Japan's international investment agreement drafting regarding express legality provisions is complex and disparate, with quite a few treaties omitting them altogether. This may be due to the country's limited awareness of those provisions' significance. It could also reflect Japan's less vigorous pursuit of including explicit legality provisions in investment treaties, which would give host states stronger defences against Japan's outbound investors bringing ISDS claims against such states (raising objections about corruption or other illegality allegedly tainting the investments).

This treaty drafting practice may change over time if more foreign inbound investors commence ISDS arbitration claims against Japan, and if more of Japan's outbound investors bring ISDS cases against states with a strong rule of law tradition (and so are also less likely to raise defences of corruption and other serious illegal behaviour by investors). However, such a change will take time because there is reportedly only one known inbound ISDS treaty-based claim against Japan and six outbound ISDS filings by Japanese investors. In any event, and perhaps more likely, Japan may adopt more and clearer legality provisions if other counterparty states push more strongly for them. Japan would then agree to these in its future treaties to demonstrate its overall commitment to combatting corruption, and to preserve the legitimacy of the ISDS arbitration system.

Notes

1. See generally Hamamoto and Nottage 2011.
2. JETRO 2022.
3. OECD n.d.-b.
4. Rabinowitz 2003.
5. Hamamoto and Nottage 2011; Aronson 2013.
6. World Bank 2023.
7. Yamazaki and Tsurumaki 2020. Related to the COVID-19 pandemic, Designated Business Sectors have also been expanded to include e.g., 'Manufacturing of medicines for infectious diseases and highly controlled medical devices'.
8. Itabashi et al. 2022.
9. OECD n.d.-a.
10. See generally e.g., U.S. Department of State n.d.
11. Transparency International 2023. The Index ranked Japan the 18th least corrupt country (among 180 countries) in the world. It also ranked Australia 13th. However, the New South Wales (NSW) Independent Commission Against Corruption reported on 29 June 2023 that the former premier of the state of NSW, Gladys Berejiklian, and the former member of the NSW Parliament for Wagga Wagga city, Daryl Maguire, had engaged in serious corrupt conduct between 2012 and 2018: https://www.icac.nsw.gov.au/media-centre/media-releases/2023-media-releases/icac-finds-former-premier-and-then-member-for-wagga-wagga-corrupt.
12. WJP 2022, p. 24.
13. WJP 2022, p. 16.
14. WJP 2022, p. 103.
15. Takamiya et al. 2022.
16. *Keihō*, Act No. 45/1907.
17. Article 198 is applicable to those Japanese nationals who have bribed Japanese public employees abroad: Article 3(vi) of the Penal Code.
18. Article 7(1) of the Penal Code.
19. Takamiya et al. 2022.
20. Articles 197 and 197-3 of the Penal Code.
21. *Kokka kōmuin rinrihō*, Act No. 129/1999.
22. Article 6(1) of the NPSEA.
23. *Kokka kōmuin rinrikitei*, Cabinet Order No. 101/2000.
24. Articles 2(1) and 3 of the Ethics Code.
25. Article 968 of the Companies Act (*Kaishahō*, Act No. 86/2005).
26. *Seiji shikin kiseihō*, Act No. 194/1948, as amended by Act No. 135/2007.

27. Article 22-5.
28. Article 26-2(3).
29. Carlson 2022.
30. Yamaguchi 2021.
31. Pollmann 2020; Akimoto 2020.
32. Johnston 2022.
33. *Fusei kyōsou boushihō*, Act No. 47/1993.
34. Article 18(2) of the UCPA.
35. Takamiya et al. 2022.
36. Article 21(2) of the UCPA.
37. Takamiya et al. 2022.
38. OECD 2019.
39. Dell and McDevitt 2022. It found Japan had only commenced two investigations and two prosecutions, concluding two cases with sanctions between 2018 and 2021. However, Transparency International also noted that enforcement activity had dropped worldwide over this period, linked to (but sometimes pre-dating) the COVID-19 pandemic. The comparative report also does not try to measure the extent to which low enforcement may be due to generally low levels of foreign corruption undertaken anyway by firms within that jurisdiction. The latter may arguably be correlated with their own data on perceptions of corruption in each jurisdiction, which is very low for Japan, although it is also possible that Japanese firms rarely bribe domestically but do so more in their overseas ventures.
40. This section updates and adapts part of Nottage 2021a, pp. 297–306. See also generally the coding of substantive protections and procedural rights, as well as brief commentary on Japan's investment treaties, in Markert and Ishido 2022.
41. Hamamoto 2011, pp. 55–56.
42. Hamamoto and Nottage 2013.
43. Nottage and Jetin 2021.
44. See especially Hamamoto 2016.
45. Ishikawa 2018, pp. 518–525.
46. Hamamoto 2016, p. 8.
47. Cf. Gazzini 2022, asserting (emphasis added): Unlike some recent treaties, such as ECOWAS Supplementary Act or the Canadian European Treaty Agreement (CETA), *the treaty between Japan and Argentina remains almost silent on non-investment issues* and thus ignoring one of the main sources of criticism moved against investment agreements. This is unsatisfactory for two main reasons. On the one hand, the treaty could have rebalanced the relationship between investors and the Host State by introducing some obligations upon the former, especially regarding social and environmental impact, *corruption* and corporate governance. On the other hand, a modern investment treaty cannot neglect the interests and rights of other stakeholders.
48. However, the Morocco BIT (art 7) somewhat waters down the provision further by specifying that the states 'shall endeavour: to ensure that measures and efforts are undertaken to prevent and combat corruption'.
49. Texts of these BITs and FTAs with investment chapters can be found via UNCTAD n.d.-c.
50. In 2022 Saudi Arabia was ranked 54 worldwide for resisting corruption, but Iran was ranked 147 and Kenya ranked 123, compared to Israel ranked 31; Transparency International 2023.
51. See generally e.g., Yan 2022.
52. See also generally Chap. 4 in this volume.
53. See also generally Chap. 5 in this volume. However, Ishikawa 2022 (reviewed by Nottage 2023) argues that most existing investment treaties worldwide already allow ISDS arbitral tribunals to take jurisdiction and find admissible counterclaims by host states for violation of CSR standards, extending even to domestic 'soft law'. Although Ishikawa's multi-tiered argument focuses on standards for environmental protection, a similar argument might be constructed for anti-corruption laws and initiatives.
54. See generally Reichenbach 2022 and Chap. 6 in this volume.

55. UNCTAD n.d.-a. See also Reinisch 2018. However, in *Fynderdale Holding BV v. The Czech Republic* (PCA Case No 1018-18, Award of 29 April 2021, https://www.italaw.com/cases/4750) at paragraphs 553–554, the tribunal interpreted a similar provision (Article 2) of the Dutch/Czechoslovakia BIT (1992) as requiring investments to be legal to qualify for treaty protection.
56. UNCTAD n.d.-b.
57. UNCTAD n.d.-d. See also Chap. 14 in this volume.
58. See revised Article 1(6) and generally Fisher 2022.
59. On how sophisticated developing countries have been when negotiating treaties, compare with more pessimistic view of Lauge Poulsson with the view (linked to some seemingly careful treaty drafting around ISDS by Thailand) of Nottage 2016; Nottage 2021b.
60. UNCTAD n.d.-f.
61. IAReporter 2021b.
62. IAReporter 2021a.
63. McErlaine 2023. See also Jones 2023.
64. UNCTAD n.d.-e.
65. See generally e.g., Le and Nguyen 2022; Pang 2020. The claimant has substantively succeeded in the Eurus claim listed as 'pending', after the tribunal awarded EUR106 million in damages on 14 November 2022 on the merits. See McErlaine 2023 and Bohmer 2022. However, the claimant sought a rectification of the award on 5 January 2023: ICSID n.d.
66. Shah and Varadhan 2020. See also, against the backdrop of claims already against Spain: Hepburn 2019, noting that Japan's SoftBank Energy may be among foreign investors impacted by India's more recent state-level shifts in renewable energy policy.
67. Claxton et al. 2021.
68. On the variety of reasons for Japan's comparatively limited engagement with arbitration proceedings in general, see also Nottage and Teramura forthcoming.
69. Claxton et al. 2020.

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Luke Nottage is Professor of Comparative and Transnational Business Law at Sydney Law School, specialising in arbitration, contract and consumer law, and corporate governance, with a particular interest in Japan and the Asia–Pacific. He is founding Co-Director of the Australian Network for Japanese Law (ANJeL), Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS), and Special Counsel with Williams Trade Law. Luke has consulted for law firms worldwide as well as for ASEAN, the European Commission, the OECD, UNCTAD, UNDP and the Governments of Japan and Saudi Arabia. Luke is also a Rules Committee Member of ACICA and is on the Panel of Arbitrators for AIAC (KLRCA), BIAC, CAAI, JCAA, KCAB, NZIAC, SCIA, TAI and THAC. Luke was Visiting Professor at Universiti Brunei Darussalam in 2020 and 2023.

Nobumichi Teramura is Assistant Professor at Universiti Brunei Darussalam and Affiliate at the Centre for Asian and Pacific Law at the University of Sydney, specialising in business law, with a particular interest in arbitration, private international law, contract law and Asian law. Nobumichi is the author of *Ex Aequo et Bono as a Response to the Over-Judicialisation of International Commercial Arbitration* (Wolters Kluwer, 2020), based on his doctoral thesis from the University of New South Wales in Australia, which received a PhD Excellence Award when completed in 2018. He has taught private international law and commercial law as a lecturer at the Adelaide

Law School, Australia (since 2019). He also lectured at the Tañada-Diokno School of Law at De La Salle University in the Philippines in 2016, 2017 and 2019 on international arbitration and trade law.

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Chapter 12
Corruption and Investment Arbitration in the Lao People's Democratic Republic: *Corruptio Incognito*

Romesh Weeramantry and Uma Sharma

Abstract In recent years, corruption has become prevalent in investment arbitration. This chapter closely examines the issue of corruption in the Lao People's Democratic Republic through the lens of two key investment-treaty arbitration decisions: *Lao Holdings N.V. v. Lao People's Democratic Republic* and *Sanum Investments Limited v. Lao People's Democratic Republic*. The decisions place a spotlight on how tribunals address allegations of fraud and corruption, and also the larger systemic issues which plague the Republic. The chapter thoroughly analyses the two decisions and discusses their implications on the conduct of arbitral proceedings. It is envisaged that these observations will provide a guide for practitioners navigating allegations of corruption in investment-treaty arbitration proceedings while contextualising the socio-political environment within which such grafting is perpetuated.

12.1 Introduction

In his Foreword to the United Nations Convention against Corruption, the late Kofi Annan aptly describes corruption as 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.[1]

Hwang and Lim (2012), at p. 4. 'Corruption' finds its root in the Latin word '*corruptus*' which means 'rotten' or 'decayed'. This aptly symbolises the breaking of confidence entrusted to agents and public officers that partake in such activities.

R. Weeramantry (✉)
Clifford Chance, Perth, WA, Australia
e-mail: Romesh.Weeramantry@CliffordChance.com

U. Sharma
Jones Day, Singapore
e-mail: usharma@jonesday.com
URL: https://www.linkedin.com/in/umajsharma/

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Regrettably, foreign direct investment (FDI) in developing countries intersects too frequently or too closely with corruption.[2] While this evil may seem to present enormous benefits to unscrupulous foreign investors and locals, it inevitably causes incalculable loss to the host state's economy and society. The Lao People's Democratic Republic (Laos) is no exception. It is heavily reliant on FDI[3] but at the same time is known to have a high level of corruption.[4] In some instances, corruption may discourage FDI inflows and increase the costs of investment;[5] as such, Laos's critical priority must be to extinguish this dark side of foreign investment. In this context, investment-treaty arbitration plays an important role: it serves to expose corruption, sanction corrupt investors and highlight how the rule of international law is able to play a key role in curbing corrupt practices.

This chapter investigates corruption in Laos by focusing on the following bilateral investment treaty (BIT) arbitrations: *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (the ICSID Proceedings) and *Sanum Investments Limited (People's Republic of China) v. Lao People's Democratic Republic*—PCA Case No. 2013–13 (the PCA Proceedings). These proceedings are collectively referred to as the 'BIT Proceedings'.

Section 12.2 details the factual and procedural background of the BIT Proceedings. Section 12.3 discusses the implications of when bribery and corruption is alleged to have taken place. Section 12.4 discusses the laws applicable to allegations of bribery and corruption. Sections 12.5, 12.6 and 12.7 examine the often-discussed issue of standard of proof and good faith in the context of the Tribunals' assessment of the evidence. The pivotal issues underlying the BIT Proceedings are analysed in Sect. 12.8, which contains the authors' views on some key issues such as the obligation of host states to investigate corruption. In Sect. 12.9, the setting aside proceedings are examined and what they mean for allegations of bribery and corruption at the setting aside stage. The chapter concludes with Sect. 12.10.

12.2 Overview of the BIT Proceedings

12.2.1 Factual Background

The BIT Proceedings centred on the investments made in Laos by two American businessmen, Mr John Baldwin (Baldwin) and Mr Shawn Scott (Scott). The objective of these investments was to develop several gaming resorts including hotels, casinos and clubs in Laos. To facilitate the investment, they incorporated Lao Holdings N.V. ('LHNV') in the Netherlands, and its wholly owned subsidiary, Sanum Investments Limited ('Sanum'), in Macau. The businessmen partnered with a Laotian conglomerate, ST Group Co Ltd ('ST Group'), to pursue two casino projects—the Savan Vegas Hotel and the Paksong Vegas Casino. ST group was believed to be closely connected to leading politicians in the Laotian Government. The Savan Vegas Hotel was successfully established. The Paksong Vegas Casino was never built. As part of

Sanum's investment in Laos in or around 2007, approximately USD7.5 million was paid in tranches to ST Group.[6] Three years later, there was a falling out between LHNV and Sanum on the one hand, and ST Group on the other hand.[7]

The Claimants initially alleged treaty breaches such as, but not limited to, the imposition of an 80% tax by Laos on casino revenues, unfair and oppressive audits of Savan Vegas, expropriation of assets which belonged to the Claimants and premature termination of planned expansion of the resorts.

In relation to these alleged treaty breaches, LHNV initiated ICSID Proceedings on 14 August 2022 against Laos before the International Centre for Settlement of Investment Disputes (ICSID) under the 2003 Netherlands–Laos BIT[8] and the ICSID Additional Facility Rules. On that same day, Sanum initiated proceedings before the Permanent Court of Arbitration for breaches under the 1993 China–Laos BIT.[9] The two proceedings, while distinct, were jointly heard but were not consolidated.[10] In this chapter, LHNV and Sanum will be referred to as the 'Claimants' jointly and interchangeably.

Shortly before the joint evidentiary hearings, on 15 June 2014, the parties entered into a Settlement Deed to globally resolve the disputes. As a result, the BIT Proceedings were suspended. The Settlement Deed provided (amongst other matters) that the BIT Proceedings could be revived if Laos was in material breach of certain provisions of the Settlement Deed, and such breach was not remedied after being given notice. Further, Section 34 of the Settlement Deed[11] provided that if the arbitration was revived, neither party would be permitted to add new claims or evidence to the arbitration nor seek relief beyond what was already claimed in the BIT Proceedings.

12.2.2 Revived Proceedings and Allegations of Corruption

On 4 July 2014, the Claimants applied to the Tribunal to lift the suspension on the BIT Proceedings on the basis that Laos allegedly committed a material breach of the Settlement Deed.[12] This initial application was dismissed by the ICSID Tribunal on the merits on 10 June 2015.[13] On 26 April 2016, LHNV submitted a Second Material Breach Application.[14] And on 23 February 2017, Sanum filed a Second Material Breach Application before the PCA Tribunal.[15] Both of the Second Material Breach Applications were successful. On 15 December 2017, the Tribunals reinstated the BIT Proceedings.

In the reinstated BIT Proceedings, the Claimants no longer pursued certain expropriation and seizure claims.[16] Sanum, nonetheless, maintained the expropriation claim regarding the Thanaleng slot club, Paksan, Thakhet and the Paksong Vegas Hotel and Casino.[17] LHNV maintained this expropriation claim and also pursued the following treaty claims:[18]

(a) denial of fair and equitable treatment and prohibitions on impairment by unreasonable and discriminatory measures in respect of Savan Vegas, Thakhet, Paksan, Thanaleng Club, Ferry Terminal Club and Lao Bao Club;

(b) breach of contractual obligations regarding Savan Vegas and Paksong Hotel and Casino;
(c) national treatment obligation breaches regarding Savan Vegas, Lao Bao Club and Ferry Terminal Club;
(d) Most Favoured Nation claims regarding Savan Vegas, Thanaleng Club, Ferry Terminal Club and Lao Bao Club concerning full protection and security, most constant protection and security and access to justice.

In response, Laos contended that all claims should be entirely dismissed on the ground that the Claimants engaged in illegal conduct including bribery, embezzlement and money laundering at both the inception and operational phases of the investment.[19]

Laos alleged that the Claimants were involved in the following conduct at the investment's inception:[20]

(a) paying Laotian tax authorities a bribe of USD30,000 to obtain approvals for the original 2009 Flat Tax Agreement between Laos and Savan Vegas which the Claimants regarded as essential to their investment in their flagship Savan Vegas Hotel and Casino project; and
(b) paying government officials bribes to the value of USD25,000 to procure licenses necessary for the Savan Vegas Welcome Center and Slot Club.

On the operational front, the allegations of Laos concerned:[21]

(a) paying of USD875,000 to the Claimants' private sector consultant in Laos for bribing government officials to stop an Ernst & Young (E&Y) audit of Savan Vegas Hotel and Casino, so as to conceal the disclosure of illegal activities;
(b) witness tampering to prevent a key witness from testifying in the BIT Proceedings;
(c) paying bribes totalling USD21,000 in 2012 to Government officials to seek an extension of the 2009 Flat Tax Agreement;
(d) offering USD7 million in a bribe to the Laotian Prime Minister for approval of a licence to establish a casino in Vientiane;
(e) bribing the Governor of the Province of Champasak with a bribe of USD80,000 to approve a slot club at Chong Mek; and
(f) bribing Government officials with a total of USD106,000 to close the Paksan Slot Club as a way of pressurising ST Holdings to settle their differences.[22]

Laos also alleged that the Claimants paid USD120,000 to Cambodian officials to obtain various benefits such as licences and diplomatic passports. While the allegations relating to Cambodia were not considered further by the Tribunals, their allegations intended to demonstrate that the Claimants' principals are 'bad people', with a predisposition to rely on bribery and corruption to advance their financial interests.[23]

Awards in the reinstated proceedings were issued on 6 August 2019. Given the overlapping claims and parallel nature of the proceedings, the Awards were substantively similar. Both Tribunals dismissed the Claimants' claims on the merits. We now turn to discuss the parts of the Awards that were relevant to corruption.

12.3 Bribery and Corruption at the Time of Investment and Subsequent Performance

Laos argued that the Claimants were not legally entitled to maintain any of their claims in the proceeds as a matter of *ordre public international* and public policy.[24] It asserted that corruption is relevant to the initial investment—such that the Tribunal's jurisdiction must be denied—and also the investor's subsequent conduct in relation to the investment—such that it precludes a claimant's entitlement for relief under the BIT.[25]

The Claimants' position was that neither BIT contained an express provision authorising a tribunal to deny treaty protection on the basis that the investor had engaged in corruption.[26] Accordingly, they contended that a Tribunal would have to apply customary international law or general principles of international law, neither of which have a crystallised 'clean hands' doctrine to deny treaty protection.[27] The Claimants denied corruption, and also denied any causal connection between the acts of alleged corruption and their claims in the BIT Proceedings.[28] The Claimants highlighted that Laos 'failed to govern itself in a manner consistent with its international obligations, including due process and good faith, and the prosecution of bribe-takers as well as alleged bribe-givers'.[29]

The Tribunal considered that proof of corruption at *any* stage of the investment may be relevant depending on the circumstances and found that serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country … is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal.[30]

12.4 Applicable Laws

The Tribunals' starting position—and generally also the parties' positions—was that the BITs determined the applicable law.[31] In addition to the BITs, the Tribunals held the following other sources of law to also be applicable:

(a) *Treaty interpretation rules*: To the extent the BITs required interpretation, the Vienna Convention on the Law of Treaties' rules on treaty interpretation were held to apply.[32]

(b) *Domestic law of Laos*: While holding that domestic laws of Laos may be relevant, the Tribunals added that bribery and corruption were contrary to those laws.[33]

(c) *United Nations Convention Against Corruption* (UNCAC): Laos argued that the UNCAC constituted applicable 'international norms'.[34] In response, the Claimants contended that the UNCAC 'creates obligations only for the state Parties, to develop anti-corruption policies, practices and task forces [do] not bind or purport to bind the conduct of entities such as [the Claimants]'.[35] The Tribunals disagreed, concluding that the UNCAC, while applying to states rather

than private parties, embodies a principle of customary international law to root out corruption used to obtain or retain business or other undue advantage in relation to the conduct of international business.[36] According to the Tribunals, the Claimants were therefore under an obligation to meet the standards contained in the UNCAC.

(d) *Doctrine of clean hands*: As discussed further below (Sect. 12.8.4), Laos also relied on the doctrine of 'clean hands' to argue that the Claimants should be denied the assistance of investor–state arbitration given their misconduct. The Claimants replied that the legal basis for the Tribunals' decision must be customary international law, and as the doctrine of 'clean hands' is not a recognised rule of custom, it therefore cannot assist the Tribunals.[37] In addressing these arguments, the Tribunals refused to rely on a 'generalized doctrine of "clean hands"', although they remarked (as noted above) that 'serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country … is not without Treaty consequences', signalling that the Claimants' claims may be sanctioned for illicit conduct through the application of broader equitable principles, which disentitled them to treaty protection.[38]

12.5 Standard of Proof

The next issue determined by the Tribunals was the applicable standard of proof.[39]

Laos framed its argument on the standard of proof as an evidential one, focussing on the difficulty of proving bribery and corruption, particularly because parties are generally careful not to leave a paper trail or other evidence of illegal transactions.[40] In this context, Laos contended that to combat corruption effectively, proof must necessarily involve inferences drawn from circumstantial evidence.[41] The appropriate approach in these circumstances, asserted Laos, required the alleging party to identify 'red flags', which (when established) required the alleged perpetrators to provide an exculpatory explanation of otherwise suspicious conduct. An illustrative example is *Metal-Tech v. Uzbekistan*[42] where if the government provided evidence of substantial payments to a consultant, it would be probative of corruption if the consultant:[43]

(a) lacked experience in the sector;
(b) was not a resident of the country where the project was located;
(c) had no significant business presence or experience within the country;
(d) requested 'urgent' payments and/or unusually high commissions;
(e) requested payments be made in cash, be made in a third country, to a numbered bank account, or to some other person or entity than the one with whom the agreement was signed; and
(f) had a close personal/professional relationship to the government that could improperly influence decisions.

In contrast, the Claimants argued that the applicable standard of proof of corruption under international law is 'clear and convincing evidence', which must comprise 'substantial facts' rather than mere 'inferences'.[44] The Claimants' position, based on *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*,[45] was that this higher standard requires proof that goes beyond a balance of probabilities but falls short of a beyond reasonable doubt standard.[46]

Ultimately, the Tribunals held that the standard of proof for corruption requires 'clear and convincing evidence' that points clearly to corruption, although there need not be 'clear and convincing evidence' on every allegation of corruption.[47] The Tribunal's decision on this issue merits quotation in full:[48]

> The Tribunal acknowledges the difficulty of proving corruption as well as the importance of exposing corruption where it exists. In the nature of the offence, the person offering the bribe and the person accepting it will take care to cover their tracks. Nevertheless, given the seriousness of the charge, and the severity of the consequences to the individuals concerned, procedural fairness requires that there be proof rather than conjecture. The standard of 'probabilities' requires the trier of fact to stand back and make an overall assessment. The requirement of 'clear and convincing' evidence puts the focus more closely on the building blocks of the evidence to ensure a rigorous testing.
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> … In the Tribunal's view 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 addition to adopting the 'clear and convincing' standard of proof for corruption, the Tribunals made an important observation: aside from the criminal investigations of Baldwin and Scott, Laos had failed to investigate and prosecute *any* other persons (particularly government officials) who allegedly received bribes in relation to the specific allegations summarised above. The Tribunals' decision inferred that pursuing its own officials would not be detrimental to Laos's defence in the arbitration: '[c]onviction of its own officials would not estop the Government from pursuing the Claimants as bribe-givers.'[49] In concluding its assessment of Laos's failure to investigate and prosecute corruption (discussed further below in Sect. 12.8.2), the Tribunals drew a correlation between such failure and the Government's credibility when making corruption allegations.[50]

12.6 Tribunals' Assessment of Bribery Allegations

Given the practical difficulties of satisfying a tribunal that a standard of proof is met, this section discusses the evidence before the Tribunals in the BIT Proceedings and how such evidence was weighed and admitted (if at all). The authors consider it key

to examine how evidence of bribery and corruption is treated in arbitral proceedings, with some commentators considering the assessment of evidence to be more important than the applicable standard of proof.[51] The following bribe-related findings were made in the BIT Proceedings.

12.6.1 Alleged Bribes to Obtain the 2009 Flat Tax Agreement

Laos alleged that to obtain the 2009 Flat Tax Agreement, a bribe of USD30,000 was paid to senior government officials through the Claimants' intermediary or consultant, Madam Sengkeo.[52] In dismissing this argument, the Tribunals found Laos's position to be speculative and in finding the evidence to be unsatisfactory, observed as follows:[53]

> Madam Sengkeo was in the consulting business. Consultants are paid. While the Claimants never produced a 'consulting agreement' with Madam Sengkeo, the evidence is that it is not unusual for consultants to insist on a success fee as part of their remuneration. The effort to obtain a FTA was successful. It was likely worth millions of dollars to the Claimants in reduced taxes. In that context, payment of US $30,000 in 2009 is not a disproportionate 'success fee'. Moreover, no one was prosecuted in this affair …

The Tribunals' remarks support the view that it is not sufficient for allegations of bribery to be accompanied by mere circumstantial evidence. The Tribunals will assess the evidence holistically and ascertain whether all the circumstances point towards bribery. This view also underscores the importance of a host state investigating, and—if appropriate—prosecuting, principals involved in corrupt acts as it reflects the *bona fides* of the allegation (as will be discussed further below). This would be especially relevant where allegations of corruption and bribery are not raised contemporaneously, but after the start of arbitral proceedings, as was the case here.

12.6.2 Alleged Bribes to Extend the Flat Tax Agreement After Expiry of the Five-Year Term

Laos alleged that Bouker Noutharath—a retired hospital worker from the United States who had returned to live in Laos and had no experience as a consultant but who had contacts within the government—offered a bribe of USD21,000 to a government worker to extend the Flat Tax Agreement.[54] Noutharath cooperated with the Laos government and testified that he was sent USD21,000 to deliver it to a government official. However, he could not remember the name of that official.[55]

The Tribunals dismissed this argument for lack of 'clear and convincing evidence', holding that there were inconsistencies in Noutharath's evidence and that it was significant that he could remember nothing about (or was otherwise unwilling to identify) the government person to whom he said he handed USD21,000.[56] The

Tribunals also found that Laos's evidence did not establish that a bribe was offered even on a balance of probabilities. Laos's failure to prosecute the presumed recipient or anyone else was noted in reaching this conclusion.

12.6.3 Alleged Bribes to Shut Down the E&Y Audit of Savan Vegas and Pressure ST Holdings

During the arbitration, it was established that USD500,000 was sent by the Claimants to Vientiane, including USD300,000 cash in a backpack delivered to Madam Sengkeo, and that an identical amount of money was deposited into her bank account.[57] Laos alleged that USD270,000 was paid by Madam Sengkeo to government officials to stop the E&Y audit of Savan Vegas and that the bribe succeeded because E&Y indeed stopped the audit which prevented the exposure of the Claimants' illegal activities.[58] The Claimants' response was that Madam Sengkeo was a friend of Baldwin who urgently needed funds and that the USD300,000 was a loan to her.[59] They also contended that the government stopped the E&Y audit because its officials had concluded that E&Y had failed to find incriminating evidence.

The Tribunals found on the one hand that the Claimants' explanation of the payment to Madam Sengkeo was not credible and that if E&Y had failed to find incriminating evidence, the obvious instruction from the government would have been to keep digging and not to down tools. They further held that the Claimants had a powerful motive (e.g., they knew of 'financial skeletons' in the Savan Vegas books) to stop the audit. The Tribunals concluded that '*all in all*' the Claimants were able to get a senior Government official to stop the E&Y audit and that Madam Sengkeo paid USD270,000 (i.e. USD300,000 less a 10% commission) to that government person or persons. Despite this extremely serious finding, the Tribunals proceeded by stating that they were troubled by the government's lack of investigation into the potential bribe-takers, and that solid evidence was lacking. The Tribunal's assessment of the evidence is set out as follows:[60]

> That said, the Tribunal is troubled by the fact that the Government has apparently not identified any bribe-takers. The order to E&Y to stop the audit came as a surprise to E&Y and must have been issued by a senior Government source, otherwise the audit would have continued. The Respondent does not suggest that E&Y took the bribe but E&Y must know who gave its auditors the order to stop work. The evidentiary trail could then have been followed up the chain of command from the Government person who gave the order to identify the person who authorized the order, who could then have been required to provide the Government (and subsequently the Tribunal) with an explanation for the stop work order.
>
> … The Respondent has not offered any explanation for this gap in the evidence. In the circumstances, while the evidence of Mr. Baldwin that Madam Sengkeo required the funds for her personal use is deeply unsatisfactory, so too is the Government's apparent failure even to attempt (so far as the evidence is concerned) to get to the bottom of the matter, not only potentially to punish the wrongdoers, but to provide solid evidence that a bribe was given and taken by Government official(s) to stop the E&Y audit. (Emphasis omitted.)

For these reasons, the Tribunal concluded that while on the balance of probabilities, Madam Sengkeo was used as a conduit to bribe government officials to stop the E&Y audit, Laos had not established this conclusion to the higher standard of 'clear and convincing evidence'. The Tribunals also concluded that on the lesser standard of balance of probabilities, Baldwin 'involved the Claimants in serious financial illegalities in respect of the halt of the E&Y audit'.[61]

12.6.4 Alleged Bribes to Shut Down the Thanaleng Slot Club

Tensions with Sanum's Laotian partner—ST Holdings—ran high when the latter refused to proceed with a joint venture in relation to a profitable slot club at Thanaleng. Baldwin, according to Laos, reacted by paying bribes to government officials through a 'consultant' Mr. Anousith Thepsimuong, to shut down the Thanaleng Slot Club as a pressure tactic to force ST Holdings to negotiate rather than continue with related litigation in the Laotian courts. Laos alleged that USD190,000 was deposited in Mr Anousith's account and a cash withdrawal of USD100,000 was made the next day. Baldwin testified that Anousith was paid to lobby the Laotian National Assembly.

The conclusions of the Tribunals were brief:[62]

> the payment to Mr. Anousith is deeply suspicious. There is no documentation of any consultancy. There is no explanation of the work for which almost $200,000 were paid to him and deposited in his personal bank account. The mandate to lobby the 'National Assembly' seems far-fetched. Moreover, despite the alleged payment of bribes, the Thanaleng Slot Club was not shut down. In the circumstances, the Tribunal is unable to find 'clear and convincing evidence' that a bribe was made or even offered through Mr. Anousith.

Again, the Tribunals did not stop there but went on to apply a lower balance of probabilities standard to find that it was more likely than not that a bribe was paid to an unidentified government official or officials in an unsuccessful effort to advance the Claimants' agenda in relation to the Thanaleng Slot Club.[63]

12.6.5 Alleged Bribe to Madam Sengkeo to Prevent Her from Testifying in the Proceedings

During the 2014 proceedings, Laos sought to have Madam Sengkeo testify by granting her immunity if she provided information and documents relating to bribes offered to Laos government officials. Also during those proceedings, Baldwin requested the Tribunals to allow him to make a USD575,000 'personal loan' to Madam Sengkeo. The Tribunals declined Baldwin's request given the importance and sensitivity of Madam Sengkeo's evidence in the case. In the June 2014 merits hearing in Singapore, Madam Sengkeo did not attend to testify for Laos.[64]

In the reinstated BIT Proceedings, Laos alleged that Baldwin, having been denied permission to arrange a loan to Madam Sengkeo, arranged for a third party to make a

USD575,000 'loan' to her, which was an inducement to keep her from testifying. The Tribunals found that the USD575,000 loan, on top of the USD300,000 loan previously extended, 'of which only USD15,000 were repaid bristles with "red flags"'.[65] The following passage of the Tribunal's finding on this allegation merits quoting *in extenso* because it helps to understand the approach by the Tribunal in its finding on bribery:

> Given Madam Sengkeo's central role in dealings between the Claimants and the Government over many years, her testimony would have shed crucial light on the legality or illegality of many of the disbursements at issue in the Respondent's allegations.
>
> Mr. John Baldwin testified:
>
> Q. So when **[Madam] Sengkeo withdrew US$80,000 in cash on July 20**, the day before you went to visit your good friend, the **Deputy Prime Minister**, what do you think she was going to do with those US dollars?
>
> A. It was [Madam] Sengkeo's money to do what she wanted. She represented to me that **she needed the loan to pay construction bills**. [Tribunals' emphasis.]
>
> … It cannot be said that the bare payment of US $875,000 to Madam Sengkeo is 'clear and convincing evidence' of bribery. There is no evidence to contradict Mr. Baldwin's evidence of her need for funds. There are other possible explanations for their disbursement.
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> … On the whole, however, while the Tribunal is unable to find 'clear and convincing evidence' that the money was paid to Madam Sengkeo to bribe Government Ministers, the Tribunal is nevertheless satisfied on the lower standard of balance of probabilities that Mr. Baldwin and Madam Sengkeo were involved in channeling funds illicitly to Lao Government officials, and further that she was paid to secure her loyalty and to avoid her testifying on behalf of the Government, thereby obstructing justice.
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> … The coincidence of the timing of 'loans' of US $875,000 (less one repayment of US $15,000) to Madam Sengkeo and the Claimants' urgent need for Government intervention on its behalf at critical junctures of its business (the termination of the E&Y audit and the attempt to shut down the Thanaleng Slot Club), together with Madam Sengkeo's role as the Claimants' principal go-between with the Government, which Mr. Baldwin describes as a corrupt Government, compels an inference of Mr. Baldwin's unlawful conduct and through Mr. Baldwin, the culpability and bad faith of both LHNV and Sanum, on whose behalf he acted.
>
> … The Government's failure to track down bribe-takers or to provide a convincing explanation of its efforts (even if on occasion unsuccessful) to do so, weighs against the Government's case, although the fact that the key witness, Madam Sengkeo, herself refused to cooperate made the Government's task more difficult.
>
> … Possibly the Government prefers to spare itself some embarrassment by declining to put whatever it knows about 'bribe-takers' into the record of the Tribunal.
>
> … Be that as it may be, the circumstances disclosed to the Tribunal do not rise to the level of 'clear and compelling evidence' of corruption.[66]

Apparent from the above quotation is the Tribunals' focus on two factors in arriving at the finding that corruption had not been proven: the conduct of the Claimants in the course of the investment, as well as the respondent state's actions in responding to such allegations.[67] Accordingly, Laos's failure to take steps to investigate bribe-takers within the government undoubtedly had a major negative consequence on its bribery allegations against the Claimants.

In their final conclusion on this allegation, the Tribunals noted that while the evidence was not 'clear and compelling' as to corruption, the evidence nonetheless

satisfied the lower standard of 'balance of probabilities', which was relevant to (and would have a significant impact on) determining the Claimants' good faith arguments.

12.6.6 Other Allegations of Bribery and Corruption

Further allegations of bribery and corruption were made, including allegations of bribes offered to the Prime Minister of Laos, a Governor of a Province and other bribes to government officials relating to the establishment and operation of a casino and slot clubs. Again, the Tribunals took a critical view of Laos's failure to investigate government bribe-takers:[68]

> The Claimants complain, rightly, that the Respondent's failure to offer any credible explanation for not pursuing the investigation of its own employees, or indeed even to attempt to identify the alleged bribe-takers, weighs against the credibility of these miscellaneous allegations.

The Tribunals added that none of these other allegations relating to bribery and corruption were supported by sufficient evidence to warrant further inquiry or comment.[69]

12.7 Good Faith

Ultimately, the Tribunals dismissed the Claimants' expropriation claims on their merits. In contrast, the Claimants' fair and equitable treatment claims appear to have been denied in large measure due to their bad faith conduct.

The ICSID Tribunal noted the particular acts of bad faith by Baldwin on the Claimants' behalf, including the following: misrepresentations made to the Government to obtain an investment agreement on the strength of a promise to make a USD25 million investment which the Claimants never intended to pursue; the likely making of illegal payments to Government officials to stop the E&Y audit; likely attempting to obstruct justice with payment to Madam Sengkeo to not testify in the proceedings; and attempting to mislead the Tribunals with a sham offer.[70] The ICSID Tribunal noted that Baldwin's evidence demonstrated bad faith exhibited by him and LHNV in manipulating the Laos government to advance their gambling initiatives, and manipulate the arbitration process itself.[71]

LHNV also alleged that Laos's audit proceeded in bad faith and constituted one of the wrongful acts orchestrated by it to assist ST Holdings in its ongoing dispute with LHNV, resulting in a breach of contractual and treaty obligations (including fair and equitable treatment standards), in respect of Savan Vegas.[72] The Tribunal found that LHNV failed to establish bad faith on Laos's part in pushing for an audit, in its capacity as a significant shareholder in Savan Vegas.[73] The government's conduct

was not found to be arbitrary, and there was no credible evidence suggesting that the E&Y audit was conducted in an unreasonable manner.[74]

The Tribunals dismissed the fair and equitable treatment claims as a result of the Claimants acting in bad faith:[75]

> serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country (such as criminality in defrauding the host Government in respect of an investment) is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of *fair and equitable treatment*, as well as their entitlement to relief of any kind from an international tribunal. (Emphasis added.)

Notwithstanding the finding by the Tribunals that there was no bribery and corruption proven to the standard of 'clear and convincing evidence', the Tribunals did find—as noted above—that on the 'balance of probabilities' standard that:

(a) The Claimants' 'consultant', Mr Bouker, had offered a bribe to a government official;[76]
(b) Mr Baldwin involved the Claimants in serious financial illegalities in respect of the cessation of the E&Y audit;[77]
(c) A bribe was paid to an unidentified government official or officials in an (unsuccessful) effort to advance the Claimants' agenda at the Thanaleng Slot Club;[78]
(d) Baldwin and Madam Sengkeo channelled funds illicitly to Lao government officials;[79] and
(e) Madam Sengkeo was paid to secure her loyalty and to avoid her testifying on behalf of Laos in the arbitration.[80]

Having found this conduct had taken place, but on a standard below that which was required to make a finding of bribery and corruption, the Tribunals relied on that conduct as evidentiary support for a finding that the Claimants had acted in bad faith:

> the evidence is clear that the Claimants dealt in bad faith with the Government from the initial signing of the Paksong Hotel and Casino PDA calling for a US $25 million hotel and casino to the financial irregularities in the operation of the Savan Vegas Hotel and Casino. … The bad faith continued further up to its recent efforts to deter Madam Sengkeo's appearance to testify at the merits proceeding and the sham MaxGaming offer to purchase Savan Vegas in April of 2015.[81]
>
> …
>
> The Tribunal listened carefully to the testimony of Mr. John Baldwin and found him to be an argumentative witness who preferred evasion to candour. Much of his testimony was simply not credible. He proceeded in bad faith from the outset in assuring the Government that he intended to invest US $25 million at the Paksong site, which by his own account was likely to be highly unprofitable.[82]
>
> Mr. Baldwin is the directing mind of both Claimant companies. His conduct throughout was to advance their corporate interests. His bad faith conduct is their conduct.[83]
>
> It is well established that the bad faith conduct of the investor is relevant to the grant of relief under an investment treaty.[84]

The Tribunals ended their section on bad faith by stressing 'the Tribunal wishes to leave in no doubt its conclusion that Mr. Baldwin and Sanum exhibited manifest bad faith in various efforts not only to manipulate the Government to advance their gambling initiatives but, in the instance of Madam Sengkeo, to manipulate the arbitration process itself.'[85] However, the Tribunals' decisions are silent as to what the precise consequences of this finding are. As noted above, it may be inferred that their bad faith finding indirectly led to the Tribunals denying any rights under the fair and equitable treatment provisions under the respective BITs.

12.8 Pivotal Issues and Wider Implications

We turn now to make some observations on the key issues and wider implications relating to corruption that arose from the BIT Proceedings.

12.8.1 Applicable Standard of Proof

Allegations of corruption present serious evidentiary issues for parties and tribunals alike. An initial difficulty arises from the silence of institutional rules as to the standard of proof. Absent party agreement, parties must include in their pleadings detailed arguments as to the applicable standard; and a decision on this issue must be made by the tribunal.

Some tribunals choose to apply the lower standard of 'balance of probabilities';[86] but more tribunals tend to follow the stricter requirement of 'clear and compelling evidence'.[87] As set out above, there were several instances in the BIT Proceedings where although the evidence was insufficient to prove the allegations of bribery and/or corruption on a 'clear and convincing' basis, it still satisfied the lower threshold of balance of probabilities. Such conclusions may reflect a practical approach: the Tribunals were first obliged to apply the higher standard (given it is adopted by the majority of tribunals) but in finding that this standard was too high to prove corruption on the facts, the Tribunals proceeded to make a determination on the same facts (but on a lower standard) that fell short of a corruption finding but still resulted in sanctioning extremely questionable investor conduct. It remains to be seen whether this two-pronged approach of the Tribunals (i.e., assessing the facts on both a 'clear and compelling' and a 'balance of probabilities' standard and then deploying case-specific consequences) will be adopted or whether future tribunals may simply apply a lesser standard for proof of corruption.[88]

An alternative approach to the standards of proof is manifest in *Metal-Tech*, where the tribunal did not endorse either the 'clear and convincing' standard or the 'more likely than not' standard for allegations of bribery. It instead examined whether corruption had been established with 'reasonable certainty'. Notably, the *Metal-Tech* tribunal took the view that the difficulty of establishing corruption made it

acceptable for corruption allegations to 'be shown through circumstantial evidence'[89] and that in this context recourse to 'red flags' was often needed.[90] Another (less used) variation on the standard of proof is based on the concept of an 'inner conviction'.[91] This standard is rooted in the inquisitorial model of certain European continental countries, where the tribunal must be subjectively persuaded that corruption exists.

In *Metal-Tech*, red flags related to consultancy arrangements entered into by the claimant were relied on by the tribunal to find that bribery under Uzbekistan's Criminal Code (the law of the host state in that case) had been proven. These red flags included the magnitude of the sums the consultants were paid, the lack of qualifications held by the consultants to provide lobbying services, the secrecy surrounding the contracts (at least one was a sham), the inability to produce meaningful contemporaneous documentation as to the services rendered by the consultants, and the significant connections that two of the consultants had with Uzbek government officials.[92] As indicated above, in the BIT Proceedings, Laos argued that the Tribunals should apply the *Metal-Tech* tribunal's 'red flag' approach to corruption.[93] This argument was not accepted by the Tribunals in the BIT Proceedings.

Had the *Metal-Tech* approach been accepted by the Tribunals, the chances of a finding of corruption would likely have increased given the circumstantial evidence or red flags that were proved on the 'balance of probabilities' (e.g., the offering of bribes or illicit channelling of funds to Laos government officials, financial illegalities relating to the cessation of the E&Y audit, and the payments to avoid Madam Sengkeo from testifying). In making their decisions, the Tribunals in the BIT Proceedings did not explicitly refer to *Metal-Tech*. Nonetheless, it is apparent that the *Metal-Tech* approach was not followed because the Tribunals applied a 'clear and convincing' standard of proof. According to the Tribunals, this higher standard was difficult to overcome especially because the factual matrix before them evidenced that Laos had failed to investigate who the recipients of the Claimants' bribes were. The inability to find corruption in the context of some damning evidence against the Claimants did not appear to cause too much concern for the Tribunals given the eventual outcome, that is, all the claims were dismissed on the merits, either for lack of proof of any BIT breach or because the Claimants serious financial misconduct (proved on the 'balance of probabilities') was incompatible with the Claimants' good faith obligations. The latter, reading between the lines of the awards, was considered by the Tribunals to have precluded the Claimants' entitlement to relief of any kind from an international tribunal.[94]

What is apparent is that the standard of proof has the potential to be a critical factor in how allegations of corruption influence the outcome of the case. This emphasises the pressing need to establish a universally consistent and acceptable standard of proof. Inconsistency on such an important issue undermines the legitimacy of the investment arbitration process. The need for a unified and coherent approach is real and urgent.

12.8.2 *Obligations on Host States to Investigate Corruption*

A major issue arising from the BIT Proceedings is the Tribunals' direct criticism of Laos's failure to investigate or prosecute persons who allegedly engaged in serious criminal activities other than Baldwin and Scott. The Tribunals noted that it was 'disturbing that no prosecutions have been brought against any persons alleged to have accepted bribes, nor has there been evidence of due diligence in any investigation. These omissions are relevant to the credibility of the Government's allegations'.[95] The Tribunals' decision is not unique. Almost 25 years prior to the BIT Proceedings, the *Wena Hotels Ltd. v. Arab Republic of Egypt*[96] tribunal partially rejected Egypt's bribery defence for failure to show that the implicated government official was investigated and prosecuted. More generally, tribunals and commentators have rooted this obligation on expectations of a sovereign state to genuinely investigate or prosecute alleged corruption within its territory, failing which the application of principles of estoppel, good faith and acquiescence may be applied to that state's detriment.[97]

While a respondent state's obligation to investigate may be justified on the basis that governments are well resourced and best placed to pursue such investigations, the degree to which this obligation can be practically complied with is a separate question. Further, assuming that a positive duty on a host state is established, the content of such a duty is difficult to articulate, especially when considering the variegated capacities of developing and developed countries.[98]

Conversely, if the investor is the party that makes corruption allegations against the host state,[99] it begs the question as to whether there is a duty on a host state to pursue such investigations simply on the basis of mere allegation, and if so, what the content of such obligation should be.

On these issues, we again see inconsistent practice in investment-treaty arbitrations. A comparison between the approaches taken in *Metal-Tech* and *Sanum* is illustrative. In *Metal-Tech*, in addition to accepting a lower threshold to prove corruption (e.g., by using circumstantial evidence and red flags), the tribunal did not calibrate its decision by taking into account the host state's failure to investigate red flags pointing to corruption of its government officials. The factual matrix in that case showed that the claimant had, for example, paid government officials to use their official positions to influence government support of the claimant's investment in Uzbekistan. The *Metal-Tech* tribunal found that this conduct breached the Uzbek Criminal Code and constituted corruption.[100] Despite this involvement in corruption on the part of government officials, the tribunal did not take this state-side conduct into account. A reason is given for this:[101]

> the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.

Based on this statement, a conscious decision appears to have been made by the tribunal not to include the conduct of government (in omitting to investigate its officials) in its assessment. If the *Sanum* approach is applied to the factual circumstances in *Metal-Tech*, it may be argued that the absence of any state-led investigation of corrupt government officials would have been relevant to assessing the credibility of Uzbekistan's allegations and, accordingly, this evidentiary blind spot may have led the tribunal to find that the totality of the evidence was insufficient to establish corruption (particularly on a 'clear and compelling' standard). On the one hand, omitting the conduct of the government in its assessment of the evidence may prove to be the 'safer' (or perhaps even the 'easier') option. On the other hand, this very omission increases the likelihood that the conduct of corrupt actors acting for or within governments will not be investigated. Whether this has any empirical correlation to increased attempts at corruption vis-à-vis foreign investors remains to be seen. However, it presents an uncomfortable image for investment arbitration which is expected to promote conditions in which a strong rule of law framework exists for foreign investors and host states alike.

Llamzon aptly notes that the 'prospect of corruption as litigation strategy, as a trump by host States to insulate themselves from otherwise legitimate obligations to investors, can be a genuine concern for the fairness of the system of international investment arbitration'.[102] It is thus a challenge to envisage how balance can be restored to ensure that the implementation of anti-corruption norms in investment arbitration holds both states and investors accountable.

Another divergent practice of tribunals in relation to the involvement of government officials in corruption is the allocation of costs. In *Sanum* and *LHNV*, despite the criticism of the tribunal that Laos did not investigate bribe-taking on the part of its officials, the Tribunals required the Claimants to pay all of the arbitration costs (including the fees of the PCA and the Tribunal) as well as all of Laos's legal costs. A very different outcome was reached in *Spentex v. Uzbekistan.*[103] The tribunal in that case decided that corruption had made the claims inadmissible. Nonetheless, the majority of the tribunal held that its decision was not 'in favour' of Uzbekistan because it was equally implicated in the corruption (by condoning the initial corruption and by failing to investigate the responsible parties). According to the majority, this situation could lead to an imbalance arising from the punishment of one side to the corruption (the investor) and the avoidance of liability by the other (the host state). To address this imbalance, the majority urged Uzbekistan to donate USD8 million to a United Nations anti-corruption project, failing which the tribunal would order Uzbekistan to pay the costs of the proceedings (including 75% of the claimant's costs; i.e., approximately USD12 million).

Although the approach in *Spentex* constitutes a novel approach to the allocation of costs, it illustrates yet again a considerable inconsistency in the manner in which tribunals treat the responsibility of host states when they fail to investigate their officials who have (or are alleged to have) engaged in corruption with a claimant investor.

12.8.3 Corruption Allegations and Host States with a Culture of Corruption

The prevalence of bribery and corruption has a chilling effect on the inflow of FDIs,[104] which Laos is heavily reliant on. This phenomenon is exacerbated by cumbersome procedural regulations, poor infrastructural support, unpredictable law enforcement and a discriminatory regulatory environment.[105] Economically, the Laos State Inspection Authority reported that the Laos government lost funding of approximately USD732 million from 2016 to 2020 for reasons of corruption, with such funds being pocketed by Laos state officials or misused for other state projects.[106] In the 2020 World Bank Ease of Doing Business report, Laos scored a low 50.8 out of 100, far short of the regional average of 63.3.[107] This counters certain economists' claims that transnational corruption is an 'efficient market-clearing mechanism' and does not necessarily disincentivise the attraction of FDI.[108]

Going below the surface, this culture of corruption is both the cause and effect of a systemic problem that has political implications as well. Trust in public institutions is undermined,[109] and parties are driven to prefer a delocalised justice system (which perhaps may benefit the arbitration community). A 2021 United States of America Department of State report highlighted the difficulties faced in attracting foreign investment:[110]

> neither the government's investment bureaucracy nor the commercial court system is well developed, although the former is improving and reforming. Investors have experienced government practices that deviate significantly from publicly available law and regulation. Some investors decry the courts' limited ability to handle commercial disputes and vulnerability to corruption. The Laos government has repeatedly underscored its commitment to increasing predictability in the investment environment, but in practice, with some exceptions in the creation and operation of SEZs, and investments by larger companies, foreign investors describe inconsistent application of law and regulation.

Predominantly, anti-corruption efforts in Laos have been externally spearheaded, with the United Nations agencies and other non-profit organisations taking a leading role. By September 2020, Laos completed two cycles of its UNCAC Review, covering *inter alia* criminalisation, law enforcement, prevention and asset recovery.[111] Training has also been conducted to strengthen capacity-building efforts of Laotian state agencies to conduct financial crime investigations.[112] While the Laotian government was criticised in the BIT Proceedings for not seriously investigating and prosecuting persons suspected of partaking in bribery and illegal conduct relating to the investments, there appears to have been some progress since then. From 2016 to 2020, 3690 Laotian officials were disciplined for corruption, with more than 2000 being expelled from the Lao People's Revolutionary Party (Laos is a one-party state).[113] Such statistics compel us to question how deep-rooted corrupt practices are and whether these figures are only the tip of the iceberg. The Ministry of Finance announced in December 2022 that the Ministry's administration system must digitise to combat corruption, as it would improve management, record-keeping, tax collection and regulate with whom businesses deal with.[114]

With much of Laos's anti-corruption efforts being externally managed, such plans for internal reform indicate a nascent change from within. These developments indicate the Laotian Government's serious commitment to bolster the anti-corruption movement both preventively and remedially. However, it would be premature to celebrate anti-corruption efforts so quickly. Many of the international guidelines and discussions on combatting bribery and corruption remain aspirational, with a majority of movements merely promoting monitoring, advocacy and community engagement.[115] Where BITs contain express provisions governing measures against corruption, such provisions are vaguely worded and are similarly aspirational, but may still provide some compulsion.[116] Faced with a history of political instability and a weak rule of law, a significant move up Transparency International's Corruption Perceptions Index[117] will be difficult to implement and sustain in the near future, more so since the public sector appears especially impacted by and complicit in such practices.

This brings us to the question of how to deal with allegations of corruption against an investor in a host state that has a significant culture of corruption. In *ECE Projektmanagement International GmbH v. Czech Republic* (*ECE Projektmanagement*),[118] the investor (the claimant) made allegations that the state (the respondent) sought a bribe. The investor did not adduce any direct or specific evidence but rather relied on the general prevalence of corruption in the Czech Republic. Unsurprisingly, the Tribunal refused to make a finding of corruption, noting that more relevant and probative evidence of the specific allegations was required.[119] Tribunals appear unwilling to accept claimant arguments that the entire political system in a host state is corrupt—the 'everyone knows' argument—and require more direct proof that underlies the alleged conduct.

ECE Projektmanagement illustrates a practical evidentiary problem faced when mounting allegations of corruption exists, in economies with a high rate of corruption, such as Laos, many are aware and may even know of corrupt practices, but none can prove it. For a tribunal to make a positive finding of such illegitimate conduct, mere insinuations are insufficient—and for good reason. The seriousness of quasi-criminal allegations, such as fraud, bribery, corruption and embezzlement, warrant that proof prevails over conjecture.[120]

Despite the conceptual and practical difficulties of proof, where allegations of corruption are involved, there may be merit in tribunals paying closer attention to proactively managing the early processes of evidence gathering, such as during the document disclosure phase. This process may be able to produce more relevant evidence, for example evidence as to what has been done to investigate any possibility of bribe-taking by the host state's officials. Also, having bribery and corruption issues in proceedings culminating in publicly available awards may give rise to a greater level of transparency, and perhaps a greater moral impetus for host states to weed out practices that encourage corruption.

12.8.4 Clean Hands Versus Bad Faith

On the doctrine of 'clean hands', the Tribunals cautioned that the '[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'.[121] The Tribunals found that Laos's allegations of bribery lacked sufficient 'clear and convincing evidence' to justify an affirmative finding of specific acts. However, the ICSID Tribunal went on to consider the probable existence of illicit payments to Madam Sengkeo and to Government officers under the general allegation of bad faith.[122] The Tribunal assessed the claimants' entire course of conduct and found the following factors to be relevant:[123]

(a) Probability of corruption in Claimants' orchestration of the termination of the E&Y audit;
(b) Manipulation of Government authorities to obtain a gambling licence without any intention of building the hotel and casino;
(c) Baldwin's testimony which confirmed the view that the Claimants were contemptuous of the commitments that came with the advantages of their Laotian investments; and
(d) Baldwin's attempt to compromise the integrity of the arbitration through inducing Madam Sengkeo to not testify in the proceedings.

In concluding that the Claimants' bad faith initiation of some investments and bad faith performance of other investment agreements 'provide added reasons to deny the Claimant LHNV the benefit of Treaty protection',[124] the Tribunal stopped short of making any positive and conclusive finding on corruption. While facts suggesting bad faith were assessed to be relevant, the Tribunal's assessment of the evidence presents more questions than clarifications: How does this factor of 'bad faith' on the investor's part measure against the stricter 'clean hands' doctrine? Is there a different evidential standard (e.g., the lower 'balance of probabilities' standard) applicable to establishing bad faith?

12.9 Setting Aside Proceedings

12.9.1 Introduction of Additional Evidence

Factual and legal issues relating to bribery and corruption featured even after the BIT Proceedings. In setting aside proceedings commenced in Singapore, a central issue was the introduction of the following additional evidence by Laos after the BIT Proceedings were revived:

(a) Two awards in related Singapore International Arbitration Centre arbitrations;
(b) Documentary evidence and sworn testimony relevant to Laos's defences to prove bribery and fraudulent conduct by the Claimants:[125]

(c) An accounting report by BDO Financial Services Limited, commissioned by Laos, which would be relevant to quantify Laos's embezzlement counterclaim. The counterclaim was eventually not pursued.

The factual background to the setting aside proceedings is as follows. Laos applied to introduce additional evidence in the arbitration in aid of its submission that the Claimants' bribery, corruption and illegal conduct would disentitle them to any relief in the BIT Proceedings, without relying on a standalone ground of bad faith as a substantive defence.[126] This application was filed in May 2018, close to four years after the allegations of bribery were first made in 2014.[127] In objecting to the application, the Claimants relied on the supposed 'mandatory language' of Section 34 of the Settlement Deed which had the effect of creating a 'frozen record' at the time the Settlement Deed was executed, such that the Tribunals had no discretion to admit the new evidence.[128] Laos justified its application to introduce fresh evidence as the tribunals maintained a residual discretion to admit such evidence notwithstanding Section 34, that there were compelling circumstances to do so, and that the Claimants' bribery, corruption, illegal and bad faith activities would result in a dismissal of the Claimants' claims in the BIT Proceedings.[129]

The Tribunals granted Laos's application in part, concluding that all relevant documents should be before the Tribunals to allow them 'to get to the bottom of the allegations', especially considering that the corruption issues 'are of over-riding importance to the rule of law and the integrity of the arbitration process'.[130] In allowing the application, the Tribunals justified their order on the basis that the record should remain 'frozen' according to Section 34 of the Settlement Deed, unless the Tribunals were satisfied that 'compelling circumstances' existed to admit fresh evidence. The Claimants soon thereafter submitted a request to introduce their own additional evidence and rebuttal evidence,[131] followed by a further application by Laos.[132] Both of these applications were to a large extent granted by the Tribunals.

After the Awards were published, the Claimants applied to set aside the Awards of the BIT Proceedings in Singapore (the seat of the BIT Proceedings), alleging broadly that:

(a) The Tribunals' findings relating to allegations raised regarding bribery and fraud, and separately in the case of the ICSID Proceeding, the findings in respect of certain expropriation claims that were unpleaded exceeded the scope of the parties' submission to arbitration (under Article 34(2)(a)(iii) of the Model Law);
(b) The arbitral procedure in the BIT Proceedings was not in accordance with the parties' express agreement under Section 34 of the Settlement Deed (under Article 34(2)(a)(iv) of the Model Law); and/or
(c) That the Claimants were not afforded a reasonable opportunity to be heard on determinations made in the BIT Proceedings (under Article 34(2)(a)(ii) of the Model Law and/or section 24(b) of the International Arbitration Act 1994).

Section 34 of the Settlement Deed provides:

> 34. In the event that the arbitration is revived pursuant to clause 32 above, neither [the Claimants] nor [Laos] shall […] be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings.

The setting aside applications were heard by the Singapore International Commercial Court (SICC) in the first instance and were dismissed entirely. First, on the issue of the scope of submission to arbitration, the SICC held that the BIT Tribunals' jurisdiction was derived from the terms of the Laos-Netherlands BIT and the Laos-PRC BIT, and the matters submitted to the Tribunals. The key issue was whether Section 34 operated in a manner to limit the scope of matters submitted to the awards such that (as the Claimants submitted) there was a limit on the allegations that could be made in the proceedings after they were revived, and no new claims, evidence or reliefs could be sought. In interpreting Section 34, the SICC held that the clause operates in a manner to 'preclude either party from making new claims or seeking new relief which were outside the scope of the claims and counterclaims already submitted to arbitration in the BIT Arbitrations'.[133] However, the SICC held that the Claimants' contention did not warrant a setting side on the basis of Article 34(2)(a)(iii) as the allegations in question were not 'new claims' or 'new relief' but formed part of Laos's existing defence of corruption, bribery, illegality and/or bad faith as further allegations in support of pre-existing defences. The SICC further held that the 'allegations relating to new evidence are procedural matters that do not engage Art 34(2)(a)(iii)'.[134] Further, the Claimants were precluded from seeking relief under Article 34(2)(a)(iii) of the Model Law as they waived their right to do so in failing to raise a jurisdictional obligation in relation to the applications to admit additional evidence, and in fact, proceeded to file their own application which was granted in large part.

On the alternative basis for challenging the scope of submission to arbitration viz. that the ICSID Tribunal made findings or rulings in respect of expropriation claims relating to Paksong Vegas, the Paksan Club and the Thakaek Club, which were not pleaded by parties in the ICSID Arbitration but only pursued by Sanum in the PCA Arbitration, Laos submitted that the issue of the Claimants' illegal and/or bad faith conduct relating to those investments was presented to the ICSID Tribunal and addressed by witnesses. The SICC noted that '[w]hilst the expropriation claims for the three projects were only made in the PCA Arbitration, it is evident that issues of illegality and bad faith relating to the three projects were raised in the ICSID Arbitration, both in the pleadings and in the evidence'.[135] The SICC, thus, held that 'issues of illegal and bad faith conduct relating to [the three projects] were matters raised in GOL's defence and formed part of the issues in the ICSID arbitration'.[136] The SICC rejected the ground and dismissed the Claimants' application to set aside the ICSID Award on the basis of Art 34(2)(a)(iii) of the Model Law. Critically, the parties had conferred jurisdiction on the Tribunals to interpret Section 34 in the event of a dispute, and thus the Tribunals' decision would not be a matter which a supervisory court could consider *de novo*.[137] As an alternative, the SICC found that it should not interfere with the Tribunals' findings of fact on questions of foreign law which are final and binding.[138] Assuming *arguendo* that the Tribunals were to reopen the findings as to their ability to admit additional evidence, the Tribunals retained a residual power to do so in exceptional circumstances (under Section 34 and general procedural powers) and that Section 34 did not consist of a blanket exclusion of all new evidence. The Claimants also contended that the BIT Tribunal's assessment of the merits of their treaty claims was made with substantial reliance on

Laos's new evidence raised in the Revived Proceedings or was tainted by the factual findings made by the Tribunal in relation to the same. The SICC concluded that there was no basis for this contention as the Tribunals made separate and independent findings regarding parties' conduct and the merits of the claims, as opposed to relying substantially on the new evidence and evidence such as witness testimony which in some instances was undisputed. Moreover, where a party seeks to advance evidence of corruption, the SICC was 'of the clear view that no agreement between the parties can prevent the arbitral tribunal from reviewing and, where appropriate, admitting that evidence. This is consistent with the commentaries ... and with the public duty which, we find, applies as much as to arbitrators as it does to judges. Otherwise, parties could enter into procedural agreements deliberately or unintentionally precluding evidence of corruption and arbitral tribunals might make awards supporting or enforcing that corruption'.[139] The SICC also noted that the Claimants' failure to raise a jurisdictional objection at the time of Laos's application to admit additional evidence was filed (and in fact, having filed their own application) constituted a waiver of making such a belated challenge.[140] In any event, even if the Tribunals breached an agreed procedure under Section 34 by admitting the additional evidence, no prejudice was established or suffered by the Claimants. The SICC concluded that the BIT Tribunals could not reasonably have arrived at a different overall result, even if the additional evidence admitted was considered. Even if the court were to determine the matter *de novo*, the SICC would have reached the same conclusion of the matters. Accordingly, for all of the above reasons, the SICC dismissed the Claimants' application to set aside the BIT Awards under Article 34(2)(a)(iv) of the Model Law based on their contention that the arbitral procedure was not in accordance with parties' agreement.

Insofar as the Claimants argued that the Tribunals' exclusion of certain further evidence would have reasonably made a difference to the outcome of the proceedings, the SICC found that the Tribunals would not have arrived at a different conclusion on the claimants' conduct in terms of illegality, corruption, bribery and/or fraud, even if the Tribunals could have arrived at a different conclusion on some of the specific factual findings.[141]

Finally, the SICC held that the claimants were afforded a reasonable opportunity to present their case. Notably, the claimants could not successfully advance this argument as they were:

(a) Aware of Laos's defences of illegality and bad faith;
(b) Put on notice as to the evidence (such as the BDO Report) which was relied upon in support of these arguments of illegality and bad faith; and
(c) Had extensive opportunities to ventilate their counter-arguments (including on the admissibility of certain reports, which, in any event, would not have made a difference to the outcome of the case).

The claimants proceeded to appeal to the Singapore Court of Appeal, which dismissed it. The two grounds of appeal were that:[142]

(a) The Tribunals wrongly accepted Laos's argument that mandatory prohibition in Section 34 of the Settlement Deed would be overridden or circumvented by a supposed 'inherent power'; and

(b) The Tribunals made several factual findings in breach of the rules of natural justice, in that the findings on bribery and fraud were made without the Tribunals being addressed on those issues.

On the first ground, the Court of Appeal remarked that the Court will defer to a tribunal's construction of an agreed procedure in an arbitral agreement that is open to interpretation, in line with its general approach of minimal curial intervention:[143]

> 102 As a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties where the construction is open on the text of the agreement. That is to say, even though there might be more than one construction and the court might think a construction other than that chosen by the tribunal is to be preferred, the court will accept the tribunal's construction. Where, however, a tribunal adopts and acts upon a construction of a term, providing for an agreed procedure, which is simply not open on any view of the text, then the tribunal cannot be said, on any view, to have adhered to the agreed procedure. It is open to the supervising court in such a case to determine the content of the agreed arbitral procedure.

The Court of Appeal held that the SICC did not err in its characterisation of the interpretive approach taken by the Tribunals which determined the scope and limits of Section 34 and that the construction of the text was left open for the Tribunals' interpretation.[144] The Tribunals found that the preclusive operation of Section 34 did not extend to entirely displacing their powers to receive new evidence.[145] In arriving at this construction, the Tribunals were guided by the text of Section 34 and the applicable arbitral rules. The Court of Appeal further remarked that the Tribunals were correct in adopting a construction of a discretionary reception of additional evidence in limited circumstances.[146]

On the Claimants' second ground of appeal, the Court of Appeal held that there was no breach of natural justice.[147] Laos clearly pleaded the defence of bad faith as a distinct ground for the denial of treaty relief. The claimants also had the opportunity to ventilate their position and advance arguments on the standard of proof required.[148]

We make the following observations from the setting aside proceedings. First, both the SICC and Court of Appeal judgments reiterate the pro-arbitration approach of Singapore courts, affording deference to decisions of tribunals on agreed arbitral procedure. That being said, the SICC's observations reveal that such agreement—while derived from party autonomy—is not absolute, especially in the context of bribery and corruption. The SICC noted that 'while the BIT Tribunals would normally give effect to the parties' agreement respecting evidentiary matters, the Tribunals retained a residual discretion to chart a different course "if compelling circumstances were shown to exist"'.[149] More directly, the SICC stated that '[w]here, therefore, a party seeks to put before an arbitral tribunal evidence of corruption, we are of the clear view that no agreement between the parties can prevent the arbitral tribunal from reviewing and, where appropriate, admitting that evidence'.[150] This endorses the public duty of investment treaty tribunals, and provides some implicit endorsement of the *sua sponte*[151] investigative powers of tribunals in cases where conduct of bribery and corruption is alleged and pleaded.[152]

Second, the Courts' deference towards the Tribunals' interpretations of Section 34 of the Settlement Deed supports the general proposition that a tribunal is a master

of its own procedure. These wide powers were derived from the Laos–Netherlands BIT, the Laos–PRC BIT, the ICSID Additional Facility Rules and the UNCITRAL Rules. All of these sources contain some form of the general proviso that the Tribunal shall determine its own procedure, unless parties have decided otherwise, including the admissibility, relevance, materiality and weight of the evidence offered. Such expansive provisions are a double-edged sword. On the one hand, it offers the tribunal wide-ranging powers to have parties present evidence that *may* be relevant to the issues at hand. On the other hand, given the seriousness of allegations of bribery and corruption, tribunals may be over-inclusive towards the admission of such evidence, to the point of compromising the efficiency of the arbitral process. The Claimants' applications to adduce evidence to rebut Laos's first application is also an illustrative example of the possibility of parties' utilising the flexible evidentiary rules to gain a seemingly strategic advantage.

12.10 Conclusion

It is axiomatic that corruption is internationally condemned. The myriad of both international and domestic legal rules and frameworks addressing corruption may create a perception that controls are in place for this evil to be well managed. This could not be further from the truth, especially for countries with unstable political and legal systems.

The BIT Proceedings demonstrate that, notwithstanding the culture of corruption in many countries, which is often silently acknowledged, proof is a thorny issue. Critically, it is difficult to satisfactorily prove allegations of corruption. Corrupt investors and officials will cover their tracks, often with sophisticated methods designed to escape detection, or withhold evidence that may implicate them. Finding proof of corruption is an inherently difficult task. Inconsistency in investment arbitration jurisprudence as to the approach to be taken to make a positive finding of bribery and corruption compounds this difficulty. The investment arbitration community needs to address this issue to eliminate (or at least minimise) the significant inconsistencies in legal approaches. Certain criticisms may need to be addressed through amendments to the text of investment treaties, or some form of soft law instrument. In other instances, action needs to be taken urgently—whether through civic engagement or governments. Or else, the perpetrators of corruption will continue their unscrupulous activities, which do not affect simply an investment in a host state but also undermine democracy, the rule of law, human rights, predictable markets and the overall quality of life that investment treaties are designed to support and improve.

As mentioned above, anti-corruption efforts have been largely aspirational thus far. At the same time, the importance of advocacy efforts and community engagement may be underrated. Emerging economies, such as Laos, will inevitably yield to such efforts in a bid to attract greater FDI. While these are long-term milestones to observe for Laos, the BIT Proceedings leave a public and significant mark on the Laotian government to actively remedy this culture of corruption.

Notes

1. Annan 2003, see Foreword.
2. Blundell-Wignall and Roulet 2017.
3. International Finance Corporation 2021, p. 2.
4. Transparency International n.d. The Corruption Perceptions Index has given Laos a score of 30 out of 100, and ranks it as 128 out of 180 countries in its 2021 corruption rankings.
5. Moustafa 2021. See also US Department of State 2021 Investment Climate Statements: Laos. See however, Llamzon 2014, p. 7.
6. Cited in *Lao Holdings N.V. v The Lao People's Democratic Republic* ICSID Case No. ARB(AF)/12/6 (Award dated 6 August 2019) (*LHNV* Award) at footnote 4; *Sanum Investments Limited v the Government of the Lao People's Democratic Republic* PCA Case No. 2013-13 (Award dated 6 August 2019) (*Sanum* Award) at footnote 4.
7. *LHNV* Award at [1]-[2]; *Sanum* Award at [1]-[2].
8. Signed on 16 May 2003, in force since 1 May 2005.
9. Signed on 31 January 1993, in force since 1 June 1993.
10. *LHNV* Award at [68]; *Sanum* Award at [66].
11. Section 34 of the Settlement Deed reads: '34. In the event that the arbitration is revived pursuant to clause 32 above, neither the Claimants nor Laos shall not be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings'.
12. *LHNV* Award at [26]; *Sanum* Award at [69].
13. *LHNV* Award at [26].
14. *LHNV* Award at [10].
15. The PCA proceedings were revived by a decision of the Singapore Court of Appeal dated 29 September 2016: see *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] 5 SLR 536; [2016] SGCA 57.
16. *LHNV* Award at [73]; *Sanum* Award at [71].
17. *Sanum* Award at [73].
18. *LHNV* Award at [75].
19. *LHNV* Award at [88]; *Sanum* Award at [90]; see also *Sanum* Award at [87] and *LHNV* Award at [89]: 'As the Tribunal understands it, the present submission of the Respondent to dismiss all claims on grounds of illegality is not an objection to the Tribunal's jurisdiction, but an affirmation of the Tribunal's jurisdiction to consider the claims on their merits which, the Government says, ought to be dismissed because of the Claimants' illegal conduct.'.
20. *LHNV* Award at [93]; *Sanum* Award at [91].
21. *LHNV* Award at [94]; *Sanum* Award at [92].
22. The following claims by Laos were subsequently abandoned: (i) paying unspecified amounts of bribes to Government officials stationed at Savan Vegas to turn a blind eye to unlawful gambling by Lao citizens; (ii) paying unspecified amounts of bribes to Thai border officials to facilitate Thai gamblers crossing into Laos to gamble and return unhindered with their winnings; and (iii) engaging in money laundering and embezzling funds from Savan Vegas using falsified loans: See *LHNV* Award at [94]; *Sanum* Award at [92].
23. *LHNV* Award at [95]; *Sanum* Award at [93].
24. *LHNV* Award at [98]; *Sanum* Award at [96].
25. *LHNV* Award at [98]–[99]; *Sanum* Award at [96]–[97].
26. *LHNV* Award at [102]; *Sanum* Award at [100].
27. *LHNV* Award at [102]; *Sanum* Award at [100].
28. *LHNV* Award at [103]; *Sanum* Award at [101].
29. *LHNV* Award at [103]; *Sanum* Award at [101].
30. *LHNV* Award at [104]; *Sanum* Award at [102].
31. *LHNV* Award at [82], [83], [87]; *Sanum* Award at [80], [81], [85].
32. *LHNV* Award at [87]; *Sanum* Award at [85].

33. *LHNV* Award at [87], [97]; *Sanum* Award at [85], [95].
34. *LHNV* Award at [82]; *Sanum* Award at [80].
35. *LHNV* Award at [83]; *Sanum* Award at [81].
36. *LHNV* Award at [105]; *Sanum* Award at [103], citing Article 16(1) of the UN Convention Against Corruption and Article 1(1) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
37. *LHNV* Award at [102]; *Sanum* Award at [100].
38. *LHNV* Award at [106]; *Sanum* Award at [104].
39. See generally Caprasse and Tecqmenne 2022.
40. *LHNV* Award at [107]; *Sanum* Award at [105].
41. *LHNV* Award at [107]; *Sanum* Award at [105].
42. *Metal-Tech Ltd. v. Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, 4 October 2013 (*Metal-Tech* Award) at [293].
43. *LHNV* Award at [105]; *Sanum* Award at [103].
44. *LHNV* Award at [108]; *Sanum* Award at [106], citing *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Award dated 22 June 2010) at [424].
45. *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* ICSID Case No ARB/05/15, (Award dated 1 June 2009) (*Waguih Elie v. Egypt* Award).
46. *Waguih Elie v Egypt* Award at [326].
47. *LHNV* Award at [110]; *Sanum* Award at [108].
48. *LHNV* Award at [109]-[110]; *Sanum* Award at [107]-[108].
49. *LHNV* Award at [110]; *Sanum* Award at [108].
50. *LHNV* Award at [111]; *Sanum* Award at [109].
51. Caprasse and Tecqmenne (2022), p. 543.
52. *LHNV* Award at [113]; *Sanum* Award at [111].
53. *LHNV* Award at [123]; *Sanum* Award at [122].
54. *LHNV* Award at [124]; *Sanum* Award at [123].
55. *LHNV* Award at [124]; *Sanum* Award at [123].
56. *LHNV* Award at [127]; *Sanum* Award at [126].
57. *LHNV* Award at [129]–[130]; *Sanum* Award at [128]–[129].
58. *LHNV* Award at [131], [133]; *Sanum* Award at [130], [132].
59. *LHNV* Award at [134]; *Sanum* Award at [133].
60. *LHNV* Award at [137]–[138]; *Sanum* Award at [136]–[137].
61. *LHNV* Award at [139]; *Sanum* Award at [138].
62. *LHNV* Award at [148]; *Sanum* Award at [147].
63. *LHNV* Award at [148]; *Sanum* Award at [147].
64. *LHNV* Award at [149]–[151]; *Sanum* Award at [148]–[150].
65. *LHNV* Award at [154]; *Sanum* Award at [153].
66. Nothing in the Awards appear to show that the Tribunals considered the ‘clear and compelling evidence’ standard was any different to ‘clear and convincing evidence’. We assume for the purposes of this chapter that the Tribunals treated these two standards as one and the same. See Caprasse and Tecqmenne 2022, pp. 529, 533–541, 543.
67. See Chapter 7 in this volume.
68. *LHNV* Award at [170]; *Sanum* Award at [169].
69. *LHNV* Award at [171]; *Sanum* Award at [170].
70. *LHNV* Award at [238].
71. *LHNV* Award at [239].
72. *LHNV* Award at [260].
73. *LHNV* Award at [265].
74. *LHNV* Award at [265]–[269].
75. *LHNV* Award at [106]; *Sanum* Award at [104].
76. *LHNV* Award at [127]; *Sanum* Award at [126].
77. *LHNV* Award at [139]; *Sanum* Award at [138].

78. *LHNV* Award at [148]; *Sanum* Award at [147].
79. *LHNV* Award at [157]; *Sanum* Award at [156].
80. *LHNV* Award at [157]; *Sanum* Award at [156].
81. *LHNV* Award at [233]; *Sanum* Award at [171].
82. *LHNV* Award at [235]; *Sanum* Award at [173].
83. *LHNV* Award at [236]; *Sanum* Award at [174].
84. *LHNV* Award at [237]; *Sanum* Award at [175].
85. *LHNV* Award at [239]; *Sanum* Award at [177].
86. See Weeramantry and Packer (2023), citing *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 183 (endorsing the balance of probabilities standard, but stating that '*it will where necessary adopt a more nuanced approach and will decide in each discrete instance*' whether the allegation had '*been proved on the basis of the entire body of direct and indirect evidence before it*.'); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 244 (finding that the standard of proof was the 'balance of probabilities' but that a tribunal must '*tak[e] into account that more persuasive evidence is required for implausible facts*'); and *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 124 (not taking a position on the standard of proof but stating that it would approach the issues on the basis that the claimant had to show its assertions were '*more likely than not to be true'*).
87. See Weeramantry and Packer (2023), citing *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 492 (evidence must be 'clear and convincing'); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 479 ('*evidence must be clear and convincing*'); *Oostergetel v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 303 ('*Mere insinuations cannot meet the burden of proof [for allegations of corruption]*'); and *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009, paras 325–326 ('*The Tribunal accepts the Claimants' submission [of a standard of clear and convincing evidence]. It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof*'). See also *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014, para. 163 (evidence must be 'concrete and decisive').
88. Llamzon 2014; Caprasse and Tecqmenne 2022, p. 540.
89. *Metal-Tech* Award at [243]. This finding in *Metal-Tech* was endorsed by *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), 10 November 2017, paras. 304–306, which held that a finding of corruption gives rise to 'serious consequences' and therefore must be mased on 'solid evidence'.
90. *Metal-Tech* Award at [293].
91. See e.g. *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"),* ICSID Case No. ARB/10/18, Award, 25 February 2019.
92. *Metal-Tech* Award at [199]–[226].
93. *LHNV* Award at [107]; *Sanum* Award at [105]: summarising Laos's argument, 'if corruption is to be combatted effectively, it is necessary to rely on inferences from circumstantial evidence. A reasonable approach is to identify "red flags" which, if established, require the alleged perpetrators to provide an exculpatory explanation of otherwise suspicious conduct.').
94. *LHNV* Award at [106]; *Sanum* Award at [104].
95. *LHNV* Award at [112]; *Sanum* Award at [111].
96. *Wena Hotels Ltd. v. Arap Republic of Egypt* Case No. ARB/98/4 (Award dated 8 December 2000) at [116].
97. Reid and Zamour 2022, at III.B(i).

98. Chapter 15 in this volume notes that there are difficulties in investigating complex allegations of corruption, especially for developing economies. Tribunals may consider adopting a higher standard of proof, although this may mean lengthier arbitral proceedings.
99. For example in *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009, the claimant-investor alleged corruption against principals of the state. There, the investor alleged that public officers—purportedly on behalf of the Prime Minister—solicited or extorted bribes of USD2.5 million from investors to extend the investment agreement. EDF argued that all of the acts of certain government-controlled agencies of Romania were allegedly part of 'an orchestrated action to take the investor's investment in retaliation for his refusal to pay bribes' and were thus attributable to the state. The Tribunal found 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. See [221]–[237]. The Tribunal concluded that the claimant had not discharged its burden of proof with respect to its allegation of bribery solicitation by the state, and therefore no FET violation can be held by the Tribunal to be present as to the allegation that a bribe was solicited to extend the agreement.
100. See e.g., *Metal-Tech* Award at [325]–[326].
101. See e.g., *Metal-Tech* Award at [389].
102. Llamzon 2014, p. 12.
103. *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award, 27 December 2016. The Award has not been made public. Summaries of this award have been published in Djanic 2017 and Peterson and Djanic 2017.
104. Moustafa 2021; see also U.S. Department of State 2021. See however, Llamzon 2014, p. 7.
105. International Finance Corporation 2021.
106. Vongphachanh 2022a.
107. World Bank Group 2020, at p. 16.
108. Llamzon 2014, p. 25; see also e.g., Alesina and Weder 2002.
109. Pieth 2021 at p. 8.
110. US Department of State (2021) Investment Climate Statements: Laos.
111. UNODC Regional Office for Southeast Asia and the Pacific 2021.
112. UNODC Regional Office for Southeast Asia and the Pacific 2022.
113. Vongphachanh 2022a.
114. Vongphachanh 2022b.
115. See e.g., Transparency International and UNCAC Coalition (2014), *Using the UN Convention against Corruption to Advance Anti-corruption Efforts: A Guide.*
116. See e.g., Article 10 of the Japan–Lao People's Democratic Republic BIT (2008): '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'. If such a provision were present in the applicable investment treaties in the BIT Proceedings, the Tribunals could potentially have relied on the obligation to prevent and combat corruption to strengthen its view that Laos must bear some consequences for failing to investigate corruption by its officials.
117. https://www.transparency.org/en/countries/laos
118. *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic*, PCA Case No 2010–5, Award dated 19 September 2013 (*ECE Projektmanagement*).
119. *ECE Projektmanagement* at [4.879].
120. *LHNV Award* at [109]; *Sanum* Award at [107].
121. *LHNV* Award at [106]; *Sanum* Award at [104].
122. *LHNV* Award at [278].
123. *LHNV* Award at [279]–[280].
124. *LHNV* Award at [280].
125. *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228; [2021] SGHC(I) 10 (*LHNV* SICC (HC)) at [25]–[26].

126. *LHNV* SICC (HC) at [363].
127. *LHNV* SICC (HC) at [25].
128. *LHNV* SICC (HC) at [24], [54].
129. *LHNV* SICC (HC) at [58].
130. PCA Procedural Order 9; ICSID Procedural Order 11.
131. PCA Procedural Order 12; ICSID Procedural Order 14.
132. PCA Procedural Order 13; ICSID Procedural Order 15.
133. *LHNV* SICC (HC) at [68].
134. *LHNV* SICC (HC) at [71].
135. *LHNV* SICC (HC) at [104].
136. *LHNV* SICC (HC) at [104].
137. *LHNV* SICC (HC) at [130].
138. *LHNV* SICC (HC) at [142]–[143].
139. *LHNV* SICC (HC) at [153].
140. *LHNV* SICC (HC) at [73]–[77], [182]–[184], [200].
141. *LHNV* SICC (HC) at [205]–[234].
142. *LHNV* SICC (HC) at [93]–[94].
143. *Lao Holdings NV v. Government of the Lao People's Democratic Republic and another matter* [2023] 1 SLR 55; [2022] SGCA(I) 9 (*LHNV* SICC (CA)) at [102].
144. *LHNV* SICC (CA) at [112].
145. *LHNV* SICC (CA) at [111].
146. *LHNV* SICC (CA) at [139].
147. *LHNV* SICC (CA) at [158]–[159].
148. *LHNV* SICC (CA) at [156]–[160].
149. *LHNV* SICC (HC) at [126]–[130], [144].
150. *LHNV* SICC (HC) at [153].
151. On its own motion, or voluntarily.
152. See Hwang and Lim 2012, pp. 14–16.

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Romesh Weeramantry is a Special Counsel in the International Arbitration and Dispute Resolution practice of Clifford Chance. He specialises in public international law and investment treaty claims. His publications include *International Commercial Arbitration: An Asia–Pacific Perspective* (Kluwer 2023); *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (2nd edition, Sweet & Maxwell 2015, General Editor) and *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012). He is Global Fellow at the National University of Singapore Centre for International Law; a Senior Fellow at the University of Melbourne Law School; a General Editor of the *Asian Dispute Review*, a member of the Editorial Board of the *ICSID Review*; and was a member of the IBA Sub-Committee on Investment Treaty Arbitration.

Uma Sharma is a dual-qualified (England & Wales, and Singapore) Global Disputes associate at Jones Day in Singapore. With experience at all levels of the Singapore Courts, Uma's practice focusses on complex cross-border disputes and commercial arbitration. Uma was a Teaching Assistant and facilitator for the Advanced Practicum in International Arbitration module at the

National University of Singapore for three consecutive years. Prior to joining private practice, Uma was a legal intern with the International Centre for Settlement of Investment Disputes in Washington DC and worked at the Centre for International Law in Singapore.

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Chapter 13
Corruption and Illegality in Asian Investment Arbitration: The Philippines

Thomas Elliot A. Mondez and Jocelyn P. Cruz

Abstract Corruption is deeply rooted in Philippine culture. Much legislation was passed to strengthen the country's legal frameworks to prosecute corruption cases. However, the abundant local anti-corruption laws have yet to produce the desired results. For most of the latter half of the twentieth century, the Philippines relied on protectionist policies conducive to corruption to shelter its domestic economy from the burgeoning highly competitive international markets. The succeeding adoption of trade liberalization policies enabled the country to attract foreign investments to bolster its economy. Unfortunately, it also exposed investors to the pitfalls of local corruption. The country's first major investment dispute involving its main international airport was not a pleasant experience. The Philippines is no longer in a bubble. As an active member of the international community, it must adjust its law enforcement efforts, legal systems, treaty practice and business culture to match global anti-corruption standards.

13.1 Introduction: Socio-Legal Development and Corruption

The international community acknowledges international investment as an integral tool for promoting developmental goals and greater economic integration.[1] The massive global destruction caused by World War II prompted the leaders of the international community to create a blueprint for a post-war economic order. The Bretton

T. E. A. Mondez (✉)
Ramon V Del Rosario College of Business, De La Salle University, Manila, Philippines
e-mail: thomas.mondez@dlsu.edu.ph
URL: https://www.linkedin.com/in/elliot-mondez-518271128/?originalSubdomain=ph

J. P. Cruz
Ramon V Del Rosario College of Business, De La Salle University, Manila, Philippines
e-mail: jocelyn.cruz@dlsu.edu.ph
URL: https://www.linkedin.com/in/jocelyn-cruz-4b119719a/?trk=public_profile_browsemap_profile-result-card_result-card_full-click&originalSubdomain=ph

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Woods system established the International Bank for Reconstruction and Development (now the World Bank) and the International Monetary Fund. These institutions promoted international investment, trade liberalization and rapid economic growth.[2]

However, the Bretton Woods system failed to account for the preference of developing countries to adopt import-substitution policies.[3] For instance, the Philippines adopted an Import Substitution Industrialization strategy after it gained independence from the United States (US). Piecemeal trade liberalization was only initiated in the 1980s. A more comprehensive effort to open the economy to foreign trade only materialized in the 1990s.[4] To address the insufficiency of the Bretton Woods system, Bilateral Investment Treaties (BITs) and then Free Trade Agreement investment chapters were used to establish legal frameworks to protect foreign investments by imposing obligations on host states to provide adequate protection to foreign investors.[5] BITs usually stipulate an investor–state dispute settlement (ISDS) clause which allows foreign investors to address purported violations of investment agreements via international investment arbitration. The proceedings may be governed by the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), or (much more rarely) other agreed arbitral bodies.[6]

BITs therefore create binding legal frameworks that establish stability in international investment. It is a mutually beneficial system for both investors and the host states, as access to arbitration reduces business costs and encourages foreign investment.[7] Nevertheless, BITs must also account for the existing local legal systems of the host state, as well as the socio-political and economic realities of its government. The global fight against corruption necessarily involves the municipal laws of the states. Questions of jurisdiction arise when these laws are invoked in the prosecution of erring officials, which may undermine the arbitration proceedings between a state and an investor.

The wider context of corruption prosecutions and the involvement of private parties in corrupt practices concerning state agents muddle the arbitral proceedings on international investment arbitration. Corruption is used as a defense against claims raised in arbitral proceedings. A state may assert the presence of corruption to establish the inadmissibility of the claim or even the lack of jurisdiction of an arbitral tribunal. It may also raise corruption as a ground to void a contract.[8] An arbitral tribunal must thus make a tough decision—whether to refer the matter to local civil courts or to adjudicate on the issues raised.[9] Either way, the arbitral tribunal will solicit criticism since it may either be accused of eagerly abandoning its mandate by declaring lack of jurisdiction or be denounced for taking cognizance of a matter which is best left to be adjudicated by the courts of a sovereign state.

The history of the Philippines is replete with corruption issues. After more than three decades of Spanish colonial rule, the First Philippine Republic, also known as the Malolos Republic, was inaugurated in the Province of Bulacan in 1899, making it the first constitutional republic in Asia.[10] However, the Philippine Revolution coincided with the Spanish–American War. The Philippines was ceded by Spain to the US by virtue of the Treaty of Paris of 1898. The Americans took over the Spanish

regime and defeated the Filipino revolutionary forces in the Philippine–American War. The US only recognized the independence of the Philippines in 1946.[11]

The civil and criminal codes of the Philippines are respectively based on the Spanish Civil Code and the 1850 Penal Code of Spain, as amended by the Codigo Penal Reformado de 1870.[12] The civil law system of Spain was retained by the Philippines despite the introduction of American legal concepts. The Philippine Judiciary was organized during the American period and the 1935 Constitution, which was in effect when the Philippines was granted independence by the US, was largely inspired by the US Constitution. Post-war Philippines was therefore the product of two worlds. On the one hand, its system of government was installed by the US, the primary champion of the post-war Bretton Woods economic system. On the other hand, the Philippines was a developing country which had to fend off stiff economic competition from industrialized and fellow developing nations. This led to the Import Substitution Industrialization strategy and protectionist policies of the Philippines in the decades following World War II.

The prioritization of domestic trade led to the economic and political stranglehold of wealthy oligarchs, which resulted in tolerated (and, in some instances, encouraged) corrupt practices. The regime of former President Ferdinand E. Marcos, Sr. saw the rise of cronies, close friends of the ruling family who allegedly gained preferential access to government contracts and joint ventures with foreign investors.[13] The patrimonial polity of the Philippines was centralized, creating a climate that fostered state monopolies and subcontracting of important sectors of the economy to political allies.[14] The Philippines eventually opened its doors to greater foreign trade under the administrations of the leaders who succeeded President Marcos, Sr. In fact, incumbent President Ferdinand R. Marcos, Jr., the son of the former President, is known for actively engaging foreign investors. However, the oligarchy continues to rule the country regardless of whoever is in power.

The type of corruption in the Philippines is described as an 'oligarch-and-clan' system, which is often seen in countries with recent major liberalization efforts, but with weak economic institutions and insufficient state capacity to handle the new markets.[15] This form of corruption is characterized by disorderly or even violent attempts by competing oligarchs to amass wealth and power by capitalizing on various illegitimate assets such as organized crime and access to bureaucratic and judicial connections.[16] The country is ruled by around 80 families which have converted certain segments of the state into their own fiefdoms.[17] New political families who recently earned the patronage of influential national leaders have also joined this elite circle.

The relatively low salaries of civil servants in the Philippines also cultivate a culture of corruption. These salaries are standardized by periodic laws passed by Congress. Unfortunately, the pace of adjustment of public sector salaries could not match inflation and the changing economic conditions of the country.[18] Civil servants are forced to engage in corrupt practices due to their low salaries, especially government employees with low salary grades. While recent standardization laws have increased the salaries of high-ranking officials to respectable amounts, junior civil servants still earn very little compared to their superiors. The lowest Salary Grade

(SG 1) has a monthly compensation of PHP13,000 (USD235), while the highest official (the President, SG 33) is paid PHP419,144.00 (USD7,571.12).[19] The salary of civil servants with the lowest pay grade is just 3.1% of the salary of the country's top official.

The low compensation of civil servants is one of the root causes of corruption. Low-income earners resort to petty corrupt practices to augment their income.[20] Bureaucratic red tape also fosters corrupt behavior. Intermediaries known as fixers offer their services for a fee to hasten transactions and falsify or alter official documents.[21] Patronage politics is also a huge part of Filipino culture. Parents usually choose rich and powerful people to act as godparents to their children. In turn, the godparents are expected to act as intermediaries in government or private sector transactions.[22] The *padrino* system also encourages people to establish close ties with influential leaders in both the public and private sectors to secure promotions and favorable business deals.

In 2022, the Philippines was ranked 116 among 180 countries surveyed by Transparency International for its Corruption Perceptions Index (CPI). It has a score of 33, with 100 being very clean and zero being highly corrupt. The score of the country is below the average global grade of 43.[23] Among Association of Southeast Asian Nations (ASEAN) members, the Philippines is only ahead of Cambodia, Laos and Myanmar in terms of CPI.[24]

Transparency International published its Global Corruption Barometer Asia 2020 based on surveys involving 20,000 respondents in various Asian countries.[25] Data from the Philippines show that 86% of the respondents believe that government corruption is a big problem, 19% paid a bribe to access public services within 12 months of the survey, 22% used personal connections for public services within the same period, 28% were offered bribes in exchange for votes, and 9% experienced or knows someone who experienced sextortion.[26] Survey respondents from the Philippines found that most or all people in the following institutions are corrupt: local government unit (LGU) officials (19%), government officials (18%), business executives (17%), police officers (13%), and members of Congress (12%). Nine percent of the respondents found that members of the Philippine Judiciary, religious leaders, and non-governmental organizations (NGO) are corrupt. Some respondents also view army leaders (8%), the President (7%), and bankers (3%) as corrupt.[27] Statistics from the Office of the Ombudsman are in line with the Transparency International survey results.

In 2022, the majority of the cases filed against officials or employees of government agencies were from LGUs (1729). Agencies under the national government in general, excluding Congress and the Philippine National Police (PNP), accounted for 692 total cases. This is followed by the PNP (173) and the House of Representatives (48). The Office of the Ombudsman posted a 27% conviction rate in 2022.[28]

Corruption in the Philippines not only permeates due to economic conditions and poor law enforcement; it is deeply entrenched in local society due to long-established cultural factors. Policymakers and legislators have therefore created a government structure with strong checks and balances and passed numerous laws to curb corruption.

13.2 Governance and Anti-Corruption Legal Frameworks

13.2.1 Structure of the Philippine Government

The current government of the country is considered the Fifth Republic of the Philippines. After the ouster of President Marcos, Sr. in 1986, a Philippine Constitutional Commission was formed to draft a new constitution. The 1987 Constitution, which was ratified on February 2, 1987, is the fundamental law of the Fifth Republic.

Taking stock of the experience of the country during the martial law regime, the framers of the 1987 Constitution designed a system of checks and balances to forestall potential abuse by the sitting President.[29] The Constitution provides that the Philippines is both a democratic and a republican state. In a democracy, the people directly run the government via majority rule.[30] Republicanism is present in a representative type of government in which the ultimate source of authority is the popular sovereign will of enfranchised citizens.[31] The framers of the Constitution deliberately added the word ‘democratic’ as a redundancy to ‘republican’ to emphasize the role of the people in government.[32] One of the manifestations of direct participation is the system of recall for erring elected officials.[33]

The Philippine government has a tripartite separation of powers: the Executive branch is headed by the President, the Legislature is composed of a bicameral Congress (Senate and House of Representatives), and the Judiciary is led by the Chief Justice of the Supreme Court. The distribution of powers in democratic governments ensures that no single branch may dominate another.[34] It is necessary to have three co-equal branches to prevent a tyrannical or arbitrary government from taking power.[35]

The Constitution also created three independent constitutional commissions: the Civil Service Commission (CSC), the Commission on Elections (COMELEC) and the Commission on Audit (COA). The independent constitutional commissions are not under the control of the President despite having functions which are executive in nature.[36] The independent constitutional commissions are also granted fiscal autonomy.[37] Fiscal autonomy allows the concerned government agencies to work with financial certainty since their operating budgets are protected from the political whims and caprices of the organs they review or regulate. It is noteworthy that the framers of the Constitution gave fiscal autonomy to the three independent constitutional commissions, the Judiciary and the Ombudsman. These are the frontline agencies engaged in monitoring, auditing, prosecuting and adjudicating cases involving corruption.

The Office of the Ombudsman is a constitutional body tasked by the Constitution to act as protector of the people. The Ombudsman and his or her deputies are mandated to promptly act on complaints filed against public officials or employees.[38] The Office of the Ombudsman has the power to investigate, motu proprio, or acting on a complaint, any government office, including its officials and employees, concerning acts or omissions that appear illegal, unjust, improper, or inefficient. It may direct the concerned office or individuals to refrain from committing certain acts or to perform

or expedite its legal duties. The Office of the Ombudsman may also recommend imposing disciplinary sanctions and initiating criminal prosecution against erring government officials and employees. For this purpose, it may request the disclosure of relevant information from concerned government agencies.

As the primary government agency tasked to protect the people from possible government abuse, the Office of the Ombudsman is empowered to lead inter-agency efforts to eliminate corruption and red tape in the bureaucracy.[39]

The 1973 Constitution also tasked the Batasang Pambansa, then the unicameral Legislative branch of the national government, to create the Sandiganbayan, a special court with jurisdiction over criminal and civil cases involving graft and corrupt practices.[40] President Marcos, Sr, exercising legislative powers by virtue of a constitutional amendment which gave him powers to legislate until martial law was lifted, issued Presidential Decree No. 1486 which officially became the organic law of the Sandiganbayan.[41] The Sandiganbayan is one of the three third-level appellate courts of the Philippines, the other two being the Court of Appeals (general jurisdiction) and the Court of Tax Appeals (special tax court).

The LGUs of the Philippines are based on territorial and political subdivisions, classified as provinces, cities, municipalities and barangays (small administrative units also called barrios). Bangsamoro is an autonomous region in the predominantly Muslim areas of Mindanao. Apart from Muslim Mindanao, the Constitution also allows for the creation of an autonomous region in the Cordilleras in the northern part of Luzon, the main island of the Philippine archipelago.[42]

13.2.2 Local Laws on Corruption

The Constitution provides that it is the policy of the state to maintain honesty and integrity in the public service and take positive and effective measures against graft and corruption.[43] It also states that public office is considered a public trust. As such, public officers and all members of the civil service are accountable to the people.[44] The President, Vice President, members of the Supreme Court, members of the Constitutional Commissions and the Ombudsman are impeachable officials. The grounds for impeachment include graft and corruption, bribery, treason, culpable violation of the Constitution, betrayal of public trust and other high crimes.[45] An impeachment proceeding may be initiated by any member of the House of Representatives, or by any citizen upon the endorsement of any member of the said Chamber. Support of at least one-third of all the members of the House is necessary before the articles of impeachment are transmitted to the Senate, where trial shall forthwith proceed. Two-thirds of all the members of the Senate is necessary to secure a conviction.[46]

Crimes committed by public officers are considered felonies under the Revised Penal Code (RPC).[47] A public officer is defined as any person who, by direct provision of law, election, or appointment by a competent authority, takes part in the performance of the public functions of the Philippine government, or shall perform

public duties in the government as an employee, agent, or subordinate official of any rank or class.[48] Public officers involved in the justice system such as magistrates,[49] prosecutors, police officers,[50] and lawyers may be prosecuted under the RPC for anomalies in the performance of their official duties.[51]

The RPC also holds liable public officers who directly[52] or indirectly receive bribes,[53] commit fraud in public transactions, or become interested in any government contract or business wherein they have a legal duty to intervene by reason of the official functions.[54] Private citizens involved in bribery[55] or who take advantage of the financial affairs of their clients or wards by virtue of the professional or legal relationship may also be prosecuted.[56] Both public officers and private citizens may be prosecuted for malversation of public funds.[57]

Republic Act No. 1379 provides that ill-gotten wealth shall be declared forfeited in favor of the state if public officials or employees fail to prove in a court of law that the concerned properties alleged to be the fruits of wrongdoing were acquired via legitimate means.[58]

Aside from the felonies relating to public officers in the RPC, Republic Act No. 3019 or the Anti-Graft and Corrupt Practices Act specifically defines corrupt practices which are relevant to foreign investment. The said law prohibits directly or indirectly requesting or receiving any pecuniary or other form of benefit in connection with a public officer's intervention in a government transaction. Government officials are also prohibited from influencing other public officers to intervene in government transactions. Public officers and their family members are not allowed to gain employment in a private enterprise that has pending official business with their respective government offices. Moreover, public officers are not allowed to have financial interest over the transactions that they process in their official capacities.

It is also noteworthy that Republic Act No. 3019 penalizes a government official who enters, on behalf of the government, into any contract that is manifestly and grossly disadvantageous to the Republic. Giving unfair preference or advantage to any party to a government transaction is also prohibited.[59]

Republic Act No. 3019 also holds liable the private individuals who are involved in the acts described above. Furthermore, it is illegal to exploit family or close personal ties with public officials to gain favor in government dealings. The spouse and relatives by consanguinity or affinity up to the third civil degree are considered family. Close personal relations include social and fraternal connections, close personal friendships and professional employment.[60] Family members of top government officials are also prohibited from exerting influence in government appointments and transactions.[61] Members of Congress who author a law or resolution which favors a business enterprise are not allowed to receive any pecuniary interest during the term for which they were elected. Public officers who lobby for a law or resolution which benefits certain businesses are likewise prohibited from receiving pecuniary interest.[62]

Public officers are obliged to file their Statement of Assets, Liabilities and Net Worth (SALN) upon assumption of office, every year while employed by the government, and upon leaving office.[63] The regular filing of SALNs is important since Republic Act No. 3019 considers property and money manifestly out of proportion

to a public servant's salary and other lawful income as prima facie evidence of unexplained wealth, which is a ground for dismissal from office.[64] The filing of SALNs, and what must be specifically reported therein, remains a controversial issue in the Philippines. Two Chief Justices were removed from office, one via impeachment for allegedly failing to declare certain assets in his SALN and the other by the Supreme Court in a quo warranto case for failing to submit SALNs for certain years while in office.

Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees also mandates all public officials and employees to regularly file their SALNs.[65] The said law declares it a state policy that public officials and employees should lead modest lives appropriate to their positions and income. They must refrain from extravagant and ostentatious displays of wealth.[66] Republic Act No. 6713 directs all public officials and employees to avoid conflicts of interest. Should a conflict of interest arise, they must resign from their position in the private enterprise involved within 30 days from assumption of office and/or divest themselves of shareholdings or interest within 60 days from assumption.[67]

The crime of plunder is defined under Republic Act No. 7080, as amended.[68] A public officer who acquires ill-gotten wealth in an aggregate amount of at least PHP50,000,000 (USD905,068), either alone or in connivance with other people, is guilty of the crime of plunder which is punishable by reclusion perpetua. The cohorts of a person convicted of plunder shall likewise suffer the same penalty.[69]

Republic Act No. 9160 or the Anti-Money Laundering Act of 2001 declares it a state policy to protect and preserve the integrity and confidentiality of bank accounts and to ensure that the country is not used as a site for money laundering for the proceeds of unlawful activities.[70] The said law considers acts and omissions punished by the RPC, Republic Act No. 3019 and Republic Act No. 7080, among others, as unlawful activities.[71]

Public procurement is governed by Republic Act No. 9184 or the Government Procurement Reform Act.[72] This penalizes public officers for committing acts in violation of the public bidding process. Moreover, private individuals who rig the bidding process by creating an appearance of competition or by suppressing competition, submitting fabricated documents, providing false information, using the name of another to participate in a bid, or withdrawing a bid or refusing to accept an award without just cause after qualifying as the lowest bidder may face criminal prosecution.[73]

Republic Act No. 9485 or the Ease of Doing Business and Efficient Government Service Delivery Act of 2018, as amended,[74] addresses red tape and delays in government processes. The said law enforces a zero-contact policy, which prohibits government officials and employees to have any contact with any applicant or requesting party concerning an application or request, except during the preliminary assessment of the request and the evaluation of the sufficiency of the submitted requirements. Web-based business registration systems should be used to transact business and to avoid personal contact, thus eliminating one of the avenues for corruption.[75] Concerned government officials and employees may also be charged for refusing

to accept applications with complete requirements, imposing additional requirements and costs apart from those published, failing to give an applicant or requesting party a written notice of disapproval, failing to render services within the prescribed processing time without due cause, failing or refusing to issue official receipts, or colliding with fixers.[76]

Republic Act No. 11232 or the Revised Corporation Code of the Philippines[77] safeguards against corrupt practices by corporations. It penalizes corporations which conduct their business through fraud, corporations which are used for fraud or to conceal graft and corrupt practices, corporations which appoint intermediaries who engage in graft and corrupt practices, and corporations whose directors, trustees or officers tolerate graft and corrupt practices.[78] Corporations are also prohibited to retaliate against whistleblowers, by means of interfering with their employment or livelihood, who provide truthful information on the commission or possible commission of violations of the said law.[79]

Apart from the Office of the Ombudsman and the courts of the Judiciary, there are also other government organs tasked to implement anti-corruption measures. President Corazon C. Aquino established the Presidential Commission on Good Government (PCGG) in 1986 as the primary body tasked to recover alleged ill-gotten wealth accumulated by the immediately preceding administration, investigate cases of graft and corruption and adopt anti-corruption safeguards.[80] President Rodrigo R. Duterte created the Presidential Anti-Corruption Commission (PACC) in 2017 to hear, investigate, receive, gather and evaluate evidence, intelligence reports and information in administrative cases against presidential appointees in the Executive branch occupying senior positions (SG 26 and above), including members of the governing board of Government Owned or Controlled Corporations (GOCCs).[81] President Ferdinand R. Marcos, Jr abolished the PACC in 2022 and transferred its jurisdiction, powers and functions to the Office of the Deputy Executive Secretary for Legal Affairs.[82]

The Supreme Court established the Judicial Integrity Board (JIB) and the Corruption Prevention and Investigation Office (CPIO) to promote integrity and curb corruption in the Judiciary.[83] The Revised Rules of Court classifies direct and indirect bribery, dishonesty, violations of the Anti-Graft & Corrupt Practices Act and other grave offences, as serious charges which, upon recommendation by the JIB to the Supreme Court, may lead to dismissal from service, forfeiture of benefits, disqualification from reinstatement or appointment to public office, suspension from office without pay, or a fine (Fig. 13.1).[84]

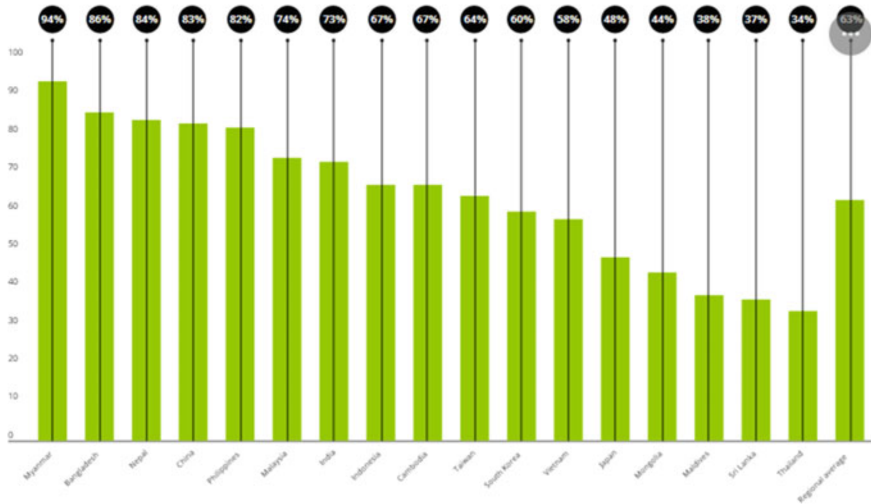

Fig. 13.1 Anti-Corruption Agency Approval Rating, by Country (%)

13.3 Treaty Obligations of the Philippines Related to Anti-Corruption Measures, Investment, and Arbitration

13.3.1 United Nations Convention Against Corruption

The United Nations Convention Against Corruption (UNCAC)[85] aims to strengthen measures against corruption, enhance international cooperation and technical assistance in combating corruption, and promote integrity, accountability and proper management of public affairs and public property.[86] The Philippines ratified the UNCAC on November 8, 2006,[87] which has an Implementing Review Mechanism (IRM) to monitor and assess the progress of the compliance of parties with the Convention. However, it has been observed that while state parties are obliged to pass local legislation to align with the Convention, the UNCAC lacks sufficient power to compel countries to actively enforce the anti-corruption laws.[88]

The first review cycle (2010–2015) reviewed Chapters III (criminalization and law enforcement) and IV (international cooperation) of the UNCAC, while the ongoing second review cycle (2016–2020, extended to 2024) covers Chapters II (preventive measures) and V (asset recovery).[89] The process includes two state parties which will conduct the review. The state party under review should also be involved in the review process.[90] Bangladesh and Egypt were the reviewing states for the first cycle review of the Philippines. The Philippine government created a Joint Technical Working Group (JTWG) headed by the Office of the President and the Office of

the Ombudsman, with representatives from the concerned government agencies, to facilitate the country's compliance with the UNCAC.

The first cycle review found that the Philippines employs laudable practices such as a witness protection program, a system of incentives and rewards under the Code of Conduct and Ethical Standards for Public Officials and Employees,[91] the Sandiganbayan's specialized jurisdiction over high-ranking public officials, and the full cooperation of local authorities with other states on matters concerning similar proceedings in foreign jurisdictions.[92] It was also reported that the Philippines has not refused requests for extradition or Mutual Legal Assistance (MLA).[93]

The report also found several challenges in the implementation of the UNCAC. It was recommended that the Philippines should harmonize the definition and coverage of 'public officials' and 'bribery' in local laws such as the RPC and Republic Act No. 3019 with the provisions of the UNCAC. The country may also consider legislation on private sector bribery, active and passive trading in influence, and the criminalization of the preparatory acts of corruption-related offences. The reviewing states also found that SALNs are not automatically reviewed unless a complaint is filed. Lack of inter-agency coordination and the limited resources of law enforcement and anti-corruption organs were also noted. The report stressed that the grant of executive clemency should not establish a culture of impunity.[94] The Philippines was also urged to enhance its extradition and MLA legal frameworks with other countries.[95]

13.3.2 Trade Agreements and Efforts of the Philippines to Harmonize Laws with International Standards

The United Nations Commission on International Trade Law (UNCITRAL) is mandated to promote harmonization and unification of laws concerning international trade. The Philippines had ratified/adopted UNCITRAL instruments such as the 1958 New York Convention, the UN Convention on the Use of Electronic Communications in International Contracts, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Cross-Border Insolvency.[96]

The New York Convention governs the recognition and enforcement of foreign arbitral awards. It promotes common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of non-domestic arbitral awards.[97] The UNCITRAL Model Law on International Commercial Arbitration is incorporated in Republic Act No. 9285 or the Alternative Dispute Resolution (ADR) Act of 2004.[98]

The Philippines was among the first signatories of the New York Convention. It acceded to the said Convention in 1967,[99] which was conceived in recognition of the importance of international arbitration as a means to settle commercial disputes. It is meant to provide common legislative standards for the recognition of agreements

resulting from international arbitration, as well as court recognition and enforcement of foreign non-domestic arbitral awards.[100]

The ADR Act provides that it is a state policy to actively promote party autonomy in dispute resolution. The Philippines encourages the use of ADR as a means to achieve speedy and impartial justice. The ADR Act applies the New York Convention to foreign arbitral awards. The recognition and enforcement of foreign arbitral awards are filed with the appropriate regional trial court in accordance with domestic rules of procedure. Applicants must establish that the country in which the foreign arbitration award was made is a party to the New York Convention.[101] For foreign arbitral awards not covered by the New York Convention, local courts may consider grounds of comity and reciprocity in deciding whether to recognize a nonconvention award.[102] Once confirmed as a foreign arbitration award, it shall be enforced as such and not as a judgment of a foreign court. A confirmed foreign arbitration award shall be enforced in the same manner as a final and executory decision of local courts.[103]

The ADR Act adopts the UNCITRAL model law as the governing mechanism covering international commercial arbitration.[104] Philippine courts are obliged to refer the parties to arbitration if the subject matter is covered by an arbitration agreement, provided that at least one party requests to bring the matter to arbitration not later than the pre-trial conference,[105] or upon the request of both parties thereafter. Local courts may only proceed without referring the matter to arbitration if the arbitration agreement is null and void, inoperative, or incapable of being performed.[106]

The Philippine Supreme Court also issued the Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules) to govern the procedural aspect of recognizing arbitral awards.[107] It specifically recognizes the New York Convention as the governing law on recognition and enforcement of foreign arbitral awards.[108] A local court is not allowed to set aside a foreign arbitral award. However, it may refuse to recognize and enforce the same based on the grounds stated in the Special ADR Rules.[109]

The Supreme Court also recognizes that when a party enters into a contract stipulating a foreign arbitration clause and submits itself to arbitration, it becomes bound by the contract, by the arbitration, and by the result of arbitration, conceding thereby the capacity of the other party to enter into the contract, participate in the arbitration, and cause the implementation of the result.[110]

It is also noteworthy that the Philippines is currently engaged in 32 active BITs and had signed 8 other agreements which are not in force.[111] It is also party to 16 treaties with investment provisions, most of which in its capacity as a member of ASEAN.[112] The Philippines had also adopted 22 investment related instruments, including the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[113]

13.4 The Ninoy Aquino International Airport's Terminal 3 PIATCO Disputes

The arbitration proceedings involving the construction of the Ninoy Aquino International Airport's (NAIA) Terminal 3 raised jurisdictional issues involving corruption. Prior to the arbitrations involving this terminal, the country was a respondent in SGS Société *Générale de Surveillance v. Republic of the Philippines*.[114] The Philippines advanced in the jurisdictional hearing of the ICSID arbitration that there was alleged fraud related to SGS inspection operations in China. However, this matter did not become material to the determination of the tribunal that it had jurisdiction over the dispute. Nevertheless, the arbitration proceedings were held in abeyance until the scope or extent of the obligation to pay off the Philippines was clarified by either agreement between the parties or by the Philippine courts, in accordance with the relevant provision of the Comprehensive Import Supervision Service Agreement. The award in *Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines* is not public,[115] while the ICSID case between Shell Philippines and the Republic involving the Malampaya deepwater gas-to-power project in the South China Sea/ West Philippine Sea is still ongoing. Hence, the NAIA Terminal 3 ICSID disputes are the only known investment treaty arbitration cases of the Philippines that clearly dealt with the issue of corruption.

13.4.1 Local Court Proceedings

In 1994, Asia's Emerging Dragon Corp. (AEDC) gave an unsolicited proposal to the Philippine government for the construction and development of the NAIA Terminal 3 project under a Build-Operate-and-Transfer (BOT) scheme. Thereafter, the government opened the bidding process to the public. Paircargo Consortium submitted a bid superior to AEDC's offer. While both companies offered to build the project for at least USD350 million at no cost to the government and to pay similar shares of the gross revenues during the concession period, Paircargo offered a higher guaranteed payment of PHP17.75 billion for 27 years compared to AEDC's offer of PHP135 million over the same period. Paircargo was later reorganized as Philippine International Air Terminals Co., Inc. (PIATCO).[116] Fraport AG Frankfurt Services Worldwide acquired a direct and indirect interest in PIATCO in 1999. By 2001, its direct and indirect ownership of PIATCO amounted to 61.44%.[117]

PIATCO was awarded a concession contract to build, operate and maintain the NAIA Terminal 3 for 25 years. It contracted Takenaka, a local branch of a Japanese corporation, for the construction of the project. It also engaged the services of Asahikosan, a Japanese corporation, for the design, manufacture, test and delivery of the plant (as defined in the Concession Agreement) in NAIA Terminal 3. PIATCO defaulted on its obligation to pay both corporations in 2002. Takenaka

and Asahikosan agreed to defer PIATCO's payment, provided that adequate security was given. On November 29, 2002, Takenaka and Asahikosan stated that it was suspending the construction of NAIA Terminal 3 due to PIATCO's failure to provide adequate security. On that date, President Gloria Macapagal Arroyo declared in a speech that the Philippines would not honor its contracts with PIATCO.[118]

In *Agan v. PIATCO*, the Supreme Court nullified the PIATCO contracts for the following reasons. Paircargo Consortium (before its incorporation in PIATCO) failed to meet the bid requirement on minimum equity; Security Bank (part of Paircargo Consortium) invested its entire net worth in a single undertaking or enterprise, in violation of Philippine banking law; and the PIATCO contracts were substantially modified compared to the draft concession agreement considered in the public bidding.[119] The Supreme Court also denied the motion for reconsideration filed by PIATCO. However, the Supreme Court stated that for the government to take over the NAIA Termina 3 facility, it had to compensate PIATCO in accordance with law and equity.[120]

On December 21, 2004, the Philippine government initiated expropriation proceedings over NAIA Terminal 3 before the Regional Trial Court (RTC), Branch 117, Pasay City. It deposited PHP3,002,125,000, the assessed value of NAIA Terminal 3, with the Land Bank of the Philippines. On even date, the RTC issued a writ of possession in favor of the Philippine government. However, it modified its decision on January 4, 2005 by directing the amount of USD62.3 million to be released to PIATCO, deductible from the just compensation, and prohibiting the Philippine government from maintaining and preserving NAIA Terminal 3, as well as to refrain from performing acts of ownership until the expropriation proceedings were terminated. The RTC, without consulting both the Philippine government and PIATCO, also appointed three commissioners to determine just compensation. The Republic sought for the inhibition of the RTC's presiding judge in view of the adverse rulings against the government. The presiding judge denied the motion for inhibition. Subsequently, Takenaka and Asahikosan informed the RTC that both corporations successfully sued PIATCO in two collection cases in London, England. Takenaka and Asahikosan moved for leave to intervene and to hold the release of PIATCO's just compensation in abeyance until the London awards were recognized. In the meantime, the Republic went directly to the Supreme Court to inhibit the presiding judge, nullify the order releasing USD62.3 million to PIATCO, and void the appointments of the Commissioners.[121]

In *Republic v. Gingoyon*, the Supreme Court ruled that:

(1) The 2004 Resolution in Agan sets the base requirement that has to be observed before the Government may take over the NAIA 3, that there must be payment to PIATCO of just compensation in accordance with law and equity. Any ruling in the present expropriation case must be conformable to the dictates of the Court as pronounced in the Agan cases.
(2) Rep. Act No. 8974 applies in this case, particularly insofar as it requires the immediate payment by the Government of at least the proffered value of

the NAIA 3 facilities to PIATCO and provides certain valuation standards or methods for the determination of just compensation.

(3) Applying Rep. Act No. 8974, the implementation of Writ of Possession in favor of the Government over NAIA 3 is held in abeyance until PIATCO is directly paid the amount of ₱3 Billion, representing the proffered value of NAIA 3 under Section 4(c) of the law.

(4) Applying Rep. Act No. 8974, the Government is authorized to start the implementation of the NAIA 3 Airport terminal project by performing the acts that are essential to the operation of the NAIA 3 as an international airport terminal upon the effectivity of the Writ of Possession, subject to the conditions above-stated. As prescribed by the Court, such authority encompasses "the repair, reconditioning and improvement of the complex, maintenance of the existing facilities and equipment, installation of new facilities and equipment, provision of services and facilities pertaining to the facilitation of air traffic and transport, and other services that are integral to a modern-day international airport."

(5) The RTC is mandated to complete its determination of the just compensation within sixty (60) days from finality of this Decision. In doing so, the RTC is obliged to comply with "law and equity" as ordained in Again and the standard set under Implementing Rules of Rep. Act No. 8974 which is the "replacement cost method" as the standard of valuation of structures and improvements.

(6) There was no grave abuse of discretion attending the RTC Order appointing the commissioners for the purpose of determining just compensation. The provisions on commissioners under Rule 67 shall apply insofar as they are not inconsistent with Rep. Act No. 8974, its Implementing Rules, or the rulings of the Court in Agan.

(7) The Government shall pay the just compensation fixed in the decision of the trial court to PIATCO immediately upon the finality of the said decision.

(8) There is no basis for the Court to direct the inhibition of Hon. Gingoyon.[122]

The Philippine government filed a motion for reconsideration which raised the issue of Takenaka and Asahikosan's claims. The Supreme Court denied the motion for reconsideration and ruled that Takenaka and Asahikosan's alleged liens were not judicially established.[123]

Thereafter, the Philippine government, PIATCO, Takenaka and Asahikosan, and the Board of Commissioners (BOC) arrived at different valuations for just compensation. The RTC ordered the Philippine government to pay USD116,348,641 as just compensation, which is way below the computations of PIATCO, Takenaka and Asahikosan, and the BOC. The RTC considered the failed structural elements of NAIA Terminal 3, inferior quality of materials, construction of areas which were deemed unnecessary, cost of gravity load and seismic structural retrofits for the failed structural elements, and other assessed costs. The amount of just compensation was modified by the Court of Appeals to USD371,426,688.24 (inclusive of interest).[124]

In *Republic v. Mupas*, the Supreme Court fixed the amount of just compensation to USD510,304,535.80 (inclusive of interest). It also held that PIATCO, not its subcontractors Takenaka and Asahikosan, was the proper party to receive just

compensation. The High Tribunal noted that PIATCO, as the property owner, was entitled to just compensation despite the liens of Takenaka and Asahikosan (which were the subject of a separate judicial proceeding).[125]

13.4.2 ICSID Disputes Involving the NAIA Terminal 3 PIATCO Case

There are two ICSID cases related to the local proceedings outlined above, entitled *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*. The first case (ICSID Case No. ARB/03/25)[126] was registered on October 9, 2003. The second case (ICSID Case No. ARB/11/12)[127] was subsequently registered on April 27, 2011.

The disputes involve Fraport AG Frankfurt Services Worldwide (Fraport, for brevity), a German company which invested in PIATCO both as a shareholder and lender. Fraport was enticed to invest in PIATCO after the Philippine government conferred concession rights to the latter for the construction and operation of NAIA Terminal 3. The Federal Republic of Germany and the Republic of the Philippines has an existing BIT treaty with ICSID arbitration provisions.

Fraport brought the case before the ICSID due to alleged breaches of the Philippine government of its obligations to Fraport. It claimed that the tribunal had jurisdiction since its substantial investment in the NAIA Terminal 3 project was made in accordance with the laws of the Philippines. Fraport also submitted that the Philippines never took legal action against the company despite knowing the manner in which its investment was structured.

The Philippine government questioned the jurisdiction of the tribunal since Fraport allegedly violated the foreign ownership and control laws of the Philippines, particularly the Anti-Dummy Law.[128] The Anti-Dummy Law is a criminal statute that penalizes the unlawful use, exploitation, or enjoyment of a right, franchise, privilege, property, or business which is reserved by the 1987 Philippine Constitution to Filipino citizens or to corporations or associations which are at least 60% Filipino-owned. It posited that the BIT between Germany and the Philippines was of limited nature. Only investments that fall within the limited scope defined therein could trigger the arbitration provisions. In addition, the investor could only avail itself of its rights and benefits under the BIT if it overcomes the burden of proof of compliance with the investment laws of the host state.

The Philippine government also alleged that PIATCO shareholders, including Fraport, engaged in fraud and corruption. Philippine officials were also involved in the purported illicit acts. It was noted that the Philippine Senate Blue Ribbon Committee conducted hearings on the alleged grossly anomalous agreement between the Philippine government and PIATCO. A high-ranking government official testified before the Committee that PIATCO's controlling shareholder purportedly took 'kickbacks' and received 'under-the-table' payments.[129] President Arroyo also declared

in a public engagement that the deal with PIATCO was a disreputable example of 'vested interest' in the Philippines.[130]

The tribunal found that Fraport had to secretly arrange for management and control of the NAIA Terminal 3 project in a way that did not conform to Philippine laws. Fraport used secret shareholder agreements to circumvent the Anti-Dummy Law.[131] It was also observed that while states can be estopped from raising violations of their own laws in rejecting jurisdiction when governments deliberately overlooked the violations, a covert arrangement which escapes the scrutiny of regulators cannot be used as a basis for estoppel.[132] The tribunal thus accepted the objection of the Philippines to the jurisdiction of the ICSID.

However, on December 23, 2010, an ad hoc Committee issued a Decision annulling the August 16, 2007 award in ICSID Case No. ARB/03/25. It held that Fraport was not afforded the right to be heard when the tribunal admitted and considered new evidence after the close of the proceedings, thus violating a fundamental rule of procedure.[133]

In the second ICSID dispute (ARB/11/12), Fraport submitted that it was subject to uncompensated and unlawful expropriation of its NAIA Terminal 3 investment. On the other hand, the Philippine government asserted again that the tribunal did not have jurisdiction under the BIT since Fraport violated Philippine laws on nationality restrictions. The Philippines also reiterated its allegations that Fraport had engaged in corruption.

It was held that Fraport had violated the Anti-Dummy Law, thus excluding its investment from the protection of the BIT due to illegality. The tribunal lacked jurisdiction since a state cannot be considered to have given its consent to arbitrate using ICSID dispute settlement mechanisms if the investments made were in violation of its own law.[134]

The Philippine government also raised corruption as a jurisdictional ground. It alleged that Fraport was engaged in illicit activities, such as: hiring a consultant to bribe government officials; overbilling the government as part of a kickback scheme that allowed PIATCO and its allies to profit; and engaging in money-laundering activities.[135] The Philippines particularly alleged that Fraport was aware of, and engaged in, corrupt and fraudulent activities when it made its initial investment. However, the tribunal found that the Philippines failed to adduce clear and convincing evidence that Fraport was engaged in corruption and fraud when it made its initial investment. It also held that there was insufficient evidence to prove that Fraport had knowledge at the time of its initial investment of PIATCO's alleged misrepresentations to obtain the NAIA Terminal 3 concession agreement.[136]

However, it must be stressed that the *Fraport v. Philippines* ICSID dispute was not dismissed for lack of jurisdiction due to corruption. The Philippines raised three jurisdictional defenses in the second ICSID dispute (ARB/11/12). The tribunal only found merit in one jurisdictional objection—that Fraport violated the Anti-Dummy Law. Notably, the tribunal held that the Philippine government submitted insufficient evidence to prove its other jurisdictional defenses, that is (1) Fraport's claims were inadmissible due to corruption and fraud; and (2) Fraport knew of PIATCO's

misrepresentations to obtain the NAIA Terminal 3 concession award. While corruption was used by the Philippine government as one of its defenses, the tribunal eventually ruled that it had no jurisdiction over the dispute because its investment in PIATCO contravened the mandate of the Philippine Constitution to limit the operation of public utilities to Philippine citizens or corporations/associations organized under Philippine laws of which at least 60% of whose capital is owned by Philippine citizens.[137]

Interest in the Fraport disputes was revived when a quo warranto case was filed against a former Chief Justice of the Philippines. Among the allegations were her alleged failure to submit her SALNs for the years while she was employed by a state university, which is considered public employment covered by the mandatory yearly filing of SALNs. Some of her years of service as legal counsel of the Republic in the Fraport disputes overlapped with her employment as a public university professor. Her alleged failure to file her SALNs and to declare her significant earnings in the Fraport international arbitrations, among other reasons, led to her ouster as Chief Justice.[138]

13.5 Conclusion and Recommendations

The question of corruption as a jurisdictional matter necessarily involves the issue of state sovereignty. The UNCAC specifically provides that the obligations of state parties therein must be carried out in a manner which is consistent with the principles of sovereign equality and territorial integrity.[139] On paper, investments can be made into a host state without an investment contract with the host state. Such contracts and BITs usually have ISDS arbitration commitments but not necessarily undergo arbitration should disputes arise. But corrupt activities may be viewed as factual circumstances that vitiate consent. Thus, a state is only considered to have given its consent to exclusively refer a dispute to international arbitration via ICSID, based on existing BITs, if the investment contract is above board. Badges of corruption may lead to a rejection of jurisdiction since it can be argued that the BIT provision on mandatory arbitration was never triggered, considering that a valid agreement was not reached.

The corruption defense ultimately leads to the issue of sovereignty. Acts of corruption are punished by local criminal laws. As such, it can be reasonably argued that local courts have exclusive jurisdiction over charges of corruption. Investment tribunals organized to hear disputes with corruption allegations should carefully study the case before exercising jurisdiction since legal proceedings may exclusively fall within the ambit of local courts. For instance, the principle of territoriality of penal laws, including the anti-corruption laws stated above, governs in the Philippines. Hence, these laws must govern and must apply to everyone regardless of nationality, for as long as the criminal act is committed within the territorial jurisdiction of the Philippines. The Philippine government is also prohibited from surrendering its constitutional mandate and treaty obligation via the UNCAC by waiving criminal

liability on matters covered by international commercial arbitration. Can charges of corruption be entirely divorced from the contractual obligation of the parties in an investment contract or other investment made covered by a BIT? If the corruption issues are directly relevant to the initial investment of the foreign party, it may be difficult to remove the criminal aspect of the alleged illicit acts from the investment dispute.

The concept of necessity in international law can also be used in analogy. The defense of necessity is used in international law as a consequence of sovereignty to excuse a state for violating a preexisting obligation.[140] For instance, Argentina invoked the necessity defense in the ICSID tribunals hearing its disputes with investors based on its BIT with the US. The economic crisis of Argentina in 2001 led to drastic state measures which dramatically changed the business environment, to the detriment of the investors. The tribunals thus had to balance the protection of the investors with the compelling sovereign interest of Argentina. Furthermore, applying a strict application of ICSID rules may cause countries to become wary of entering into BITs.[141]

Tribunals must therefore balance the interest of the state and the investor whenever the necessity defense or the corruption defense are raised. Both concepts substantially modify the context of the contractual obligation of the parties. However, the difference is that in necessity, a supervening event may cause the state to breach its contractual obligation in the exercise of its sovereign functions to address an emergency situation. Contrarily, corruption can lead to two possible legal defenses involving jurisdiction. First, the contract is void ab initio since the negotiations that led to the initial investment were tainted with fraud and other corrupt activities. Thus, the BIT provision on the exclusivity of investment arbitration does not apply since there is no valid investment contract. Second, if the issues of corruption are deeply entangled with the alleged breach, it may be impossible to separate the prosecution of corruption based on local laws with the arbitration proceedings. Hence, a tribunal may be forced to deny jurisdiction or at least rule some investor claims inadmissible in view of the exclusive sovereign functions of the host state to prosecute and adjudicate on the corruption charges. However, it may be possible to separate the prosecution of the erring individuals who commit corrupt practices in the implementation of the contract while also maintaining access to arbitration mechanisms, for as long as the original deal itself was not a product of blatant corruption.

In the *Fraport v. Philippines* ICSID dispute, the tribunal had carefully navigated the corruption and misrepresentation issues by exhaustively discussing the objections raised by the Philippine government sans a finding of guilt. It respectfully acknowledged the issues raised by the host state without compromising future local legal proceedings, if any, and without overstepping its jurisdictional mandate. Furthermore, it prevented the establishment of a precedence of successfully using corruption as a defense in investment arbitration proceedings involving the Philippines, thus maintaining investment contracts under BITs as attractive options for foreign investors.

Nevertheless, the Fraport ICSID disputes raised awareness of the deeply entrenched culture of corruption in the Philippines. While corruption is often

dismissed as part of transactional costs in the local economy, the Philippine government must step up its anti-corruption drive to attract more foreign investors who are less tolerant of corrupt practices. It is not only the presence of corruption, but also the perception of corruption that drives foreign investments away. Regardless of the merits and outcomes of the Fraport ICSID disputes and local PIATCO cases, the NAIA Terminal 3 fiasco created a perception of corruption and unreliability of the host state.

The aversion of the Philippine government to engage in matters that delve into sovereign jurisdiction issues is also a concern. The Philippines withdrew from the Rome Statue of the International Criminal Court after investigations were initiated against state organs and agents who were purportedly involved in extrajudicial killings in relation to the government's war against illegal drugs.[142] The sensitivity of the Philippine government on issues of sovereignty, and its reluctance to accept neutral proceedings undertaken by international bodies and tribunals, may further weaken the confidence of foreign investors.

The Philippine government must therefore endeavor to rebuild its brand as a stable foreign investment hub with a strong rule of law.

Notes

1. Bulovsky 2019, p. 120.
2. Ibid., 121.
3. Ibid., 122.
4. Coxhead and Jayasuriya 2004, p. 614.
5. Bulovsky 2019, p. 123.
6. Ibid., 124.
7. Ibid. For a summary of the (somewhat mixed) empirical evidence recently on the impact of ISDS-backed treaties for expanding foreign direct investment, see Nottage 2022.
8. Low 2019, p. 341.
9. Bishara 2019, pp. 461–462. See also Schwenzer 2023.
10. Proclamation No. 533 dated January 9, 2013. Declaring January 23 of every year as '*Araw ng Republikang Filipino*, 1899'.
11. The Philippines officially celebrates its Independence Day on June 12, in recognition of the declaration of independence from Spain on June 12, 1898.
12. *People v. Escote, Jr.*, G.R. No. 140756. April 4, 2003.
13. Schock 1999, p. 364.
14. Ibid., 357.
15. Johnston 2008, p. 208.
16. Ibid., 209.
17. Ibid., 214.
18. Batalla 2015, p. 62.
19. Republic Act No. 11466 or the Salary Standardization Law of 2019. January 8, 2020.
20. Quah 2018, p. 58.
21. Ibid., 59.
22. Ibid., 60.
23. Transparency International 2023.
24. Congressional Policy and Budget Research Department, House of Representatives, Philippines 2022.

25. Vrushi 2020, p. 4.
26. Ibid., 49.
27. Ibid.
28. Statistics from the Office of the Ombudsman 2022.
29. *Lagman v. Pimentel III*, G.R. Nos. 235935, 236061, 236145 & 236155. February 6, 2018.
30. *Aquino III v. Commission on Elections*, G.R. No. 189793. April 7, 2010.
31. *Ching v. Bonachita-Ricablanca*, G.R. No. 244828. October 12, 2020.
32. *Akbayan Citizens Action Party v. Aquino*, G.R. No. 170516. July 16, 2008.
33. Section 3, Article X of 1987 Philippine Constitution.
34. *Almonte v. People*, G.R. No. 252117. July 28, 2020.
35. *Lambino v. Commission on Elections*, G.R. Nos. 174153 & 174299. October 25, 2006.
36. *Funa v. Chairman, Civil Service Commission*, G.R. No. 191672. November 25, 2014.
37. Section 5, Article IX-A of 1987 Philippine Constitution.
38. Ibid., Section 12, Article XI.
39. Ibid., Section 13, Article XI.
40. Section 5, Article XIII of 1973 Philippine Constitution.
41. Presidential Decree No. 1486 (as amended by Republic Act No. 7975 and Republic Act No. 8249). June 11, 1978.
42. Section 1, Article X of 1987 Philippine Constitution.
43. Ibid., Section 27, Article II.
44. Ibid., Section 1, Article XI.
45. Ibid., Section 2, Article XI.
46. Ibid., Section 3, Article XI.
47. Title 7 of Act No. 3815 (as amended) December 8, 1930.
48. Ibid., Article 203.
49. Ibid., Articles 204 to 207.
50. Ibid., Article 208.
51. Ibid., Article 209.
52. Ibid., Article 210.
53. Ibid., Article 211.
54. Ibid., Articles 213–215.
55. Ibid., Article 212.
56. Ibid., Article 216.
57. Ibid., Articles 217–222.
58. Republic Act No. 1379. June 18, 1955.
59. Section 3 of Republic Act No. 3019 or the Anti-Graft and Corrupt Practices Act. August 17, 1960.
60. Ibid., Section 4.
61. Ibid., Section 5.
62. Ibid., Section 6.
63. Ibid., Section 7.
64. Ibid., Section 8.
65. Section 8(A) of Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees. February 20, 1989.
66. Ibid., Sections 2 and 4(h).
67. Ibid., Section 9.
68. Republic Act No. 7080. July 12, 1991.
69. Ibid., Section 2. The law provides that the penalty is reclusion perpetua to death. However, the imposition of the death penalty in the Philippines was suspended by virtue of Republic Act No. 9346.
70. Section 2, Republic Act No. 9160. September 29, 2001.
71. Ibid., Section 3(i).
72. Republic Act No. 9184. January 10, 2003.
73. Ibid., Section 65.

74. Republic Act No. 9485. June 2, 2007. The title and provisions were amended by Republic Act No. 11032.
75. Ibid., Section 7.
76. Ibid., Section 21.
77. Republic Act No. 11232. February 20, 2019.
78. Ibid., Sections 165–168.
79. Ibid., Section 169.
80. Executive Order No. 1 (as amended). February 28, 1986.
81. Executive Order No. 43. October 4, 2017.
82. Executive Order No. 1. June 30, 2022.
83. Supreme Court En Banc Resolution in Administrative Matter No. 18-01-05-SC dated July 7, 2020. https://www.transparency.org/en/news/how-does-corruption-shape-asia
84. Ibid.; Supreme Court En Banc Resolution in Administrative Matter No.18-01-05-SC dated December 15, 2020 (Internal Rules of the Judicial Integrity Board).
85. UN General Assembly, October 31, 2003. United Nations Convention against Corruption. A/58/422.
86. Ibid., Article 1.
87. United Nations 2023.
88. Hough 2017, p. 352.
89. Resolution 3/1 of the States Parties to the UNCAC, available at: https://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V1051985e.pdf.
90. Ibid., B(1)(18), 6.
91. Section 6 of Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees. February 20, 1989.
92. UNODC 2023.
93. Ibid., 12–13.
94. Ibid., 7–9.
95. Ibid., 13.
96. UNCITRAL 2023.
97. *Mabuhay Holdings Corp. v. Sembcorp Logistics Limited*, G.R. No. 212734. December 5, 2018.
98. *Korea Technologies Co., Ltd. V. Lerma*, G.R. No. 143581. January 7, 2008.
99. *Mabuhay Holdings Corp. v. Sembcorp Logistics Limited*.
100. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.
101. Section 42 of Republic Act No. 9285. April 2, 2004.
102. Ibid., Section 43.
103. Ibid., Section 44.
104. Ibid., Section 19.
105. A pre-trial conference is conducted by trial courts before trial on the merits ensues.
106. Ibid., Section 24.
107. Administrative Matter No. 07-11-08-SC dated September 1, 2009.
108. Ibid., Rule 13.4.
109. Ibid.
110. *Tuna Processing, Inc. v. Philippine Kingford, Inc.*, G.R. No. 185582. February 29, 2012.
111. UNCTAD n.d.
112. Ibid.
113. Ibid.
114. *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No ARB/02/6 (Decision dated January 29, 2004).
115. *Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines* (Award dated January 23, 2017—not public). See https://www.italaw.com/cases/5170.
116. See *Republic v. Mupas*, G.R. No. 181892. September 8, 2015.

117. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Award dated August 16, 2007).
118. Ibid.
119. *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, G.R. Nos. 15501, 15547, & 15561. May 5, 2003.
120. *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, G.R. Nos. 15501, 15547, & 15561 (Motion for Reconsideration). January 21, 2004.
121. *Republic v. Mupas.*
122. *Republic v. Gingoyon*, G.R. No. 166429. December 19, 2005.
123. *Republic v. Gingoyon*, G.R. No. 166429 (Motion for Reconsideration). February 1, 2006.
124. *Republic v. Mupas.*
125. Ibid.
126. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Award dated August 16, 2007).
127. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12 (Award dated December 10, 2014).
128. Commonwealth Act No. 108 (as amended). October 30, 1936.
129. ICSID Case No. ARB/03/25, p. 85.
130. Ibid., 88.
131. Ibid., 189–191.
132. Ibid., 165.
133. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Decision dated December 23, 2010).
134. ICSID Case No. ARB/11/12, at [148].
135. Ibid., 149.
136. Ibid., 164.
137. Section 11, Article XII of 1987 Philippine Constitution.
138. *Republic v. Sereno*, G.R. No. 237428. May 11, 2018.
139. Article 4 of the United Nations Convention against Corruption.
140. Galvez 2013, pp. 143–144.
141. Ibid., 148–149.
142. *Pangilinan at. al. v. Cayetano, et. al.*, G.R. Nos. 238875, 239483 and 240954. March 16, 2021. (The Philippine Supreme Court validated the unilateral withdrawal of then President Duterte from the Rome Statute without requiring the concurrence of the Philippine Senate. The case discussed in detail the history of the participation of the Philippines in the Rome Statute/ICC).

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Thomas Elliot A. Mondez is a professional lecturer at De La Salle University in Manila. He previously worked as chief of the staff of the Presiding Justice of the Court of Appeals, the second highest court of the Philippines. He also served as legal staff at the House of Representatives

and as an associate prosecution attorney at the Department of Justice. He is the author of the book Geopolitics and International Law (Central Books 2021).

Jocelyn P. Cruz is a full-time Commercial Law Department faculty member at Ramon V Del Rosario College of Business. She was the department's former Chair and handled various administrative positions, including Vice Dean of the College of business and economics, College of Law, Graduate School Coordinator and External Director. She authored various research in the field of Law and Education.

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Chapter 14
Investment Arbitration, Corruption and Illegality: South Korea

Joongi Kim

Abstract This chapter provides an overview of Korea's investment treaty regime and its provisions and practice concerning corruption and illegality. It further analyzes how these issues have featured in cases related to Korea and Korean investors. Korea has become a leading exporter and significant importer of foreign direct investment. To protect and promote inbound and outbound investment, Korea has established one of the most wide-ranging and extensive regimes of international investment agreements in the world, primarily through an array of bilateral investment treaties and free trade agreements with investment chapters. However, their provisions related to corruption and illegality are generally not developed. For instance, most of Korea's treaties do not include an explicit requirement for the host states to take measures against corruption. Korean treaties also vary in terms of how they require foreign investments to be made in accordance with host state laws. Korea's passivity regarding such provisions seems unaffected by foreign investors increasingly commencing arbitrations against the country recently and Korean investors also becoming more active in bringing outbound claims. While the extent that corruption or illegality features in cases brought by Korean investors remain largely unknown, some of the cases against Korea have corruption and illegality related elements. There is no indication that Korea may become more proactive in terms of corruption provisions, but there are some signs it is pursuing more and clearer legality provisions. Nevertheless, it is foreseeable that Korea might become more proactive in promoting both types of provisions in future treaties as part of its commitment to transparency.

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J. Kim (✉)
Yonsei Law School, Seoul, South Korea
e-mail: kimjg@yonsei.ac.kr
URL: https://www.mpil.de/en/pub/institute/personnel/academic-staff/mjarrett.cfm

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14.1 Introduction

This chapter provides an overview of Korea's investment treaty regime and the type of provisions it has concerning corruption and illegality. It further analyzes how corruption and illegality issues have featured in cases related to Korea and Korean investors.

I first review how Korea has become a leading major exporter and importer of foreign direct investment (FDI). In the next section, I explore how Korea has established one of the most wide-ranging and extensive regimes of international investment agreements in the world. I will show how Korea has primarily used an array of bilateral investment treaties and free trade agreements with investment chapters.

Then, I analyze corruption and illegality related provisions in Korean international investment agreements (IIAs) and Korea's investment treaty practice. Korea's investment treaty provisions related to corruption and illegality remain generally under-developed. For instance, most of its treaties do not include an explicit requirement for the host states to take measures against corruption. Korea thus can be categorized as displaying passivity regarding the inclusion of corruption or legality related provisions in its treaties.

The recent rise in investor–state dispute settlement (ISDS) arbitrations through these IIAs brought by foreign investors against Korea and by Korean investors against various states is then explored. Notably, Korea's overall passivity has appeared to be unaffected by foreign investors increasingly bringing cases against it in recent years and Korean investors becoming more active in bringing claims against states as well. While the extent that corruption or illegality features in cases brought by Korean investors remains largely unknown, some of the cases against Korea have corruption and illegality related elements.

The chapter concludes with a look into what is in store for Korea's future in terms of IIAs and corruption and illegality provisions and practice. It is foreseeable that Korea might become more proactive in promoting anti-corruption provisions in its future treaties as part of its commitment toward transparency and as a means to enhance the legitimacy of ISDS.

14.2 Foreign Investment

Korea is known to stand out as a miracle in economic development. Once one of the poorest countries in the world, it rose from the ashes of war and poverty to become a developed economy in one of the shortest spans in history. It is an uncommon example of a country that has made the successful transition from being a capital importer to becoming a capital exporter. During this transition process, Korea became a modern and developed economy.

In its initial developmental stages, Korea eagerly sought foreign investment to spur its economic growth. Its current position as a major exporter of capital is an

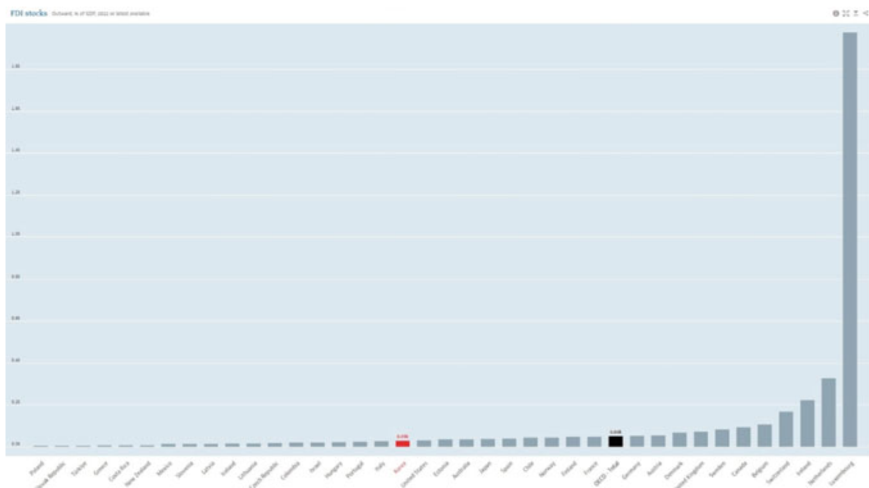

Fig. 14.1 Korea's outbound FDI as a percentage of GDP (Latest data available for each country from 2018 to 2022)[1]

indicator of how far it has come. As of 2020, for instance, Korea's outward FDI stocks amounted to 30% of gross domestic product. Although less than the OECD average in 2022 which was 51%, it still ranks highly, particularly among non-Western countries (Fig. 14.1).

On a consistent yearly basis, starting from 2014, when it was only 16.4%, Korea's outward investment has significantly increased in recent years (Table 14.1). By 2020, at 29.7%, it had nearly doubled since 2014. This most likely reflects the growth of the Korean economy and how Korean investors have sought to expand beyond the competitive and saturated Korean domestic market to find new destinations overseas.

In comparison, Korea's percentage of inbound FDI relative to GDP has also been rising in recent years but from a low base and more slowly. From 11.37% in 2014, it rose to 14.14% in 2020. Yet, when contrasted with its outward investment, inward FDI stands at a modest level. This remains a quandary even if one considers such geopolitical factors as the security risks that arise from its relations with North Korea. From a comparative standpoint, its 14.1% of FDI in 2020 was, after Japan, the second lowest among OECD countries and far less than the OECD average of 51% in 2022 (Fig. 14.2).

The quandary of Korea's low inward investment is all the more perplexing when one considers that it has an open regulatory framework in addition to its extensive

Table 14.1 Korea's inbound and outbound FDI as a percentage of GDP (2013–2020)[2]

	2013	2014	2015	2016	2017	2018	2019	2020
Outward	17.4	16.4	18.8	19.8	21.1	22.3	26.3	29.7
Inward	12.14	11.37	11.52	11.67	12.99	12.40	13.22	14.14

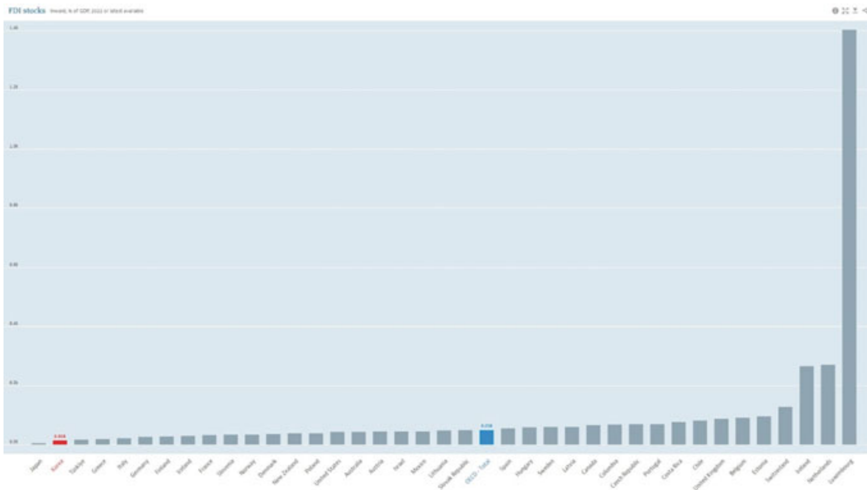

Fig. 14.2 Korea's inbound FDI as a percentage of GDP (Latest Data available for each country from 2018 to 2022)[3]

framework of investment treaties. As of 2020, for instance, Korea's formal regulatory regime was assessed at 1.35 and sixth among OECD member countries on the OECD FDI Restrictiveness Index.[4] It occupies the best rank in Asia and is considerably more open to FDI than the average among OECD countries of 0.063. Similarly, according to the World Bank's Enforcing Contracts ranking, Korea is second in the world out of 190 countries, only behind Japan.[5] In contrast, in terms of hurdles to FDI, the US State Department's Investment Climate report on Korea lists 'regulatory opacity, inconsistent interpretation of regulations, unanticipated regulatory changes, underdeveloped corporate governance, rigid labor policies, Korea-specific consumer protection measures, and the political influence of large conglomerates, known as chaebol'.[6] Hence, identifying and addressing the obstacles to inbound investment and how Korea will be able to attract further foreign investment remains an ongoing challenge (Fig. 14.3).

14.3 Corruption

14.3.1 Domestic Bribery

In law and practice, Korea has a rigorous and extensive legal regime related to monitoring, punishment and enforcement related to corruption and bribery. The Korean Criminal Code has a standard bribery provision under Article 129. Bribery related crimes are subject to enhanced punishment depending on the size of the bribe, particularly if the bribe exceeds KRW30 million (USD23,067).[7] In addition, in February

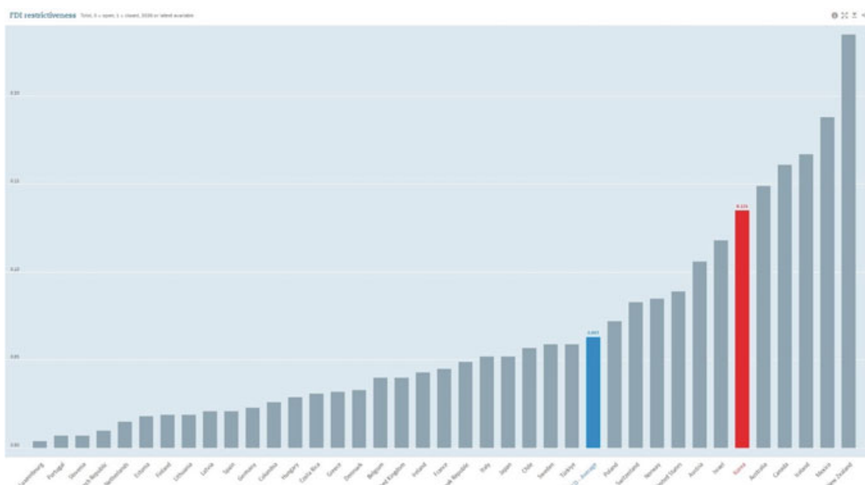

Fig. 14.3 Korea compared on the OECD FDI restrictiveness Index (2020)

2008, Korea established the Anti-Corruption and Civil Rights Commission.[8] In January 2021, it established the Corruption Investigation Office for High-ranking Officials (CIO),[9] which has a special focus on senior government officials by special prosecutors and investigators at the Office.

In terms of corruption perception, Korea has consistently improved since 2016 and currently has reached its highest score of 63 under Transparency International's Corruption Perception Index (CPI). This score is in the third out of eight tiers where countries have been evaluated. Korea continues to stand behind Singapore (85), Hong Kong (76), Japan (73) and Taiwan (68) among Asian countries, and has been slowly closing the gap with them, particularly after 2016 (Fig. 14.4).

Transparency International considers the score more significant than the rankings, and Korea's CPI ranking has also steadily improved since 2016. Korea achieved its highest ranking of 31 in the world in 2022 and continues to stand behind Singapore (5), Hong Kong (12), Japan (18) and Taiwan (25) among Asian countries, but again the gap with them has been narrowing in recent years after 2016 (Fig. 14.5).

Similarly, Korea ranks in the top tier in the World Justice Project's Rule of Law Index. In 2022, Korea was ranked 19 out of 140 countries surveyed and only stood behind Japan and Singapore in Asia.[12] The Index is compiled based on eight factors: Constraints on Government Power, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice and Criminal Justice. The Absence of Corruption factor is assessed by measuring such elements as bribery, improper influence by public or private interests and misappropriation of public funds or other resources, which are then examined with respect to government officers in the executive branch, the judiciary, the military, police and the legislature.[13] Under the more specific Absence of Corruption matrix, in 2022,

Fig. 14.4 Korea's CPI score (2013–2022)[10]

Fig. 14.5 Korea's CPI rank (2013–2022)[11]

Korea's global ranking was 35 and was the fourth best in Asia after Singapore (1), Hong Kong (9) and Japan (13).[14]

14.3.2 Foreign Bribery

Korea is a member of the major treaties related to foreign bribery regarding foreign public officials. This includes the 1999 OECD Convention on Combating Bribery

of Foreign Public Officials in International Business Transactions (OECD Convention)[15] and the 2003 United Nations Convention against Corruption. These provisions were adopted through separate implementing legislation. According to Transparency International, however, Korea (like Japan and Singapore, for example) stands at the bottom tier out of 47 jurisdictions that are classified as having 'little or no' enforcement of the OECD Convention.[16]

14.4 Investment Treaty Practice and Innovations

14.4.1 Korea's Investment Treaty Practice Generally

With 84 bilateral investment treaties (BITs) and 22 free trade agreements (FTAs) in force, Korea has one of the most extensive regimes of investment treaties.[17] As a general policy, Korea's IIAs provide for a wide range of investor protections that include such alternatives as investor–state arbitration (ISA) as a means of dispute settlement.[18] Other than its BITs with Bangladesh (1988), Germany (1967), Pakistan (1990), Tunisia (1975) and the FTA with the European Union (EU), for example, almost all of Korea's IIAs have ISA provisions.[19] In its early years, Korea aggressively pursued IIAs, initially as a means to attract foreign investment and increasingly also to protect its investors overseas.

14.4.2 Korea's Treaty Provisions Related to Illegality and Corruption

14.4.2.1 Anti-Corruption Obligations for States

Overall, Korea has not pursued a policy that pushes for the inclusion of provisions that are directed at corruption, as can be found in countries such as Japan.[20] Among its IIAs, the only major exceptions are corruption related provisions in the Canada FTA (2014) and United States (US) FTA (2012). The inclusion of the provisions in these IIAs no doubt was not driven by Korea but was at the behest of Canada and the US as part of their general treaty practice.

Korea's FTA with Canada (2014) provides a general obligation as follows under Article 8.16:

> 8.16 Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and their internal policies, including statements of principle that are endorsed or supported by the Parties. These principles address issues such as labour, environment, human rights, community relations, and *anti-corruption*. (Emphasis added.)

The Canada FTA asks that the contracting parties 'encourage' enterprises in their territories to incorporate corporate social responsibility (CSR) standards that include 'anti-corruption'. Although not included in its 2004 Model BIT, since around 2013 Canada has included this type of CSR provision in its third generation of BITs.[21] This provision remains hortatory, urging investors to 'voluntarily' comply with CSR.

The US has been among the leading countries pursuing a proactive approach in including anti-corruption related provisions in its IIAs.[22] Korea's FTA with the US (2012), for example, imposes a more far-reaching obligation on the contracting parties. As provided under a separate chapter on 'Transparency', in Article 21.6 that is titled 'Anti-Corruption', it requires that each party must: (1) maintain laws or other measures to criminalize corruption affecting international trade or investment; (2) maintain appropriate penalties and procedures; (3) maintain whistleblower protection; (4) recognize the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment; and (5) endeavor to work jointly to encourage and support appropriate initiatives in relevant international fora.[23] The whistleblower protections are notable. The obligations under the US FTA remain the most comprehensive and explicit among Korea's IIAs.

Notably, Korea's trilateral investment treaty with China and Japan does not contain Japan's shorter anti-corruption provision (2012), which may reflect the preferences of China rather than Japan, as the latter has often included a provision from around 2007. Korea is seeking to join but has yet to become a member of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which incorporates significant US IIA drafting preferences and contains a quite detailed Chapter 26 on 'transparency and anti-corruption'.[24]

14.4.2.2 Legality Requirements for Investors

Korea's international investment agreements have some variation in their provisions related to illegality. Unlike corruption related provisions, it appears that Korea has generally promoted the inclusion of a legality requirement. The end result of this apparent policy has led to slightly different provisions. Among other things, different negotiating dynamics, priorities and economic interests most likely shaped these divergent outcomes. Korean IIAs can be broadly divided into four different types of legality requirement provisions.[25]

First, Korean IIAs may include a general provision such as the following that appears in the BIT with Denmark (1988):

> Each Contracting Party shall admit the investment by nationals and companies of the other Contracting Party in accordance with its laws and regulations, and promote such investments as far as possible[26]

This provision places a general obligation upon the state to admit investments in accordance with its laws and regulations and does not impose an express obligation upon the investor in order to achieve treaty protection. In terms of limiting the definition of investment, UNCTAD classifies such provisions as not containing an express

'in accordance with host state laws' requirement. Korea's IIAs that contain some variation of this type of provision include Albania (2006), Algeria (2001), Armenia (2019), Azerbaijan (2008), BLEU (2011), Bulgaria (2006), Burkina Faso (2010), Cambodia (1997), Congo (2011), Finland (1996), Hong Kong (1997), Indonesia (1994), Kenya (2017), Mongolia (1991), Philippines (1996) and Vietnam (2004). Korea's trilateral investment treaty with China and Japan (2012) only has this first type of provision.

Although not common, a second type can be found in Korea's BIT with Lebanon (2006) that provides wording as follows:

> This Agreement shall also apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party prior to the entry into force of this Agreement. However, the Agreement shall not apply to disputes that have arisen *before its entry* into force. (Emphasis added.)

UNCTAD also classifies this provision as not constituting the 'in accordance with host State laws' requirement. This provision apparently does not qualify as a legality requirement imposed on the state because it only applies to past investments before the treaty came into force that were made in accordance with host state laws and does not cover foreign investments made afterwards. Another example of the type two treaty is Tunisia (1975).[27]

In contrast, Korean IIAs may impose a legality requirement upon investors to be eligible for treaty protection in the following form as found in the recent BIT with Uzbekistan (2023, emphasis added):

> 13.1. This Agreement shall apply to investments in the territory of the State of one Contracting Party, made in accordance with its laws and regulations, by investors of the other Contracting Party, whether *prior to, or after* the entry into force of the present Agreement.

This differs from the second type in that it applies to investments made after the IIA enters into effect as well. This would be like a substantive obligation that is prospective in nature and not limited to pre-existing investments. Korea's BIT with China (2007) is another example of an IIA with this type of provision.[28]

A fourth type of IIA contains a more explicit legality requirement on investors as found, for example, in the definition of investment in Korea's BIT with Cameroon (2018):

> 1(1) 'Investments' means every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party and in particular, though not exclusively, includes …

UNCTAD maps this fourth type as a legality provision. Similar provisions can be found in Korea's BITs with Armenia (2019), Cameroon, (2018), Kenya (2017), Malaysia (1989), Myanmar (2018) and Rwanda (2013). Noticeably, many of Korea's more recent IIAs include this type of provision. This suggests that Korea has been pushing for this type of legality provision as part of its more modern treaty practice.

In comparison with its BITs, Korea's FTAs demonstrate even less variety. Among Korea's FTAs, the ASEAN FTA (2009), China FTA (2015), Indonesia FTA (2023), and the Regional Comprehensive Economic Partnership (RCEP) FTA (2022) appear

to call for type one provisions according to UNCTAD's mapping system.[29] RCEP (2022), for instance, provides as follows:

> covered investment means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter, and which, where applicable, has been admitted, by the host Party, subject to its relevant laws, regulations, and policies

The Indonesia FTA (2023) in Article 7.1 states similarly as follows:

> covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter and which, where applicable, has been admitted according to its laws and regulations

Among Korea's FTAs, the Chile FTA (2004) includes an explicit legality provision, like type four BITs, in Annex 10.20 that provides:

> 1. An investor of a Party, on its own behalf or on behalf of an enterprise, may only make a claim under Section C [ISDS] of this Chapter, in relation to investments made and materialized in accordance with the laws and regulations of the other Party

Korea's FTA with Israel (signed in 2021 but not in effect) also contains a similar provision in Article 9.31.

The Australia FTA (2014), Central America Free Trade Agreement (CAFTA) (2019), Cambodia FTA (2016), Canada (2014), Colombia FTA (2016), European Free Trade Association (EFTA) (2006), India FTA (2010), New Zealand FTA (2015), Peru FTA (2011), Singapore FTA (2006), Turkey FTA (2015) and US FTA (2012) do not have a separate legality provision in their investment chapters. In contrast, the Cambodia FTA (2022) and UK FTA (2021) do not contain a separate investment chapter.

Overall, Korea's IIA regime is extensive and provides a wide range of protections but its provisions related to corruption and illegality have a range of different categories. The country's practice with respect to corruption and legality provisions is varied. Other than its agreements with such countries as Canada and the US, express anti-corruption provisions are not common. Recent practice suggests, however, that Korea is becoming more proactive in negotiating for an express legality provision. The reason behind this apparent trend is unclear. It may be part of Korea's general transparency efforts to impress upon Korean investors who are investing in destinations where lack of transparency and corruption concerns exist that they must be vigilant not to engage in corrupt or illegal acts or they will not benefit from protections under IIAs.

14.5 Investment Treaty Arbitration Cases Involving Korea and Korean Investors

Korea signed its first IIA in 1964 with Germany. Despite its considerable outflow and inflow of investment and long history and extensive regime of IIAs, the various protections offered through its provisions, and particularly ISDS, remained unused until recently. Yet, during the past decade, the landscape has changed. Among countries in Asia, starting from 2012 and 2013, investors into Korea and Korean outbound investors have become active users in ISDS. While the exact reasons remain unclear, this most likely represents a confluence of factors. To some degree, it reflects the considerable amount of inbound investment into Korea and outbound foreign investment by Korean investors in recent years. Other factors include a first mover effect, the growing awareness of ISDS as a means of redress for violations and the growth of large Korean law firms as well as branches of international firms in Seoul.

14.5.1 *Korea as a Respondent*[30]

In recent years, starting from 2012, Korea has faced a string of investor claims.[31] These can be divided into three types of investors. The first type are large investors with substantial claims exceeding USD100 million. The second type involves medium-sized enterprises with claims roughly between USD10 and 100 million, and the third comprises various individuals mostly claiming violations associated with real estate development regarding residential projects. The overall results have been mixed, with investors prevailing in some cases and the state prevailing in others. Most of the cases remain pending (Table 14.2).

14.5.2 *Korean Investors as Claimants*

At about the same time Korea started to become exposed to ISDS, starting from 2013, Korean investors began to bring cases through ISA. Whether this is a coincidence or related remains unclear. It is anticipated that cases will continue to increase for a variety of reasons. First, Korean investors have become more familiar with investment protections provided under IIAs, investment contracts and investment laws as well as the availability of investment arbitration to seek remedies for violations of protections provided under these instruments. Second, the success of first-mover investors in ISA will further educate and embolden other investors and, to some degree, will add to the bandwagon effect. Third, the experience gained by legal counsel specializing in investment arbitration will enable them to advise their clients about investment protections and dispute resolution as an alternative. Finally, anecdotal evidence suggests that Korean companies are gaining experience with third-party funding in

Table 14.2 Korea inbound ISDS claims (30 April 2023)[32]

Year of initiation	Short case name	Summary	Outcome of original proceedings	Home state of investor
2021	*Dayyani and others v. Korea (II)*	Investment: Summary:	Pending	Iran, Islamic Republic of
2021	*Won v. Korea*	Investment: Ownership of a residential building in Busan Summary: Claims arising out of the dispossession of the claimant's residential building by a redevelopment union allegedly affiliated with a government agency	Pending	United States of America
2020	*Min v. Korea*	Investment: Shareholding in Pi Investment Co. Ltd (Pi Korea), a real estate company Summary: Claims arising out of the forced sale of the claimant's shares in a local real estate company by Woori Bank, a South Korean bank allegedly controlled by the Government	Pending	China
2018	*Elliott v. Korea*	Investment: Shareholding in the Samsung C&T Corporation Summary: Claims arising out of the government's conduct that allegedly led to the merger of Samsung C&T Corporation with Cheil Industries and thereby caused financial losses to the claimant	Decided in favor of investor	United States of America

(continued)

Table 14.2 (continued)

Year of initiation	Short case name	Summary	Outcome of original proceedings	Home state of investor
2018	*Mason v. Korea*	Investment: Minority shareholding in Samsung C&T Corporation (Samsung C&T) and Samsung Electronics, Inc. Summary: Claims arising out of senior government officials' alleged measures to enable a merger of Samsung C&T with a Samsung affiliate, Cheil Industries Incorporated (Cheil), on terms favorable to a large domestic Cheil shareholder. This was allegedly done by substantially undervaluing Samsung C&T and caused losses to the claimants' shareholding	Pending	United States of America
2018	*Schindler v. Korea*	Investment: Minority shareholding in Hyundai Elevator Co. Ltd. Summary: Claims arising out of the government authorities' alleged failure to exercise financial oversight related to Hyundai Elevator's share capital increases and other measures taken by the controlling shareholders, including the ultimate use of corporate funds. Such actions allegedly caused significant impairments to the claimant's participation rights in Hyundai Elevator as the second largest shareholder	Pending	Switzerland

(continued)

Table 14.2 (continued)

Year of initiation	Short case name	Summary	Outcome of original proceedings	Home state of investor
2018	*Seo v. Korea*	Investment: Partial ownership (76%) of a residential property in Seoul Summary: Claims arising out of the allegedly insufficient amount of compensation set by the government for the claimant's real estate property that had been expropriated following the municipal government's designation of the relevant area for redevelopment	Decided in favor of state	United States of America
2015	*Dayyani v. Korea*	Investment: Agreement for the acquisition of a majority stake in Daewoo Electronics and 10% down payment of the price Summary: Claims arising out of Korea Asset Management Corporation's termination of an agreement for the sale of a majority stake in Daewoo Electronics to the claimants' company Entekhab and alleged non-return of the claimants' USD50 million deposit	Decided in favor of investor	Iran, Islamic Republic of

(continued)

Table 14.2 (continued)

Year of initiation	Short case name	Summary	Outcome of original proceedings	Home state of investor
2015	*Hanocal and IPIC International v. Korea*	Investment: Majority shareholding in Hyundai Oilbank, a petroleum and refinery company based in the city of Seosan Summary: Claims arising out of the alleged tax levied on the 2010 sale of the claimants' controlling stake in Hyundai Oilbank	Discontinued	Netherlands
2012	*Lone Star and others v. Korea*	Investment: Majority shareholding in a South Korean financial institution; shareholding in Seoul's Star Tower; interests in an engineering and construction manufacturer Summary: Claims arising out of the alleged failure by Korean regulatory authorities over a period of several years to approve the purchase by third parties of claimant's stake in Korea Exchange Bank, and the alleged imposition of arbitrary capital gains taxes on the sale by Korean tax authorities	Decided in favor of investor	Belgium Luxembourg

commercial arbitration cases, and this may contribute to the potential for them to use it in investment arbitration in the future (Table 14.3).

Among the cases brought by Korean investors that are publicly known, most of them are pending. Among the remaining cases, most of them are either settled, have been dismissed at an early stage or remain undisclosed. Unfortunately, given the lack of public information, for purposes of analysis, it is uncertain to what extent the claims brought by Korean investors were related to corruption or illegality.

Nevertheless, it should be noted that the countries that have been the subject of claims by Korean investors are not in the top tiers of the CPI scores or the Rule of Law rankings on the absence of corruption. For the CPI scores, out of the eight tiers in which countries have been evaluated, Saudi Arabia (53) and Oman (52) are in the fourth tier, China (45) and India (40) are in the fifth tier, Vietnam (39) is in the sixth tier, Kyrgyzstan (27) is in the seventh tier, and Nigeria (24) and Libya (17) are in the eighth (bottom) tier. For the Rule of Law rankings on absence of corruption and scores, China (55/0.53) stands in a high tier while India (93/0.40) and Vietnam (88/

Table 14.3 Korean Outbound ISDS Claims (30 April 2023)[33]

Year of initiation	Short case name	Summary	Outcome of original proceedings	Respondent state (CPI rank/rule of law index rank)
2023	*KNOC v. Nigeria*	Korea National Oil Corporation (KNOC), KNOC Nigerian West Oil Company Limited and KNOC Nigerian East Oil Company Limited	Pending	Nigeria (150/118)
2019	*Kowepo v. India*	Investment: Shareholding of 40% in Pioneer Gas Power Plant Limited (PGPL), the operator of a 388 MW project in the Raigad district in the Indian state of Maharashtra Summary:	Pending	India (85/77)
2018	*Baig v. Viet Nam*	Investment: Summary:	Pending	Vietnam (87/84)
2017	*Samsung v. Saudi Arabia*	Investment: Constructing an electric power plant Summary: Claims arising out of the alleged termination of a power plant construction contract	Data not available	Saudi Arabia (52/n.a.)
2015	*Samsung v. Oman*	Investment: Deposit in connection with the bid for a refinery improvement project Summary: Claims arising out of the alleged discriminatory treatment by the state towards the claimant in connection with the bidding process to undertake improvements to the Sohar refinery in northern Oman run by the state-owned Oman Refineries and Petroleum Industries Company (ORPIC) in 2013	Settled	Oman (56/n.a.)

(continued)

Table 14.3 (continued)

Year of initiation	Short case name	Summary	Outcome of original proceedings	Respondent state (CPI rank/rule of law index rank)
2014	*Ansung Housing v. China*	Investment: Capital expenditure of over USD15 million for the development of a golf and country club in China Summary: Claims arising out of the provincial government's alleged actions in relation to Ansung's investment in the construction of a golf and country club and luxury condominiums in Sheyang-Xian, Jiangsu province	Decided in favor of state	China (66/137)
2013	*Lee v. Kyrgyzstan*	Investment: Rights under certain lease agreements Summary: Claims arising out of the alleged expropriation of claimant's investment by terminating certain lease agreements with respect to various land plots to develop a theme park in Bishkek	Decided in favor of investor	Kyrgyzstan (144/97)
2013	*Shinhan v. Libya*	Investment: Construction of 5000 housing units and service building in Tripoli City under a contract with the government Summary:	Decided in favor of state	Libya (172/n.a.)

0.42) are in a middle tier, and Nigeria (118/0.41) and Kyrgyzstan (127/0.30) are in the lowest tiers. Data for Saudi Arabia, Oman and Libya do not exist. Based on these perceptions and rankings, one may speculate that there is a higher likelihood that corruption or serious illegality might have featured as elements in the claims that Korean investors brought. This conjecture remains to be confirmed if and when the cases become public.

14.6 Lone Star and Mason/Elliott

14.6.1 Lone Star[34]

In 2012, Lone Star, a private-equity firm based in the US, brought the first major arbitration against Korea. A complex, large-scale dispute, with multiple facets, it also involved one of the few cases where illegality featured as a prominent issue. As part of its defence, Korea stressed that the investor engaged in illegal misconduct. While allegations of corruption were also raised and created some legal uncertainties, they were not significant factors in the ultimate decision.

The case arose out of Lone Star's 2003 acquisition of a controlling stake in Korea Exchange Bank (KEB), a distressed bank, and subsequently of KEB Card, its credit card subsidiary.[35] Lone Star made the USD1.7 billion acquisition of KEB through LSF-KEB, a Belgian special purpose vehicle. After multiple attempts failed, in February 2012, LSF-KEB was able to sell its interest in KEB to another local bank for USD3.5 billion.[36] Lone Star claimed that the Korean government improperly delayed the approval of the sale of KEB on several occasions and intervened to reduce the price of the sale that caused it to suffer substantial harm. It claimed USD433 million in damages based on, among other things, a breach of fair and equitable treatment under the Belgium–Luxembourg BIT (2011).[37]

The Korean government claimed that one of the major reasons for the delay in approving the sale of KEB was because there was an ongoing criminal trial against LSF-KEB and some of its senior executives.[38] After appeals and a remand from the Supreme Court, in October 2011, LSF-KEB and a senior executive were found guilty of engaging in stock manipulation during the acquisition of KEB Card. The Seoul High Court found that the executive of LSF-KEB engaged in an unlawful deceptive scheme, in collusion with Lone Star's nominees to the KEB Board, that caused the stock price of KEB Card to fall and enrich LSF-KEB and KEB at the expense of KEB Card's minority shareholders.[39]

In the end, while finding that Korea breached its treaty obligations, a majority of the tribunal also concluded that 'Lone Star by its criminal misconduct and related legal consequences contributed substantially and materially to the USD 433 million loss'.[40] The majority cited *Yukos v. Russia* and other cases where tribunals apportioned fault where an investor committed an unlawful act. A key factor was whether the investor's wrongdoing materially and significantly contributed to the loss claimed. In the *Lone Star* case, the majority determined that 'there was a single indivisible loss to which both the Claimants and the Respondent made a material contribution. The loss cannot be broken down into individually distinct elements that could be assigned exclusively to Lone Star or the FSC'.[41] Finding equal blame on the claimants, the majority reduced the award by half to USD216.5 million.

A strong dissenting opinion argued that, among other things, the claimant had no right to a control premium. This was because control was obtained through a financial crime and the regulators acted prudently in light of the stock manipulation case.[42]

14.6.2 *Mason*[43] *and Elliott*[44]

In 2018, two large US institutional investors of Samsung C&T, a very large listed construction and engineering company, each brought claims against Korea for breach of investment protections under the Korea–US FTA.[45] Both cases did not involve more traditional examples such as where a foreign investor allegedly engaged in corruption or illegal behavior and the state cited the illicit acts as a defense against the claims. The case was also not an example of a state soliciting or extorting bribes from the investor. While corruption was a prominent fact that served as a key factor in the claimants' claims, corruption was not an issue that was directly associated with the investors themselves. The investors instead based their claims on the harm that they allegedly suffered as a result of corruption between the controlling shareholder and senior government officials. On 30 June 2023, a final award was rendered in *Elliott v. Korea* whereas an award remains pending for *Mason v. Korea* where post-hearing briefs were filed in April 2022.[46] According to the Korean Ministry of Justice, out of the USD770 million that was claimed, the *Elliott v. Korea* tribunal found Korea liable for USD54 million plus interest and the claimant's legal costs.

Both cases arose out of the merger between Samsung C&T and Cheil, at the time both affiliates within the prominent Samsung Group. Shareholders approved the merger in July 2015. With a stake of 11.21%, the National Pension Service (NPS) was the largest shareholder of Samsung C&T and, according to the claimants, provided the decisive vote in favor of the merger despite the opposition of various shareholders. Mason held 2.18% and Elliott 7.12%.

The two foreign shareholders, Mason and Elliott, claimed that they suffered damages due to bribes under a criminal scheme that was perpetrated by Korean public officials, including the then President, the Minister of Health and Welfare and the Chief Investment Officer of the NPS. The President was sentenced to 20 years in prison for bribery and other charges.[47] Elliott sought USD539.8 million and Mason USD191.4 million in damages plus interest and other relief.

A key part of the case concerned whether the President provided 'decisive assistance' to approve the merger as a *quid pro quo* for receiving bribes from the controlling shareholder of the Samsung Group. The claimants contended that the President received the bribes in exchange for her assistance in getting NPS to approve the merger. The claimants asserted that the President requested the bribe in the form of sponsorship of certain sports organizations and that there was a common understanding that the economic support was in exchange for the President's help for the controlling shareholder's succession plan through the merger.

As a result, the claimants asserted a breach of the minimum standard of treatment because, among other things, Korea's actions were arbitrary, grossly unfair, unjust, discriminatory, in disregard of due process and proper procedure, and lacked transparency. They argued that Korea's action violated the International Court of Justice's *Neer* judgment standard and that 'Korea's corruption, bribery, overt discrimination, and flaunting of its own laws was outrageous'.[48] According to them, Korea had no legitimate interest to vote in favor of the merger.

In its reply, Korea argued that the 'High Court did not find that President provided any assistance to the Merger, let alone that she gave instructions to implement any measures against Mason or any foreign hedge fund'.[49] Korea stressed that the courts held that any *quid pro quo* relationship and payment of bribes occurred after the President met the controlling shareholder on 25 July 2015, which was after the NPS's Investment Committee's decision on 10 July 2015 and the shareholders meeting on 17 July 2015, both to approve the merger. Korea asserted that there was no evidence that the bribes were connected with the merger and could have been intended to induce its approval. The claimants also lacked a legally significant connection between Korea's alleged measures and their investments.[50]

Korea also stated that the NPS did have a legitimate interest in supporting the merger because supporting the Samsung Group's succession process was in the interest of the Korean economy. It did not have as a purpose the expropriation or extraction of value from SC&T's shareholders. They cited that the High Court did not conclude that the merger 'extracted value from SC&T's shareholders, much less that the Korean government intended to extract value'.[51] According to Korea, the goal was to instead support the succession process and stabilize the Samsung Group.

The Elliott tribunal found that the NPS's merger vote was the result of the improper influence by Blue House and the Ministry of Health and Welfare (MHW) and not of its own independent, professional judgment. More specifically, the tribunal found that the NPS 'did not take its decision independently, based on the commercial merits of the Merger, but acted under the direction and instructions of the MHW and thus effectively as an instrument of the MHW in the implementation of a government policy'.[52] Quoting from *Waste Management v. Mexico*, the state's conduct was deemed to be 'unjust' and amounted to a 'willful neglect of … duties' and 'a pronounced degree of improper action' that breached the minimum standard of treatment required.[53]

Both cases did not involve a situation of a failure to prosecute as was raised in such cases as *World Duty Free v. Kenya*[54] and *Wena v. Egypt*.[55] Instead, the claimants relied extensively on the prosecution's cases and the resulting court awards against the former Korean government officials. The tribunal even noted the state's diligent prosecution of those involved and described 'the action taken by the Korean State in this regard is commendable and demonstrates its commitment to the rule of law'.[56]

14.7 Conclusions

Among countries in Asia, Korea has become a major net capital exporter as well as a significant destination for foreign investment. Korea also maintains one of the most extensive networks of IIAs in the world, particularly in the Asia–Pacific region. Yet Korea has remained overall quite passive with regard to anti-corruption and legality related provisions. This passivity appears to be unaffected by foreign investors increasingly bringing cases against Korea in recent years and Korean investors becoming more active in bringing claims against states as well. In terms of its IIAs, however, recent practice suggests that Korea is becoming more proactive in

negotiating for an express legality provision. The reasons behind this apparent trend are unclear. It may be part of Korea's general transparency efforts to impress upon Korean investors that they must be vigilant and avoid corrupt or illegal acts or else they will not benefit from IIA protections.

Despite this confluence of factors, until 2012 and 2013, Korean IIAs were not widely used. Korea has become the subject of a host of claims, many that are quite substantial (and therefore sometimes politically controversial). Korean investors have increasingly become the more active users of ISDS in Asia. With the rise in cases, the corruption and illegality issues have emerged in some of the cases against Korea, most prominently already in the *Lone Star* case, but also in the ongoing claims by *Mason* and *Elliott*. Most of the cases brought by Korean investors remain pending, so the extent to which they involve corruption or illegality remains unclear.

At present, there is no indication that Korea may become more proactive in terms of anti-corruption provisions, although there are some signs, including clearer legality provisions. Nevertheless, it is foreseeable that Korea might become more proactive in promoting anti-corruption and legality provisions in its future treaties as part of its commitment to transparency (a related hot topic), or to preserve the wider legitimacy of the ISDS arbitration regime.[57]

Notes

1. OECD n.d.-c.
2. OECD n.d.-d.
3. OECD n.d.-b.
4. OECD n.d.-a.
5. World Bank n.d.
6. US State Department's Investment Climate report on Korea.
7. Act on the Aggravated Punishment, etc. of Specific Crimes [Enforcement Date 5 May 2020.] [Act No.16922, 4 Feb. 2020, Partial Amendment].
8. The Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission. [Enforcement Date 18 Feb. 2022.] [Act No.18438, 17 Aug. 2021, Partial Amendment].
9. Act on the Establishment and Operation of the Corruption Investigation Office for High-Ranking Officials [Enforcement Date 1 Jan. 2021.] [Act No.17646, 15 Dec. 2020., Amendment by Other Act].
10. Transparency International.
11. Transparency International.
12. World Justice Project 2022, p. 22.
13. World Justice Project 2022, p. 29.
14. World Justice Project 2022, p. 29.
15. Act On Combating Bribery of Foreign Public Officials in International Business Transactions [Enforcement Date 9 Jan. 2022.] [Act No.18470, 8 Oct. 2021., Partial Amendment].
16. Transparency International 2020.
17. Korea finalized negotiations of an FTA with the Philippines on October 26, 2021 but which has yet to be ratified. fta.go.kr. Accessed 30 April 2023.
18. Kim 2018.

19. For convenience, BITs are abbreviated with the name of the other contracting party and the year the treaty entered into force in parenthesis while FTAs are abbreviated with the name of the other contracting party with 'FTA' included.
20. See Chap. 11 in this volume.
21. Brower and Ahmad 2019.
22. See Chap. 1 in this volume.
23. The provisions follow similar requirements under the US FTAs with DR-CAFTA (Article 18.7), Colombia, Peru and Panama.
24. See respectively Chap. 11 on Japan and Chap. 4.
25. See also the typology in Chap. 11 on Japan.
26. Article 2, Denmark (1988).
27. UNCTAD has mapped the definition of investment in the separate and earlier BIT with Japan (2003) as 'in accordance with host State laws' but it appears that this has been incorrectly categorized as such because it only applies to investments made prior to the entry into force of the BIT.
28. UNCTAD has mapped Austria (1991) as not 'in accordance with host State laws' but it appears that this has been incorrectly mapped as such because it applies to investments made prior to and after the entry into force of the BIT.
29. ASEAN FTA (2009), Article 1(C); China FTA (2015), Article 12.2.2. UNCTAD examples include the Australia–PRC FTA and the Canada–Cameroon BIT. See Reinisch 2018.
30. Some of the largest claims, which have a connection to corruption and illegality, are analyzed separately in the next section.
31. The first known case against Korea was filed in 1984 but was based on consent to arbitration in a contract rather than a treaty, which the country settled. *Colt Industries Operating Corporation v. Republic of Korea* (ICSID Case No. ARB/84/2).
32. UNCTAD n.d.
33. Adapted from UNCTAD n.d. (accessed 28 May 2023).
34. *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37.
35. In 2006, LSF-KEB acquired an additional 13.6% stake in KEB.
36. In June 2007, LSF-KEB sold its 13.6% stake for USD1.28 billion.
37. This figure excluded an additional tax claims and allegations based on conduct before the 2011 BIT went into effect.
38. Korea also claimed serious uncertainties to justify the delay because of a 2006 Bureau of Audit and Investigation (BAI) report that LSF-KEB allegedly acquired KEB through misconduct (Award, 198). The BAI found that the approval for LSF-KEB's acquisition of KEB was 'attained illegally, as well as unjustly, based on, among others, a distorted forecast BIS ratio …[that] was derived from the overstated weakness of Korea Exchange Bank according to Lone Star's lobbying and improper requests for such overstatement.' Award, para. 199.
39. The stock manipulation yielded Lone Star a profit of USD806 million of which USD64 million was deducted because it was found to be due to another joint venture partner. Award, para. 548.
40. Award, para. 20.
41. Award, para. 839.
42. Dissent, paras. 64, 79. The dissent also disagreed with the majority's finding of illegality and a violation of fair and equitable treatment on the part of Korea.
43. The two claimants were Mason Capital L.P. and Mason Management LLC (Mason).
44. Elliott Associates, L.P. (Elliott). While the cases are technically separate and have been argued differently by the parties, the factual scenarios largely overlap, and the cases will be analyzed together for purposes of this chapter.
45. *Mason Capital L.P. and Mason Management LLC v. The Republic of Korea*, PCA Case N° 2018–55 (*Mason v. Korea*); *Elliott Associates, L.P. v. The Republic of Korea*, PCA Case N° 2018–51 (*Elliott v. Korea*).

46. *Mason v. Korea*, https://pca-cpa.org/en/cases/198/; *Elliott v. Korea*, https://pca-cpa.org/en/cases/197/. Pursuant to KORUS FTA, the memorials of the parties are available on the PCA's website, but the factual exhibits, legal authorities, witness statements and expert reports are not. For updates, see Kim 2023. The *Elliott v. Korea* award remains unpublished.
47. The controlling shareholder was also found guilty of bribery. Notably, no evidence existed that the President, Minister or CIO personally benefited from the payments and the only direct beneficiary was a close confidante of the President. Furthermore, the senior government officials were not found guilty of bribery and the Minister was sentenced to two and a half years for abuse of power and perjury and the CIO was sentenced for two and a half years for occupational breach of trust.
48. *Mason v. Korea*, Claimant's Request for Arbitration and Statement of Claim, para. 73.
49. *Mason v. Korea*, Respondent's Post Hearing Brief, para. 20.
50. Korea argued, among other things, that the actions of NPS did not have a legally significant connection with the claimants because (i) in exercising its shareholder right to vote on the merger, NPS did not owe any duty to the claimants; (ii) the NPS exercised its shareholder voting rights in the same way as any other Samsung C&T shareholder; (iii) the merger did not impair or expropriate Mason's rights as a Samsung C&T shareholder; and (iv) there was no evidence that Korea and the NPS intended to extract value from Samsung C&T's shareholders through the merger. *Mason v. Korea*, Respondent, Post-Hearing Brief, para. 11; *Elliott v. Korea*, Respondent, Statement of Defense, para. 541.
51. *Mason v. Korea*, Respondent, Post-Hearing Brief, para. 14.c.
52. *Elliott v. Korea*, Award, para. 623.
53. *Elliott v. Korea*, Award, para. 603.
54. *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7. See further Chap. 4 in this volume.
55. *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award on Merits (8 December 2000), paras. 82–84.
56. *Elliott v. Korea*, Award, para. 604.
57. See further Chaps. 11 and 15 in this volume; and generally on more transparency provisions in Korea's IIAs, Kim 2018.

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Joongi Kim is a Professor of Law at Yonsei University. His research focuses on international dispute resolution, international trade and investment, corporate governance and good governance. He sits on the editorial boards of International Investment Law and Arbitration (Brill), Asian Journal of Comparative Law (Cambridge University Press), Dispute Resolution International (IBA) and Korean Arbitration Review. He has been a visiting professor at ESADE, Georgetown, Keio, the National University of Singapore, National Law School of India University (Bangalore), University of Florida and University of Hong Kong.

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Chapter 15
Foreign Investment, Corruption, Investment Treaties and Arbitration in Thailand

Sirilaksana Khoman, Luke Nottage, and Sakda Thanitcul

Abstract Thailand's economy has developed strongly by consistently attracting foreign investment especially since the 1980s, despite political upheavals and persistent corruption amidst ongoing challenges. It has also expanded the numbers and scope of its investment treaties, including more options for investor–state dispute settlement arbitrations to enforce substantive commitments to foreign investors, resulting in a few treaty-based arbitrations as well as some contract-based arbitrations involving foreign investors. A few, and possibly the *Kingsgate v. Thailand* claim under the Thailand–Australia Free Trade Agreement since 2017, have involved allegations and investigations concerning corruption and other serious illegal behaviour. As reiterated in the conclusion, corruption investigations and court proceedings are necessarily very lengthy, sometimes more so than the time taken to generate and enforce final awards in large (especially treaty-based) investment arbitrations. To reduce the consequent risk of enforcing an award that later proves to be based on seriously corrupt conduct, one solution may be for investment treaty arbitrators to apply the same higher standard of proof that corruption investigators and criminal courts need to apply, although this will mean more delays and perhaps costs in arbitration. Secondly, more transparency could be added to Thailand-related investment arbitration proceedings, so that the public at least knows that corruption is being alleged.

S. Khoman
Thammasat University, Bangkok, Thailand
URL: https://www.americanconference.com/speakers/dr-sirilaksana-khoman/

L. Nottage (✉)
University of Sydney Law School, Sydney, NSW, Australia
e-mail: luke.nottage@sydney.edu.au
URL: https://www.sydney.edu.au/law/about/our-people/academic-staff/luke-nottage.html

S. Thanitcul
Chulalongkorn University, Bangkok, Thailand
e-mail: Sakda.T@chula.ac.th
URL: https://www.law.chula.ac.th/en/profile/5496/

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15.1 Introduction

Thailand has been very open to foreign direct investment (FDI) particularly from the 1980s, fuelling strong economic growth, albeit with strong competition from Singapore, Malaysia and more recently Vietnam as popular FDI destinations within the Association of Southeast Asian Nations (ASEAN) (Sect. 15.2). This pro-FDI environment has arisen despite many military coups and political upheavals.[1] Corruption has also remained a serious challenge for local and foreign investors, although improvements have been made thanks to an anti-corruption agency and other initiatives (Sect. 15.3).

Inbound FDI has been underpinned by four somewhat overlapping waves of investment treaties, although originally with no investor–state dispute settlement (ISDS) arbitration option or only ones with very limited scope. The award against Thailand in the Walter Bau arbitration (2005–2009) took over a decade subsequently to be enforced. The government has also vigorously defended arbitration claims and award enforcement in cases brought instead under investment contracts rather than investment treaties, often very protracted and sometimes alleging corruption or other investor misconduct. Yet Thailand has gradually become more supportive of international arbitration overall (Sect. 15.4).

The second major inbound ISDS arbitration claim was commenced in 2017 under a 2004 bilateral free trade agreement (FTA) by Australia's Kingsgate, after the Thai government suspended operations at its joint venture gold mine in 2015 (and other mines from late 2016) allegedly for environmental reasons. Public sources also indicate that questions have arisen about whether the foreign investor's shareholding in the joint venture was within the maximum permitted under Thai law, and especially about potential bribery. The Australian investor in this Chatree gold mine joint venture has contested these allegations, and by early 2022 it looked like the case was going to settle before the award and that mining would resume, before any corruption inquiries had fully run their course (Sect. 15.5).[2]

In conclusion (Sect. 15.6), we reiterate first how corruption investigations and court proceedings are necessarily very lengthy, sometimes more so than the time taken to generate and enforce final awards in large (especially treaty-based) investment arbitrations. To reduce the consequent risk of enforcing an award that later proves to be based on seriously corrupt conduct, one solution may be for investment treaty arbitrators to apply a high standard of proof, similar to that applied by corruption investigators and criminal courts, although this will mean more delays and costs in arbitration. Secondly, we suggest that this topic shows the importance of adding more transparency to investment arbitration proceedings, so that the public at least knows that corruption is being alleged and investigated. Like a growing number of states, Thailand should therefore consider building more transparency provisions into future investment treaties and review past ones to incorporate such provisions, in various ways, to help promote important public interests and rule of law values.

15.2 Foreign Investment in Thailand: Past, Present and Future

Foreign investment, especially FDI in manufacturing, has been an important part of industrialisation in Thailand since 1959. FDI has also been central in Thailand's overall strategy to push its industrial structure from labour-intensive to capital-intensive, then assembly-intensive (1981–2018) and now innovation-intensive (the national strategy 2018–2038).[3] As more Asian countries became independent and rebuilt after World War II, Thailand in 1949 became a member of the International Monetary Fund (IMF) and the World Bank, which made its first loan in 1950 to accelerate industrialisation. In 1959 coup leader Sarit Thanarat committed Thailand to a path of economic growth based on an essentially pro-capitalist economy with private ownership as the means of production and an open trading regime, including American advice and a revision of the Investment Promotion Law in 1962. The role of the Board of Investment (BOI) was crucial, not just because of the few incentives it could grant, but because it was a symbol of the state's commitment to promoting import-substitution industrialisation (ISI).

However, the ISI strategy adopted by the Sarit government and its successors led the economy into structural difficulties, including a chronic and growing adverse trade balance and deteriorating balance of payments. The labour-absorptive capacity of this strategy was also weak, impeding the modernisation of agriculture and expanding the urban poor. In 1972, the Thais started to move from ISI to export-oriented industrialisation with a revision of the Investment Promotion Law in 1972, designed to offset the disincentives inherent in import protection. The BOI offered export incentives for intermediate goods. Under the fourth economic and social development plan (1977–1981), the export promotion policy was significantly revised to reduce the anti-export bias resulting from ISI. The BOI still had a major role in authorising and granting exemptions and privileges.[4]

From around 1980, the World Bank and newer Asian Development Bank encouraged Thailand to upgrade their export capability as four Asian newly industralised countries (South Korea, Taiwan, Singapore and Hong Kong) moved away from manufacturing textiles and simple consumer electrical goods and so on to more sophisticated products like automobiles and videocassette recorders. The success of some Thai exporters of labour-intensive products created demonstration effects for other firms.[5]

General Prem (prime minister over 1980–1988) was convinced by his top economic advisors to establish Joint Public–Private Cooperation, helping to stimulate the Thai economy by exporting. The discovery of natural gas in the Gulf of Thailand made possible the Eastern Seaboard Development Program, a large-scale industrial development modelled after Japanese success, which generated petrochemical and fertilizer industries as well as two industrial parks near deep-sea ports.[6]

Export-oriented industrialisation took off after the Thai baht (tied to the US dollar) depreciated, as Japan strengthened the yen after the Plaza Accord of 1985. By the late 1980s, Thailand had become an attractive investment location due to

high economic growth without high inflation, unstable exchange rates or political turmoil—despite occasional military coups. The private-enterprise economy, positive attitude towards foreigners and increasing export-oriented strategy induced foreign investors, especially Japanese firms, to relocate industrial plants to Thailand.

Most of this Japanese FDI was concentrated in assembly-intensive industries (such as automobiles and parts, electrical appliances, electronic goods and machinery) and capital-intensive industries (such as petrochemicals), mainly geared to the export market. By 1993, the World Bank ranked the late-comers in industrialisation (Indonesia, Malaysia, Singapore and Thailand) as High-Performing Asian Economies successful in reducing poverty.[7]

However, after the 1997 Asian Financial Crisis (AFC), to push Thailand up the industrial ladder to an innovative-based or knowledge-based economy, Thaksin Shinawatra (elected prime minister in 2001) invited Harvard economics professor Michael Porter to design a new plan. However, there was a serious problem in the implementation process, which led to the failure of this excellent strategy.[8] There was political turmoil during the second Thaksin Shinawatra administration, leading to the coup in 2006. There was a general election in 2009, and another in 2011 when his sister Yingluck Shinawatra won a large victory, but political unrest continued until there was another coup in May 2014 led by General Prayut Chan-o-cha.

In 2012, Thai policy makers also realised that the absolute share of Thailand's FDI had decreased from 1.2% in 1990 to 0.6%, while the foreign investor confidence index for Vietnam, Malaysia and Indonesia surpassed that of Thailand. For FDI share, Thailand was ranked 17 in 1990 but dropped to 29 in 2012. As its exports were driven by FDI, when the share of FDI dropped, the ranking of the share of its exports also dropped from 15 in 1990 to 22 in 2012.[9] Fortunately, tourism became an important source of revenue for Thailand particularly after the AFC.

Thailand, classified by the World Bank as a lower-middle-income country in 1991, was reclassified in 2012 as high-middle-income. Accordingly, the next year, the European Union (EU) cut off Thailand from being a beneficiary of the EU Generalized System of Preferences. Being stuck in a middle-income trap while society aged rapidly also became a serious problem for the then Thai government. The economy became over-dependent on tourism (as highlighted by the COVID-19 pandemic from 2020), particularly from China, but this is not sustainable due to the rapidly deteriorating environment.

To move Thailand out of this middle-income trap, the Prayuth government adopted the 20 year national strategy (2018–2038) on 13 October 2018. The sub-strategy concerning competitiveness aims to push the Thai economy up the industrial ladder to knowledge-based or innovative-based industries or 'Future Industries and Services'. This means firstly the extension of industries that Thailand already has: (1) Next-Generation Automotive; (2) Smart Electronics; (3) Affluent, Medical and Wellness Tourism; (4) Agriculture and Biotechnology; and (5) Food for the Future. The sub-strategy also promotes new industries that Thailand does not have yet or not sufficiently: (1) Robotics; (2) Aviation and Logistics; (3) Biofuels and Biochemicals; (4) Digital; and (5) Medical Hub.

Most of the 'Future Industries and Services' will be located in existing and new industrial parks in phase II of the Eastern Seaboard Development Program, called the 'Eastern Economic Corridor (EEC) area'. After major transport infrastructure is completed in 2026, foreign tourists and investors can travel more conveniently. Because of the lack of Thai companies with advanced technology in those ten targeted industries and services, Thailand needs to solicit foreign companies with sophisticated technology to come to invest in Thailand, especially in the EEC area. The BOI now offers investment incentives to those companies.[10]

15.3 Governance and Corruption

Thailand's impressive FDI trajectory has been achieved despite extensive political turmoil and wider governance challenges, including considerable bribery of public officials. Its current anti-corruption legislation dates back to the Criminal Code of 1956. Under Article 149, corruption and particularly bribe taking are serious crimes punishable by death. However, the death penalty has never been applied, and instead serves the purpose of eliciting confessions whereby the sentence is commuted to life imprisonment.

The student movement that toppled the military dictatorship in 1973 led to an interim civilian government that established Thailand's first agency dedicated to fighting corruption in 1975. However, this agency was generally perceived to be ineffective since it was housed under the Prime Minister's Office, and its ability to fight high-level corruption was limited. Under the new people-based Constitution of 1997, widely considered to be enlightened and progressive, a new independent anti-corruption agency (the National Anti-Corruption Commission; NACC) was set up in 1999. A new Anti-Corruption Act was also enacted (last amended in 2018).

The anti-corruption legal infrastructure subsequently improved, with the passing of several laws, including the Anti-Bid-Rigging in Public Procurement Act (1999), the Facilitation Act for Licences and Permits (2015), and the Public Procurement Act (2017). Measures to improve governance were also encapsulated in a set of guidelines, the Regulations of the Prime Minister's Office on Good Governance in 2001, and each government agency was required to create and abide by explicit codes of conduct. These guidelines sought to promote transparency in government, improve the quality of public services, strengthen integrity in public life, prevent corruption and misconduct for personal gain, as well as create a sense of mutual responsibility towards society. Moreover, popular participation was mandated by law, and there were various awareness-raising campaigns organised by local and international civic organisations, as well as the country's increasingly dynamic media, which thrived in the wake of a coup in 1991.

Nonetheless, the anti-corruption law focused mainly on the bribe receiver. Amendments in 2018 added provisions based on the 2003 United Nations Convention against Corruption (ratified in 2011), bringing greater focus on the bribe payer as well as international players. A separate central Anti-Corruption Court was created in 2016

to expedite the handling of corruption cases, with nine provincial courts specialising in corruption cases set up in different parts of the country in 2017.

Despite all these initiatives, Thailand's extensive web of integrity, anti-corruption and institutional arrangements for good governance have not succeeded. For example, Transparency International's score for Thailand in its 2021 Corruption Perception Index remained at 35 out of 100, well below the Asia–Pacific average (45) and not much different to nearby Laos (30) and Vietnam (39) although better than Cambodia (23).[11] So what went wrong? Thailand's current corruption problem stems from the confluence of four main inter-connected factors in the late 1990s: (i) the 1997 Constitution, (ii) the Asian economic crisis, (iii) civil service reform and (iv) ingrained political culture.

First, the reformist constitution of 1997 encompassed most of the standard provisions said to underpin good government and governance as well as specific provisions for increasing transparency and probity. Ironically, the same Constitution contained certain features that had unintended consequences on the nature of corruption in Thailand. By imbedding several elements that ensured strong government (to foster accountability), the seeds for 'network' corruption were inadvertently planted. For example, those eligible to stand for election had to belong to a political party for more than 90 days before contesting elections, ostensibly to prevent questionable candidates from registering overnight. No independents were allowed. However, if Parliament was dissolved, elections had to be held within 45 days. Deviation from party lines would most likely result in expulsion, which would be tantamount to political suicide. Accordingly, even when corruption among high-level party members could be perceived, dissension was practically impossible, so voting would still conform to party directives. The Constitution was intended to create strong government, but it led to the concentration of power, monopoly of government and decline in political contestability. This allowed a powerful business–politics nexus to capture key state and regulatory processes.

Second, the 1997 Asian economic crisis had two main consequences in Thailand. First, it led to structural shifts in economic power and the face of cronyism in Thai society changed. Because it started off as a financial crisis, private-sector banking was decimated through massive non-performing loans, paving the way for new businesses like telecommunications and information technology to dominate. Big business entered politics and became central to forming government.

The concentration of political power also allowed vulnerable populist policies to be pursued, with government banks now gaining prominence and becoming tools under government command. With strong government, political objectives often took precedence over economic rationality, with tendencies to circumvent proper evaluation, feasibility studies and scrutiny. Distortions in the economy were created, and necessary long-term projects or programmes for capacity building were crowded out. At the very least, there was a tendency to disregard the fiscal burden and long-term consequences for macroeconomic stability. In addition, strong government paved the way for irregularities and conflicts of interest in procurement and interventions in contracts, subsidies, taxation and concessions. Technocrats were largely discredited, and had little say, because the crisis happened under their watch. Many projects

were found to have connected dealings and reeked of conflicts of interest involving high-level politicians in power. Thus, the crisis aftermath also contributed to the ascendancy of a powerful business–politics nexus capable of blocking reform and sometimes even the judicial process.

Third, civil service reform was a factor. Several laws already regulated the conduct of public employees.[12] Many were linked to much larger civil service reform efforts enacted in the aftermath of the 1997 AFC. However, the appearance of reform also allowed considerable looting of the economy. Because the bureaucratic system was generally seen as inefficient and ineffective, new 'public organisations' were set up with greater flexibility in procurement and human resource management. This allowed cronies to be appointed to high-paying positions, using public funds with no accountability, in return for political support and suspected kickbacks. In addition, risk-averse policy makers were reluctant to enact meaningful reforms that might jeopardise the interests of constituents who profited from systemic corruption.

Fourth, engrained political culture remains a problem. In many parts of Southeast Asia, the family dynasty–big business nexus is common and these well-connected dynasties control politics through their power and influence.[13] In Thailand, big business became the government. This gives rise to the most insidious form of corruption, involving bribery, connected dealings and state capture, often perpetrated by high-level power brokers in government. Thailand lacks a strong conspiracy law similar to the 1970 Racketeer Influenced and Corrupt Organisations (RICO) Act in the United States. The process of prosecuting corruption cases is therefore time-consuming and arduous, particularly if key players are sitting in seats of power.

Space precludes elaborating the theoretical and empirical framework for such 'network corruption', but it is important to understand the ongoing problem in Thailand (and beyond). Network relationships play an important role and help to create efficiency, whether in business or politics, or any other area of interaction. Indeed, investing in creating trust, brand loyalty, recognition and reputation, whether in personal or business relationships, is part of the process of networking. Trust implies confidence that some person or institution will behave in an expected way. Yet there are also built-in dangers when networking turns into conspiracy aimed at siphoning public funds into private coffers. Exchanges expand among identified patrons and clients, in a growing self-enforcing network.[14] Information asymmetry compounds the complexity of corruption investigations.[15]

Prior to the 1990s, perhaps because of failings of governments in the past, poor and disenfranchised people who cannot rely on governments for basic services sought to affiliate themselves with people in power or groups with access to power. Political parties recruited members who then became part of the party's central customer database, a stock of regular customers willing to vote for the party in elections. Candidates were not evaluated on the basis of policy or ideology, but on which network they belonged to, and whether election outcomes were beneficial or detrimental to the group's interests. To a large extent, political loyalties were not directed towards ideas, but towards leading personalities. Therefore, for the most part, it is not ideological persuasion but the leadership qualities of individual politicians that become important. Such features remain ingrained in Thailand's political culture.

In sum, these four factors combined to transform the nature of corruption in Thailand from simple embezzlement, or 'skimming off' projects, to the unprecedented emergence of a powerful business–politics nexus. Contracts were often won because of undisclosed network relationships rather than objective criteria. Although procurement regulations may be clear and strict, loopholes can be found that allow conspirators within patron–client networks to engage in wrongdoing with much impunity. Sometimes, laws and regulations are blatantly violated because of perceived 'protection' within the network. Because of these complexities, corruption investigations are time-consuming and fraught with obstacles, as shown for example in the Klong Darn wastewater plant case.[16] By contrast, arbitration proceedings are generally less complicated, by focusing on narrower issues and relationships, and so are often concluded long before corruption cases are completed.

15.4 Investment Treaties and Arbitration

15.4.1 Four Phases in Thailand's Investment Treaty Practice

Thailand has gone through four partially overlapping phases in signing investment treaties, connected with national, regional and global trends in FDI, treaty-making and arbitration. The first phase encompassed 7 of Thailand's 39 BITs (of which 36 are currently in force), signed between 1961 (with the then West Germany) and 1991 (with Vietnam).[17] None of these seven treaties allowed for any ISDS arbitration to be initiated by the foreign investor, instead only inter-state arbitration of alleged substantive violations by the host state. These BITs also focused on protection of investments once made, not providing liberalisation favouring investors from the home state (e.g. through national treatment commitments from the host state extending to the pre-establishment phase).

However, some such liberalisation along with protections for investors was provided under the 1965 Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America, albeit without an enforcement mechanism. This treaty was concluded in the context of the Cold War, the war in Vietnam and the Sarit military government's laissez-faire ISI strategy (outlined in Sect. 15.2 above), and a long tradition of such treaties signed by the US and earlier by other Western states. The Treaty allowed US investors (at least 51% American-owned and with at least half the directors comprising American citizens) to own the majority of or all shares in Thai entities, and to engage in business activities like local companies (exempt from most restrictions on FDI imposed by the Revolutionary Party's Order No 281 on Foreign Business 1972). However, for example, the 1965 Treaty maintained restrictions over US investments in sensitive areas such as communications, transport, banking, land ownership, exploitation of land or resources, and domestic trade in local agricultural products.

The second phase involved nine BITs signed by Thailand from 1989 (with South Korea), then Hungary in 1991, through to 18 February 2000 (with Egypt). These treaties are distinguished by adding the possibility of ISDS arbitration by foreign investors, but only under the framework 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which also established the International Centre for the Settlement of Investment Disputes. Yet, because Thailand had only signed that ICSID Convention and has never ratified it, ISDS in fact remained unavailable under all nine of these BITs. Our separate research suggests this was quite deliberate drafting from the side of Thailand, in an era when the country was also not yet keen on arbitration generally.[18] Through the 1990s, Thailand was anyway a booming destination for FDI, despite a hiatus around the 1997 AFC.

Thailand's third phase of investment treaty-making ran from 1993 (with a BIT signed with Romania) through to 2008 (with Myanmar) and then a gap until 2015 (with the United Arab Emirates). All of these 26 treaties involved full ISDS, because they allowed foreign investors to invoke instead or as well the UNCITRAL Arbitration Rules. The early BITs over this phase were mostly with other ASEAN member states (Cambodia, the Philippines and Indonesia) but also for example included BITs signed with Taiwan in 1996 and Canada in 1997, as significant actual or potential investors into Thailand.[19] Remarkably, on 18 February 2000, Thailand signed six BITs (along with the one with Egypt mentioned above), all concluded with less important states for FDI flows (such as Zimbabwe—indeed that BIT never even entered into force). This seems a good example of mass signings by states prompted around that time by UNCTAD, which actively promoted investment treaties to promote FDI and related trade, which were already starting to burgeon regionally and globally as socialist states in Europe and then Asia started to open up their economies.

The BITs in this third phase, overlapping with new economic and FDI policies aimed at pushing Thailand out of the middle-income trap (as mentioned above in Sect. 15.2), still focused on the protection of foreign investment once accepted and made. Liberalisation was primarily promoted only with other ASEAN member states, through the 1998 Framework Agreement on the ASEAN Investment Area. However, the latter only provided for enforcement through inter-state arbitration. Complementing this treaty, focused on protection of investors from the then other ASEAN member states and underpinned also by ISDS, was the earlier 1987 ASEAN Investment Agreement. These two intra-ASEAN treaties were supplanted by the ASEAN Comprehensive Investment Agreement signed in 2009, providing for both liberalisation and protection of foreign investment underpinned equally by ISDS.

Thailand's fourth phase (since around 2004) has been characterised mostly by free trade agreements (FTAs) including investment chapters, although it has also signed a few BITs (in addition to those with Myanmar and the UAE, also in 2005 with Hong Kong, Turkey, Jordan and Tajikistan—the latter not yet in force). These include bilateral FTAs with Australia (signed in 2004), New Zealand (2005), Japan (2007) and Chile (2013). Negotiations for more FTAs have been suspended due partly to Thailand's shifts to military government, meaning it has far fewer than say Singapore, but the latter also has been able to conclude more FTAs because it

already has an even more open economy for investors and traders. This means that most FTAs for Thailand, promoting both liberalisation and protection for foreign investors and usually providing for full ISDS, have come from regional 'ASEAN-Plus' treaties. These include the ASEAN Japan Economic Partnership Agreement signed in 2008 (with an investment chapter omitting ISDS, but anyway available for Japanese investors against Thailand under the 2007 bilateral FTA), the ASEAN Australia New Zealand FTA (AANZFTA) signed in 2009 and updated in 2022, the ASEAN Korea Investment Agreement and the ASEAN China Investment Agreement signed in the same year, the ASEAN India Investment Agreement signed in 2014 (but not yet in force) and the ASEAN Hong Kong Investment Agreement signed in 2017. The latter four are complemented by ASEAN Plus trade agreements, whereas AANZFTA combines an investment chapter along with commitments on trade and other matters such as intellectual property rights.

AANZFTA does allow for ISDS but involves less commitments than say the bilateral Thailand–Australia FTA (TAFTA), even though the latter was signed five years earlier. For example, AANZFTA only provides for a work programme to negotiate pre-establishment national treatment or liberalised market access for foreign investors. By contrast, TAFTA commits to various liberalisations going beyond Thai national law for foreign investors, or at least locks in via the treaty certain market access commitments for Australian investors. For example, there is pre-establishment national treatment (Article 904), although this provision preventing discrimination compared to local Thai investors is subject to reservations from Thailand contained in Annex 8.

Protections under TAFTA include post-establishment national treatment (Article 906) and most-favoured nation treatment (Article 910) without scheduled exceptions, fair and equitable treatment (Article 909(2)), and compensation for direct or indirect expropriation (Article 912). By contrast, AANZFTA lacks any most-favoured-nation commitment, even after the establishment of the investment, that would require Thailand to treat an Australian investor equally to an investor from a third state. AANZFTA also limits fair and equitable treatment to the minimum standard of treatment under customary international law (Article 6(2)(3)), like some of Australia's later FTAs influenced by evolving US and other Asia–Pacific investment treaty drafting practice.

AANZFTA's Investment Chapter 11 Article 2(a) (and the earlier TAFTA, in Article 901) defines protected 'covered investment' as those 'admitted' by the host state subject to its 'laws, regulations and policies'. However, AANZFTA qualifies admission with 'where applicable' and adds in Note 1 'for greater certainty' for Thailand that it means 'specifically approved in writing *for protection* by the competent authorities' (emphasis added, perhaps responding to the Walter Bau ISDS claim discussed next). Thailand's other treaties, especially earlier and recent BITs, have been mixed in including such explicit 'legality' requirements, which arguably are crucial in taking away jurisdiction of ISDS tribunals to award relief for substantive treaty violations if serious corruption tainting the initial investment can be proven.[20]

15.4.2 *Investment Treaty and Contract-Based Arbitrations Involving the Thai Government*

Thailand has therefore built up a quite extensive network of investment treaties, with gradually more expansive commitments from the host state underpinned increasingly by ISDS provisions, while FDI flows have continued to burgeon in parallel. Unsurprisingly, therefore, there have now started to be some treaty-based ISDS claims. Yet only two have been brought against Thailand,[21] perhaps reflecting the long tradition of (even very different) Thai governments being very welcoming towards foreign investors (outlined in Sect. 15.2 above). The latest ISDS arbitration was initiated in 2017 by Australian investors Kingsgate under TAFTA, after the Thai military government closed down their Chatree joint venture and gold mining in Thailand (detailed in Sect. 15.5 below).

The first treaty-based ISDS claim against Thailand was initiated in 2005 by the liquidators of Walter Bau under a BIT revamped with Germany in 2002 (adding ISDS), and related to a tolled Bangkok highway project. This claim led to a 2009 award of EUR29 million (plus interest and significant costs) by an UNCITRAL Rules ad hoc arbitration tribunal chaired by a former New Zealand judge. The Thai government vigorously attempted to resist enforcement by applying unsuccessfully to have the award set aside at the seat in Switzerland, and then to resist enforcement in US courts against Thai government assets possibly held in that jurisdiction. In both proceedings Thailand reagitated the argument that it had not given sufficient consent in writing to ISDS jurisdiction, which had been dismissed by the original tribunal as Walter Bau had obtained various other governmental consents associated with the highway project.

The company's liquidator did not attempt to enforce the award through Thai courts, perhaps fearing they might apply the public policy exception or some other ground permitted under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ratified by Thailand in 1960). Instead the liquidator applied for seizure of the aeroplane of the then Crown Prince when he was visiting Germany in 2011. After it was released by the government paying funds into the German court, the liquidator sought enforcement of the award in Germany. Thailand again contested consent to arbitration but finally in December 2016 the last of various German court decisions ordered enforcement. This denouement and presumably payment of the award plus interest by Thailand, received curiously little coverage in Thailand although this first-ever ISDS case had become quite a cause célèbre in the Thai media.[22]

Ironically, given the government's dispute resolution tactics in the protracted Walter Bau saga, Thailand has made several submissions to UNCITRAL deliberations about reforming the ISDS system globally, underway since 2017, complaining about the high costs associated with ISDS cases.[23] However, the government's dogged and doubtless expensive defence in this treaty-based case is also characteristic of several high-profile contract-based arbitration claims brought by foreign

investors. One reason is arguably that Thai government officers can be held personally liable for breaching official duties intentionally or with gross negligence, under the Tort Liability of Officials Act 1996. In addition, the public can be very critical of perceived government failures.[24] One commentator on arbitration in Thailand further notes:[25]

> a well-recognised reluctance among officials to take responsibility for authorising payment of public funds in circumstances where there still exists some possibility—however remote—that the payment may not be due. Thai law imposes broad criminal liability on officials who exercise their functions incorrectly, and this has contributed to an institutional mindset that seeks to avoid personal responsibility for any matter that could conceivably be controversial or open to future reconsideration. Delay and appeals are obvious methods for deferring decisions and (with luck) passing responsibility to a successor.

Thus, even more than civil liability under the 1996 Act, Thai officials—including lawyers representing the government in arbitration-related proceedings—are likely to be concerned about potential imprisonment and/or fines for dishonest (in)action, under Section 157 of the Criminal Code. Such concerns are particularly understandable given Thailand's frequent coups and changes of government. A further cause of protracted arbitration related proceedings involving the government is that there may be actual or perceived corruption involved in the conclusion of the underlying contracts, as also mentioned in Sect. 15.3 above, and agitating such issues before arbitral tribunals and often again before courts can be very time-consuming.

One example of the active defence of a contract-based arbitration involving the Bangkok metropolitan government relates to a Thai Arbitration Institute (TAI) tribunal award for THB 6.2 billion (now about USD176 million). After this was enforced by the Bangkok Civil Court in December 2003 against the Rapid Transit Authority, regarding a claim filed in 1998 by a consortium for the Bangna Expressway project formed after Japanese firm Kumagai Gumi sold out in 1994 after an earlier dispute, the government appealed. The Civil Court's enforcement order was overturned by the Supreme Court in 2006, after it found evidence of bribery and conflicts of interest rendering the underlying agreement contrary to public policy.

Another claim lodged with the TAI in 2004 awarded large damages to Hong Kong construction firm Hopewell in 2008, finding wrongful contract termination by the government. However, in 2014 the Central Administrative Court annulled the award on public policy grounds by applying legislation enacted in 1999 setting a shorter prescription period than the period in force when Hopewell had commenced arbitration.[26] Hopewell appealed unsuccessfully to the Supreme Administrative Court, which upheld the Central Administrative Court's decision. The Ministry of Transportation and the Railroad Authority of Thailand via the Ombudsmen then appealed to the Constitutional Court. It ruled that the resolution of the Supreme Administrative Court judges (Grand Bench, number 18/2545) concerning the time prescription was void. Accordingly, on 4 March 2022, the Supreme Administrative Court ordered the Central Administrative Court to decide this case again, to decide whether Hopewell took legal action by commencing arbitration within the relevant prescription period.

On 9 October 2014, noting also a 2006 annulment decision in an award related to the ITV television station, one Thai practitioner expert in international arbitration remarked:[27]

> The Hopewell case follows a series of cases in the past decade where the Thai courts have broadly interpreted public policy in order to set aside awards against state entities. …
>
> In 2007, the Supreme Court overturned the Civil Court's enforcement of the USD 202 million award against the Expressway and Rapid Transit Authority ('ETA') upon finding evidence of bribery and numerous conflicts of interest. The Supreme Court concluded that the underlying agreement was contrary to public order and good morals, and therefore the award was against public policy.
>
> The picture is not entirely bleak; indeed, the Central Administrative Court has enforced a THB 9 billion arbitration award against the Pollution Control Department for breach of contract for the construction of a wastewater treatment system on 9 November 2012. The court enforced the award despite allegations of corruption, criminal charges and convictions of a high-ranked official. The matter is pending appeal.

The last-mentioned case involves the controversial Klong Dan waste water plant dispute. On 10 October 2014 the Supreme Administrative Court did affirm the TAI award enforcement, ordering the Department to make payment to the consortium within 90 days of the court judgment. Two years later, a settlement was reached whereby the Prayut government agreed to pay the award in three tranches.[28] However, investigations into corruption and criminal proceedings had continued. The State Audit Commission wrote to the Prayut government to suspend the payment because of a Criminal Court's decision that the Director General of the Pollution Control Board illegally sold public land to the consortium. Accordingly, the Minister of Finance and the Department petitioned the Central Administrative Court to retry the case based on new evidence (the Director General's conduct) and to set aside the TAI award based on the violation of public policy (pursuant to Section 40(3)(2)(b) of the Arbitration Act 2002). The Central Administrative Court agreed with the Minister's argument, and set aside the TAI award in March 2018. However, the consortium then appealed to the Supreme Administrative Court, which reversed the judgment of the Central Administrative Court and ordered the government to pay the award.

This protracted Klong Dan dispute highlights an important point concerning the interface between corruption and arbitration, which are further elaborated below regarding the Kingsgate treaty-based ISDS case study below (Sect. 15.5) and reiterated in the Conclusions (Sect. 15.6). Arbitration is often criticised for being too slow and costly, but the process resulting in an award and even then any extra time due to the losing respondent contesting the award through the courts can often be quicker than the time needed to commence and conclude investigations into corruption, and then prosecute cases through multiple forums. This is because of the difficulties of collecting evidence and coordinating corruption investigations involving often multiple government and private entities such as banks domestically, let alone internationally, as outlined in Sect. 15.3 above. The evidence of corruption needs to be sufficient ultimately to prove the case in criminal courts, beyond reasonable doubt, and also to avoid potentially tarnishing reputations or resulting in political backlash

if corruption is alleged and investigated but not finally proven. The end result is that an arbitration award may be rendered and even enforced before the necessarily detailed and lengthy corruption matters have been finally resolved in other forums. This problem becomes more acute as states 'compete' to make themselves more 'arbitration-friendly', including by promoting more efficient proceedings in their arbitration centres and courts dealing with any challenges to award enforcement or arbitrators.

Indeed, overall, the Thai government has become more positive and proactive generally about arbitration, albeit in fits and starts, and comparatively less so than in nearby states like Malaysia and especially Singapore. The TAI was established by the Ministry of Justice in 1990, but was moved under the jurisdiction of the judiciary's ADR Office in 2000 partly to promote its independence from the executive branch of government. In 2002 Thailand also enacted a new Arbitration Act based on the global best practice of the UNCITRAL Model Law template. Since 2015 the TAI has also been subjected to competition from the new Thai Arbitration Centre, under the Ministry, but seemingly aiming to be more like the popular arbitration centres in the region. In 2015 the Cabinet Office also revised its policy requiring only three types of government contracts to be reviewed before including arbitration agreements, instead of all government contracts (as under a policy introduced in 2009, soon after the Walter Bau treaty-based arbitration award) and earlier all concession contracts (in 2004).[29] Thus, the Thai government has gradually started to promote and support international arbitration, while also pursuing a longstanding programme to address corruption (Sect. 15.3), creating more scope for tension in the interface between the two regimes.

15.5 *Kingsgate v. Thailand* Gold Mine Case Study

Given the complicated background outlined above concerning Thailand's evolving attitudes towards investment treaties and international arbitration, it is unsurprising that the second major ISDS claim to proceed against Thailand, by Australian listed mining company Kingsgate,[30] was also protracted and controversial. Interestingly, the arbitration initiated under TAFTA raised questions of potentially illegal and/or corrupt practices involving the Australian investor. Unfortunately, the arbitration claim is subject to confidentiality restrictions so the following analysis is based only on publicly available information, including media reports, which may not always be accurate or complete.[31]

Sydney-based listed company Kingsgate, which had operated in Thailand since 1987, invested with Thai shareholders in Akara Resources to begin operating from 2001 the open-pit Chatree gold mine 280 km north of Bangkok in Pijit Province, the first and largest gold mine in Thailand, expecting to operate the mine under concessions until 2028.[32]

In late 2010, 44 local residents filed a lawsuit against five Thai government authorities claiming they had illegally issued Chatree mine concessions and land use permits,

and negligence in mitigating alleged health and environmental damage. In 2012, the Phitsanulok Administrative Court refused to revoke the concessions or grant local people access to allocated forest areas. However, it did instruct Akara Mining to conduct an environmental and health impact assessment, stating that the concessions grant without such assessments was contrary to environmental protection clauses in the Constitution enacted in 2007 (the year after the coup deposing Prime Minister Thaksin Shinawatra).[33]

In January 2015 (after the military coup led by Prayut), the Department of Primary Industries and Mines ordered a 30-day suspension of Akara's operations. After Akara's environmental impact studies had continued to find no adverse impact, a government study had found excessive arsenic and manganese among 282 villagers living nearby. However, commentators reported that Kingsgate 'responded by arguing that "arsenic and manganese are not used or stored at the Chatree Mining operation now or at any time in its history". Indeed, it is cyanide rather than arsenic or manganese which is used to leach gold from ore'.[34]

After public consultations in February 2015, the Department agreed to lift the suspension order if Akara could prove its operation did not pose a health threat; the order was extended for 45 days. Australian-government-funded researchers argued that a contributing factor to this ongoing dispute was that a 'systematic lack of engagement of all villagers in Pijit to actively participate in decision-making has led to frustration and dissatisfaction'. They further noted:[35]

> The legacy of political decentralisation promoted while Thailand was under the rule of the Shinawatra siblings, is the expectation rural communities will be involved in decision-making processes impacting their welfare. At the same time, most villagers we interviewed consider themselves 'uneducated' and 'powerless'.

The suspension led to Akara reporting an after-tax loss of USD147 million for the 2015 full year, up from the USD97.6 million in fiscal year 2014. On 2 October 2015, it was reported that:[36]

> Almost 100 members of a residential group living near the mine told Thai authorities this week their quality of life had improved because of the mine's employment and development funds, and they suffered no adverse health effects from living near the mine.
>
> Kingsgate's chairman Ross Smyth-Kirk in August announced plans for the company to expand its gold mining operations in south-east Asia, including Thailand, Indonesia, Papua New Guinea and Vietnam. He was quoted by the *Bangkok Post* as saying his company was waiting for Thailand's government to establish a policy for gold mining. Thailand has not opened any gold mine concessions for private companies for eight years.

However, the report added that the Australian Securities and Investment Commission (ASIC) had sent initial evidence to its Thai counterpart, the Securities and Exchange Commission, according to Wicha Mahakhun, chair of Thailand's NACC sub-committee investigating an allegation that Kingsgate bribed Thai state officials to obtain the Chatree gold mining concession. Its then CEO Greg Foulis reportedly responded that 'Kingsgate had always acted in accordance with Thai mining laws and categorically stated that the company had never made an improper payment in return for a mining lease in Thailand'.

He later also elaborated:[37]

> As for Kingsgate's 100-per-cent share in its Thai subsidiaries, which is against Thai law on foreign investment, he said the Thai media had misunderstood, as the figure shown in the company's annual report stood for the percentage of ordinary shares in Thai subsidiaries and not the overall share structure. 'I confirm that our shareholdings in Akara Resources are 48 per cent which are common shares, while the other 52 per cent of shares are preferred shares held by the Thai investor. Therefore it is not against Thai foreign-investment law,' he said.

In April 2016, Kingsgate executives continued to defend the company's environmental record at its Thai operations against claims of polluting the local community.[38] In August 2016, Thai authorities reportedly permitted an application for renewal of the licence to proceed. However, Kingsgate alleged in November 2016 that this did not compensate for the substantial losses Kingsgate had already suffered 'as a result of the unlawful expropriation and closure of the Chatree Mine'.[39] In May 2016, the government declared it would shut down the country's only gold mine after the government said environmental concerns outweighed the economic benefits.[40]

In December 2016, General Prayut, as Thai Prime Minister and head of the ruling National Council for Peace and Order, invoked (non-reviewable) Section 44 of the military government's interim Constitution to suspend Chatree's mining operations from 1 January 2017. He cited villagers' complaints that wastewater discharged from the mine had poisoned the environment and harmed their health.[41] The Kingsgate chairman responded that the 'Prayuth Chan-ocha's gold mind decision sends a "horrendous" message; FDI is already way down and there is no chance in the mining sector of anybody else going there'.[42]

On 3 April 2017, Kingsgate announced a formal notice of dispute filed against Thailand under TAFTA.[43] In August 2017, Kingsgate shares soared when the government announced the ban would be partially lifted. However, the government reportedly would not offer any compensation for the past shutdown of the mine and dismissal of employees, although negotiations were ongoing about possible alternative 'meaningful benefits' given the investment losses plus substantial costs and future uncertainties around reopening the mine.[44] Operations ultimately did not resume, and on 2 November 2017, Kingsgate announced it was commencing arbitration, claiming expropriation of the Chatree gold mine, under UNCITRAL Arbitration Rules.[45]

On 18 March 2019, Kingsgate's claim against its political risks insurers in the New South Wales Supreme Court was settled for around AUD82 million. This included a AUD55 million cash payment and 'up to $US3.5 m to help Kingsgate fund its fight against the Thai government and share future costs relating to the legal battle' ongoing under TAFTA.[46]

Also in December 2017, in the context of the EU resuming FTA negotiations with Thailand after its Prime Minister reiterated that democratic elections would be held, the co-founder of the 'FTA Watch' NGO (Kannikar Kijtiwatchakul) warned that the Kingsgate dispute showed the risks of the Thai government facing more claims 'if it hastily cancels foreign investments especially those with clear benefits for the public'.[47]

Meanwhile, in March 2018, a Civil Court lawsuit was filed against Akara claiming about THB500 million (AUD20 million) in compensation for alleged harm on behalf

of hundreds of named plaintiffs and potentially over 6000 villagers under a US-style class action law enacted in 2015. The plaintiffs' main lawyer reportedly stated that a 'recent report by Naresuan University, which confirmed the leakage of water from the gold mine's tailing storage facility to the environment, would be prominent evidence in the case'.[48] It took the Civil Court (Environmental Section) about two years of preliminary hearing before this class action was accepted. Akara appealed the Civil Court's decision to accept this case. The Appeal Court then rejected Akara's request for dismissal. Accordingly, the Civil Court was scheduled to hear the witnesses of the plaintiffs and Akara in February 2023. Settlement negotiations proceeded but fell through in May, so hearings resumed in the Civil Court from 22 June.

The Kingsgate ISDS arbitration, commenced in late 2017, has attracted some attention in the Thai and international press. On 7 June 2018, for example, *Nikkei Asia* reported that the 'Australian gold miner's arbitration case against Thailand's ruling military junta has put the spotlight on a [temporary] constitutional law that gives the government sweeping power to intervene on any matter it sees fit'. It noted that a government spokesperson had claimed being 'confident that we have strong information and data to defend our stance on why we needed to order Akara to close its mining operation', and soon after in a press release maintained that the 'gold mine had adverse environmental effects that harmed local villagers'. However, Kannikar Kijtiwatchakul (for FTA Watch) was quoted as saying on the Prachathai website earlier that 'Section 44 is not a typical civilian law, which could be the Thai government's weakest point and prevent the country from winning this case', although 'that is just one side of the coin'.[49]

In March 2019, soon after its settlement with political risks insurers and around Thailand's general election when General Prayut and his party were narrowly elected to power, Kingsgate stated it now had sufficient cash to pay off its debt and no longer needed to pursue the option of a litigation funder for its ongoing dispute. The first TAFTA arbitration hearing was also scheduled for November 2019 in Hong Kong. Reporters added that 'Kingsgate has not said how much compensation it is seeking, but an Akara executive once said the company could have earned another 30 billion baht [now worth over AUD1.2 billion] if the mine had continued to operate throughout the remainder of its term' through to 2028.[50]

In June 2019, various groups opposed generally to ISDS arbitration published a case study of the Kingsgate claim against Thailand, as part of a report entitled 'Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice', arguing that:[51]

> the question of who gets to decide what is a harmful level of exposure to certain chemicals is crucial. In this ISDS case, rather than trusting national research institutes, the precautionary principle or the local community's knowledge, the decision will be made by three investment arbitrators based on narrow investment law in a secret backroom process. Neither the details of the claim, nor how much or what type of compensation is being demanded by the company are public at this stage, and yet the arbitrators' decision could impact the entire country through the precedent it sets for regulation in Thailand. There is a big risk that all environmental and human rights concerns will be ignored in the panel's decision, as has happened in many other cases.

In October 2019, with remarkable transparency, Thai media reported that the Energy Ministry had proposed four options to the Cabinet for resolving the case with Kingsgate:[52]

> (1) paying Akara Resources to shut it down; (2) complying with Akara's demands to avoid paying; (3) waiting for the ruling of the arbitrator and abiding by it; and (4) partially paying the damages and then allowing the mine to reopen. Some ministers did not agree with the last option, viewing if the government had already shut down the mine, it would be inappropriate to allow it to reopen. While the meeting was discussing the issue, [Prime Minister] Prayut said he needed time to think. 'I can't decide now but I'll bear all the responsibility,' he said. Interior Minister Anupong Paochinda said Thailand should wait for the ruling while Finance Minister Somkid Jatusripitak made no comments.

In January 2020, due to civil unrest in Hong Kong it was reported that the first TAFTA arbitration hearing would instead be held in Singapore the following month.[53] On 29 August, Thai media further reported that:[54]

> An inquiry panel looking into kickback allegations involving an Australia-based gold mining firm and Thai state officials has found documents that might prove the company had paid bribes to the officials, according to graftbuster Supa Piyajitti [in the NACC].

These allegedly showed the financial routes used for the alleged bribes with money being wired to Hong Kong and Singapore, and bribes to Thai state officials to secure concessions and authorisations needed for gold mine explorations and operations, which Kingsgate still denied. Earlier in 2020, in March, the then Director General of the Department of Primary Industries and Mines had been indicted by the NACC partly in relation to Akara's operations, although it is unclear whether these allegations extend to the original investment.[55] In addition, Akara's former managing director was indicted by the NACC for bribing Department officials to allow the company to partially expand its mining project without conducting an environmental impact assessment report.[56]

Later in 2020, on 2 September, the Industry Ministry reportedly stated that 'Thailand needs a budget to finance its legal fight with an Australian gold mining company after a House committee vetting the budget bill in fiscal 2021 slashed its 111-million-baht [AUD4.5 million] request'. The committee had voted 38 to 21 in favour of cutting the budget by THB12 million from the total for legal expenses incurred from arbitration initiated by Kingsgate.[57]

On 7 September 2020, the *Bangkok Post* editorial reported that the government had resumed negotiations with Kingsgate, which Deputy Prime Minister Wissanu Krea-ngam reportedly hoped would be concluded before the arbitral tribunal's ruling. The negotiation effort initiated by Industry Minister Suriya Jungrungreangkit began late in 2019 but was discontinued due to the COVID-19 pandemic. He had reportedly proposed to settle the case and to pay compensation, but Prime Minister Prayut rejected this as he thought Thailand could win. In addition, noting the NACC had recently found documents relating to bribes denied by Kingsgate, the editorial argued that 'details could still be used as new evidence to fight the case' and:[58]

> Whatever option it takes, the government is obliged to dig into the bribery allegations, and see if there was any foul play that enabled the company to mine the area. Those who abused their authority must be held accountable and pay the price.

Soon afterwards, on 16 September 2020, Rich Phoom (linked to Akara) submitted gold mining exploration requests for Phetchabun and Chantaburi provinces, prompting local opposition. The *Bangkok Post* editorial suggested that by allowing the request the government was practically lifting the ban on Akara, despite the pending arbitration, raising concerns that a settlement might have been reached. The editorial added that the department's director general:[59]

> Wisanu Tabtieng, in particular, downplayed worries by local villagers over the requests, insisting that the new Mineral Act BE 2560 has teeth. In a TV interview, the chief was adamant that Akara or Rich Phoom are obliged to follow strict environmental protection guidelines and also a public participation process. He seemed to imply that the Chatree mine was not subject to the law and that's why it's riddled with problems.
>
> Yet, it's too premature for environmentalists and the public to feel relieved or rejoice. In Thailand, it's a case of strong laws, but weak enforcement. In addition, the top [Department of Primary Industries and Mines] official seems to have forgotten the allegation of bribery brought against the mine operator and Thai authorities in securing a permit for the Phichit mine. Shouldn't all concession requests be suspended at least until allegations are cleared?

Nonetheless, in November 2020, with the tribunal's decision looming, the government issued prospecting licences and allowed the sale of high-value gold and silver 'sludge' secured at the Chatree Gold Mine.[60] The following month, a group of Akara former employees pleaded with the government to revive mining operations given the suspension's adverse impact on the local economy and community.[61]

On 18 February 2021, Kingsgate publicly announced via the Australian Securities Exchange (ASX), pursuant to continuous disclosure obligations, that it was continuing with its longstanding policy of negotiating a settlement, bolstered by those developments, but Kingsgate felt the need to elaborate on some matters arising from discussions over the TAFTA case discussed during a debate in the Thai Parliament. This was despite Kingsgate adhering to the arbitral tribunal's order to keep the arbitral proceedings confidential unless required to fulfil a legal duty. Kingsgate then noted:[62]

> In relation to aspects of the negotiations that were specifically mentioned in the parliamentary debate such as the metallurgical licence, the Chatree South mining leases, investment incentives and other Special Prospecting Licence Applications, Kingsgate would like to make it clear that these are not special concessions by any means, rather basic operational items that are required to operate the mine.
>
> In addition, Kingsgate cannot comment on the advice that the Thai Government has purportedly received from its international legal advisers that was also mentioned during yesterday's debate, which indicated they may have to pay compensation to the Company. Kingsgate does however, stand by its previous comments that the Board considers the Company has excellent prospects for a successful outcome.

Further complicating the picture, however, on 6 March 2021 Thailand's Department of Special Investigation was reportedly investigating Akara after a civil society group accused it of allowing the use of proxy shareholders contrary to the Foreign Business Act.[63] Nonetheless, from mid-2021 Kingsgate began commissioning studies and finance for refurbishing and restarting the Chatree mine. On

23 September 2021, it announced that negotiations with Thailand were entering the final stages, while the tribunal was getting ready to issue its award, so the parties 'jointly requested' that the tribunal pause rendering the award until 31 October 2021, 'to allow the parties a short extension to conclude their settlement negotiation'.[64]

Negotiations were prolonged, until on 30 January 2022 Kingsgate announced to the ASX that, less than a fortnight before the arbitral tribunal was due to release its award that month, the firm had been awarded four 10-year leases allowing it to restart the Chatree mine. Speculating that this outcome may be due to Prime Minister Prayut's weakening control over his government, Australian media reported further that 'Thai Deputy Prime Minister Wissanu Krea-ngam said the mine was being permitted to re-open under new laws as long as the company complied with strict environmental, land management and community health provisions' and that:[65]

> Kingsgate's permission to re-open has prompted scrutiny from opposition politicians and activists about what deal had been struck by Prayut's under-fire government to avoid the ignominy of defeat at the tribunal and a 10-figure payout. Opposition MPs had given Thailand little chance of winning the TAFTA case because Prayut had invoked a section of junta-era legislation labelled 'the dictator law' to shut the mine without due process, pushing more than 1000 workers out of jobs.

On 9 March 2022, around 30 activists petitioned the parliamentary committee on law, justice and human rights, arguing the licences were renewed unlawfully, and later visited the Ministry of Justice and the Ministry of Industry.[66] On 11 March, however, the president of the 'Gold Mine Lovers Club' and some residents near the Akara gold mine submitted a letter to provincial governor Paiboon Nabutchom saying they awaited the mine's re-opening, claiming it did not affect the environment or local residents' health and would improve their incomes and quality of life. Residents also reportedly 'asked the government not to be afraid of intimidation from [NGOs] outside the area'. Paiboon told them he had met with opponents of the re-opening but later found out they were not local residents, and pledged to protect them 'with transparency and in line with laws'.[67] Tensions therefore remain among different groups interested in the gold mine, somewhat like those identified by commentators in 2015.

Nonetheless, in May 2022 Kingsgate announced appointment of a locally based company to refine the gold and silver expected from resumption of mining, with the Kingsgate chairperson asserting this initiative offered a real opportunity to create 'Thai gold for the Thai people'.[68] In its ASX announcements, Kingsgate further declared the appointment of a company to refurbish and restart the mine, with experience across Asia and long-term relationships with mining companies in Laos and Vietnam. Kingsgate also announced almost 50% increases in expected gold and silver Chatree mine ore reserves compared to the last assessment in 2016. On 17 March 2023, Kingsgate announced that the Department had approved re-opening of the mine, and on 21 March that the BOI had approved its investment promotion application including tax and import duty benefits for eight years. On 24 March Kingsgate declared the first gold pour had started (also filmed on its YouTube channel) and then that it had raised funds for refurbishment of the mine. The Kingsgate Equity Raising

Presentation did not mention any future risks from government intervention in the mine but rather that:[69]

> In 2022, positive negotiations with the Thai Government … led to key developments and approvals to permit Akara to prepare for a restart of its Chatree operations.

Local Thai media added that the general manager of the Akara subsidiary stated it was 'also preparing documents to clarify supposed irregularities in issuing land-rights documents' to the NACC.[70] The Kingsgate share price rose from AUD1.51 on 16 March to AUD2.01 on 24 March before dropping back to AUD1.50 on 29 March 2023 (and then to AUD1.29 on 2 June 2023).[71]

Overall, the Kingsgate dispute and TAFTA-based ISDS claim commenced in late 2017 first illustrate an important point raised already from the outline of the contract-based investment arbitration in the Klong Dan waste water plant case outlined above in Sect. 15.4.2. Much of the media and other commentary has focused on the alleged environmental harms from the Chatree gold mine operated by Akara, until the issuance of temporary suspension orders in early 2015 and then a permanent suspension decree from late 2016. Yet in 2015 the media were already reporting that Thai authorities were investigating possible bribery, and in 2020 reporting on the indictment of the former Director General of Mines who had signed off on Akara operations (albeit possibly not regarding Kingsgate's original investment). By the time this and any other prosecutions are decided by Thai courts, likely then after many appeals as in past cases like the Klong Dan case, an award or settlement will probably then have been reached and enforced, with compensation possibly paid to Kingsgate.

A second general point that can be distilled from this case study is that information about this ISDS arbitration claim under UNCITRAL Rules has remained sparse. The analysis above has had to be based on publicly available information mostly from newspapers (in English and Thai) and other media sources, as well as brief announcements made by Kingsgate to the ASX as required under Australian corporate and securities law. The arbitration itself remains subject to a confidentiality regime, as the applicable UNCITRAL Rules and TAFTA do not provide for greater transparency as is the case with more recent or other rules and investment treaties. Yet corruption thrives when there is lack of transparency around government affairs.

15.6 Conclusions and Recommendations

Thailand's economy has developed strongly by consistently attracting foreign investment especially since the 1980s (Sect. 15.2), despite political upheavals and persistent efforts to reduce corruption amidst many ongoing challenges (Sect. 15.3). It has also expanded the number and scope of its investment treaties, including more options for ISDS arbitrations to enforce substantive commitments to foreign investors

(Sect. 15.4.1), resulting in a few treaty-based arbitrations as well as some contract-based arbitrations involving foreign investors (Sect. 15.4.2). A few, and the *Kingsgate v. Thailand* claim under TAFTA since 2017, have involved allegations and investigations concerning corruption and other serious illegal behaviour (Sect. 15.5).

Such investigations and any final convictions are necessarily detailed and time-consuming, potentially resulting in an arbitration award or settlement being paid out before the full facts and outcomes concerning corruption have been reached. One way to reduce this risk is to speed up investigations and court proceedings, but this is difficult especially in more developing economies—precisely where corruption tends to be more pervasive. Another approach may therefore be for arbitral tribunals to apply a similarly high (criminal law) standard to assessing allegations of corruption,[72] which will entail allowing more time for evidence to be assembled, tabled and discussed in the arbitral hearings. A further way to address this dilemma could also point towards developing countries like Thailand seeking to add an internal appeals process to the arbitration, whether in contract- or treaty-based investment arbitrations, as pressed for example by the European Union in its investment treaties involving a two-tier investment court.[73]

Admittedly, setting a higher standard of proof may mean the host state is less likely to prevail in the arbitration when raising corruption defences. In addition, a competing interest is that international arbitration should be as cost- and time-effective as possible especially as it is often and perhaps increasingly seen as too expensive and slow.[74] Nonetheless, more careful investigations and deliberations by tribunals around allegations such as corruption seems a relatively small price to pay to help maintain the legitimacy of international arbitration, as the latter also depends on rule of law values—including consistency of outcomes[75]—dovetailing with concerns about corruption.

A related broader point that emerges from this analysis of Thailand, particularly from the complicated Kingsgate case, is that investment arbitrations would benefit from more transparency—particularly when serious matters like corruption are raised on a credible basis. The problem is acute with cases like Kingsgate brought under the old UNCITRAL Rules, even though there is no express general obligation of confidentiality, as the tribunal typically ends up ordering or agreeing to a confidentiality regime to promote the procedural integrity of the arbitration, if sought by one party or more. Yet more transparency in ISDS arbitration is being built into bilateral and regional investment treaties concluded since 2014 that give the option to foreign investors of invoking the UNCITRAL Rules, as these were revised in 2013. Thailand in future treaties could also draft in greater transparency provisions around ISDS (as Australia and other countries have been doing for some years), even though such provisions typically provide for exceptions to be pleaded, such as the host state requesting confidentiality on matters of national security or the investor invoking business secrets.[76]

In addition, arbitration pursued under the 1965 ICSID Convention and its main Arbitration Rules have long had more transparency, including basic facts about the parties, arbitrators and dispute sector but also the publishing of excerpts of legal

reasoning from awards even if a disputing party objects—often resulting in publication of the entire award via the ICSID website. ICSID Arbitration Rules in force from 1 July 2022 expand transparency somewhat, for example by making award publication automatic unless a party objects within 60 days. Thailand could therefore expand transparency by ratifying the ICSID Convention, and then including the option of ICSID Convention arbitration in future treaties (or in consents to ICSID arbitration through contracts or licences with foreign investors). Admittedly, ratification could mean quicker or more successful enforcement of future ISDS arbitration awards against Thailand as a respondent state, compared to enforcement of UNCITRAL Arbitration Rules awards through the New York Convention where enforcement courts could consider public policy objections. Thai firms are also now significant outbound investors, so the option of ICSID arbitration could assist them, and more credible ISDS mechanisms might lead to even more inbound investment into Thailand.

By ratifying the ICSID Convention, Thailand would also make available ICSID Convention arbitration under many past treaties, which currently have no access to ISDS at all. However, for some past Thai treaties, there would still be the option of the foreign investor choosing the old UNCITRAL Rules,[77] including limited transparency as mentioned above. In addition, therefore, Thailand should consider also ratifying the 2014 United Nations Convention on Transparency in Treaty-based Investor–State Arbitration.[78] This would retrofit the transparency provisions from the revised UNCITRAL Rules onto all of Thailand's old pre-2014 treaties (if the counterpart state has also ratified this 2014 Mauritius Convention, as Australia already has) for all ISDS arbitrations commenced under such treaties, whether under old UNCITRAL Rules, the recently amended ICSID Rules, or any other rules provided as an option.

Regarding contract-based arbitrations, the Thai government should also consider choosing arbitral institutions that provide for more transparency in their Arbitration Rules (such as the International Chamber of Commerce) and perhaps encourage the TAI or THAC to add more transparency provisions to its rules, at least when government entities are involved (as under the revised UNCITRAL Rules).[79] Again, all these suggestions for greater transparency may lead to more costs and delays in arbitrations. However, it might also encourage better value for money from the service providers generally.[80] Anyway, these proposals for greater transparency in investment arbitration seem another small cost to pay to better address the important public interests and rule of law values associated with serious allegations such as corruption.

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Notes

1. Nottage and Thanitcul 2017.
2. See also Kawharu and Nottage 2018, pp. 62–66.
3. For more details and references, see Nottage et al. 2023, Part 2.
4. Meier 1984, pp. 13–16.
5. Akrasanee and Somsak 1990, p.115.
6. Unakul 2014, pp. 32–40.
7. World Bank 1993, pp. xvi, 33.
8. Akrasanee 2014, p. 161.
9. Suthiwatnarueputhi 2013, p. 21.
10. Secretariat Office 2019, pp. 129–143, 242–243.
11. See https://www.transparency.org/en/news/cpi-2021-for-asia-pacific-grand-corruption-holding-back-progress (25 January 2022).
12. Notably e.g., the Civil Service Act (1992), the Tort Liability of Officials Act (1996), the Witness Protection Act (1997), the Right to Official Information Act (1997), the Organic Law on the Election of Members of the House of Representatives and Senators (1999) regulating electoral fraud and corruption, the Anti-Bid-Rigging in Public Procurement Act (1999), and the Act on the Management of Partnerships and Securities Owned by Ministers (2000).
13. Kidd and Richter 2003; Lim and Stern 2002. On the significance of family and government shareholders even in listed companies across Asia, including Thailand, see also Nottage 2022.
14. On such 'network corruption', see Khoman 2015 (and see summary in Nottage et al. 2023, Part 3).
15. Khoman 2017.
16. See Khoman 2016 and Sect. 15.4.2 below.
17. See https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand and more details in Nottage et al. 2023, Part 4.1.
18. Nottage and Thanitcul 2017.
19. Yackee (2018, p. 88) points out that the BITs with Romania, Cambodia and Taiwan provided for ISDS 'where both parties to the dispute so agreed' or 'if so agreed by both parties', suggesting that only a possibility of host state consent. Nonetheless, a more purposive interpretation and/or legislative history may allow for such phrasing to be construed as sufficient advance consent to ISDS.
20. Most BITs signed between 1992 (with Poland) and 2000 (with India) include a clear legality provision to be an investment covered by the treaty, but mostly not those before 1992 and only inconsistently since 2002. Thailand's FTAs even since TAFTA are also inconsistent. (Among its bilateral FTAs, moreover, only Article 7 of the 2007 FTA with Japan urges each state to take measures against corruption.) On the importance of a clear legality provision, see generally Chaps. 1 and 16 in this volume.
21. See https://investmentpolicy.unctad.org/investment-dispute-settlement/country/207/thailand/respondent. Another reportedly threatened under a treaty with Hong Kong, in 2014 involving the Tongkum gold mine, has seemingly not proceeded (Nottage and Thanitcul 2017). In addition, although Thailand now has quite a large amount of outbound FDI, no formal ISDS arbitration has yet been commenced by any Thai investor. However, Thai-Lao Lignite obtained a USD59 million contract-based arbitration award in 2009 against Laos for termination of its power plant investment.
22. See Nottage and Thanitcul 2017.
23. See summaries by Anthea Roberts and others over 2018–2019 available via https://www.ejiltalk.org/author/aroberts/. See also generally Calamita and Giannakopoulos 2022, pp. 123–4 and 131–2.
24. As discussed in Nottage and Thanitcul (2017) an example is when Thai media commentary described one adverse contract-based award (seemingly referring to the Bangna Expressway case, mentioned below) as the 'cost of stupidity' ('*ka ngo thang duang*') despite the Supreme

Court overturning it six years later. The Klong Dan wastewater treatment dispute award and settlement, described below, have also been referred to as a ‘stupidity fee’: Patsara Jikkham, ‘Cabinet OK B9.8bn “stupidity fee” over Klong Dan plant’, *Bangkok Post* (17 November 2015) http://www.bangkokpost.com/archive/cabinet-ok-b9-8bn-tupidity-fee-over-klong-dan-plant/768032.

25. Henderson 2009, p. 66.
26. Sucharitkul 2014.
27. Sucharitkul 2014. On the 2011 award, see also Janjira Pongrai, ‘Bt11bn compensation over Klong Dan project’, *The Nation*, 11 February 2011 http://www.nationmultimedia.com/2011/02/11/national/Bt11-compensation-over-Klong-Dan-project-30148430.html. For details on the Klong Dan project saga, see Khoman 2016.
28. Patsara Jikkham, ‘Cabinet OK B9.8bn “stupidity fee” over Klong Dan plant’, *Bangkok Post* (17 November 2015) http://www.bangkokpost.com/archive/cabinet-ok-b9-8bn-tupidity-fee-over-klong-dan-plant/768032. (This news report states that the ‘consortium agreed to waive interest charges of 1.8 million baht per day ordered by the Supreme Administrative Court’, but the judgment does not contain such an order.).
29. See further Nottage and Thanitcul 2017 and generally extra references in Nottage et al. 2023, Part 4.2.
30. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/825/kingsgate-V-thailand.
31. For further details and references on this section (researched and written by Nottage), see Nottage et al. 2023, Part 5.
32. *Sydney Morning Herald* (14 January 2015) https://www.smh.com.au/business/companies/thailand-shuts-down-australian-gold-mine-over-health-fears-20150114-12nrfd.html.
33. *Finance Nine* (28 March 2012) https://finance.nine.com.au/business-news/thai-court-rules-on-australian-gold-miner/53e216ea-1543-4094-a915-f94763fd24ce.
34. Pimp and Moore 2015.
35. Ibid.
36. *Sydney Morning Herald* (2 October 2015) https://www.smh.com.au/business/companies/australian-gold-miner-kingsgate-accused-of-bribing-thai-officials-20151002-gjzwkf.html.
37. *The Nation Thailand* (8 October 2015) https://www.nationthailand.com/news/30270416.
38. *Sydney Morning Herald* (28 April 2016) https://www.smh.com.au/business/companies/kingsgate-chairman-denies-pollution-charges-at-thai-goldmine-20160428-goh4zx.html.
39. Hepburn 2017.
40. Reuters (14 December 2016) https://www.reuters.com/article/us-thailand-mine-australia-idUSKBN1430OE.
41. *Bangkok Post* (13 December 2020) https://www.bangkokpost.com/thailand/general/2034607/akara-workers-plead-for-govt-to-reopen-gold-mine and Reuters (14 December 2016) https://www.reuters.com/article/us-thailand-mine-australia-idUSKBN1430OE.
42. *Sydney Morning Herald* (15 December 2016) https://www.smh.com.au/business/companies/thai-prime-minister-prayuth-chanochas-gold-mine-decision-send-horrendous-message-says-kingsgate-chairman-20161214-gtb5hy.html.
43. See IAReporter 2017.
44. *Sydney Morning Herald* (18 August 2017) https://www.smh.com.au/business/companies/kingsgate-shares-soar-as-thai-government-lifts-ban-20170818-gxz9g9.html.
45. Hepburn 2017.
46. Stockhead (18 March 2019) https://stockhead.com.au/resources/kingsgate-just-won-its-82m-case-over-a-closed-thai-gold-mine-shares-soar-80pc/.
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49. *Nikkei Asia* (7 June 2018) https://asia.nikkei.com/Business/Companies/Thai-junta-s-battle-with-Australian-miner-puts-law-under-spotlight.

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63. *Bangkok Post* (6 March 2021) https://www.bangkokpost.com/business/2079079/akara-resources-to-face-dsi-probe-over-alleged-proxy-use.
64. Announcements available via https://www.kingsgate.com.au/newsdesk/latest/.
65. *Sydney Morning Herald* (7 February 2022) http://www.smh.com.au/world/thai-prime-minister-under-fire-over-reopening-of-australian-gold-mine-20220207-p59ud5.
66. *Bangkok Post* (10 March 2022) https://www.bangkokpost.com/thailand/general/2276607/activists-oppose-akara-permits. No mention is made of the activists having also petitioned or visited the NCAC.
67. *The Nation* (11 March 2022) https://www.nationthailand.com/in-focus/40013296.
68. *Mining Weekly* (24 May 2022) https://www.miningweekly.com/print-version/kingsgate-secures-refinery-for-chatree-ore-2022-05-24.
69. See https://www.kingsgate.com.au/announcements/, especially in reverse chronological order: 27 March 2023 (quoting from p. 15), 28 March 2023, 24 March 2023 (referring also to https://www.youtube.com/user/kingsgatemining), 21 March 2023, and 17 March 2023; 19 May 2022 and 18 May 2022.
70. *The Nation* (31 March 2023) https://www.nationthailand.com/thailand/general/40025890.
71. See Kingsgate's ASX share price trends at https://www2.asx.com.au/markets/company/kcn.
72. See generally Chap. 6 in this volume. Setting instead a lower (balance of probabilities) standard could lead to corruption allegations being more readily upheld, thus depriving the investor of jurisdiction or damages. However, with less information available from the domestic proceedings, the allegations may still not be upheld, and this then leaves the spectre of an award being paid out despite the domestic proceedings later finding corruption associated with the investment. If instead corruption is upheld on the lower standard applied by the arbitrators,

later domestic proceedings applying the higher standard may find insufficient evidence of corruption, thus creating inconsistent outcomes which goes counter to rule of law values and therefore undermining the legitimacy of international arbitration.

73. See generally Kawharu and Nottage 2017.
74. Nottage 2021.
75. Menon 2020.
76. See generally e.g., Ubilava and Nottage 2021.
77. Nottage and Thanitcul 2017.
78. See https://uncitral.un.org/en/texts/arbitration/conventions/transparency.
79. For early suggestions for institutional rule amendments along these lines, followed almost a decade later by e.g., the Singapore International Arbitration Centre, see also Nottage and Miles 2009.
80. Nottage 2014.

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Sirilaksana Khoman is Vice Chair of the Foundation for Public Policy and Good Governance (PPGG) and is former Advisor to the Commissioner and Chair of the Economic Sector Corruption Prevention at Thailand's National Anti-Corruption Commission (NACC). She was Dean of the Faculty of Economics, Thammasat University in Thailand, and International Consultant for the United Nations Office on Drugs and Crime in Vienna. She received her Bachelor and Master's degrees in economics from the Australian National University, her PhD in Economics from the University of Hawaii, and a Certificate in International Trade Regulation from Harvard Law School.

Luke Nottage is Professor of Comparative and Transnational Business Law at Sydney Law School, specialising in arbitration, contract and consumer law, and corporate governance, with a particular interest in Japan and the Asia–Pacific. He is founding Co-Director of the Australian Network for Japanese Law (ANJeL), Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS), and Special Counsel with Williams Trade Law. Luke has consulted for law firms worldwide as well as for ASEAN, the European Commission, the OECD, UNCTAD, UNDP and the Governments of Japan and Saudi Arabia. Luke is also a Rules Committee Member of ACICA and is on the Panel of Arbitrators for AIAC (KLRCA), BIAC, CAAI, JCAA, KCAB, NZIAC, SCIA, TAI and THAC. Luke was Visiting Professor at Universiti Brunei Darussalam in 2020 and 2023.

Sakda Thanitcul is Professor of Law and previously Dean at Chulalongkorn University, Bangkok, Thailand. He teaches competition law, international economic law, tort and product liability law. He is presently serving as Member of the Committee on the Foreign Business Act and is Member of the Committee on Anti-Dumping. He holds a Bachelor of Law degree from Chulalongkorn University and Master and Doctor of Law degrees from Kyoto University and the University of Washington.

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Chapter 16
Towards a More Harmonised Asian Approach to Corruption and Illegality in Investment Arbitration

Nobumichi Teramura, Luke Nottage, and Bruno Jetin

Abstract In parallel with their strong economic growth, Asian jurisdictions have scaled up campaigns against bribery and other illegal misconduct by foreign investors by adopting international anti-corruption frameworks. Nonetheless, corruption remains common in many places and there is also still a lack of consensus on the influence of corruption and illegality over foreign direct investment (FDI), as well as in investor–state arbitration cases. There is also a paucity of literature considering how Asian countries have dealt with such serious misconduct by foreign investors. The foregoing chapters have started to fill the gaps, finding that there are some 'Asian approaches' to corruption and bribery in investment arbitrations: some individual jurisdictions have started to address the issues of corruption and illegality through treaty (re)drafting and/or investment disputes. However, a uniform Asian approach towards corruption and illegality in investment arbitration has not yet been established. Thus, this chapter proposes a roadmap for a more harmonised regional approach to corruption and illegality in Asian investment arbitration. It recommends that Asia should (1) establish a forum for all jurisdictions to discuss corruption and other serious misconduct involved in FDI, (2) develop more unified rules on corruption and illegality specifically in Asian investment arbitration and (3) consider creating an independent institution or permanent court to better handle Asian investment disputes—not necessarily limited to allegations of corruption and illegality.

N. Teramura (✉) · B. Jetin
Institute of Asian Studies, Universiti Brunei Darussalam, Bandar Seri Begawan, Brunei
e-mail: nobumichi.teramura@ubd.edu.bn
URL: https://ias.ubd.edu.bn/nobumichi-teramura/

B. Jetin
e-mail: bruno.jetin@ubd.edu.bn
URL: https://ias.ubd.edu.bn/bruno-jetin/

L. Nottage
University of Sydney Law School, Sydney, NSW, Australia
e-mail: luke.nottage@sydney.edu.au
URL: https://www.sydney.edu.au/law/about/our-people/academic-staff/luke-nottage.html

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16.1 Introduction

Over the last three decades, Asia has experienced a steady increase in foreign direct investment (FDI) inflows and outflows. Between 1990 and 2021, the annual amount of FDI inflows across all of Asia recorded a 30-fold growth, increasing from USD21,933 million to USD618,938 million, whereas annual FDI outflows grew 40-fold from USD9,943 million to USD394,118 million.[1] Similar or more dramatic FDI growth trends can be seen in East Asia (USD8,099 million–USD328,918 million annual FDI inflows; USD8,521 million–USD244,389 million annual FDI outflows), Southeast Asia (USD12,821 million–USD175,314 million annual FDI inflows; USD2,328 million–USD75,838 million annual FDI outflows) and South Asia (USD213 million–USD52,417 million annual FDI inflows; USD65 million–USD15,986 million annual FDI outflows).[2] Correspondingly, these regions' share of global gross domestic product (GDP) based on purchasing power parity constantly increased between 1990 and 2020—from 15.36 to 25.23% for East Asia, 4.46 to 6.37% for Southeast Asia and 4.86 to 8.85% for South Asia.[3] Multiple commentators confirm the overall positive impact from this FDI for economic growth.[4]

In parallel, international and regional organisations have stepped up their campaigns against bribery and other serious misconduct in Asia and beyond. Asian states have reacted positively to such initiatives, although the chapters in this volume show that corruption is still a serious problem regionally. Prompted by the Foreign Corrupt Practices Act two decades earlier in the United States, and opened for signature in 1997 (in force from 1999), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) became the first multilateral international treaty requiring member states to criminalise the bribery of foreign public officials. A 2009 Recommendation for improving the Convention's operation was updated over 2018–2021.[5] As large net FDI exporters since the 1980s and 1990s respectively, Japan (which joined the OECD in 1964, three years after its establishment) and South Korea (which joined in 1996) have adopted this Convention, thus subjecting themselves to periodic 'peer reviews' regarding enforcement of these obligations,[6] which target the 'supply side' of corruption. However, although eight states beyond the 38 (developed economy) OECD member states have acceded to the Convention, none are from elsewhere in North, East, South or Southeast Asia (the main focus for this book).[7]

In 1999, following the Asian Financial Crisis and concerns about 'crony capitalism' and poor corporate governance,[8] the OECD nonetheless created with the Asian Development Bank (ADB) the Anti-Corruption Initiative for Asia and the Pacific (ACIAP). This aimed to provide a regional forum for policymakers, practitioners, experts and private sector representatives to exchange opinions on anti-corruption and business integrity. Today, 23 Asian states and jurisdictions have become members of that forum.[9] The OECD also includes the avoidance of corruption in its Guidelines for Multinational Enterprises, developed from the 1970s. Significant revisions in 2011 added wider recommendations from member states towards their transnational corporations in line with the 2011 United Nations Guiding

Principles on Business and Human Rights.[10] A system of 'national contact points' has developed allowing complaints about firms from OECD and non-OECD states violating the Guidelines to be filed for investigation and mediation.[11]

Moreover, all Asian countries (excluding North Korea) have ratified the United Nations Convention against Corruption (UNCAC), opened for signature in 2003 (in force from 2005), addressing corruption from both the supply side and demand side domestically.[12] However, there is no pan-Asian treaty against corruption, in contrast to other parts of the world. It seems that Asia still prefers various 'soft law' best practices and capacity-building initiatives regionally,[13] perhaps because of the socio-political diversity and sensitivities around corruption and governance structures around the region. This is despite international economic integration, and to a lesser extent other aspects of the evolving architecture of the Association of Southeast Asian Nations (ASEAN), developing more treaty-based 'hard law' as well as institutional coordination and networking.[14] Despite some significant initiatives, international rankings suggest that corruption and poor governance remain serious problems in most parts of Asia.[15] Many commentators remain concerned about the negative influence of such serious misconduct for the effectiveness of FDI in Asia, and the region's attractiveness for sustainable investment.[16]

One of the most significant mechanisms promoting investment protection and liberalisation is investor–state dispute settlement (ISDS), particularly investment arbitration procedures offered to foreign investors (usually nowadays through investment treaties with their home states) to more credibly enforce host state substantive commitments such as non-discrimination or adequate compensation for expropriation. Yet such investment arbitration has addressed questions of bribery and other serious illegal conduct by foreign investors only sporadically, despite corruption allegations being raised increasingly in cases over the last 10–15 years.[17] Offering a neutral, enforceable and fair forum for dispute resolution between foreign investors and host states, ISDS arbitration is mostly administered through a World Bank affiliate under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), or conducted by tribunals under ad hoc arbitration rules (underpinned by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). Those rules are offered by host states under a standalone bilateral investment treaty (BIT) or an investment chapter within a free trade agreement (FTA), collectively sometimes referred to as international investment agreements (IIAs).

However, as Teramura, Nottage and Jetin elaborated in Chap. 1, ISDS arbitral tribunals have been struggling to strike a balance between investors and host states in dealing with disputes over FDI allegedly tainted especially by corruption.[18] Sometimes investors raise corruption to further their investment treaty claim for lack of fair and equitable treatment (FET) or other violations. But mostly and increasingly, host states allege bribery particularly regarding the initial investments, so this is a major (though not exclusive) focus throughout this book.[19] Some tribunals have suggested that they should not proceed to hear the merits of any claims if there is evidence presented of any (non-trivial) corruption associated with the initial investment, because such serious misconduct means they lose jurisdiction and investors

therefore lose treaty protections. This 'zero-tolerance' approach is likely advantageous for host states if corruption is prevalent in their territory because they may avoid ISDS claims completely by raising a corruption defence to challenge the tribunal's jurisdiction. The strongest basis for this argument has been where the investment treaty expressly limits its scope to covered investments made in accordance with host state law, but the necessary wording has often been unclear (as several country reports show in this volume).[20]

By contrast, several tribunals have heard corruption-related claims more carefully and have dismissed at least some claims instead for inadmissibility. This may leave scope for other treaty claims to be heard, and also means that procedures to review (especially positive) findings on jurisdiction are no longer available. Accordingly, this 'closer-look' approach is somewhat less favourable to host states.

Other tribunals have opted for the 'it-depends' approach. They have analysed more closely the nature of corruption or illegality allegations when addressing the merits of individual claims (such as making it less likely for investors to succeed in proving lack of FET, if corruption or related behaviour was involved) and/or adjusting damages or ISDS costs awarded. With such allegations growing, ISDS arbitration tribunals are further divided on other issues, such as burden and especially standard of proof for corruption allegations, as well as the arbitrators' duty and rights to investigate corruption.[21]

Despite this fragmentation in ISDS tribunals' attitudes towards corrupt practices involved in FDI projects, reflecting also the limited specific guidance from investment treaties or arbitration rules,[22] there is a paucity of literature on Asian perspectives on corruption and other serious investor misconduct. This book has therefore started to fill that gap. The principal questions posed were:

(1) What are the real impacts of corruption, potentially of very different types, particularly on FDI and local economies in Asian jurisdictions?
(2) Has Asia been and will it remain in general 'ambivalent' about international investment law relevant to corruption and illegality?
(3) Have Asian countries dealt with corruption and illegality in relation to foreign investment projects and disputes, and if so how?
(4) Have Asian countries been or are they more likely to become 'rule makers' (creating rules on their own initiative) rather than 'rule takers' (following primarily Western normative templates) in international investment law, specifically regarding corruption and illegality?[23]

The foregoing 15 chapters have discussed these broad themes from economic and legal perspectives, focusing on developments in China and Hong Kong, India, Japan, Lao Republic, the Philippines, the Republic of Korea and Thailand. This concluding chapter will highlight key findings in the individual chapters, and then outline some recommendations for corruption and illegality issues increasingly arising in Asian investment arbitration.

16.2 Asian Approaches to Corruption and Illegality in Investment Arbitration

The key lesson learnt from this book's chapters is that Asia remains at a very early stage of harmonising its approaches to disputes over corruption and other serious misconduct involved in FDI projects. Asian approaches to FDI-related corruption are diverse, and corruption trends vary across the region; this diversity likely deters Asia from becoming a rule maker in this area of international investment law. This may be linked to the wider challenges for the development of regional models for international investment dispute resolution, alluded to by Amokura Kawharu in her Foreword.[24]

16.2.1 Economic Effect of Corruption on FDI and Local Economies in Asia

Part I of this book has considered the influence of corruption, in particular on FDI and local economies in Asian states and territories. From a macro-perspective, before the jurisdiction-specific studies and closer analyses of specific legal issues that ISDS arbitration tribunals and treaty drafters are now grappling with, two chapters have considered the various manifestations of corruption and how they may impact on economic behaviour and outcomes across the region. If it does or will likely experience patterns different from elsewhere, it is plausible that this will be or become reflected in Asian states' investment treaties or one-off investment contracts concluded with individual foreign investors, as well as the broad approaches and specific decisions of arbitral tribunals dealing with related investment disputes.

First, Khalid in Chap. 2 examined the economic cost and impact of corruption on FDI. After reviewing an extensive theoretical and empirical literature on corruption–growth and corruption–investment relationships in Asia and beyond, Khalid undertook an econometric analysis to test for the 'grabbing hand' and 'helping hand' views on the impact of corruption. The former hypothesises that corruption discourages FDI flows into a host state, which is the assumption of international bodies like the OECD and United Nations promoting instruments and mechanisms to combat all types of corruption, although Commentaries on the 1997 OECD Convention allow the option of a defence against (minor and documented) 'facilitation payments' so this has been retained by some member states (notably Australia, New Zealand and the US).[25] By contrast, the 'helping hand' theory propounded by some economists suggests that bribery can increase procedural efficiency, bypassing excessive bureaucracy or other structural problems, which can therefore increase the flow of FDI into a host state.

Khalid's analysis applied fixed-effects panel estimation statistical analysis to the data between 2000 and 2022 from Transparency International's Corruption Perception Index (CPI), one of the main ways to track corruption (although still hard to

measure). Khalid examined the influence of corruption in the public sector on FDI and economic growth in the top 20 least and most corrupt countries in the CPI, many of which are Asian countries. His analysis first suggests a grabbing hand view for the 20 least corrupt countries, while it claims a helping hand view for the 20 most corrupt countries. Secondly, the relationship among corruption, economic growth and FDI in the 20 most corrupt countries is non-linear. The corruption–growth relationship is an inverted U-shape: growth increases and reaches a maximum level in countries at low to moderate levels of corruption, although it falls in countries at high levels of corruption. The corruption–FDI relationship largely followed suit. He further extends his analysis to a random selection of 33 Asian countries and confirms the helping hand view for the corruption–FDI relationship. In our view, one possible implication of such results becoming more widely appreciated is that arbitral tribunals could become more forgiving of at least some types of corruption when foreign investors engage in some types of economies. However, this will depend on treaty references to corruption, directly or through references to other international instruments, and drafting history. It will also depend on what other empirical studies uncover.

Dovetailing with Khalid's study, Jetin, Saadaoui and Ratiarison in Chap. 3 considered the effect of corruption on FDI in East, South and Southeast Asia and beyond, adopting a panel econometrics investigation analysis with fixed effects. The analysis assessed the relationship between FDI stocks and the World Bank's 'control of corruption' (CC) index—another often-used measure but one that, unlike the CPI, captures the perceived corruption of both public officials and private companies. Jetin, Saadaoui and Ratiarison adopted a regional approach to corruption patterns and disaggregate large regions into smaller sub-regions: East Asia, Southeast Asia and South Asia, plus Australia and New Zealand in Oceania. They also looked at Europe and the EU to contrast with Asian sub-regions.

They concluded as follows. First, at the world level, the control of corruption is lenient, which nevertheless has a positive effect relative to FDI, justifying the 'helping hand' thesis. Second, in East Asia, the control of corruption is strict, which has a positive effect on FDI, in conformity with the 'grabbing hand' theory. East Asia being composed mostly of upper-middle-income and high-income countries, this conclusion is consistent with Khalid's finding that the grabbing hand prevails in the top 20 countries. Third, in South Asia, corruption stimulates FDI, but caution should prevail because the correlation is not significant. Again, this weak result somewhat confirms Khalid's finding that corruption is a helping hand in low and lower-middle countries, because South Asian countries belong to these categories. Fourth, in Southeast Asia, there is a significant correlation between the control of corruption and FDI in that when these countries curb corruption, FDI increases. Thus, corruption is a grabbing hand, as in East Asia. These results contradict the traditional portrayal of Asia as a region of widespread cronyism, where corruption may often stimulate FDI.[26] Things have likely changed thanks to better control of corruption in recent decades. Finally, the chapter showed that corruption is a grabbing hand in Australia and New Zealand, which again confirms the conclusion that in high-income countries, corruption is associated with less FDI. However, this finding cannot be generalised to all high-income countries because in the EU-15 (the 15 pre-2004 EU

member states), Jetin et al. find that corruption is a helping hand. This conclusion invites close scrutiny into how the rule of law works in practice and its interaction with public and private senior officers.

16.2.2 Legal Issues Related to Corruption and Illegality in Asian ISDS Arbitration

Part II of this book examined broad legal issues pertaining to corruption and investment arbitration in Asia and beyond. It considered how disputants, tribunals and commentators, especially in Asia, may already or could in future tackle those issues.

Chapter 4 by Reyes and Haechler suggested that arbitral tribunals should adopt a nuanced approach to treating corruption in international investment law. They first reviewed multilateral and bilateral international agreements on corruption, including the OECD Convention and UNCAC, as well as some indicative references to corruption more recently in the Japan–Philippines Economic Partnership Agreement (as an example of a bilateral FTA) and the CPTPP (a major mega-regional FTA). They then examined how these international agreements have been implemented in the domestic laws of Asian jurisdictions, and whether differences in implementation cause uncertainty as to the scope of corruption offences under Asian anti-corruption laws. They demonstrated the uncertainty by illustrating the fragmentation of the treatment of 'facilitation payments' across Asian jurisdictions. Such uncertainty may unreasonably favour the host state if the ISDS tribunal adopts an 'all or nothing approach' to jurisdiction (i.e., the 'zero-tolerance' approach) because the host state may take advantage of that uncertainty to defend itself from the tribunal's jurisdiction, especially where its high-ranking officials actively demanded bribes at the outset of the investment, as found in *World Duty Free v. Kenya*[27] and *Metal-Tech v. Uzbekistan.*[28]

Thus, Reyes and Haechler compellingly concluded that the 'zero-tolerance' approach can be abusive to foreign investors. To limit the possibility of abuse, inspired also by developments in English law related to illegality, they encourage investment tribunals to adopt a nuanced approach that 'balance[s] all relevant factors to assess whether an investor should be entitled to a remedy in whole, in part, or not at all'. This range of factors approach was signalled in *Vladislav Kim and others v. Uzbekistan*,[29] in which the tribunal decided whether illegality allegations oust its jurisdiction by applying a three-step test that considers: (1) the significance of the legal obligation with which the investor is alleged to have violated; (2) the seriousness of the investor's (mis)conduct; and (3) whether and to what extent the combination of (1) and (2) compromises a significant interest of the host state, making the loss of tribunal jurisdiction a proportionate outcome.[30]

Going into further detail in some respects, Chap. 5 by Yan and Liu examined international and regional soft and hard law instruments against corruption in Asia and elsewhere, and anti-corruption provisions in IIAs concluded among Asian states

(extending to Central and West Asia). As well as the UNCAC and OECD Convention, and regional treaties against corruption, they outlined the ADB/OECD Anti-Corruption Action Plan, the G20 Anti-Corruption Action Plans and the ASEAN Member States' Memorandum of Understanding on Cooperation for Preventing and Combating Corruption. Asian countries have strived to eliminate corruption by adopting such international frameworks, but they are not always effective for curbing corruption in international investment activities.

Asian states' general lack of interest in fighting corruption in FDI through investment treaty redrafting (except for Japan) is somewhat discernible from the number of intra-Asian IIAs containing an express anti-corruption clause—45 out of 2584 IIAs concluded before 2012, and 16 out of 89 IIAs signed after 2012.[31] Moreover, Yan and Liu examined those 16 IIAs concluded after 2012, finding that (1) none of them directly impose an anti-corruption obligation on investors, (2) only two IIAs preclude corrupt investors from accessing arbitration, (3) 13 IIAs require the contracting state's general commitments to enforcing anti-corruption measures and (4) only one IIA has a corporate social responsibility provision explicitly referring to corruption. Yan and Liu then recommend that 'Asian countries reinforce the legal framework of anti-corruption in the region and insert more commitments for corruption deterrence and prevention into IIAs'. On the latter, they encourage Asian states to incorporate in their future IIAs anti-corruption provisions with 'real teeth', such as provisions establishing foreign investors' anti-corruption obligation or rules limiting corrupt investors' access to the ISDS system. We also note that Asian economies are also starting to conclude anti-corruption provisions in IIAs with non-Asian states,[32] which may provide more momentum for including such provisions in intra-Asian IIAs. Another new development is the agreement, in principle reached in July 2023 at the World Trade Organization (WTO), regarding investment facilitation, which also contains anti-corruption provisions, although the text and membership of this new WTO treaty was only finalised on 25 February 2024.[33]

Chapter 6 by Hwang and Chang provided a closer look at potential legal issues investors and host states may experience in raising or being confronted with a corruption allegation in ISDS arbitrations, particularly under investment treaties. Those issues include (1) the meaning of corruption, (2) evidentiary problems such as a tribunal's *ex officio* investigations into corruption and the burden or standard of proof for corruption allegations, (3) the attribution of responsibility between the foreign investor and host state, and (4) the legal consequences flowing from a finding of corruption (already sketched above).

On the first issue, Hwang and Chang point out that the broad definitions of public and private corruption as well as other forms of corruption can be found in the UNCAC and other anti-corruption conventions, but they note how such concepts are nonetheless deployed in investment arbitration. On the second set of issues discussed, they suggest that most tribunals have started to apply a higher than usual standard of proof, similar to that adopted in national criminal proceedings alleging corruption. (This could reflect the very serious flow-on effects on individuals for corruption findings, even by investment tribunals, especially in some countries in Asia recently.)

However, they suggest that ISDS arbitration should apply a single balance of probabilities standard, albeit with nuancing, requiring greater evidence for more unlikely allegations of corruption. Further, on this and their remaining sets of issues, such as attribution,[34] Hwang and Chang succinctly set out the key problems and indicate where further research is needed as:

> Evidential issues concerning burden and standard of proof frequently come to the fore due to the difficulties of obtaining direct evidence of corrupt dealings. This may even prompt a more proactive approach from the tribunal, though any such approach will be subject to limitations inherent in the arbitral process. However, it is not enough to simply establish proof of corruption, as the presence of a host state as a party and the involvement of corrupt public officials will necessarily require a tribunal to engage in questions of attribution of responsibility. Even where the issues of evidence and attribution of responsibility are overcome, there remains the difficulty of deciding what legal consequences should apply to a finding of corruption, which is especially thorny in situations where both parties had been complicit in the corruption.

This analysis sets the stage for further scrutiny of these major legal issues (and some others) in the subsequent country reports.[35]

Dovetailing with the concerns raised especially by Reyes and Haechler, Chap. 7 by Jarrett discussed asymmetries between host states and investors in Asian investment arbitration, focusing on ‘systemic corruption’ in host states in which bribes are not only asked for but expected. He claims systemic corruption should be treated differently from other forms of corruption—such as individual or institutional corruption—because the wrongfulness of investor participation in systemic corruption is limited. If corruption is part of the government’s everyday administration, the investor would have no choice but to pay bribes. If so, even express investment-legality requirements in investment treaties (such as requiring investments to be ‘in accordance with host state laws’ protected) would work on the investor too unfavourably, as the tribunal may adopt those requirements to dismiss virtually any claim filed by that investor. (We add that this could even lead perversely to the host state ensuring—or assuming—that someone requests and takes a bribe, expecting furthermore that such an official is not prosecuted, which could be evidenced later in an ISDS arbitration to deprive the tribunal of jurisdiction and the investor of all treaty protections.)

Accordingly, Jarrett proposes an innovative solution for arbitral tribunals to redress this imbalance. He suggests they could adopt and adapt the doctrine of duress under applicable international law, inspired by developments in English law as an influential law in Asia and elsewhere. He argues that if the investor successfully established that its participation in corruption had been caused by duress, the tribunal should not activate the investment-legality requirement to simply and completely nullify the legal effect of that investor’s conduct. In our view, this is a novel approach because duress is usually used to void a claim, not a defence. It might also substitute one all-or-nothing approach (namely the ‘zero tolerance’ approach of some tribunals so far) with another (instead overly favouring the foreign investor).

16.2.3 'Asian Approaches' to Corruption and Other Serious Misconduct in Investment Arbitration

Despite some growing awareness of the legal issues and possible solutions through investment treaty (re)drafting or developments in reasoning applied by tribunals, as outlined in Part II, it remains to be seen whether Asian jurisdictions can collectively deal with those legal issues in the ways suggested by those contributors. The country reports in Part III uncover further challenges by surveying how a variety of Asian states—net FDI exporters and importers, developed and developing economies, democratic and authoritarian political regimes—have approached corruption in investment arbitration.

The countries detailed are diverse in overall governance and corruption control, investment treaty trajectory (including in the specific context of corruption) and experience of ISDS arbitration cases involving alleged bribery or other serious investor misconduct, based on an investment treaty or occasionally on a one-off investment contract. The reports cover the selected Asian states and territories in alphabetical order—China and Hong Kong, India, Indonesia, Japan, Lao Republic, the Philippines, South Korea and Thailand. Collectively, they cover Asia's most populated and economically prosperous sub-region. The diversity of approaches found in this subset of jurisdictions suggests that similar trends may exist across Asia more broadly.

First, Bath and Gu have reported on China and Hong Kong, the world's largest communist regime and a special administrative region that remains a major financial centre. Both have performed differently in international rankings, as can be seen from the CPI in 2022: China and Hong Kong had global rankings of 65th and 12th, respectively.[36] Underpinned by their international treaty obligations, both have established a comprehensive system of laws and regulations to curb official and commercial corruption at a domestic level. However, the omnipresence of the Chinese Communist Party (CCP) in mainland China raises concerns about implementing that system in politically sensitive cases. For instance, recent practice and legal authorities have adopted various excuses—business secrets, personal information and national security—to avoid open trials. A small number of ISDS cases have been brought against China, with corruption seemingly not constituting a major issue, but there has been little transparency on the claims and evidence presented. Moreover, despite its huge FDI outflow, neither China nor Hong Kong is keen to pursue criminal convictions through the court system for bribery outside China. Somewhat mirroring this hesitance, China's vast network of IIAs does not currently contain any provision specifically against corruption other than in the RCEP.

Next, Ranjan examined the issue of corruption in India, the world's most populous democracy. The CPI in 2022 ranked India 85th despite the country's several laws to regulate corruption, money laundering and undisclosed foreign income and assets.[37] The country signed approximately 80 BITs between 1990 and 2010, most of which contained nothing specifically on corruption issues, although often including an 'in accordance with domestic law' clause. After losing the case of *White Industries v. India*,[38] however, the country terminated the BIT with Australia that was relied on

in that case as well as dozens of other BITs, and is trying to conclude new BITs following the 2016 Indian Model BIT. This contains an illegality clause, as well as a provision on corporate social responsibility (CSR, also discussed by Yan and Liu) that obliges foreign investors and their enterprises to observe the anti-corruption principle. However, only a handful of countries have concluded new BITs based on the 2016 Model.

Moreover, among a burgeoning number of ISDS arbitration claims,[39] India has experienced two BIT claims brought about by the foreign investors of Devas, India's multimedia services provider.[40] Yet the Indian government curiously failed to raise the argument of fraud and corruption before the arbitral tribunals. This was despite several government officials involved in Devas's project being prosecuted for committing various offences under the Prevention of Corruption Act.

As we note below also in the context of a recent ISDS claim against Thailand, coordination among different parts of government involved in corruption allegations is likely to be particularly acute in developing economies. This suggests the need for greater harmonisation and capacity-building both domestically and internationally. India's new Model BIT, and the quite transparent public process that generated it, can also help to highlight the issue and potential treaty provisions related to corruption in investment arbitration. However, the unwillingness so far of counterparty states to agree to the Model BIT as the overall basis for new treaties dampens the potential for India to become a more prominent 'rule maker' in this field.[41]

Butt, Crockett and Lindsey evaluated Indonesia, the most populous Islamic country in the world, as 'notorious for high levels of corruption'. Indeed, the CPI has consistently rated Indonesia among the most corrupt countries.[42] To deal with the situation, the country adopted several reforms after the Asian Financial Crisis and the following fall of the authoritarian Soeharto regime in 1998. These included the 1999 Corruption Law, the powerful new Anti-Corruption Commission, and the Anti-Corruption Court, so investigating and prosecuting corruption could become more efficient than in the past.

However, the political elites and 'judicial mafia'—with judges often taking bribes and occasionally being prosecuted for this—have undermined those reforms through legislative amendments and, ironically, corruption. Thus, avoiding the national courts of Indonesia is the norm among foreign investors. Instead, they conclude contracts providing for arbitration, especially seated abroad, and they also may access ISDS through Indonesia's BITs and FTAs (with some newer ones containing treaty provisions addressing corruption). The government nonetheless announced its intention to terminate its BITs after experiencing high-profile ISDS cases on corruption and FDI, due to adverse media reporting. This is similar to India, but Indonesia ultimately defended such claims very well, including one where the claim was dismissed because the tribunal found the foreign investors to be 'wilfully blind' about their local partner's forgery of underlying mining licences.[43]

Nonetheless, it remains to be seen whether the new treaty practice initiative will materialise since Indonesia maintains a good success rate in ISDS proceedings, having prevailed in seven out of eight cases. Meanwhile, in contrast to India it has not developed a Model BIT and has concluded new treaties on a rather similar template

as before, although for example a new treaty with Australia signed in 2019 (replacing an old BIT) adds an innovative ISDS requirement for foreign investors to attempt mediation if requested by the host state before proceeding to arbitration.[44] In our view, it is possible but unlikely that Indonesia may innovate further by advocating for new types of treaty provisions, in its own or ASEAN-wide agreements, directly targeting corruption and serious investor misconduct.

Nottage and Teramura turned to Japan, which is instead a large net FDI exporter and one of the least corrupt countries in Asia (ranked by CPI as the third least corrupt Asian jurisdiction in 2022),[45] although high-profile bribery scandals have been reported occasionally. Japanese law is rigorous concerning bribery and other serious misconduct. The Penal Code, the National Public Service Ethics Act, the National Public Service Ethics Code and the Political Funds Control Act effectively deal with domestic corruption in general. Furthermore, the Unfair Competition Prevention Act criminalises bribery of foreign public officials based on the OECD Convention, although there have not been many prosecutions.[46] In addition, as it has belatedly become more active in concluding BITs and FTAs, Japan has incorporated both anti-corruption provisions (perhaps most actively and consistently, among Asian states, from around 2007) and illegality clauses (albeit less consistently, which advances the short-term interests of its outbound investors as express clauses would likely deprive them completely of jurisdiction in treaty-based ISDS arbitration claims). However, none of the (very few) Japan-related ISDS cases seem to be related to bribery and other serious misconduct, which reduces the salience of this problem and so may also dampen scope for Japan to take a leadership role towards more harmonised regional developments in related international investment law.

Weeramantry and Sharma examined corruption and FDI in the Lao PDR, which is known to have a very high level of corruption. The country is not active in cracking down on corruption and bribery related to FDI, as two intertwined BIT arbitrations involving Sanum have also demonstrated.[47] The Lao PDR alleged that all claims should be entirely dismissed on the grounds of the claimants' engagement in illegal conduct including bribery, embezzlement and money laundering in the investment's inception and operation. The tribunals adopted a nuanced approach that nevertheless went into the merits of the claims, after holding that the standard of proof for corruption requires 'clear and convincing evidence'. The standard was not met, but could have been on the lower 'balance of probabilities' standard, and the investor's misbehaviour influenced the decision on the FET claim. The tribunal highlighted that, aside from the criminal investigations of the foreign investors (i.e., alleged bribers), no investigation or prosecution had been made by the Lao government against any other persons, such as government officials, who had allegedly accepted bribes in relation to the investment projects. More generally, anti-corruption efforts have been made in the country, with the support of the United Nations agencies and other non-profit organisations, but they have largely been aspirational.

Mondez and Cruz have commented that '[c]orruption is deeply rooted in Philippine culture'. This is attributable to the oligarch-and-clan system governing the Philippines and the relatively low salaries of civil servants. In 2022, the country ranked 116 among 180 states in the CPI,[48] being only ahead of Laos, Cambodia and

Myanmar among ASEAN members. The Revised Penal Code, the Anti-Graft and Corrupt Practices Act and other domestic laws penalise virtually all corrupt practices involving Filipino public officials, although their perceived legitimacy and effectiveness are somewhat dubious. For instance, there have been two ICSID cases brought by *Fraport AG Frankfurt Airport Services Worldwide* against the Filipino government, pertaining to the construction of the Ninoy Aquino International Airport's Terminal 3.[49] In both cases, the government raised a jurisdictional objection based on Fraport's alleged engagement in fraud and corruption, but its attempt was not successful. The tribunal in the first case accepted the objection at first, but the award was ultimately set aside by an ad hoc Committee. In the second case, the tribunal rejected the jurisdictional objection for the Philippines' failure to produce clear and convincing evidence. According to Mondez and Cruz, '[the ICSID tribunal in the second case] prevented the establishment of a precedent for successfully using corruption as a defence in investment arbitration proceedings involving the Philippines, thus maintaining investment contracts under BITs as attractive options for foreign investors'.

Kim surveyed the investment treaty regime of South Korea, a leading exporter and (to a lesser extent) importer of FDI. Corresponding to a commendable result in the CPI in 2022 (31 among 180 states),[50] after a dip around 2016 when a corruption scandal developed that eventually led to removal of the President, South Korea is developing a rigorous and comprehensive legal regime monitoring and punishing domestic corruption and bribery based on the Criminal Code, which is implemented and enforced by the Anti-Corruption and Civil Rights Commission and the Corruption Investigation Office for High-ranking Officials, among others. The country also criminalises foreign bribery through legislation implementing the OECD Convention and the UNCAC.

Nonetheless, Kim suggests that corruption and illegality provisions in South Korea's IIAs and practice surrounding these provisions are underdeveloped. Among the country's 84 BITs and 22 FTAs in force, the only major agreements that contain explicit anti-corruption clauses are the 2014 Canada–Korea FTA and the 2012 US–Korea FTA. Many Korean IIAs contain legality requirements, but there is fragmentation in how they require foreign investments to be made in accordance with the host state's laws. Korea and Korean investors are active players in ISDS, and the Korean government reportedly experienced corruption and illegality issues in the claims raised by Lone Star,[51] and especially Mason/Elliot.[52] Kim concludes that there is no strong sign showing South Korea may become more proactive in the development of anti-corruption provisions in IIAs, except perhaps in adding more and consistent explicit legality provisions in recent years. Such provisions may bring more scope for host state defences and thus be advantageous for the national interest of Korea that has a significant number of inbound ISDS claims (linked perhaps to its still larger IIA network) as well as more corruption domestically than Japan.

Finally, Khoman, Nottage and Thanitcul reported on Thailand, traditionally a large net FDI importer (albeit open mostly in manufacturing rather than the services sector), but recently emerging as a significant FDI exporter especially around Southeast Asia. Exacerbated by multiple military coups, corruption remains a persistent problem compared say to Japan, despite new laws and institutions established from

around the time of the Asian Financial Crisis in 1997.[53] There have been a few contract-based arbitrations embroiling the Thai government where corruption allegations were raised, resulting in awards being set aside at the seat in Thailand, but there have been only two major treaty-based claims against Thailand. The ISDS arbitration initiated by Kingsgate since 2017, under the FTA with Australia after a forced closure of the Chatree gold mine joint venture allegedly due to environmental pollution, is paralleled by media reports of 2015 investigations and 2020 indictments for corruption by a senior Mining Department official and the joint venture company's managing director. Yet the gold mine has recently resumed operations, so it seems that the dispute has nonetheless been settled or may be formally over 2024, despite the FTA containing an express legality provision (Article 901(1)).

Nottage, Khoman and Thanitcul concluded firstly by emphasising from this case study, and other contract-based arbitrations where corruption is suspected, that investigations and convictions domestically often take even longer than international arbitrations, and coordination may be lacking among different parts of the government responsible for domestic and international proceedings. (This may also be a factor behind India's *Devas* case management, mentioned above.) One solution may be for ISDS arbitration tribunals to defer proceedings until local proceedings are resolved. However, this may take far too long and those proceedings may themselves be suspect. Instead, they propose that arbitral tribunals examine corruption allegations more carefully and slowly, perhaps even adopting a higher standard of proof (like or closer to that adopted in domestic criminal proceedings, or the *Sanum* dispute with Laos), despite this exacerbating the general problem of delays and costs in ISDS proceedings. However, they acknowledge (as do Hwang and Chang, for example) that this question remains quite finally balanced. The second main conclusion is that ISDS arbitrations should be made more transparent, through various proposed mechanisms, particularly for states like Thailand (or, we might now add, India and Vietnam in Asia), that have not yet ratified the ICSID Convention.

To summarise, Part III showed that there are indeed some 'Asian approaches' emerging which are related to corruption and bribery in investment arbitrations, in the narrow sense of individual Asian countries having dealt with the issues of corruption and other serious misconduct in some treaties and/or (occasionally high-profile) disputes. However, those experiences are still far from creating a uniform Asian approach towards corruption and illegality in investment arbitration. One commonality, at least, is the acceptance of dispute resolution through ISDS arbitration—even in principle by India under its 2016 Model BIT. Yet countries like India and Thailand have maintained some scepticism by not ratifying the ICSID Convention, leaving foreign investors to rely on ad hoc arbitration rules offered in their investment treaties or one-off contracts with those host states. Moreover, although prominent Asia-based ISDS arbitrators are emerging along with more Asia-related treaty claims after a slow start compared to other parts of the world,[54] those from Western Europe still dominate in ICSID proceedings.[55] This may make it even more difficult to turn Asia into a 'rule maker' on any investment arbitration issues including bribery and other serious misconduct.

16.3 A Roadmap for an Asian Approach to Corruption and Illegality in ISDS

On the 'dawn of an Asian century in international investment law', Schill suggested that 'Asian actors still face considerable hurdles in assuming leadership in shaping the future of global investment governance, in particular when not acting in concert, but based on purely national interest'.[56] This book has demonstrated that Asia is not yet assuming leadership in forming 'Asian' international investment law governance around the issues of corruption and illegality due to Asian states' diverse backgrounds and some disagreements on those issues. Thus, this chapter concludes by identifying a roadmap for Asia to establish a more unified approach to corruption and illegality in Asian investment arbitration, reducing uncertainties and transaction costs as well as providing more scope to influence ongoing debates globally.

First, Asia is encouraged to establish a forum where all states and jurisdictions may discuss corruption and illegality involved in FDI. As this book has demonstrated, Asian countries and territories show significant disparity in their practical engagement with global anti-corruption initiatives. Some countries are ambivalent about international law prohibiting corruption and illegality in FDI, while others are not. Asian jurisdictions need to have more scope for dialogue on how they address such differences in the context of ISDS, especially treaty-based arbitration. They do not have to build such a forum from scratch as they may take advantage of the ACIAP, which is currently joined by 23 Asian economies and operated under the joint secretariat of the ADB and OECD.[57] If the ADB and OECD allow it (although this might be challenging), those 23 member economies may invite the non-member Asian economies of the ACIAP, such as Brunei Darussalam, Myanmar and Laos, to discuss anti-corruption initiatives for Asian ISDS. As well as expanding the scope of the ACIAP focused on corruption, the ADB and OECD should be encouraged to link that work with the growing work it has been doing in international investment law and arbitration, especially in recent years after the setback experienced in the late 1990s with the failed Multilateral Agreement on Investment.[58]

Furthermore, the ADB and OECD should coordinate such a combined initiative with efforts from the United Nations and other international organisations, like the OECD did in 2011 with its Guidelines on Multinational Enterprises (already highlighting corruption, as mentioned above). The United Nations itself needs better coordination, as corruption is being addressed mainly through the parts interested in human rights, while the United Nations Conference on Trade and Development (UNCTAD) deals with investment policy and treaties generally, and the United Nations Commission on International Trade Law (UNCITRAL) since 2019 has been discussing dispute resolution reform related to ISDS arbitration. UNCTAD seems to have focused some attention on Asia as a whole, but the UNCITRAL reform discussions on ISDS have reflected interests primarily of (some) individual Asian states rather than regional perspectives.[59] The ADB and OECD should also collaborate with ASEAN, which has reaffirmed its anti-corruption commitments on many occasions,[60] and the WTO, given its new agreement on investment facilitation.

Second, after identifying what they may agree and disagree with in that forum, Asian states and jurisdictions are recommended to develop more unified rules to deal with corruption and other serious misconduct in Asian investment arbitration. As suggested by Yan and Liu, a starting point would be to promote a regional convention on anti-corruption in Asia, and then incorporate more specific references to its principles in investment treaties as well. The baseline for the regional treaty is likely to be the UNCAC,[61] which has been ratified by all Asian countries apart from North Korea. The OECD Convention may be useful only as a point of reference because Asian countries—other than Japan and South Korea—have not adopted the legal instrument. A 'peer review' mechanism similar to that under the UNCAC could also help with implementation. Enhanced implementation could also come by incorporating agreements in advance to inter-state dispute settlement processes (as under the latter's Article 66) in the new regional convention and/or for example under an FTA (as occurred with the CPTPP, building on US FTA practice, for cross-referenced environmental protection treaties with otherwise weak enforcement mechanisms).[62]

However, even the UNCAC (and OECD Convention) leave discretion for member states as to how to incorporate provisions in their local laws (e.g., regarding facilitation payment defences) and especially as to enforcement activities. Investment treaties could therefore add more detail, if and when member states are willing. In addition, even if their anti-corruption obligations on states remain quite weak (as in Japan's suite of treaties from around 2007) this could provide a 'hook' for countries to seek funding from respective governments to beef up capacity-building and joint anti-corruption enforcement efforts.[63]

Establishing such unified rules is not easy for Asia, where states and jurisdictions have diverse legal and governance systems, and different attitudes towards international hard and soft law on corruption and illegality. There is also an investor–investee divide in Asia. For example, large economies like China may pursue their interests as FDI investors, whereas small economies like Laos may be willing to protect their interests as capital-importing countries. This could influence the calculus of states if they debate issues such as specifying a particular standard of proof for ISDS arbitration tribunals to apply when faced with defences alleging bribery, especially given that arbitration rules and soft law tend to leave that issue to the discretion of tribunals. Nonetheless, it should not be impossible for Asian countries and jurisdictions to establish some more uniform anti-corruption rules and those should interface with ISDS proceedings, as they all know that corruption and illegality often do more harm than good to FDI and local economies once those have developed sufficiently.[64] Such rules may also serve as effective tools for Asia to remove its stereotypical reputation as the place with a weak rule of law, improve its FDI attractiveness and contribute to IIA reforms.[65]

Third, Asia should consider establishing an independent institution or permanent court to better deal with allegations of corruption and other serious misconduct in relation to Asian investment disputes. This idea is not very new. The European Union has proposed a permanent investment court as a means to address concerns about the current global system of ISDS that is centred around the ICSID, although this proposal has faced pushback from Asian countries (notably Korea and Japan).[66]

Some commentators put forward the creation of a multilateral investment court balancing 'merit choices with forms of regional, legal and diversity representation'.[67] Calamita and Giannakopoulos propose establishing the ASEAN Investment Tribunal, a regional investment court system consisting of a first instance chamber, an appellate chamber, a joint committee of the contracting parties and a secretariat.[68] Asia as a whole should similarly investigate establishing a more permanent independent body, likely better able to deal more transparently with FDI disputes involving controversial issues of corruption, illegality and other matters than ad hoc ISDS arbitral tribunals, to shift the current paradigm of Asian ISDS—rather than diverting most cases to ICSID Convention arbitration mainly in Washington DC, where Asia remains rather weakly represented.[69]

Creating an independent Asian investment court or tribunal is not a straightforward project as it is a matter of diplomatic, (geo)political and practical feasibility.[70] Neither the Asia–Pacific Economic Cooperation (APEC) nor the ADB appears keen to pursue such a project, or indeed to be very aware of the growing intersection between corruption and investment arbitration—even though they have considered each topic separately.[71] However, including these prominent regional bodies in such an initiative would further undergird the growth of international investment law and arbitration into the Asian region, paralleling the earlier spread of international commercial arbitration.[72]

Notes

1. UNCTAD 2023; Chap. 1 in this volume.
2. UNCTAD 2023.
3. IMF 2023.
4. Azis 2018; Chaudhury et al. 2020; Kotrajaras et al. 2011.
5. OECD n.d.-f.
6. See OECD n.d.-c.
7. The eight states are Argentina, Brazil, Bulgaria, Croatia, Peru, Romania, Russia and South Africa: see OECD n.d.-b.
8. Also, around this time, the OECD–Asia Roundtable on Corporate Governance was established, aiming to contextualise and implement more effectively in the region the 1999 OECD Corporate Governance Principles; see OECD n.d.-e.
9. Namely Afghanistan, Bangladesh, Bhutan, Cambodia, China, Hong Kong, India, Indonesia, Japan, Kazakhstan, Korea, Kyrgyzstan, Macao, Malaysia, Mongolia, Nepal, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, Timor-Leste and Vietnam; see OECD n.d.-a.
10. See United Nations 2012 and generally Choudhury 2023.
11. For a recent example (filed 15 December 2022), involving an Australian firm complaining about an Indian firm not adhering to the Guidelines, see http://mneguidelines.oecd.org/database/instances/au0028.htm.
12. See United Nations n.d. See also generally Chaps. 4 and 5 in this volume.
13. See Chap. 5 in this volume; and Hsieh 2021 (advocating for a 'new Asian regionalism' in international economic law.
14. See generally Nottage et al. 2019; Pekkanen 2016.
15. Transparency International 2023; WJP 2022. See also e.g., https://www.transparency.org/en/news/cpi-2022-asia-pacific-basic-freedoms-restricted-anti-corruption-efforts-neglected.

16. See, e.g., Canare 2017; Qureshi et al. 2021; Shaari et al. 2022.
17. Caprasse and Tecqmenne 2022, p. 520; UNODC 2021, p. 6.
18. Reichenbach 2022; Wilske and Obel 2013.
19. Performance-phase corruption, namely after the initial investment, is generally not treated so harshly by tribunals. This is arguably understandable, given that the investor is more 'hostage' to bribe requests from public officials after costs have been sunk into the investment. The volume also does not discuss allegations of corruption regarding arbitrators or arbitral institution staff, as these are rarely made—let alone proven.
20. See generally Reinisch 2018 (critically surveying different phrasings and conclusions reached by tribunals).
21. Caprasse and Tecqmenne 2022; Valle and Carvalho 2022; Chap. 6 in this volume.
22. Pieth and Betz 2019.
23. See Chap. 1 in this volume.
24. See generally Kawharu and Nottage 2017.
25. Senate Economics References Commitee 2018, Chap. 7; see Chap. 4 in this volume.
26. Wedeman 2002.
27. *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.
28. *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013.
29. *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017.
30. Weeramantry and Packer 2023, p. 442.
31. Among those 45 IIAs concluded before 2012, ten were concluded by Japan with other Asian countries (broadly interpreted), although Yan and Liu suggest that anti-corruption provisions in Japan's IIAs should contain more details about anti-corruption commitments for states to take and the consequences of a breach of those commitments.
32. See e.g., a new agreement signed between Taiwan and the US: Liang 2023. The negotiated text is available at: https://ustr.gov/sites/default/files/2023-05/AIT-TECRO%20Trade%20Agreement%20May%202023.pdf.
33. WTO 2024.
34. For a further detailed analysis, including discussion of whether the general rules under public international law could be varied in the investment treaty context, see Viñuales 2022.
35. On whether and how arbitrators should themselves raise and investigate the possibility of corruption, see also generally Lojan 2023 and Igbokwe 2023 (albeit mostly in the context of commercial arbitration).
36. Transparency International 2023. For a recent high-profile case of judicial corruption at the highest level in mainland China, see Zhuang 2023.
37. Transparency International 2023.
38. UNCITRAL, Final Award (30 November 2011). See further Claxton et al. 2021 (via https://ijiel.in/).
39. These include *Astro All Asia Networks and South Asia Entertainment Holdings Limited v. India* (2016), PCA Case No. 2016-24/25, which arose out of an allegedly unfair and biased criminal investigation by the Indian government into suspected bribery by claimants of Indian government officials; and *Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust, UAE with Ace Hospitality Management DMCC, UAE v. India* (2016), UNCITRAL Rules, ad hoc arbitration, which concerned the Indian government's alleged non-investigation of allegations of forgery and criminal actions by an Indian construction company.
40. *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No 2013-09, Award on Jurisdiction and Merits, 25 July 2016; *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017.

41. Moreover, after a notably more pro-arbitration approach being adopted by India's Supreme Court and legislature from around 2012 (Aragaki 2018), concerns have been raised about further recent amendments to the 1996 Arbitration and Conciliation Act. The amendments extend powers to the Indian courts to stay enforcement of an award unconditionally when they are prima facie satisfied that not only the award making, but also the arbitration agreement or even the underlying contract, was induced by fraud or corruption: Dholakia et al. 2021.
42. See Chaps. 1 and10 in this volume.
43. See, for example, *Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14.
44. Ubilava and Nottage 2021.
45. Transparency International 2023.
46. OECD 2019; Takamiya et al. 2022.
47. *Lao Holdings NV v. Lao People's Democratic Republic* (the *Lao Holdings* case), ICSID Case No. ARB(AF)/12/6; *Sanum Investments Limited (People's Republic of China) v. the Government of the Lao People's Democratic Republic* (the *Sanum* case), PCA Case No. 2013-13.
48. Transparency International 2023.
49. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/03/25 (Award dated August 16, 2007); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/11/12 (Award dated December 10, 2014).
50. Transparency International 2023.
51. *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No ARB/12/37. The August 2022 award ordered Korea to pay approximately USD215.5 million in damages (out of USD4.7 billion claimed) but it successfully applied for rectification of the award to reduce the amount by USD0.5 million. It also reportedly contemplated annulment proceedings, which have been filed already by the claimant. For details and updates see Charlotin 2023 and https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/37.
52. *Mason Capital LP and Mason Management LLC v. The Republic of Korea*, PCA Case N° 2018-55; *Elliott Associates, LP v. The Republic of Korea*, PCA Case N° 2018-51. The London-seated UNCITRAL Rules arbitration tribunal awarded Elliott around USD53.6 million in damages (out of the USD770 million reportedly claimed originally). Both parties have filed for corrections to the award, and Korea has filed for the award to be set aside. See Bohmer 2023 and https://pca-cpa.org/en/cases/197/.

    For updates, including further on the award rendered in June 2023 in the latter case, see Kim 2023.
53. Wombolt et al. 2018. Reforms in 2015 had introduced corporate liability, introducing an offence for companies benefiting from a bribe by a related person, subject to a reasonable procedures defence based on the UK Bribery Act, as well as prohibiting demand and supply side bribery of foreign public officials and international organisations. Legislation in 2018, replacing the 1999 Act, extended corporate criminal liability to companies registered outside Thailand and bolstered cross-border cooperation. Also in 2018, India, Japan, Singapore, Malaysia, Vietnam and China had all introduced further anti-corruption legislation.
54. Nottage and Weeramantry 2012.
55. Coleman 2016; Langford et al. 2022.
56. Schill 2015, p. 771.
57. OECD n.d.-a; see further Chap. 5 in this volume.
58. See OECD n.d.-d.
59. See generally Calamita and Giannakopoulos 2022 on ASEAN state engagement, and the reports of deliberations including interventions also by other Asian states available via https://www.ejiltalk.org/category/investor-state-arbitration-tribunals/.
60. See further Chap. 5 in this volume. The ADB and OECD may also coordinate with ASEAN Plus Three and ASEAN Parties Against Corruption (joined by anti-corruption agencies of all ASEAN members: http://www.asean-pac.org/). However, they may not expect to have close

cooperation with the East Asia Summit on corruption in Asian investment arbitration as the Summit has significant non-Asian members, such as Russia and the US.
61. Yan 2022, p. 164.
62. Huang and Hu 2021.
63. See e.g., how sparse references to competition law cooperation in the Australia–New Zealand ASEAN FTA have led to a vigorous programme among respective regulators: ASEAN Secretariat n.d.; Australian Competition & Consumer Commission n.d. See also Wombolt et al. 2018.
64. See Chaps. 2and3 in this volume.
65. Yan 2022.
66. Li 2018.
67. Ghori 2018; Lévesque 2019, p. 100.
68. Calamita and Giannakopoulos 2022, pp. 183 ff.
69. Langford et al. 2022, p. 313.
70. Calamita and Giannakopoulos 2022, pp. 214 ff.
71. ADB 2021, 2023; Calamita 2020.
72. See generally Nottage et al. 2021; Nottage 2021.

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Nobumichi Teramura is Assistant Professor at Universiti Brunei Darussalam and Affiliate at the Centre for Asian and Pacific Law at the University of Sydney, specialising in business law, with a particular interest in arbitration, private international law, contract law and Asian law. Nobumichi is the author of *Ex Aequo et Bono as a Response to the Over-Judicialisation of International Commercial Arbitration* (Wolters Kluwer, 2020), based on his doctoral thesis from the University of New South Wales in Australia, which received a PhD Excellence Award when completed in 2018. He has taught private international law and commercial law as a lecturer at the Adelaide Law School, Australia (since 2019). He also lectured at the Tañada-Diokno School of Law at De

La Salle University in the Philippines in 2016, 2017 and 2019 on international arbitration and trade law.

Luke Nottage is Professor of Comparative and Transnational Business Law at Sydney Law School, specialising in arbitration, contract and consumer law, and corporate governance, with a particular interest in Japan and the Asia–Pacific. He is founding Co-Director of the Australian Network for Japanese Law (ANJeL), Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS), and Special Counsel with Williams Trade Law. Luke has consulted for law firms worldwide as well as for ASEAN, the European Commission, the OECD, UNCTAD, UNDP and the Governments of Japan and Saudi Arabia. Luke is also a Rules Committee Member of ACICA and is on the Panel of Arbitrators for AIAC (KLRCA), BIAC, CAAI, JCAA, KCAB, NZIAC, SCIA, TAI and THAC. Luke was Visiting Professor at Universiti Brunei Darussalam in 2020 and 2023.

Bruno Jetin is Associate Professor at Universiti Brunei Darussalam (UBD); he was also Director of the Institute of Asian Studies (2018–2022). Prior to joining UBD, he was a researcher at the Institute for Research on Contemporary Southeast Asia (IRASEC, CNRS-MAEE, Bangkok) and Associate Professor at the University Sorbonne Paris Nord where he was Deputy Director of the Research Center in Economics. He holds a PhD in economics from the University of Sorbonne Paris Nord. His current research areas include ASEAN and the Belt and Road Initiative, foreign investment and trade in the Asia–Pacific, income distribution and growth. He is also an expert on the automobile industry and the electric car.

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