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.*

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) (2003), which has 189 member states and is the only universal legally binding anti-corruption instrument.[2] Another influential international legal instrument is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Convention') (1997). This is '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. Forty-four signatories – all 37 OECD developed economies, plus Argentina, Brazil,

[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.-b.

[3] OECD n.d.-b

Bulgaria, Costa Rica, Peru, Russia and South Africa – have adopted this convention.[4] Both treaties reflect the normative global consensus against corruption and bribery,[5] and Asian states certainly form part of the consensus.[6]

Nevertheless, enforcement of these treaties and related national laws remains problematic,[7] and corruption and poor governance remain serious problems world-wide, including in many Asian jurisdictions. For example, the majority of East (North and Southeast) 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 based on responses from experts and businesspeople. As demonstrated in Table 1.1 below, Singapore, Hong Kong, Japan, Bhutan and Taiwan are ranked in the top 30 least corrupt countries and territories, but 12 among 22 East and South Asian jurisdictions sank below the top 90.

Table 1.1: 2021 Corruption Perceptions Index for East and South Asia (Best to Worst)[8]

Country/ Territory	Singapore	Hong Kong	Japan	Bhutan	Taiwan	South Korea	Malaysia	China	India
Global Rank	4/180	12/180	18/180	25/180	25/180	32/180	62/180	66/180	85/180
Country/ Territory	Maldives	Indonesia	Sri Lanka	Mongolia	Thailand	Philippines	Nepal	Papua New Guinea	Laos
Global Rank	85/180	96/180	102/180	110/180	110/180	117/180	117/180	124/180	128/180
Country/ Territory	Myanmar	Bangladesh	Cambodia	North Korea					
Global Rank	140/180	147/180	157/180	174/180					

[4] OECD n.d.-b In addition, there are regional conventions fighting against corruption, 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.

[5] Gaillard 2019, p. 14. These conventions offer various definitions on corruption because there is no universal definition of corruption (Baizeau 2015, p. 9). However, corruption normally refers to 'the deliberate abuse of authority or trust to benefit a private interest' including '"bribery" (ie, giving or offering something to someone as a reward for doing something), "embezzlement" (ie, improperly taking control of assets to which one has access) and "fraud" (ie, false representations by statements or conduct to gain a material advantage) (Banifatemi 2015, p. 16).

[6] 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.-a. In contrast, only Japan and South Korea have adopted the OECD Convention in Asia.

[7] See eg Joutsen 2011; Davids and Schubert 2011; Arnone and Borlini 2014; OECD n.d.-a; Pieth 2020. However, enforcement of these treaties targeting corruption can sometimes be strong, eg even just for temporary domestic electoral advantage: see eg 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 eg Harris and Nolan 2021.

[8] https://www.transparency.org/en/cpi/2021

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'.[9] In this ranking again, the results of assessment on 17 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.[10]

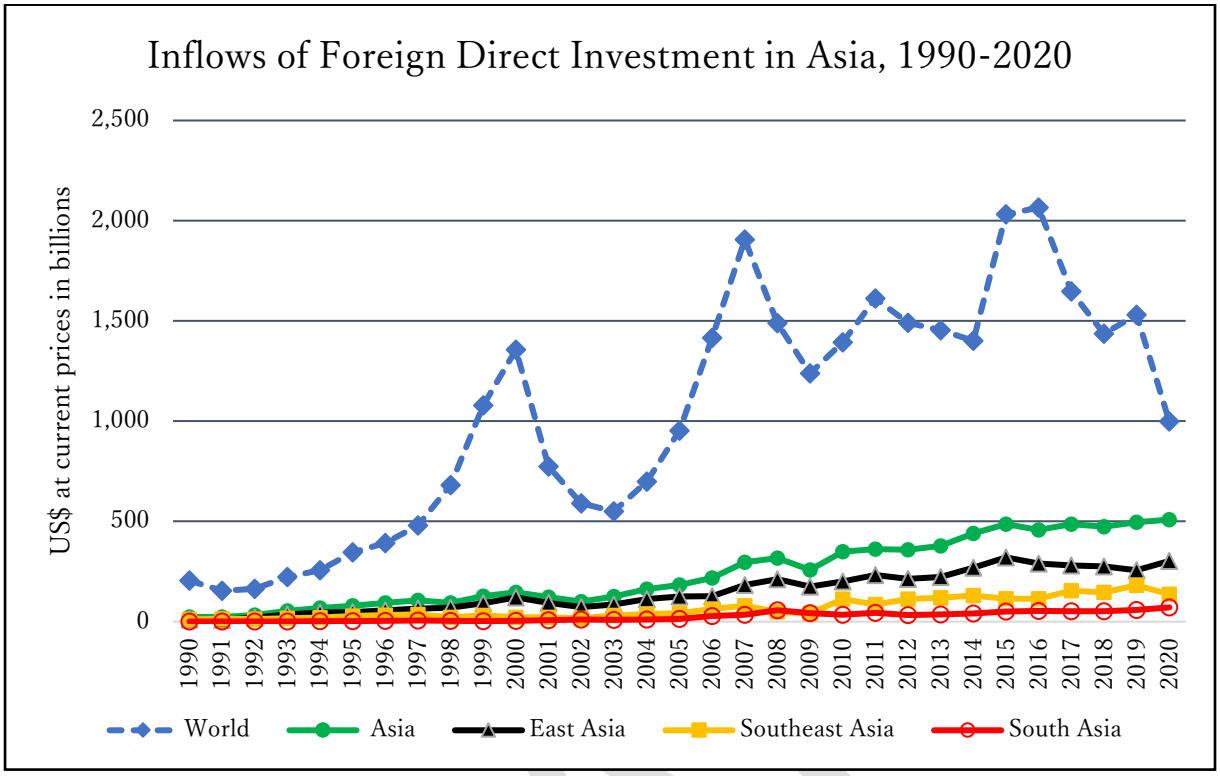
Table 1.2: WJP Rule of Law Index (2021) for East and South Asia (Best to Worst)[11]

Country/ Territory	Japan	Singapore	Hong Kong	South Korea	Malaysia	Mongolia	Indonesia	Nepal	Sri Lanka
Global Rank	15/139	17/139	19/139	20/139	54/139	61/139	66/139	70/139	76/139
Country/ Territory	India	Thailand	Vietnam	China	Philippines	Bangladesh	Myanmar	Cambodia	
Global Rank	79/139	80/139	88/139	98/139	102/139	124/139	128/139	138/139	

This reality in many parts of Asia as well as worldwide encourages some foreign investors, even from OECD Convention members states, to pay bribes or engage in other illegal behaviour often with the explicit or implicit support of host state officials and/or local investment partners. 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[12] as shown in Figure 1.1 below.

[9] WJP 2021, p. 9 (emphasis added).
[10] International 2022.
[11] https://worldjusticeproject.org/rule-of-law-index/global
[12] 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 and South Asia as this closely links to the domestic issues of corruption and illegality in the host states.

Figure 1.1: Inflows of Foreign Direct Investment in Asia, 1990-2020[13]



FDI started to surge in the 1990s when the deregulation of world markets and the decline of protectionism initiated hyper-globalisation.[14]. Figure 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 USD 2 trillion in 2016, fuelled by a flurry of megadeals in cross-border mergers and acquisitions in high-income countries.[15] 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 USA.[16] Excluding one-off factors, FDI growth averaged 1% per year after the global financial crisis (2009-2018) compared with 8% over the period of 2000 to 2007.[17] This evolution has fuelled the debate concerning the entry into a period of deglobalisation.[18] In this gloomy context for foreign investment, the shock of the COVID-19 pandemic occurred. The fall in 2020 brought global FDI back to $1 trillion, an amount equivalent to the sum in 2005 and around 20% lower than the trough after the global financial crisis of 2009.

[13] Source: Jetin's computation with UNCTAD data.
[14] Carroll et al. 2020; Subramanian and Kessler 2013.
[15] UNCTAD 2018.
[16] UNCTAD 2019.
[17] UNCTAD 2019.
[18] Antràs 2020.

In comparison, FDI inflows in 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. In particular, China recovered in March 2020 from the COVID and removed the nationwide lockdown long before the rest of the world. Southeast Asia recovered lately 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.[19] Consequently, FDI in Southeast Asia was down 25% in 2020 compared to 2019. FDI in South Asia remains around two times and four times less than in Southeast 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 and grew by 20% in 2020 compared to 2019. Overall, FDI in Asia has increased firmly despite the global economic decline, reaching 51% of the world total in 2020, up from 32% in 2019. East Asia attracted 30.2%, Southeast Asia 13.6% and South Asia 7.1% 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 extent to which foreign investments allegedly tainted by corruption or other serious illegality are likely to be protected through arbitration in the context of international investment disputes. Such disputes can be 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.[20] 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 arbitrations 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

[19] UNCTAD 2022.

[20] However, undermining neutrality somewhat, some government entities (eg 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 eg Nottage and Thanitcul 2017, with a longer version at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770889.

Commercial Contracts).[21] 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 169 states,[22] like most purely commercial arbitral awards rendered by a foreign-seated tribunal nowadays, 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).[23] 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.[24]

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,[25] 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 "public policy" of any state.[26] 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,[27] thus preventing any further review there for "public policy" or other NYC-like grounds for refusing enforcement.[28]

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). 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

[21] For a recent example where an arbitral tribunal applied these Principles (even though not originally expressly chosen to apply to a lease agreement) to award nearly $US15 billion to eight Filipino individuals (heirs to the last Sultan of Sulu) against Malaysia (successor to the British North Borneo Company), see Charlotin 2022.
[22] See UNCITRAL n.d.-a
[23] See UNCITRAL n.d.-b; and generally eg Bell 2018.
[24] 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 eg Bermann 2017.
[25] See ICSID 2022b.
[26] Article 52 of the ICSID Convention.
[27] Article 54 of the ICSID Convention.
[28] 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.

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).[29]

Such investment treaty arbitration is typically referred to as 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.[30] 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),[31] as well as investor-state conciliation or mediation rather than arbitration (so far rare, but of growing interest including via investment treaty provisions).[32] In this chapter and volume, we refer to this route of consent to arbitration through investment treaties as "treaty-based ISDS". Known cases have become increasingly common world-wide (reaching over 1100 filings as of 23 March 2022)[33] as 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 3300 signed[34]) that increasingly provide for ISDS as well as inter-state 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).[35] However, the proportions and absolute numbers have been increasing significantly over the last decade.[36]

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

[29] See UNCTAD n.d.-b. Out of 1104 treaty-based ISDS claims recorded as of 20 December 2020, for example, 352 were ad hoc arbitrations under the UNCITRAL Rules. The reason for very few treaty claims being referred to arbitration centres might be that their leaders were involved in corruption allegations in the past, as discussed in Sim 2019 on the Asian International Arbitration Centre.

[30] See eg Nottage 2021a; Nottage 2022.

[31] There have been 146 cases filed with ICSID under consents to arbitration in individual contracts, according to ICSID 2022a. Of these, 133 involved ICSID Convention Arbitration Rules.

[32] Ubilava 2022; Claxton 2020.

[33] There had been 1104 known filings, according to UNCTAD n.d.-c.

[34] There had been 2805 BITs signed (2242 in force) and 424 signings of other investment agreements such as FTAs (331 in force), according to UNCTAD n.d.-a.

[35] Nottage and Weeramantry 2012; Nottage and Weeramantry 2011; Kim 2012.

[36] See eg Chaisse and Nottage 2018.

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.[37]

1.2. Investor-State Dispute on Corruption in Investment Arbitration

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, Bilateral Investment Treaty (BIT) or Multilateral Investment Treaty (MIT). 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.[38] The investor will not favour litigation in the host state, as it perceives the domestic legal system to be biased and partial,[39] and it anyway 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,[40] national treatment, most-favoured-nation treatment, full protection and security, and dispute resolution by a neutral third party (especially arbitration).[41] 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

[37] 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; García-Castrillón 2017; Schmidl 2021; Ballantyne 2021 (introducing a Japanese investor's successful ICSID claims against the Spanish government over solar reforms).

[38] Walter 2015, pp. 85, 90ff.

[39] Besch 2015, pp. 140-141.

[40] Of 2,538 BITs signed between 1959 and 2016, 2,418 (95%) have a fair and equitable treatment clause: UNCTAD n.d.-d

[41] Hobe 2015, p. 13; Meshel 2013, pp. 270-271.

with or in conformity with domestic laws of the host state,[42] which normally criminalise corrupt practices such as bribery.[43] 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.[44]

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. 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. 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.[45] The very type of jurisdictions likely still to be struggling with problems of corruption and lack of transparency in public affairs, hence, nonetheless likely to be hit by ISDS claims at least in the shorter term.[46] 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.[47]

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

[42] 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

[43] Obersteiner 2014, p. 276; Tamada 2015, p. 107.

[44] See generally Banifatemi 2015.

[45] Discussing the empirical evidence on the impact of ISDS-backed provisions on FDI flows, see eg Singh 2021; Armstrong 2018; Nottage 2021b; Armstrong and Nottage 2022.

[46] 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').

[47] However, significant net positive effects on local legal and political institutions from ISDS claims may need to be accompanied by specific law reforms, like enactment of broader arbitration legislation following global standards, as suggested recently eg by Rogers and Drahozal 2022.

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 ...[48]

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 Deal 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.[49] Those approaches have evolved by absorbing debates 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 over any corruption cases. 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.[50] 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.[51] 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'.[52] Several investment arbitral

[48] UNODC 2021, p. 6.
[49] 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 on corruption along the lines of the three approaches).
[50] Greenwald and Ivers 2018, pp. 56-72.
[51] Wetter 1994.
[52] Wetter 1994, p. 294.

tribunals have followed suit, holding that such intermediatory contracts contemplating bribery are void(able) and therefore should not give rise to valid claims.[53]

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' clause. This type of clause has also been applied to decline jurisdiction for other serious investor misconduct. In a quite 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][54] (*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'.[55] 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.[56] 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*.[57]

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 investments' compliance with the host states' laws.[58] However, this view is quite

---

[53] 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 Oct. 4, 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 Aug. 19, 2013 (*Niko* case).

[54] ICSID Case No. ARB/03/25, Award dated 16 August 2007.

[55] *Fraport (I)* case, pp. 159 and 170.

[56] Ibid, p. 194.

[57] See also *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated Oct. 4, 2013 (*Metal-Tech* case).

[58] 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 Apr. 15, 2009; *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated June 6, 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*

controversial because its legal basis is unclear, and arbitral tribunals adopted different rationales without uniformity.[59] Several commentators and arbitrators further criticise the view, suggesting that contracting parties (ie, states) do not consent to limit the jurisdiction of a tribunal without an express agreement.[60] They claim that denouncing its jurisdiction based on allegedly implied legality clause would risk the tribunal to exceed its jurisdiction and would thereby cause the resulting award to be challenged under Article 52 of the ICSID Convention.[61] 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'.[62] Therefore, the 'zero-tolerance' approach would only become reasonable where a tribunal relied on an explicit legality clause in an investment treaty or agreement.

According to Tamada, the 'zero-tolerance' approach may slightly re-balance the interests between the investor and host state in the current framework of investor-state dispute settlement, which is (arguably) disproportionately pro-investor.[63] (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.[64]) Other commentators claim that this strict approach may anyway advance anti-corruption objectives.[65] 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 claims on the grounds of corruption. This approach is different from the zero-tolerance approach in that its focus is directed at the claim

the Philippines (II), ICSID Case No. ARB/11/12, Award dated Dec. 10, 2014; *Cortec Mining Kenya Limited et al. v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award dated Oct. 22, 2018.

[59] 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).

[60] 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').

[61] Moloo and Khachaturian 2011, p. 1490; Reichenbach 2022, para 21.34.

[62] Druce 2018, p. 704.

[63] Tamada 2015, p. 117.

[64] See eg UNCITRAL 2022 (with helpful summaries of deliberations via McInerney-Lankford and Vasquez 2020; Roberts and John 2019). In Working 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)

[65] Meshel 2013.

itself and its admissibility rather than the basis of a tribunal's jurisdiction.[66] In *Plama Consortium Limited v Republic of Bulgaria* (2008),[67] 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),[68] 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.[69] If issues of corruption or serious irregularity go to admissibility of the claims, rather than jurisdiction, at least the ISDS tribunal can hear evidence to decide the matter.[70] 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.[71]

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.[72] 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.[73] Newcombe is also in favour of the closer look approach, claiming it is useful to avoid procedural complications at later stages such as challenge to the arbitral award for the tribunal's failure to exercise jurisdiction.[74]

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 relevant corruption allegations.[75] This can impact on liability, and/or remedies awarded (typically damages).[76] Factors taken into consideration by the tribunal include whether the allegedly

[66] 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).
[67] ICSID Case No. ARB/03/24, Award, 27 August 2008.
[68] ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40, Award, 6 December 2016.
[69] The *Churchill* case, p. 191.
[70] See generally Banifatemi 2015.
[71] Ibid.
[72] The *Fraport (I)* case, p. 23/24.
[73] Wilske and Obel 2013, p. 184.
[74] 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.
[75] Wilske and Obel 2013, pp. 184-186; Tamada 2015, p. 116.
[76] See, eg, *Hesham T. M. Al Warraq v. Republic of Indonesia* (*Al Warraq* case), UNCITRAL, Final Award dated on 15 December 2014; Burgstaller and Risso 2021, p. 703.

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 (for example, violation of fair and equitable treatment commitments), referring to the diversity of corrupt practices and the bilateral nature of corruption.[77] 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,[78] especially where they came across issues pertaining to post-investment corruption.[79] For instance, the tribunal in the *Fraport* 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*'.[80]

The ISDS tribunals are further divided on more specific issues, which can arise under all or some of the three approaches outlined above. Controversial topics include standards of proof for allegations of corruption,[81] the evaluation of risk factors that may imply the existence of corruption ie, the treatment of circumstantial evidence or 'red flags' of corruption,[82] arbitrator's investigative and reporting rights and duties on corruption (including obligations to report corruption to the responsible authority),[83] burden of proof for allegations of corruption,[84] impact of criminal investigations over arbitral proceedings,[85] 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),[86] availability of remedies for findings of illegality (such as restitution of benefits under contracts tainted by corruption),[87] possibility for an investor to raise the demand for a bribe from a state agency as the infringement

[77] Wilske and Obel 2013, p. 185.
[78] 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.
[79] 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.
[80] The *Fraport* case, pp. 164-165 (emphasis added). See also the dissent of the Fraport case, noting that '[a]s a matter of principle, therefore, the legality of the investor's conduct is a merits issue' (p. 22).
[81] Khvalei 2015; Menaker 2015; Hoepfner 2017, pp. 216ff; Greenwald and Ivers 2018, pp. 38-49; Sayed 2017.
[82] 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.
[83] Ziadé 2015; Marcenaro 2015; Sprange 2015; Baizeau and Hayes 2017; Rose 2014.
[84] Tezuka 2015, 58-59; Menaker 2015, 79-82.
[85] Besson 2015; Wallgren-Lindholm 2015, pp. 185-186.
[86] Nappert 2015; Llamzon 2015; Llamzon 2014, pp. 238-281; Devendra 2019; Wood 2018.
[87] Gaillard 2019, pp. 10-12; Fernández-Armesto 2015, pp. 169ff; Partasides 2017.

of its rights such as legal expropriation and fair and equitable treatment,[88] 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,[89] and prospects of host-state counterclaims where the state is not liable for corruption.[90]

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

Despite by now quite a few Asian ISDS arbitration cases, including awards now discussing corruption and other serious misconduct by investors,[91] 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.[92] Thus, for example, Llamzon's *Corruption in International Investment Arbitration* (Oxford University Press 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'.[93] The 358-page volume offers a deep insight of the relationship between investment arbitration and corruption based on the author's careful and rigorous legal research.[94] However, the book only occasionally discusses the perspectives of Asian countries because its focus is not in Asian approaches, although it indeed examines several Asia-related ISDS decisions discussing corruption.[95] Moreover, Greenwald and Ivers contributed in 2018 a 93-page report on *Addressing Corruption*

---

[88] Schefer 2021, pp. 35-36; Ziadé 2015, pp. 746-747; Llamzon 2014, pp. 119-200; Vijayvergia and Belmannu 2020, Sec. 2.4.

[89] Chan 2022.

[90] Vijayvergia and Belmannu 2020.

[91] 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.

[92] See eg Chaisse and Nottage 2018; Nottage et al. 2021; Mohan and Brown 2021.

[93] Mistelis 2014.

[94] Donoghue 2015.

[95] *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.

Allegations in International Arbitration.[96] 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*.[97] 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.

Such limited coverage of Asia is also salient in research articles addressing specific topics of corruption and other illegal conducts. On the fundamental issue of whether international arbitration is an appropriate forum to decide corruption claims, Rose's paper 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.[98] 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.[99] 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.[100] Wilske and Obel classify arbitral tribunals' handling of corruption allegations into three categories, but their focus is also not on Asia.[101]

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'.[102] The proponents of the zero-tolerance approach are likely to find Wood's thesis useful as it suggests to immune states 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

[96] Greenwald and Ivers 2018.
[97] 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 2022 via ICC n.d., but it is unclear how many Asian jurisdictions will be covered.
[98] Rose 2014.
[99] For example, Vietnam, Cambodia and Laos: Teramura 2021b, 27; Teramura 2021a.
[100] Polkinghorne and Volkmer 2017.
[101] Wilske and Obel 2013. Other articles on the three categories do not focus on Asia either. See Tamada 2015; Raouf 2009; Schefer 2021.
[102] Wood 2018, p. 117.

host [s]tate may be held internationally responsible for the corrupt conduct of its public officials'.[103] 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 s/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.[104] Overall, these useful and significant contributions by leading experts of ISDS analyse core issues around corruption and investment arbitration without paying great attention to Asian contexts.

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 of "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.[105] 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.[106] 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* (Brill | Nijhoff 2017) is a handy reference tool especially for practitioners to study investment protection in the region.[107] 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's and Nottage's *International Investment Treaties and Arbitration Across Asia* (Brill | Nijhoff 2018) introduces FDI trends and regulations, investment treaties and arbitration across Asia.[108] The reach of

[103] Devendra 2019.
[104] Caserta 2021, p. 321.
[105] Gong and Scott 2016.
[106] Warf 2018.
[107] Malintoppi and Tan 2017.
[108] Chaisse and Nottage 2018.

the 700-page voluminous edited book is more comprehensive in that it offers studies for the ten member states of the 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. One may find such limited attention to corruption in ISDS in *The Asian Turn in Foreign Investment* (Cambridge University Press 2021).[109] In sum, there is no comprehensive study comparing Asian laws and practices addressing corruption and illegality in the context of investor-state arbitration.

1.5. Developing Asian Perspectives on Corruption and Illegality in Investment Arbitration

The book aims to examine Asian approaches and case studies toward 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. 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-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.[110] Accordingly, the member states of those arrangements – mostly Asian countries – are now facing elevated and collective pressure to fight against corruption.[111] 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.[112] 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 directly amenable to ISDS claims.[113] 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

[109] Mohan and Brown 2021.
[110] See Chapter 26 (Transparency and Anticorruption) of the Consolidated TPP Text; and Article 17.9 of the RCEP Agreement.
[111] Chaisse et al. 2022, suggesting the RCEP agreement 'represents [a region-wide] effort to reconcile overlapping agreements around a more common template'.
[112] Article 26.12.3 of the TPP Text and Article 17.9.2 of the RCEP Agreement.
[113] 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 have been gaining increasing traction in international investment law: Jarrett et al. 2021; Burgstaller and Risso 2021; Llamzon and Chrostin 2021.

account by [an ISDS arbitration] tribunal in determining whether, or to what extent, the investor may invoke' [the treaty's] protection'.[114] 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,[115] provided that the standards reflect also a voice from Asia. Unfortunately, the voice has unlikely reached the ears of international policymakers yet. For instance, the UNODC and the 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'.[116] The Meeting reportedly gathered over 140 experts from 60 countries,[117] but the number of presenters in the event was eighteen,[118] and only two speakers were from Asian countries (Mongolia and China).[119] 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 comments of many trade and investment law experts now suggesting treaty reforms to upgrade the framework of investor-state arbitration at a global level.[120] Someone needs to challenge the *status quo*, otherwise Asian states would miss golden opportunities to influence the ongoing international policy-making process for investment arbitration.

Against the backdrop, this edited volume aims to accumulate and present Asian perspectives, for Asia to build the foundation of leading the next rounds of treaty reforms in the field of corruption and ISDS. In particular, it intends to address the following questions:

1. Whether Asia has been and will remain 'ambivalent' about international law prohibiting corruption and illegality. How have Asian countries been combatting corruption and other illegal activities particularly as to foreign investment? What laws and rules exist, and how do they operate in respective jurisdictions? What are the recent developments?

[114] Ishikawa 2018, pp. 537-538.
[115] UNODC 2021, p. 6.
[116] UNODC 2021, p. 3.
[117] Kryvoi 2021.
[118] UNODC 2021, p. 2.
[119] The Mongolian speaker was a UNODC officer based in Vienna, Austria.
[120] Nottage et al. 2018; Trakman 2018.

2. Whether and how Asian countries have dealt with corruption and illegality in relation to foreign investment projects. If they have faced any international investment claims involving such elements, whether treaty-based ISDS cases or those based on investment contracts providing consent to arbitration, what are the outcomes and consequences?

3. Whether Asian countries have been or are 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.[121]

Those questions will support us to achieve the central objective: to examine Asian approaches toward corruption and illegality in international investment arbitration. This edited book further takes into account not only legal perspectives but also non-legal ones such as business and economics.

1.6. Structure of the Book

Following this introductory chapter, the edited volume proceeds as follows. Part I considers wider business and economic issues relating to corruption and investment in the Asian region. 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.[122] Bruno Jetin's chapter turns to how the level of corruption in host states likely affects the amount of foreign investment into Asian nations. His 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. Masairol Bin Haji Masri's chapter studies the various accounting measures the Asian states have employed in their efforts to crackdown on corruption by government officials and/or foreign corporations. The chapter evaluates how such measures have been (non-)effective for reducing corrupt practices (including grey or borderline ones) persisting in Asian business settings and contexts.

Part II discusses general legal issues related to corruption and investment arbitration in Asia. Martin Jarrett begins by exploring 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 imbalances between states and investors pertaining to corruption, Jarrett explores the way to rebalance the asymmetries and fragmentation, regarding (non-)Asian ISDS. Anselmo Reyes then considers corruption regulations in Asia generating cross-border economic and geopolitical tensions, inspired by the famous Alstom saga in which the US allegedly applied its anti-corruption regulations in corporate law as an economic weapon against Alstom —

[121] Compare generally Chesterman 2017; Chaisse and Nottage 2018; Nottage et al. 2021; Hsieh 2021 (arguing the new Asian regionalism that shaped the new regional economic order and international trade norms).
[122] For example, see Ang 2020.

a French conglomerate and one of the biggest competitors of General Electric (GE).[123] His chapter discusses how Asian states may invoke their municipal laws to destabilise the world's largest companies, for the benefit of their national industries. Next, Colin Ong examines the standard of proof for corruption allegations in ISDS. As briefly mentioned above,[124] establishing a clear standard of proof for corruption is a complicated task for arbitrators because they are often required to rely on circumstantial evidence in determining the existence of illegality. Thus, Ong analyses practical approaches to risk factors or red flags of corruption in Asian ISDS. Hammeed Abayomi Al-Ameen's chapter considers Asia's business laws and corruption in generally, focusing especially on the experience of Asian common law countries.

Part III collects the reports of corruption 'hot spots' in Asia: 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 treaties trajectory in the context of corruption, and relevant ISDS cases involving alleged bribery and serious investor misconduct based on an investment treaty or 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, Vivienne Bath discusses the impact of the nation-wide 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 examines India's approach to corruption and illegality in investor-state arbitration. Ranjan sheds light on several corruption-related ISDS arbitrations involving India as respondent. These include *Astro All Asia Networks and South Asia Entertainment Holdings Limited v India* (2016),[125] which arose out of an allegedly unfair and biased criminal investigation by the Indian government on 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),[126] which concerned the Indian government's alleged non-investigation of allegations of forgery and criminal actions by an Indian construction company. Then, Simon Butt, Antony Crockett and Tim Lindsey provide a thorough overview of Indonesia's quite pervasive corruption, domestic laws and institutions aiming to combat it, and 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 claims in ISDS, such as in the *Churchill Mining* case and the *Al Warraq*

[123] Pierucci 2019.
[124] See Section 1.3.3.
[125] PCA Case No. 2016-24/25.
[126] UNCITRAL, ad-hoc arbitration.

case. In the ensuing chapter on Japan, a large net capital exporter rather than a major destination for FDI, Dai Tamada examines anti-bribery and related provisions contained in Japan's recent investment treaties to assess their (potential) impact on the operation of Japanese companies in Asia and beyond. Joongi Kim's chapter on South Korea reviews not only the government's approach towards corruption, which has generated some recent high-profile cases, but also Korean companies' experiences in dealing with issues of corrupt practices abroad.

Turning then to smaller and/or more developing economies in Asia, Romesh Weeramantry's chapter 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, Jocelyn Cruz, Justin Sucgang and Rebecca Khan discuss the aftermath of the landmark *Fraport* (I) case, referring to President Rodrigo Duterte's fight against corruption since his presidential appointment in 2016. Lastly, Sakda Thanitcul, Sirilaksana Khoman and Luke Nottage 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 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 elaborates 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.

References

Alvarez JE, Topalian G (2012) The Paradoxical Argentina Cases. World Arbitration & Mediation Review 6 (3): 491-544

Ang YY (2020) China's Gilded Age: The Paradox of Economic Boom and Vast Corruption. Cambridge University Press, Cambridge, UK

Annan KA (2004) Foreword to United Nations Convention Against Corruption. UNGA Res 58/4:

Antràs P (2020) De-Globalisation? Global Value Chains in the Post-COVID-19 Age, vol 28115. NBER Working Paper Series. National Bureau of Economic Research, Cambridge, MA, US

Armstrong S (2018) The Impact of Investment Treaties and isds Provisions on fdi in Asia and Globally. In: Chaisse J, Nottage L (eds) International Investment Treaties and Arbitration Across Asia. Brill | Nijhoff, Leiden, pp 57-82

Armstrong S, Nottage L (2022) Mixing Methodologies in Empirically Investigating Investment Arbitration and Inbound Foreign Investment. In: Behn D, Fauchald OK, Langford M (eds) The Legitimacy of Investment Arbitration: Empirical Perspectives. Cambridge University Press, Cambridge, UK, pp 315-364

Arnone M, Borlini LS (2014) Corruption: Economic Analysis and International Law. Edward Elgar Publishing, Chelterman, UK

Northampton, MA, US

Baizeau D (2015) Introduction: Definitions and Scope of the Topic. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 9-11

Baizeau D, Hayes T (2017) The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte. In: Menaker A (ed) International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19. Wolters Kluwer; ICCA, Alphen aan den Rijn, The Netherlands, pp 225-265

Baizeau D, Kreindler R (eds) (2015) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris

Ballantyne J (2021) Japanese Investor Wins Damages over Spanish Solar Reforms. Global Arbitration Review, 25 November 2021. https://globalarbitrationreview.com/achmea/japanese-investor-wins-damages-over-spanish-solar-reforms

Banifatemi Y (2015) The Impact of Corruption on "Gateway Issues" of Arbitrability, Jurisdiction, Admissibility and Procedural Issues. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 16-31

Bell GF (ed) (2018) The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons. Cambridge University Press, Cambridge, UK

Bermann GA (2017) Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts. In: Bermann GA (ed) Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts. Springer International Publishing, Cham, Switzerland, pp 1-78

Besch M (2015) State Contracts and the Relevance of Investment Contract Arbitration: II. Typical Questions Arising within Negotiations. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International Investment Law: A Handbook. Bloomsbury T&T Clark, London, pp 93-152

Besson S (2015) Corruption and Arbitration: Impact of Criminal Investigations. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Alphen aan den Rijn, The Netherlands, pp 103-113

Bohmer L (2019) In Tethyan Copper v. Pakistan Corruption Decision, Arbitrators Decide that Pakistan Failed to Submit "Solid" and "Persuasive" Evidence of Corruption in the Making or Performance of the Investment. Investment Arbitration Reporter, 15 August 2019. https://www-iareporter-com.ezproxy.library.sydney.edu.au/articles/in-tethyan-copper-v-pakistan-corruption-decision-arbitrators-decide-that-pakistan-failed-to-submit-solid-and-persuasive-evidence-of-corruption-in-the-making-and-p/

Burgstaller M, Risso G (2021) Due Diligence in International Investment Law. Journal of International Arbitration 38 (6): 697-722

Carroll T, Hameiri S, Jones L (2020) The Political Economy of Southeast Asia: Politics and Uneven Development Under Hyperglobalisation. 4th edn. Springer International Publishing, Cham, Switzerland

Caserta S (2021) Western Centrism, Contemporary International Law, and International Courts. Leiden Journal of International Law 34 (2): 321-342

Chaisse J, Elsig M, Jusoh S, Lugg A (2022) Drafting Investment Law: Patterns of Influence in the Regional Comprehensive Economic Partnership (RCEP). Journal of International Economic Law 25 (1): 110-128

Chaisse J, Nottage L (eds) (2018) International Investment Treaties and Arbitration Across Asia. Brill | Nijhoff, Leiden

Chan K-c (2022) Deciding by Numbers: How Do Legal Indicators Impact State Responsibility in Investment Arbitration. Kluwer Arbitration Blog, 2 April 2022. http://arbitrationblog.kluwerarbitration.com/2022/04/02/deciding-by-numbers-how-do-legal-indicators-impact-state-responsibility-in-investment-arbitration/

Charlotin D (2021) Laos Defeats Bid by Casino Investors to Set Aside Pair of Awards; Court Emphasizes That Arbitrators Have a "Public Duty" to Address Issues of Corruption. Investment Arbitration Reporter, 10 September 2021. https://www-iareporter-com.ezproxy.library.sydney.edu.au/articles/laos-defeats-bid-by-casino-investors-to-set-aside-pair-of-awards-court-emphasizes-that-arbitrators-have-a-public-duty-to-address-issues-of-corruption/

Charlotin D (2022) Analysis: Sole Arbitrator Finds that, as a Tenant of Territory Still Held by Heirs of Defunct Sultanate, Malaysia Breached Lease Agreements; State Is Ordered to Repay Nearly 15 Billion USD

Considering the Territory's Oil Resources. Investment Arbitration Reporter, 2 March 2022. https://www.iareporter.com/articles/analysis-sole-arbitrator-finds-that-as-a-tenant-of-territory-still-held-by-heirs-of-defunct-sultanate-malaysia-breached-lease-agreements-state-is-ordered-to-repay-nearly-15-billion-usd-considering/

Chesterman S (2017) Asia's Ambivalence about International Law and Institutions: Past, Present and Futures. European Journal of International Law 27 (4): 945-978

CIDS (n.d.) Academic Forum on ISDS. https://www.cids.ch/academic-forum. Accessed 24 March 2022

Claxton JM (2020) Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor-State Mediation. Asian Journal on Mediation: 34-51

Cohen L, Li B (2021) The Political Economy of Anti-Bribery Enforcement. NBER Working Paper Series

Coppens G (2011) Treaty Definitions of 'Investment' and the Role of Economic Development: A Critical Analysis of the Malaysian Historical Salvors Cases. In: Bath V, Nottage L (eds) Foreign Investment and Dispute Resolution Law and Practice in Asia. Routledge, London, pp 174-191

Davids C, Schubert G (2011) The Global Architecture of Foreign Bribery Control: Applying the OECD Bribery Convention. In: Graycar A, Smith RG (eds) Handbook of Global Research and Practice in Corruption. Edward Elgar Publishing, Cheltenham, UK

Northampton, US, pp 319-339

Devendra IC (2019) State Responsibility for Corruption in International Investment Arbitration. Journal of International Dispute Settlement 10 (2): 248-287

Djanic V (2022) Tribunal Issues Partial Award in Opaque UNCITRAL Arbitration Against Asian State. Investment Arbitration Reporter, 4 March 2022. https://www-iareporter-com.ezproxy.library.sydney.edu.au/articles/tribunal-issues-partial-award-in-opaque-unictral-arbitration-against-asian-state/

Donoghue JE (2015) The Corruption Trump in Investment Arbitration. ICSID Review - Foreign Investment Law Journal 30 (3): 756-761

Druce J (2018) Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration. Journal of International Arbitration 35 (6): 665-718

Dupont C, Schultz T, Angin M (2022) Double Jeopardy? The Use of Investment Arbitration in Times of Crisis. In: Behn D, Fauchald OK, Langford M (eds) The Legitimacy of Investment Arbitration: Empirical Perspectives. Cambridge University Press, Cambridge, UK, pp 365-393

Fernández-Armesto J (2015) The Effects of a Positive Finding of Corruption. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Alphen aan den Rijn, The Netherlands, pp 167-174

Gaillard E (2019) The Emergence of Transnational Responses to Corruption in International Arbitration. Arbitration International 35 (1): 1-19

García-Castrillón CO (2016) Spain and Investment Arbitration: The Renewable Energy Explosion. Investor-State Arbitration Series (17)

García-Castrillón CO (2017) Spain and Investment Arbitration: The Renewable Energy Explosion. In: Mestral Ad (ed) Second Thoughts: Investor State Arbitration between Developed Democracies. McGill-Queen's University Press, Montreal, pp 285-308

Gong T, Scott I (eds) (2016) Routledge Hanbook of Corruption in Asia. Routledge, London

Greenwald BK, Ivers JA (2018) Addressing Corruption Allegations in International Arbitration. Brill Research Perspectives in International Investment Law and Arbitration 2 (3): 1-93

Harris H, Nolan J (2021) Learning From Experience: Comparing Legal Approaches To Foreign Bribery And Modern Slavery. Cardozo International & Comparative Law Review 4 (2): 603-652

Haugeneder F (2021) Dealing with Corruption. In: Lim CL (ed) The Cambridge Companion to International Arbitration. Cambridge University Press, Cambridge, UK, pp 410-437

Hepburn J, Peterson LE (2012) Laos Has Yet to Pay $56 Million Arbitral Debt, but New Investors Line Up to Sue; Chinese Claimant Says MFN Clause Circumvents Narrow Arbitration Clause. Investment Arbitration Reporter, 19 August 2012. https://www-iareporter-com.ezproxy.library.sydney.edu.au/articles/laos-has-yet-to-pay-56-million-arbitral-debt-but-new-investors-line-up-to-sue-chinese-claimant-says-mfn-clause-circumvents-narrow-arbitration-clause/

Hobe S (2015) The Law Relating to Aliens, the International Minimum Standard and State Responsibility: I. The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International Investment Law. Bloomsbury T&T Clark, London, pp 6-22

Hoepfner CWVW (2017) The Corruption Defense and Preserving the Rule of Law. In: Menaker A (ed) International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19. Wolters Kluwer; ICCA, Alphen aan den Rijn, pp 203-224

Hsieh PL (2021) New Asian Regionalism in International Economic Law. Cambridge University Press, Cambridge, UK

ICC (n.d.) Commission on Arbitration and ADR. https://iccwbo.org/dispute-resolution-services/commission-on-arbitration-and-adr/. Accessed 24 March 2022

ICSID (2021) Resources: ICSID Rules and Regulations Amendment. https://icsid.worldbank.org/resources/rules-amendments. Accessed 24 March 2022

ICSID (2022a) Cases Database: Search Cases. https://icsid.worldbank.org/cases/case-database. Accessed 23 March 2022

ICSID (2022b) Resources: ICSID Convention. https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview. Accessed 24 March 2022

International T (2022) CPI 2021 for Asia Pacific: Grand Corruption and Lack of Freedomes Holding Back Progress. Transparency International: News, 25 January 2022. https://www.transparency.org/en/news/cpi-2021-for-asia-pacific-grand-corruption-holding-back-progress

Ishikawa T (2018) A Japanese Perspective on International Investment Agreements: Recent Developments. In: Chaisse J, Nottage L (eds) International Investment Treaties and Arbitration Across Asia. Brill | Nijhoff, Leiden, pp 513-543

Jarrett M, Puig S, Ratner S (2021) Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals. Journal of International Dispute Settlement 00: 1-26

Joutsen M (2011) The United Nations Convention Against Corruption. In: Graycar A, Smith RG (eds) Handbook of Global Research and Practice in Corruption. Edward Elgar Publishing, Cheltenham, UK

Northamton, US, pp 303-318

Khvalei V (2015) Standards of Proof for Allegations of Corruption in International Arbitration. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 69-76

Kim J (2012) A Pivot to Asia in Investor–State Arbitration: The Coming Emergence of Asian Claimants Get access Arrow. ICSID Review - Foreign Investment Law Journal 27 (2): 399-415

Kryvoi Y (2021) Expert Group Meeting on Corruption and International Investments – Key Findings Revealed. BIICL Blog, 20 December 2021. https://www.biicl.org/blog/30/expert-group-meeting-on-corruption-and-international-investments-key-findings-revealed#:~:text=The%20Expert%20Group%20Meeting%20took,finance%20institutions%2C%20national%20and%20international

Langford M, Potestà M, Kaufmann-Kohler G, Behn D (2020) Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions (An Introduction). The Journal of World Investment & Trade 21 (2-3): 167-187

Levine J (2021) Corruption and International Arbitration - Toils and Tools for Tribunals. Transnational Dispute Management 18 (3): 1-4

Llamzon A (2014) Corruption in International Investment Arbitration. Oxford University Press, Oxford

Llamzon A (2015) On Corruption's Peremptory Treatment in International Arbitration: State Responsibility, Unclean Hands, and the Return of Corruption as a Jurisdictional Issue. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, pp 32-50

Llamzon A, Chrostin JBu (2021) The Due Diligence Expansion in International Investment Arbitration. In: Mohan M, Brown C (eds) The Asian Turn in Foreign Investment. Cambridge University Press, Cambridge, UK, pp 261-278

Low LA (2019) Symposium on New Directions in Anticorruption Law: Dealing with Allegations of Corruption in International Arbitration. AJIL Unbound 113: 341-345

Malintoppi L, Tan C (eds) (2017) Investment Protection in Southeast Asia: A Country-by-Country Guide on Arbitration Laws and Bilateral Investment Treaties. Brill Nijhof, Leiden

Marcenaro E (2015) Arbitrators' Investigative and Reporting Rights and Duties on Corruption. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 141-157

McInerney-Lankford S, Vasquez MC (2020) UNCITRAL WGIII and Human Rights: Towards a More Balanced ISDS System? EJIL: Talk!, 8 October 2020. https://www.ejiltalk.org/uncitral-wgiii-and-human-rights-towards-a-more-balanced-isds-system/

Menaker A (2015) Proving Corruption in International Arbitration: Who Has the Burden and How Can It Be Met? In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 77-102

Meshel T (2013) The Use and Misuse of the Corruption Defence in International Investment Arbitration. Journal of International Arbitration 30 (3): 267-281

Mistelis L (2014) Series Editor's Preface. In: Llamzon A (ed) Corruption in International Investment Arbitration. Oxford University Press, Oxford, pp vii - x

Mohan M, Brown C (eds) (2021) The Asian Turn in Foreign Investment. Cambridge University Press, Cambridge, UK

Moloo R, Khachaturian A (2011) The Compliance with the Law Requirement in International Investment Law. Fordham International Law Journal 34 (6): 1473-1501

Nappert S (2015) Raising Corruption as a Defence in Investment Arbitration. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 175-183

Newcombe A (2011) Investor Misconduct: Jurisdiction, Admissibility or Merits? In: Brown C, Miles K (eds) Evolution in Investment Treaty Law and Arbitration. Cambridge University Press, Cambridge, UK, pp 187-200

Nottage L (2021a) International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts. Edward Elgar Publishing, Cheltenham, UK

Northampton, US

Nottage L (2021b) Rebalancing Investment Treaties and Investor–State Arbitration in the Asian Region. In: Mohan M, Brown C (eds) The Asian Turn in Foreign Investment. Cambridge University Press, Cambridge, UK, pp 379-398

Nottage L (2022) International Arbitration and Society at Large. In: Bjorklund A, Ferrari F, Kröll S (eds) Cambridge Compendium of International Commercial and Investment Arbitration. Cambridge University Press, Cambridge, UK, p [Forthcoming]

Nottage L, Ali S, Jetin B, Teramura N (eds) (2021) New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution. Wolters Kluwer, Alphen aan den Rijn, The Netherlands

Nottage L, Chaisse J, Thanitcul S (2018) International Investment Treaties and Arbitration Across Asia: A Bird's Eye View. In: Chaisse J, Nottage L (eds) Investment Treaties and Arbitration Across Asia. Brill | Nijhoff, Leiden, pp 1-56

Nottage L, Thanitcul S (2017) International Investment Arbitration in Thailand: Limiting Contract-Based Claims While Maintaining Treaty-Based ISDS. The Journal of World Investment & Trade 18 (5-6): 793–835

Nottage L, Weeramantry JR (2011) Foreign Investment and Dispute Resolution Law and Practice in Asia. In: Bath V, Nottage L (eds) Investment Arbitration in Asia: Five Perspectives on Law and Practice. Routledge, London, pp 25-52

Nottage L, Weeramantry JR (2012) Investment Arbitration in Asia: Five Perspectives on Law and Practice Get access Arrow. Arbitration International 28 (1): 19-62

Obersteiner T (2014) 'In Accordance with Domestic Law' Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors. Journal of International Arbitration 31 (2): 265-288

OECD (n.d.-a) Data on Enforcement of the Anti-Bribery Convention. https://www.oecd.org/corruption/data-on-enforcement-of-the-anti-bribery-convention.htm. Accessed 26 March 2022

OECD (n.d.-b) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. https://www.oecd.org/corruption/oecdantibriberyconvention.htm.

Park SK, Samples TR (2017) Tribunalizing Sovereign Debt: Argentina's Experience with Investor–State Dispute Settlement. Vanderbilt Journal of Transnational Law 50 (4): 1033-1063

Partasides C (2017) Remedies for Findings of Illegality in Investment Arbitration. In: Menaker A (ed) International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19. Wolters Kluwer; ICCA, Alphen aan den Rijn, The Netherlands, pp 740-745

Pavić V (2012) Bribery and International Commercial Arbitration—the Role of Mandatory Rules and Public Policy. Victoria University of Wellington Law Review 43: 661-686

Pierucci F (2019) The American Trap: My Battle to Expose America's Secret Economic War Against the Rest of the World. Hodder & Stoughton, London

Pieth M (2020) Negotiating Settlements in a Broader Law Enforcement Context. In: Søreide T, Makinwa A (eds) Negotiated Settlements in Bribery Cases: A Principled Approach. Edward Elgar Publishing, Cheltenham, UK

Northampton, US, pp 19-24

Pieth M, Betz K (eds) (2019) Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators. Basel Institute on Governance and Competence Centre for Arbitration and Crime, Basel, Switzerland

Polkinghorne M, Volkmer S-M (2017) The Legality Requirement in Investment Arbitration. Journal of International Arbitration 34 (2): 149-168

Raouf MA (2009) How Should International Arbitrators Tackle Corruption Issues? ICSID Review - Foreign Investment Law Journal 24 (1): 119-136

Reichenbach C (2022) The Corruption Defence and the Jurisdictional Consequences of Corruption Allegations in International Law and Investment Arbitration. In: Sachs LE, Johnson LJ, Coleman J (eds) Yearbook on International Investment Law & Policy 2020. Oxford University Press, Oxford,

Roberts A, John TS (2019) UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting. EJIL: Talk!, 20 September 2019. https://www.ejiltalk.org/uncitral-and-isds-reforms-agenda-widening-and-paradigm-shifting/

Rogers CA, Drahozal CR (2022) Does International Arbitration Enfeeble or Enhance Local Legal Institutions? In: Behn D, Fauchald OK, Langford M (eds) The Legitimacy of Investment Arbitration: Empirical Perspectives. Cambridge University Press, Cambridge, UK, pp 467-500

Rose C (2014) Questioning the Role of International Arbitration in the Fight against Corruption. Journal of International Arbitration 31 (2): 183-264

Sayed A (2017) Duplicity in Corruption and Arbitration: Dealing with the Evidentiary Gap. In: Menaker A (ed) International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19. Wolters Kluwer; ICCA, Alphen aan den Rijn, The Netherlands, pp 266-282

Schefer KN (2021) Crime in International Investment Arbitration. In: Chaisse J, Choukroune L, Jusoh S (eds) Handbook of International Investment Law and Policy. Springer Nature Singapore, Singapore, pp 881-915

Schmidl M (2021) The Renewable Energy Saga from Charanne v. Spain to The PV Investors v. Spain: Trying to See the Wood for the Trees. Kluwer Arbitration Blog, 1 February 2021. http://arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/

Sim C (2019) Should Arbitral Institutions Have Diplomatic Immunity? Kluwer Arbitration Blog, 27 February 2019. http://arbitrationblog.kluwerarbitration.com/2019/02/27/should-arbitral-institutions-have-diplomatic-immunity/

Singh J (2021) Indian Investment Treaty Practice: Qualitatively and Quantitatively Assessing Recent Developments. In: Nottage L, Ali S, Jetin B, Teramura N (eds) New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution. Wolters Kluwer, Alphen aan den Rijn, The Netherlands, pp 287-312

Sprange TK (2015) Corruption in Arbitration: Sua Sponte Investigations — Duty to Report. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 134-140

Subramanian A, Kessler M (2013) The Hyperglobalization of Trade and Its Future. Working Paper 13-6: 1-66

Tamada D (2015) Host States as Claimants: Corruption Allegations. In: Lalani S, Lazo RP (eds) The Role of the State in Investor-State Arbitration. Brill | Nijhof, Leiden, pp 103-122

Teramura N (2021a) Direct Jurisdiction: Asian Perspectives. In: Reyes A, Lui W (eds). Hart Publishing, Oxford, pp 201-219

Teramura N (2021b) Japan as a Source of Legal Ideas: A View from the Mekong Subregion of ASEAN. New Voices in Japanese Studies 13: 19-46

Tezuka H (2015) Corruption Issues in the Jurisdictional Phase of Investment Arbitrations. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Alphen aan den Rijn, The Netherlands, pp 51-68

Trakman L (2018) An Empirical Case for Extending Standing Panels in Investor-State Arbitration. In: Chaisse J, Nottage L (eds) International Investment Treaties and Arbitration Across Asia. Brill | Nijhoff, Leiden, pp 613-645

Ubilava A (2022) Mediation as a Mandatory Precondition to Investor-State Arbitration. Brill | Nijhoff, Leiden

UNCITRAL (2019) Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa. United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth Session, Vienna, 14-18 October 2019 (A/CN.9/WG.III/WP.176)

UNCITRAL (2022) Working Group III: Investor-State Dispute Settlement Reform: Status of Work as of March 2022. https://uncitral.un.org/en/working_groups/3/investor-state. Accessed 24 March 2022

UNCITRAL (n.d.-a) Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2. Accessed 24 March 2022

UNCITRAL (n.d.-b) Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. Accessed 24 March 2022

UNCTAD (2018) World Investment Report 2018: Investment and New Industrial Policies. United Nations Publication, Geneva

UNCTAD (2019) World Investment Report 2019. Special Economic Zones. United Nations Publication, Geneva

UNCTAD (2021) World Investment Report 2021: Investing in Sustainable Recovery. United Nations Publication, Geneva

UNCTAD (2022) World Investment Report 2020: International Production Beyond the Pandemic. United Nations Publication, Geneva

UNCTAD (n.d.-a) International Investment Agreements Navigator. https://investmentpolicy.unctad.org/international-investment-agreements. Accessed 23 March 2022

UNCTAD (n.d.-b) Investment Dispute Settlement Navigator: Advanced Search. https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search. Accessed 1 March 2022

UNCTAD (n.d.-c) Investment Policy Hub: Investment Dispute Settlement Navigator. https://investmentpolicy.unctad.org/investment-dispute-settlement. Accessed 23 March 2022

UNCTAD (n.d.-d) Investment Policy Hub: Mapping of IIA clauses. https://investmentpolicy.unctad.org/pages/1031/mapping-of-iia-clauses.

UNODC (2021) Executive Summary of the Follow-up Report of the Expert Group Meeting on Corruption and International Investments held virtually on May 18–19, 2021. CAC/COSP/2021/CRP13:1-7

UNODC (n.d.-a) Signature and Ratification Status. https://www.unodc.org/unodc/en/corruption/ratification-status.html.

UNODC (n.d.-b) United Nations Convention against Corruption. https://www.unodc.org/unodc/en/corruption/uncac.html.

Vijayvergia C, Belmannu P (2020) Exploring the Prospects of Host-State Counterclaims in Corruption Disputes. Arbitration International 36 (4): 583-600

Wallgren-Lindholm C (2015) Consequences and Effects of Allegations or of a Positive Finding of Corruption. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Addressing Issues of Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Alphen aan den Rijn, The Netherlands, pp 184-186

Walter Av (2015) State Contracts and the Relevance of Investment Contract Arbitration: I. Investor-State Contracts in the Context of International Investment Law. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International Investment Law: A Handbook. Bloomsbury T&T Clark, London,

Warf B (ed) (2018) Handbook on the Geographies of Corruption. Edward Elgar Publishing, Cheltenham, UK

Northampton, US

Wetter JG (1994) Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110. Arbitration International 10 (3): 277-294

Wilske S, Obel W (2013) The “Corruption Objection” to Jurisdiction in Investment Arbitration: Does It Really Protect the Poor? In: Schefer KN (ed) Poverty and the International Economic Legal System: Duties to the World's Poor. Cambdidge University Press, Cambridge, UK, pp 177-188

WJP (2021) The World Justice Project Rule of Law Index® 2021

Wood T (2018) State Responsibility for the Acts of Corrupt Officials: Applying the ‘Reasonable Foreign Investor’ Standard. Journal of International Arbitration 35 (1): 103-118

Ziadé NG (2015) Addressing Allegations and Findings of Corruption: The Arbitrator's Investigative and Reporting Rights and Duties. In: Baizeau D, Kreindler R (eds) Dossiers of the ICC Institute of World Business Law, Volume 13: Corruption in Commercial and Investment Arbitration. Wolters Kluwer; International Chamber of Commerce, Paris, pp 114-133