

Nobumichi Teramura, Luke Nottage and
Bruno Jetin (eds), *Corruption and
Illegality in Asian Investment Arbitration*
(Springer 2024)

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Asia in Transition 22

Nobumichi Teramura
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Bruno Jetin *Editors*

Corruption and Illegality in Asian Investment Arbitration

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Investment arbitration?

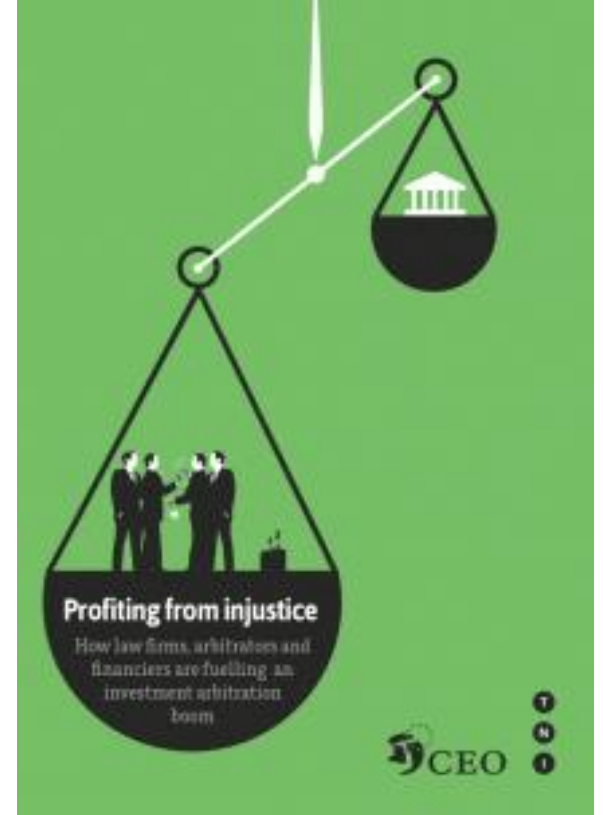
- Investment arbitration (or investor-state dispute settlement (ISDS) arbitration) is a procedure for resolving disputes between foreign investors and host states. (Eg, A Dutch casino company v the government of Laos)
- These days, an increasing number of arbitration cases have witnessed “a clash between the states’ commitments towards their citizens, which include the duty to protect the environment, their health and wellbeing, and the commitment towards foreign investors to protect their investments” – Flavia Marisi, *Environmental Interests in Investment Arbitration: Challenges and Directions* (Wolters Kluwer, 2020). → Investment arbitration is a key mechanism of balancing the interests of foreign investors and host states, though it might not always be the case as some suggest it is pro-investors.



https://corporateeurope.org/sites/default/files/styles/image_1/public/chapter7.gif?itok=BkkfPaOL



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Aims of the book

*Bribery and other serious illegal behaviour by foreign investors are widely condemned in any society. The problem is that people seem not to have reached a consensus on the consequences of corruption and illegality in 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 who violated a host state's law would be awarded protection of its investment, as per its contract with the host state and/or the applicable trade agreement between the home state and the host state.** ... **This research explores 'Asian' approaches toward the issue,** considering the extent to which significant states in Asia are likely to become 'rule makers' rather than 'rule takers' regarding corruption and serious illegality in investor-state arbitration.*

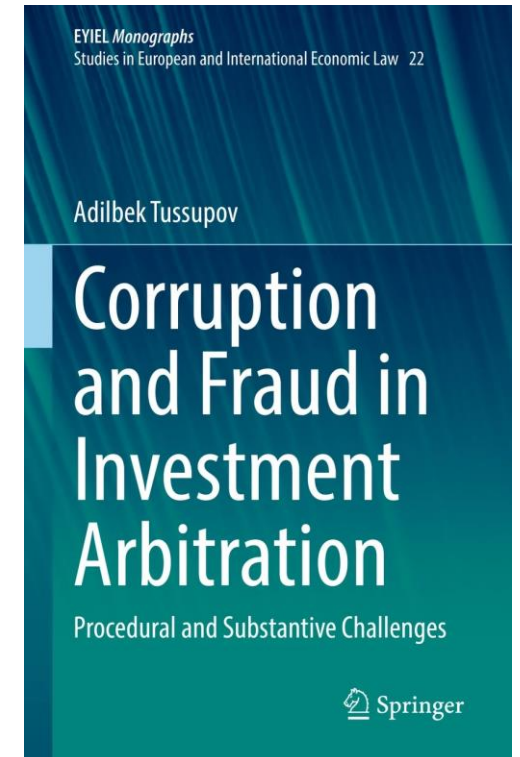
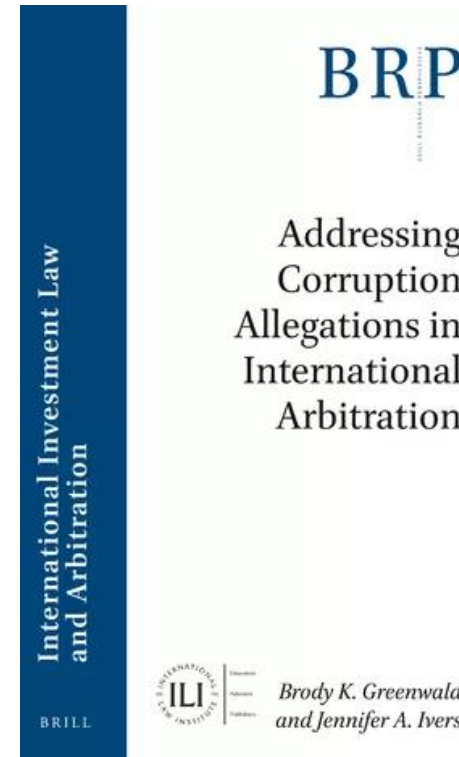
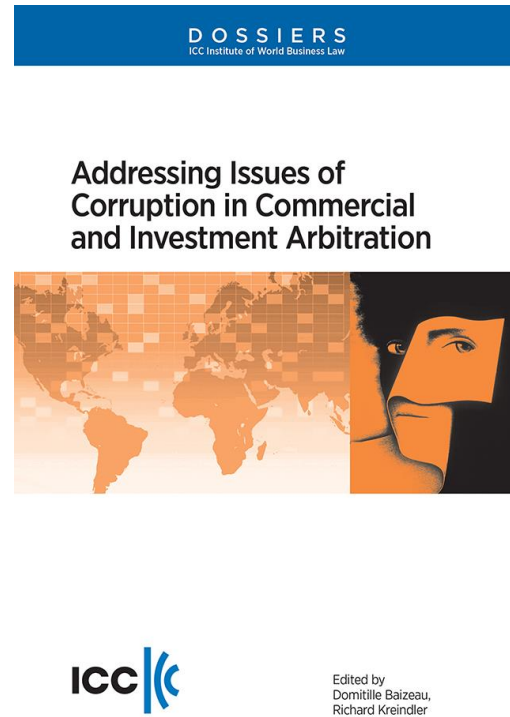
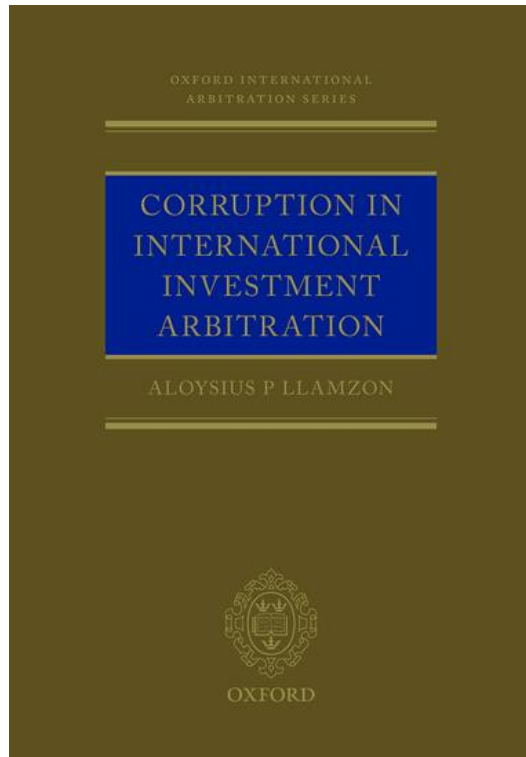
Corruption and Illegality in Asian Investment Arbitration?

- Asian countries seem to be striving to curb corruption and other similarly serious illegal misconduct.
 - 23 Asian states are members of the Anti-Corruption Initiative for Asia and the Pacific (ACIAP) established by OECD and ADB.
 - All Asian countries (excluding North Korea) have adopted the United Nations Convention against Corruption addressing the supply and demand sides.
 - Almost all Asian countries have domestic legislation prohibiting corruption and bribery.
- BUT corruption and bribery remain real in Asia.
 - Multilateral treaties on anti-corruption are often quite general, not setting for example any minimum criminal penalties for bribery.
 - Transparency International's Corruption Perceptions Index (TICPI) and the World Justice Project's Rule of Law Index (WJPRLI) indicate that corruption and poor governance are still prevalent across Asia.
 - **Especially, Asia still seems to have difficulty controlling FDI-related corruption through international investment agreements (IIAs).**

Corruption and Illegality in Asian Investment Arbitration? [cont'd]

- Corruption issues have been cropping up increasingly, especially from around 2010, in ISDS arbitrations initiated under IIAs.
- Occasionally, a foreign investor claims compensation because host state officials solicited a bribe in contravention of the 'fair and equitable treatment' commitment under the IIA.
- BUT, more often, the host state raises as a defence against an ISDS claim that the allegation that the foreign investor made a bribe when making the investment, so it is not covered under the IIA.
 - If the arbitral tribunal agrees, it may decline jurisdiction, so the investor loses all treaty rights under international investment law, especially where the IIA specifies that it only covers investments made 'in accordance with host state law'.
 - Such outcomes may disincentivise foreign investors to provide any form of bribery, but **may lead to the incentive of the host state deliberately seeking a bribe, never enforcing sanctions against the official, but keeping evidence of the bribe as a 'get out of jail free card'?**

Paucity of Research on “Asian” Perspectives



Corruption and Illegality in Asian Investment Arbitration: Project Details

- UBD Grant Book Project since 2021 by Professor Luke Nottage (USYD), Professor Bruno Jetin (UBD) and Dr Nobumichi Teramura (UBD/USYD).
- It considers 'Asian' approaches toward the corruption and illegality in Asian Investment Arbitration, considering the extent to which significant states in Asia are likely to become 'rule makers' rather than 'rule takers' regarding corruption and serious illegality in investor-state arbitration.
- We have organised one webinar (mid-2022), one international conference at UBD(29 May 2023) and one book launch symposium at the Attorney General's Chambers of Brunei (28 May 2024). [See next.]



Research Questions

- (1) What are the real impacts of corruption, potentially of very different types, particularly on FDI and local economies in Asian jurisdictions.
 - (2) Whether Asia in general has been and will remain 'ambivalent' about international investment law relevant to corruption and illegality.
 - (3) Whether and how Asian countries have dealt with corruption and illegality in relation to foreign investment projects and disputes.
 - (4) 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.
- We have discussed these broad themes from economic and legal perspectives, focusing on developments in China and Hong Kong, India, Japan, Lao Republic, the Philippines, the Republic of Korea and Thailand.

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Our findings

- There are some 'Asian approaches' emerging in relation to corruption and bribery in investment arbitrations.
- BUT, this is in the narrow sense that individual Asian countries have dealt with the issues of corruption and other serious misconduct in some treaties and disputes. → **Those experiences are still far from creating a uniform Asian approach.**
- So, what should Asia do?



A Roadmap for an Asian Approach to Corruption and Illegality in ISDS

- (1) Asia is encouraged to establish a forum where all Asian states and jurisdictions may discuss corruption and illegality involved in FDI in Asia. (Based on the Anti-Corruption Initiative for Asia and the Pacific?)
- (2) Asian states and jurisdictions are recommended to develop more unified rules to deal with corruption and other serious misconduct in Asian investment arbitration. (Based on UNCAC?)
- (3) Asia should consider establishing an independent institution or permanent court to better deal with allegations of corruption and other serious misconduct in relation to Asian investment disputes. (Like a permanent investment court proposed by the EU?)

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