COMBATTING CORRUPTION IN INTERNATIONAL INVESTMENT LAW: CHALLENGES AND PROSPECTS

by

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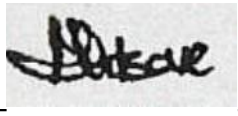
DECLARATION

I, **Emma Chitsove**, hereby declare that this thesis is my original work and it has not been previously submitted for the award of a degree at any other university and institution.

Signed: _____  **_____**

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Summary of Thesis

Corruption is increasingly playing a critical role in international investment arbitration disputes. Investors have lost rights under BITs against a State due to corruptly securing its investment. Corruption has been raised by the investor as a sword, and by the State as a shield against investor's claims. This has raised concerns about whether international investment arbitrations and institutions should be seized with corruption matters and if so, in what form and substance. This thesis argues that the contemporary international investment regulatory regime is inadequate to combat corruption in foreign investment transactions. The main challenge with the bulk of the international investment agreements which contain anti-corruption clauses is that these provisions are couched as general principles and prohibitions, merely encouraging the host States to enact and enforce anti-corruption laws. These instruments are of less functional value to investment arbitrators when faced with allegations of corruption. It further argues that the prevailing host State's legal mechanisms are inherently inadequate to effectively regulate and combat corruption relating to foreign direct investments, and therefore there is a need for an international intervention through international investment agreements. The situation is exacerbated by the divergent approaches taken by investment arbitrators when dealing with corruption in investment transactions. This thesis recommends the adoption of an elaborate anti-corruption clause in international investment agreements. The main contribution of this thesis is to suggest a framework for combatting corruption in investment transactions. It provides a model anti-corruption treaty clause which attempts to promote accountability of both the foreign investor and the State. This model anti-corruption clause includes guiding factors that arbitrators in the investor-State arbitration may take into account when arbitrating disputes involving corruption, so that they can meaningfully contribute towards combatting corruption.

Key Terms

Arbitration, arms deal, bribery, collective action, corruption, clean hands, foreign direct investment, investment, international investment agreements, legality clause, host State, South Africa, New Zealand, transnational public policy, principal-agent, proportionality.

List of Abbreviations

APEC	Asia-Pacific Economic Cooperation
APRM	African Peer Review Mechanism
AU	African Union
BIT	Bilateral Investment Treaty
CASAC	Council for the Advancement of the South African Constitution
CoE	Council of Europe
CPI	Corruption Perceptions Index
CW	Corruption Watch
DSO	Directorate of Special Operations
ECOSOC	United Nations Economic and Social Council
EU	European Union
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
IIA	International Investment Agreement
IACC	Inter-American Convention Against Corruption
ICC	International Chamber of Commerce
ICCPO	International Code of Conduct for Public Officials
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
LHWP	Lesotho Highlands Water Project
JVA	Joint Venture Agreement

NEPAD	New Partnership for Africa's Development
NPA	National Prosecution Authority
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development
PCCAA	Prevention and Combatting of Corrupt Activities Act
PP	Public Protector
SASSA	South African Social Security Agency
SADC	Southern African Development Community
SFO	Serious Fraud Office
TI	Transparency International
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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CHAPTER 1

INTRODUCTION

1.1. Introduction

Corruption is increasingly playing a critical role in international investment arbitration disputes.[1] Investors have lost rights under Bilateral Investment Treaties (BITs) against a State due to corruptly securing its investment. States have raised corruption as a defence against investors' claims, arguing that the investment in issue should not be recognised because the investor secured it corruptly. On the other hand, investors have invoked corruption as a sword, contending that the State public officials solicited bribes.[2] This has raised concerns on whether international investment arbitrations and institutions should be seized with corruption matters and if so, in what form and substance. Currently, international investment laws regulate issues such as admission of investments and investors, protection against unlawful expropriation, compensation, and dispute settlement mechanisms. Only a handful of current International Investment Agreement (IIAs) address the issue of corruption.[3] Such an inclusion of corruption in the IIAs could have been motivated by States' concerns that older investment agreements

[1] For instance, UNCTAD's 2019 compilation of investment disputes cases reflect an increase in the number of disputes involving allegations of corruption between the period of 2009 and 2019. These include: *Alverley Investments Limited and Germen Properties Ltd v Romania* ICSID Case No. ARB/18/30 (pending); *Omega Engineering LLC and Oscar Rivera v Republic of Panama* ICSID Case No. ARB/16/42 (pending); *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v Republic of Senegal* ICSID Case No. ARB/15/21 (Award in French -jurisdiction declined); *Tariq Bashir and SA Interpétrol Burundi v. Republic of Burundi* ICSID Case No. ARB/14/31 (pending); *Deutsche Telekom AG vThe Republic of India* PCA Case No. 2014-10 (pending); *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan* ICSID Case No. ARB/13/1(); *Spentex Netherlands, B.V. v Republic of Uzbekistan* ICSID Case No. ARB/13/26 (Award not available for public); *Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v Arab Republic of Egypt* ICSID Case No. ARB/11/16; *Metal-Tech Ltd. v Republic of Uzbekistan (ICSID Case No. ARB/10/3*. See UNCTAD *Investment Dispute Settlement Navigator: full data release as of 31/07/2019* available at https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 24 July 2020).

[2] I C Devendra 'State responsibility for corruption in international investment arbitration' (2019) 10:2 *Journal of International Dispute Settlement* 248. See also the case of *EDF (Services) Limited v Romania* ICSID Case No ARB/05/13, Award dated 8 October 2009.

[3] As of 20 May 2019, there are currently 2353 Bilateral Investment Treaties (BITs) and 313 Treaties with Investment Provisions (TIPs) that are currently in force. Out of these, only about 71 BITs and TIPs alludes to corruption. These include: Afghanistan-US TIFA (2004); Albania-EC Association Agreement (2009); Albania- EFTA FTA (2010); Algeria-EC Association Agreement(2005); ANDEAN-EC Cooperation Agreement (2003); Armenia-EC Cooperation Agreement (1999); Austria-Kazakhstan BIT (2010); Austria-Nigeria BIT (2013); Austria-Tajikistan BIT (2010); Austria-Uzbekistan BIT (2000); Art 1908 Canada-Peru Free Trade Agreement (2009); Art 10 Agreement between Japan and Lao People's Democratic Republic for the Liberalization and Protection of Investment (2008); Art 10 SADC BIT model; Art 21.5 USA-Singapore FTA (2003); Art 8 Japan-Philippines Economic Partnership Agreement 2006; Preamble Norway Model BIT (2007). See: https://investmentpolicyhubold.unctad.org/IIA/AdvancedSearchBITResults (accessed 20 May 2019).

did not cater for a balance between investment protection and public policy interests such as human rights, protection of the environment and corruption.[4]

Corruption is widely practiced,[5] including in foreign investments. International investment transactions are prone to corruption due to the following elements: foreign investor, commitment to invest large sums of money or resources, direct involvement of the host State government, presence of intermediaries who have access to public officials and government exercising monopoly over a certain area of interest to foreign investors.[6] The foreign element is crucial in this equation as it means that the investor is not familiar with the socio-political and legal landscape in which it is operating; therefore it has to rely on local intermediaries familiar with the power structures prevalent in the host State. In order to have access to the key power players, the foreign investor is enticed to resort to corruption. Furthermore, the large sums of capital involved present an opportunity to hide corrupt activities. For instance, the construction industry is perceived as the most corrupt industry due to the capital involved.[7] Investments in economic infrastructure such as dams, airports and railways can cost billions of dollars, making it easier to conceal corrupt activities. The net effect of such corruption is that it increases the cost of doing business. A corrupt investor has to find ways of recouping this additional cost either through increasing the price or providing an inferior quality project.

While international law relating to the combatting of corruption has developed tremendously with the adoption of conventions such as the United Nations Convention Against Corruption (UNCAC), investment laws have lagged behind. This present research seeks to examine whether investment laws should be concerned with issues of corruption, and if so, how best it can be achieved.

[4] A Newcombe and L Paradell *Law and practice of investment treaties* (2009) 124.
[5] For a list examples of corruption scandals in the different parts of the world, see https://www.transparency.org/en/news/25-corruption-scandals (accessed 24 July 2020). According to the United Nations Secretary-General, António Guterres on the International Anti-Corruption Day (9 December 2018), corruption is costing the global economy $3.6 trillion dollars every year, see https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n (accessed 24 July 2020).
[6] A Llamzon *Corruption in International Investment Arbitration* (2014) 32.
[7] N Stansbury 'Exposing the foundations of corruption in construction' in Transparency International *Global corruption report: corruption in construction and post-conflict reconstruction* (2005) 36-39; World Economic Forum 'This is why construction is so corrupt' https://www.weforum.org/agenda/2016/02/why-is-the-construction-industry-so-corrupt-and-what-can-we-do-about-it/ (accessed 19 May 2020).

1.2. Problem statement

The contemporary investment regulatory regime is inadequate to combat corruption in foreign investments transactions. Most IIAs do not provide a framework for dealing with corruption. Only recent IIAs contain some provisions which condemn corruption.[8] The main challenge with the bulk of the IIAs that contain anti-corruption clauses is that the provisions are couched as general principles and prohibitions, merely encouraging the host States to enact and enforce anti-corruption laws.[9] Furthermore, there is no uniform approach towards addressing corruption. The most common approaches are referral to corruption in the preamble, [10] subjecting corruption matters to domestic laws and regulations of the Parties,[11] introducing an investors' anti-corruption obligation clause,[12] establishing carve-out clauses,[13] and encouraging enterprises to adopt corporate social responsibility measures or principles which address issues such as anti-corruption.[14] These approaches will be discussed in detail in Chapter 6.

These instruments are of little functional value to investment arbitrators faced with allegations of corruption. Only the IIAs that contain investor anti-corruption obligation clauses set out obligations informing the investor of expected conduct prior to and after the establishment of the investment. However, even these clauses are limited in their efficiency in combatting corruption in international business transactions, as they focus on the conduct of the investor only. Corruption is a reciprocal act[15] and any meaningful attempt to deal with it requires reciprocal enforcement and sanctioning as well. Therefore, this thesis calls for the accountability of both the investor and the host States in corruption.

Further, owing to lack of effective domestic legal mechanisms regulating corruption in international investment transactions, coupled with the absence of any resolute international

[8] (n 3 above).
[9] See for instance, Art 8 of the 'General Provisions' Chapter of the Japan-Philippines Economic Partnership Agreement (2006) which reads: 'Each Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.'
[10] The preamble of the US-Peru FTA states that Parties agree to 'promote transparency and prevent and combat corruption, including bribery, in international trade and investment.'
[11] Art 18.5 US-Morocco FTA (2004); Art 18.5 US-Oman FTA (2005); Art 21.5 USA-Singapore FTA; Art 8 of the "General Provisions" Chapter of the Japan-Philippines Economic Partnership Agreement (2006).
[12] Art 17 Morocco-Nigeria BIT; Art 10 SADC Model BIT (2011).
[13] Art 16 Netherlands Model BIT (2018). Carve-outs clauses generally circumscribe the treaty's scope of application or the limits of specific clauses.
[14] Art 16 Canada-Senegal BIT (2014); Art 15 Canada-Côte d'Ivoire BIT (2014); Art 8.16 Canada-Korea FTA (2014); Art 16 Canada-Serbia BIT (2014); Art 16 Canada-Nigeria BIT 2014; Art 15 (2) Canada-Cameron (2014).
[15] Llamzon (n 6 above) 68.

mechanism to enforce anti-corruption norms, the investor-State arbitration has emerged as one of the few ways in which the international legal order now deals with issues of corruption, specifically in foreign investment.[16] However, even this platform is encumbered with certain challenges. First, what should be the appropriate consequences for the different levels of corruption?[17] Second, does corruption that leads to the establishment of an investment agreement between the host State and the investor render such agreement void or voidable and what is the appropriate sanction?[18] Third, to what extent can corruption can be raised as a complete defence against investor's claims? Finally, what is the extent to which any policy considerations should be considered by the arbitrators when dealing with allegations of corruption?

Investment arbitrations so far have not provided clear responses on these issues, and importantly, they appear to evade corruption issues where they has been admitted by Parties to arbitration.[19] Therefore, this study aims to interrogate the issues raised above and suggest a framework for combatting corruption in investment transactions. The study will examine existing anti-corruption clauses in IIAs and highlight their deficiencies in addressing or combatting transboundary corruption. It will then provide a model anti-corruption treaty clause that attempts to protect investors and their investments and promotes State accountability as well. The model anti-corruption clause will include guiding factors that arbitrators in investor-State arbitration may take into account when arbitrating disputes involving corruption, so that they can meaningfully contribute towards combatting corruption.

1.3. Hypothesis

The prevailing legal mechanisms in most developing countries are inherently inadequate to effectively regulate and combat corruption related to Foreign Direct Investment (FDI), and

[16] Llamzon (n 6 above) 10-11. At national level, US's Foreign Corrupt Practices Act (FCPA) and UK's Bribery Act (2011) provides a platform to deal with corruption involving foreign investments. Under the FCPA companies and individuals can be held civilly and criminally liable for corruption even if committed outside United States of America provided that either: a) company or person involved is a US nationality or; b) the companies is organised under US laws, or; c) the company has its principal place of business in the US, or; d) the company is listed on stock exchanges in the US, or the company is required to file periodic reports with the Securities and Exchange Commission. In terms of the Bribery Act, a foreign company which carries on any 'part of a business' in the UK could be prosecuted under the Bribery Act for failing to prevent bribery committed by any of its employees, agents or other representatives, even if the bribery takes place outside the UK and involves non-UK persons.

[17] Llamzon (n 6 above) 3.

[18] H Raeschke-Kessler 'Corruption' in P Muchlinski, F Ortino and C Schreuer (eds.) *The Oxford Handbook of International Investment Law* (2008) 585- 613.

[19] See for instance the case of *F-W Oil Interests, Inc. v The Republic of Trinidad and Tobago* ICSID Case No. ARB/01/14, Award of March 3, 2006 para 211-212.

therefore there is a need for an international intervention through IIAs. Nevertheless, the existing international investment legal framework needs strengthening to render it effective. The existing approaches to deal with corruption include examination of breach of international public policy[20] or the legality clause.[21] A handful of IIAs which have endeavoured to include corruption clauses in their texts, have provisions which regularly give reference to the domestic laws of the host States. The domestic legal frameworks of most developing countries have their own weaknesses, such as a narrow scope of activities that are regarded as corruption, and inadequate enforcement mechanisms. For instance, Zimbabwe's Prevention of Corruption Act does not cater for activities such as influence peddling and illicit enrichment.[22] Therefore, it follows that where influence peddling is the subject matter in an investment, such will never be considered as corruption under the domestic laws of Zimbabwe. However, if an IIA is available, this defect might precisely be dealt with and perpetrators accordingly sanctioned.

Further, both domestic anti-corruption legal frameworks and IIA frameworks mainly view corruption from the principal-agent theory. This theory assumes that corruption is an individualistic problem solved through mere policies meant to reduce opportunities and incentives for corruption. While this model has been successful in some cases, it has limitations which have rendered the current solutions inadequate to effectively deal with corruption. Specifically, the shortfall of the principal-agent approach, which contemporary anti-corruption laws is based on, wrongfully assumes that the all the principals are 'principled', thereby willing to hold agents accountable for their actions. Studies have revealed that in some instances, either the principals are directly involved in corrupt activities or indirectly condone corruption by not acting against the agents for corrupt activities.[23]

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[20] This concept of 'international public policy' is explained in *World Duty Free* case as generally entailing an 'international consensus as to universal standards and accepted norms of conduct that must be applied in all fora' para 139.

[21] In the case of *Inceysa Vallisoletana S.L. v Republic of El Salvador* Award, ICSID Case No. ARB/03/26, Award of August 2, 2006, the host state sought the investment agreement between itself and the investor to be set aside as it was not made in accordance with the laws of the host State. Specifically, the investor fraudulently misrepresented its financial conditions and an agreement came into being based on such fraud. See also *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001; *Saipem S.p.A. v People's Republic of Bangladesh* ICSID Case No. ARB/05/7, Decision of March 21, 2007; *Inceysa Vallisoletana S.L v Republic of El Salvador* ICSID Case No. ARB/03/26, Award of August 2, 2006; *Tokios Toheles v Ukraine* ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004.

[22] Prevention of Corruption Act (Chapter 9:16).

[23] A Persson, B Rothstein & J Teorell 'Why anticorruption reforms fail-systemic corruption as a collective action problem' (2013) 26:3 *Governance: An International Journal of Policy, Administration, and Institutions* 454-456.

Additionally, investment tribunals have been inconsistent regarding how corruption should be dealt with, including the effect of corruption on the investment agreement and the proper sanction thereof. For instance, if the host State raises corruption as a defence, the dispute is either dealt with at the jurisdiction stage[24] or merit stage,[25] or the stages are combined.[26] The point at which corruption is dealt with affects the outcome. If corruption is dealt with at the jurisdiction level, and notably the tribunal's finding that it lacked jurisdiction to corruption, then the host State's counter-claims could not be considered.[27] Therefore, there is a need to develop a legal framework that addresses corruption in IIAs and arbitrations. The said framework should reflect a collective action approach towards corruption. Such an approach would establish that corruption is not purely a principal-agent problem but a collective problem that requires collective solutions that are reciprocal, such as incorporating the doctrine of contributory fault in IIAs. In an investment tribunal, the effect of applying the doctrine of contributory fault is that rather than holding the investor solely accountable for corruption, award damages would be in accordance with the relative levels of culpability as between the investor and the host State in the overall dispute. [28]

1.4. Research questions

The overall research question is whether international investment law should concern itself with regulation of corruption and if so, how best this can be dealt with. In addressing this issue, the study seeks to answer the following related issues:

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[24] *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6; *Azpetrol v Azerbaijan* ICSID Award of September 2009; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru* ICSID Case No. ARB/03/4; *TSA Spectrum v Argentina* ICSID Case No. ARB/05/5, Award of December 19, 2008; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and Production Company Limited and others,* ICSID Case Nos ARB/10/11 and ARB/10/18; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v La République démocratique du Congo* ICSID Case No. ARB/05/21; *Inceysa v El. Salvador* ICSID Award of August 2006; *African Holding Company of America, Inc et Societe Africaine de construction au Congo SARL v Republique du Congo* ISCID 2008.

[25] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13; *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* ICSID Case No. ARB/05/15; *Rumeli Telekom v Kazakhstan* ICSID Award of July 29, 2008; *EDF (Services) v Romania* ICSID Award of October 2009; *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7, Award of October 4, 2006.

[26] *Methanex Corporation v USA* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005; *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3.

[27] *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3. However, in *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and Production Company Limited and others,* ICSID Case Nos ARB/10/11 and ARB/10/18 para 485, despite corruption having been admitted to the Canadian authorities, the Tribunal refused to 'rely on the events subject of the Canadian judgment as grounds for refusing to examine the merits of a dispute which the parties to the agreements have accepted to submit to ICSID arbitration'.

[28] R Z Torres-Fowler 'Undermining ICSID: How the global anti-bribery regime impairs investor-state arbitration' (2012) 52:4 *Virginia Journal of International Law* 1030.

1. How is corruption defined and what are its recognised forms?
2. Does the international anti-corruption regime adequately deal with investment corruption?
3. Can national laws effectively regulate corruption?
4. Should international investment law be concerned with addressing corruption?
5. To what extent have the international investment tribunals dealt with corruption in foreign investments?
6. How do existing IIAs regulate corruption?
7. Are there any reforms that should be undertaken in the current investment law regime to combat corruption?

1.5. Justification of study/rationale/motivation

While the global community should be deriving comfort from the presence of various international anti-corruption instruments,[29] the world is yet to witness any significant enforcement actions at the international level. This could be attributed to lack of political will, an ineffective legal regime or perhaps uncertainties regarding interpretation of anti-corruption laws, especially in investment arbitrations.[30] However, at the national level there have been significant enforcement efforts to combat corruption in cross-border transactions.[31] In investment tribunals, States have raised corruption as a ground of contesting the jurisdiction of the tribunal[32] or seeking annulment of the investment,[33] inasmuch as it might have been Party to the corrupt transactions. In most of these circumstances, the State is successful, and

[29] Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions(1997); Inter-American Convention Against Corruption (1997); African Union Convention on Preventing and Combating Corruption (2003); Council of Europe's Criminal Law Convention on Corruption (1999) Council of Europe civil law convention on corruption; United Nations opened its Convention Against Corruption (2003); SADC Protocol on Corruption (2001); ECOWAS Protocol on the fight against corruption (2001); EU Convention against corruption involving officials (1997).
[30] Llamzon (n 6 above) 74-76.
[31] See for instance prosecutions under US's Foreign Corrupt Practices Act; cases such as *SEC v Archer-Daniels-Midland Co*., No. 13-cv-2279 (C.D. Ill. 2013); *SEC v Weatherford Int'l Ltd*., No. 4:13-cv-03500 (S.D. Tex. 2013) (Weatherford and its subsidiaries made improper payments to government officials in Angola, Algeria, Albania, and Iraq to win lucrative oil services contracts and to gain significant market share.).
[32] *Metal-Tech v Kazakhstan* ICSID Case No ARB/10/3, Award of October 4, 2013; *TSA Spectrum v Argentina* ICSID Case No. ARB/05/5, Award of December 19, 2008.
[33] *Tanzania Electric Supply Company v Power Tanzania Limited* ICSID Award of July 2001; *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7, Award of October 4, 2006.

investor's claims against the State are dismissed. The investor would expect the host State to shoulder some blame, since its agent was a Party to the corrupt activities, especially in those cases where the agent solicited the bribe. State liability arises by virtue of the State failing to take measures to stop the occurrences of corruption.[34] States have routinely been held responsible for violations of international obligations by their public officials even when the acts, ranging from violations of human rights[35] to security of investments, are clearly illegal.[36] The expectation of the investor that the State should bear responsibility for the actions of its agents is not novel in investment issues. For instance, States have previously been held liable for breach of full protection and security standard, where violence stemming from private Parties was directed at persons and property. [37]

To a greater extent, the lack of substantive provisions on corruption in IIAs that form the basis of the investor-investor relationship contributes towards unsatisfactory anti-corruption practices. Most IIAs do not currently provide guidelines on how to deal with corruption in investment issues. This has led to the strict application of the corruption defence as exhibited by the *World Duty Free*[38] and *Metal-Tech*[39] cases; such approach allocates the entire loss upon the foreign investor.[40] Perhaps current IIAs may be developed to factor in the element of contributory fault with the view of holding both Parties accountable for the corruption.

In examining how corruption can be dealt with in investment law, and by way of extending suggestions such as the development and improvements of anti-corruption provisions in IIAs, this study endeavours to contribute an alternative way to deal with allegations of corruption in international investment law. This alternative way seeks to create a legal framework which promotes accountability of both the foreign investor and the host State.

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[34] B W Klaw 'State Responsibility for bribe solicitation and extortion: obligations, obstacles, and opportunities' (2015) 33:1 *Berkeley Journal of International Law* 77.
[35] See for instance Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* Fifteenth Extra Ordinary Session.
[36] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* 4 ICSID Report 246; *Saluka Investments BV v Czech Republic* UNCITRAL Partial Award of March 17, 2006.
[37] See for instance, the case of *Wena Hotels v Egypt* Award of December 8, 2000.
[38] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7, Award of October. 4, 2006). This case will be discussed in Chapter 5.
[39] *Metal-Tech v Kazakhstan*, ICSID Case No ARB/10/3, Award of 4 October 2013. This case will be discussed in Chapter 5.
[40] R Z Torres-Fowler 'Undermining ICSID: How the global anti-bribery regime impairs investor-state arbitration' (2012) 52:4 *Virginia Journal of International Law* 1030.

Furthermore, the expositions of the study may also contribute towards efforts in fighting corruption globally. By dealing with corruption in the investment arena, corruption on a large scale can be combatted. Such a theory is not far-fetched, as cases of grand corruption[41] have been witnessed in transactions which involves movement of large sums of money, and such include foreign investments. Foreign investors have the supply and are willing to pay to do business. Therefore, addressing corruption in investment law is one step towards combatting corruption globally. Also, the punitive aspect of the tribunal awards serves as a deterrent. [42] Threats of exposure of public officials' conduct at an international forum, may arguably, force States to effectively deal with corruption within their domestic frameworks.

1.6. Literature review

This section reviews literature on corruption in investment law. The literature shows a dissatisfaction with the current approach of investment tribunals in cases involving corruption. Torres-Fowler[43] discussed the interaction between current international anti-corruption laws and investor-State disputes. The author indicated that the current global anti-corruption laws and ICSID awards undermine the investor's protection. This specifically arises in cases where the State raises corruption as a defence in a bid to avoid liability for breach of BIT provision such as expropriation. In the *World Duty Free* case, the State successfully raised this defence and the Tribunal emphasised that once corruption has been proved, the investor loses its protection under the BIT.[44] The investor is placed in an untenable position of losing the

[41] An example of a grand-scale corruption is Kenya's 'Chickengate' corruption scandal. A British firm, Smith & Ouzman, paid bribes codenamed 'chicken' to government officials to secure tenders to supply electoral material such as ballot papers, voter's ID cards, voter registration forms and nomination forms for the 2010 Constitution referendum. The printing contracts were inflated by up to 38% to cater for the kickbacks, which totalled to £349 059.39 (Sh50 million). See: http://www.businessdailyafrica.com/UK-court-exposes-bribery-ring-in-Kenya-poll-agency/-/539546/2525946/-/530fouz/-/index.html (accessed 17 October 2019). For other examples, see G Dell *Anti-corruption conventions in Africa: what civil society can do to make them work. A civil society advocacy guide* 7-8.

[42] For instance, in *Yukos Universal Limited (Isle of Man) v Russian Federation* Award PCA Case No AA 227, ICGJ 481 (PCA 2014) paras 1637 and 1827, the Tribunals awarded total damages for expropriation to the investor of more than US$ 50 billion. Of interest is that this amount was reached at after reducing 25%, which was the investor's contribution to the prejudice it suffered at the hands of the host State. The reduction was as result of applying the doctrines of 'unclean hands' and contributory fault.

[43] R Z Torres-Fowler 'Undermining ICSID: How the global anti-bribery regime impairs investor-state arbitration' (2012) 52:4 *Virginia Journal of International Law* 995.

[44] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7, Award of October 4, 2006. For other analysis on this case see: M Waibel 'World Duty Free Company LTD. v the Republic of Kenya' (2007) 46:2 *International Legal Material* 337-372; C B Lamm *et al* 'From World Duty Free to Metal-Tech: A review of international investment treaty arbitration cases involving allegations of corruption' (2014) 29:2 *ICSID Review* 328-349; M Reeder 'Estop that! Defeating a corrupt state's corruption defense to ICSID BIT arbitration' (2016) 27 *The American Review of International Arbitration* 311-325.

investment since it is tainted by corruption and of possibly being prosecuted for corruption in his home country, for example, the US through the Foreign Practices Act. The investor, given the two evils, may opt to walk away from the investment rather than to tarnish its image defending itself while the State stands to benefit from the tainted dealing.

Torres-Fowler indicated that States are utilising the allegations of corruption to their advantage during litigation. For instance, in the *Siemens* case,[45] when the German prosecutors unearthed corruption activities against Siemens, the Argentine government applied for a 'revision' of the ICSID award. Siemens discontinued from the proceedings. The net effect of these regimes is that they hamper efforts to establish a stable international investment environment and inhibit the battle against corruption.

Further, the incumbent regime appears to indirectly and unintentionally incentivise the host State to promote bribery in order to unjustly enrich itself.[46] States do not explicitly instruct their agents to solicit bribes for reasons of public perception, but they acquiesce to corruption by failing to implement ant-corruption laws.[47] Unjust enrichment arises as the net effect of the manner in which the defence of corruption is applied.[48] Currently, where corruption is alleged and proved, the investment agreement is regarded as void, the host State is justified for not upholding its obligations and the investor ultimately cannot claim its investment back. If jurisprudence is allowed to develop this way, host States will find it advantageous not to condone corruption. Torres-Fowler concludes by recommending a realignment of the systems through the creation of a contributory fault standard when considering the corruption defence.

Having identified the challenges of the current anti-corruption regime and its interaction with investor-State dispute settlement, this study will take into account the recommendations proffered and will take a step further to incorporate them in BITs. The study will further examine how this standard will operate in current BITs regime and anti-corruption regime.

[45] *Siemens A.G. v Argentine Republic* ICSID Case No. ARB/02/8, Award of February 6, 2007).
[46] These sentiments are shared by other writers including M A Losco 'Streamlining the corruption defense: a proposed framework for FCPA-ICSID Interaction' (2014) 63 *Duke Law Journal* 1201, 1204; R Bhojwani 'Deterring global bribery: where public and private enforcement collide' (2012) 112 *Columbia Law Review* 66, 99; A B Spalding 'Symposium: deconstructing Duty Free: Investor-state arbitration as private anti-bribery enforcement' (2015) 49 *UC Davis Law Review* 443, 456.
[47] Torres-Fowler (n 43 above) 998.
[48] Torres-Fowler (n 43 above) 1029.

Raeschke-Kessler[49] examined the legal effects of corruption on international investment contracts. The author contends that there is uncertainty as regards the effects of corruption on the investment. Countries do not have consensus on the rule of *ipso iure* and *ab initio* nullity of a contract tainted by corruption. Due to lack of consensus on the effect of corruption on investment, Raeschke-Kessler suggests a balanced approach of addressing contracts tainted with corruption. This approach, in particular, focuses on examining the circumstances of each case, weighing the interests of the State and those of the investor. This study contends that the 'all or nothing' approach in international investment law as reflected in the IIA awards could be avoided if corruption is fully addressed in the IIAs. Currently, awards in which the arbitrators determined that corruption was the determinant factor, the balancing act is not permitted. There is no middle ground or compromise. Either corruption is present and the investment is rendered void, or corruption is not present and the investment is valid. The tribunals need not be placed between a rock and a hard place to determine the effects of corruption on investment law by examining the laws of the Parties to the dispute and the transnational public policy. If the balanced approach suggested is to be applied, such should be guided by the language of the IIAs and not discretionary decision-making.[50]

Halpern[51] interrogated the tribunal award of the *World Duty Free* case. He averred that the 'gift' was a bribe which rendered the agreement between the State and the investor voidable. However, the fact that the government did not prosecute the Parties involved, that is, the former President, such would be regarded as ratification and this should have estopped the State from claiming corruption as a complete defence. The article lamented that the Tribunal was too quick to dismiss the case without examining the surrounding circumstances. Had the Tribunal examined the merits, a certain equitable defence could have been applied whose affect was to bar the State from using corruption as a complete defence.

Further, by solely focusing on the activities of the Parties rather than on the true beneficiaries of the investment (that is the public), thereby dismissing the claim, the Tribunal actually failed to protect the public from corruption. It also did not take into account the contribution made towards development by the investment. Overall, the Tribunal oversimplified the problem of

[49]H Raeschke-Kessler 'Corruption' in P Muchlinski, F Ortino and C Schreuer (eds) *The Oxford handbook of international investment law* (2008) 585-613.
[50] This will be discussed in Chapter 7.
[51] M Halpern 'Corruption as a complete defense in investment arbitration or part of a balance' (2015-2016) *Willamette Journal of International Law and Dispute Resolution* 297.

corruption and failed to take into cognisance the realities of international business. Halpern suggests a more balanced approach towards arbitration of corruption issues, in particular, examining the circumstances of the case and estopping the State from using corruption as a complete defence, especially where the State had knowledge of the corrupt activities but took no action to condemn such behaviour. This would encourage the State to enforce its anti-corruption laws. The current study will interrogate the balanced approach and determine how it would operate in investment agreements and before tribunals. It will further provide some guidelines that the arbitrators should take into account when applying the balancing exercise.

Yackee[52] explored the defence of corruption in international investment tribunals, focusing on the case of *Siemens AG*.[53] Since the issue of revision of the award was never dealt with by the Tribunal, the author attempted to speculate how the defence of corruption was to be used by the State and how the Tribunal was going to deal with this case. The article argued that the Tribunal would have likely applied an international public policy to sanction Siemens for its corrupt conduct, based on previous decisions that do not condone corruption. The State, on the other hand, would raise corruption as a defence, in particular that the investment was not made 'in accordance with its legislation'.[54] However, certain difficulties would be encountered using this provision. First such provision is wide and does not inform which laws should be adhered to. Second the 'in accordance' does not contain the consequences of breaching such laws in relation to the investment. Third, it is unclear whether the 'in accordance' provision establishes a continuous duty upon the investor to ensure the legality of its actions. Lastly, it is unclear whether there are any available mitigating factors and defence against violating the domestic laws. Because of these challenges, Yackee suggests that Parties should consider modifying the language of the investment treaties rather than relying on international public order policy or the legality provisions. The present study associates itself with Yankee's recommendations. However, the current study will go further to provide possible models of anti-corruption clauses in investment agreements.

[52] J W Yackee 'Investment treaties and investor corruption: an emerging defense for host states?' (2011-2012) 52 *Virginia Journal of International law* 723.
[53] *Siemens A.G. v Argentine Republic* ICSID Case No. ARB/02/08, Award of February 6, 2007.
[54] Art 3 of the Germany-Argentina BIT.

How the State's corruption defence in an ICSID BIT arbitration can be defeated is discussed by Reeder,[55] who highlights that the corruption defence is rooted in the unclean hands doctrine.[56] Nonetheless, employing this defence as an absolute bar to arbitration in investment arbitration is problematic, because, unlike in contract-based arbitration, ICSID BIT arbitration's purpose is to protect investors from the abuse of State power, and this purpose is frustrated by corruption defence's complete bar to arbitration as the bar effectively grants States additional power over investors. Reeder suggests employing the doctrine of estoppel in cases of mutual corruption. This would prevent States from hiding behind an illegality for their own benefit. Evidence of the application of the doctrine of estoppel is the *George Siag* case,[57] wherein the question when, for purposes of state responsibility, a government is deemed to know of its officials' actions, was closely considered. Egypt was disputing the *locus standi* of the investor on the basis that he had been declared bankrupt by the Egyptian court, and by failing to disclose his status, he was acting in bad faith, therefore should be estopped. In dismissing Egypt's defence of estoppel, the Tribunal relied on Articles 4[58] and 7[59] of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts and imputed the Egyptian judiciary's knowledge of Siag's bankruptcy to the Egyptian state.[60] To successful estop a corruption defense, Reeder suggest that claimants must urge tribunals to apply *George Siag* case and the ILC Articles to hold the state responsible for its officials' acts. Also, a claimant must admit its own corruption and implicate the state in the same. However, Reeder indicated that, once a Tribunal employs

[55] M Reeder 'Estop that! Defeating a corrupt state's corruption defense to ICSID BIT arbitration' (2016) 27 *The American Review of International Arbitration* 311-325.

[56] This doctrine is discussed by various authors in its applications in investment arbitrations. See Al Llamzon 'Case Comment Yukos Universal Limited (Isle of Man) v The Russian Federation the State of the 'unclean hands' doctrine in international investment law: Yukos as both Omega and Alpha (2015) 30: 2 *ICSID Review* 320-321; M deAlba 'Drawing the line: addressing allegations of unclean hands in investment arbitration' (2015)1 *Revistade Direito Internacional* 324; C Le Moullec 'The clean hands doctrine: a tool for accountability of investor conduct and inadmissibility of investment claims' (2018) 84:1 *The International Journal of Arbitration, Mediation and Dispute Management* 27; R H Kreindler 'Corruption in international investment arbitration: jurisdiction and the unclean hands doctrine' in K Hobér (ed), *Between East and West: Essays in Honour of Ulf Franke Juris (*2010) 31

[57] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* ICSID Case No. ARB/05/15.

[58] Article 4 of the ILC Articles states that:

> 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.'

[59] Article 4 of the ILC Articles state that:

> The conduct of an organ of a State…shall be considered an act of the State under international law…even if it exceeds its authority'

[60] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* ICSID Case No. ARB/05/15 para 201.

estoppel and asserts jurisdiction, the award must be narrowly tailored to avoid overreach and damages must be apportioned in recognition of any harm suffered by the state due to corruption.[61]

Klaw examined the concept of State responsibility and proposes extending its application to corrupt acts. [62] Klaw contends that BITs are among 'the most promising treaties on which to found an international obligation for the State to refrain from, or prevent, bribe solicitation and extortion'.[63] Therefore, a State might be internationally liable for failure to take measures to stop the occurrence of bribery. The suggestions proffered by Reeder and Klaw will be explored further in this research for possible incorporation in IIA provisions.

The manner in which investment tribunals are currently approaching corruption is discussed by Raouff.[64] He contends that arbitrators confronted with corruption have two options: a passive approach, by refusing to tackle corruption for reasons pertaining to their powers; and an active approach, by addressing the corrupt activities. The limited means at the disposal of investment tribunals, especially with respect to gathering evidence, makes it difficult for arbitrators to fight corruption without exceeding their powers. Nevertheless, it was noted that even with limited means, arbitrators are better placed to fight corruption because of their independence. Raouff suggests that a State that has taken a bribe must be precluded from complaining. Should the State fail to investigate allegations of corruption against its public officials, it should not rely on corruption as a defence against investor's claims. Raouff's suggestions are instrumental in this research and could be incorporated in the proposed model anti-corruption clause.

One of the legal concepts utilised by investment tribunals in dealing with corruption is that of transnational public policy. The applicability of transnational public policy in investment disputes is discussed by Hunter and Silva.[65] Their discussion reflects that investment arbitrators

[61] Reeder (n 55 above) 325.
[62] B W Klaw 'State Responsibility for bribe solicitation and extortion: obligations, obstacles, and opportunities' 33 *Berkeley Journal of International Law* 62; see also I C Devendra 'State responsibility for corruption in international investment arbitration (2019) 10:2 *Journal of International Dispute Settlement* 248.
[63] Klaw (n 62 above).
[64] M A Raouf 'How should international arbitrators tackle corruption issue?' (2009) 24:1 *ICSID Review Foreign Investment Law Journal* 116-136.
[65] M Hunter & GC Silva 'Transnational public policy and its application in investment arbitrations' (2003) 4:3 *Journal of World Investment* 367.

are classically called to arbitrate disputes arising from public policy issues such as bribery and expropriation. Even though international tribunals often have not made direct reference to transnational public policy, its application is evident in cases such as expropriation[66] and compensation for an unlawful interference with contractual rights.[67] By its very nature, transnational public policy is based on internationally and commonly recognised principles that must be accepted without question. Further, its application to the conduct of States is triggered when there is a breach of a fundamental interest of the international community. This raises the question whether this concept can be applied in putting liability on the State for the conduct of its public officials in cases of corruption.

Lew[68] discusses the application and effects of transnational public policy by international arbitration tribunals. The author argues that it is now widely acknowledged that an internationally agreed transnational public policy against corruption and bribery has emerged and exists. This is evidenced by the promulgation of many regional and international conventions against bribery and corruption[69] and the enactment of domestic legislation condemning corruption. However, Lew concedes that certain acts have not gained universal recognition to be deemed as corrupt activities. Such include facilitation payments and influence peddling. Therefore, there is a possibility of tribunals treating different kinds of arrangements in a different way: corruption to one tribunal may not be seen in the same light by another tribunal.

[66] *Compala del Desarrollo v Costa Rica* ICSID Case No. AR/96/1 Award of February 17, 2000; *Metalclad Corporation v United Mexican States* ICSID ARB (AF) 97/1 Award of August 30, 2000.
[67] *Benvenuti & Bonfant v Congo* ICSID Award of August 8, 1980.
[68] J D M Lew 'Transnational public policy: its application and effect by international arbitration Tribunals' (2018) *CEU Ediciones Fundación Universitaria San Pablo.*
[69] Such include Inter-American Convention Against Corruption (1996); Convention on the Fight Against Corruption Involving Officials of the European Communities (1997); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Criminal Law Convention on Corruption (1999); Civil Law Convention Against Corruption (1999); African Union Convention on Preventing and Combating Corruption (2003);116 and the United Nations Convention Against Corruption (2003).

Cases dealing with corruption in which transnational public policy has been applied include the ICC Court Case No. 1110 of 1963,[70] the *Westacre* case,[71] and the *World Duty Free* case.[72] In all these cases, the arbitrator dismissed the claimants' claims on grounds of transnational public policy, since the underlying transactions were tainted with corruption, specifically bribery. While Lew has identified the prohibition against bribery as a principle of transnational public policy, other acts of corruption are yet to receive this transnational recognition. Therefore, one of the issues this research will address relates to the limitations of transnational public policy in combatting corruption.

Joachim analysed whether it is appropriate in the investment arbitration context to deny contracts or investments procured by corruption any form of protection as the Tribunals in *World Duty Free*, *Metal-Tech* and *Spentex* have done, relying on considerations of international (transnational) public policy.[73] Joachim argues that transnational public policy against corruption does not exist. This is due to lack of a universal definition of corruption; flawed, purportedly universal, condemnation of all sorts of corruption, while acts such as influence peddling are not universally condemned; and the fact that none of the international conventions are self-executing. To this end, the decision of the tribunal in the *World Duty Free* case, which relied on the transnational public policy against corruption, was wrong. Joachim argues that international conventions against corruption do not oblige signatory States to adopt legislation to the effect that contracts obtained through corruption must be void and unenforceable. Rather, to the extent that they deal at all with the civil law impact of corruption on contracts procured by it, the international conventions afford contracting States a great deal of flexibility. The flexibility afforded to the injured Party includes upholding the contract or terminating it.

Further, Joachim explored investment tribunals' approach to corruption where there is a treaty. The trend is to address the legality requirement as a jurisdictional issue, on the grounds that host State consented to arbitrate, and is conditioned on an investment being compliant with its

[70] The Claimant concluded an agreement with the Respondent, in which the Claimant was to help the Respondent obtain a public works contract in Argentina. The Respondent was to pay Claimant a commission of 10% of the value of the contract. The commission was required for the purpose of bribing Argentine officials.
[71] In *Westacre v Juogoimport* ICC Case No. 7047, the parties had concluded a consultancy agreement whereby Westacre was to receive commissions on any contracts concluded between the Defendants and the Kuwaiti Ministry of Defense. The Defendants asserted that the consultancy agreement was null and void as the Claimants had bribed Kuwait officials.
[72] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7, Award of October 4, 2006. This case will be discussed in Chapter 5.
[73] D Joachim 'Fiat iustitia, ne pereat mundus: A novel approach to corruption and investment arbitration' (2018) 35:6 *Journal of International Arbitration* 665-718.

laws. Investments acquired illegally are not deemed as investments for the purpose of the treaty's scope of application. It was further argued that there were no sound reasons for a temporal dividing line between investor illegality affecting jurisdiction or admissibility and illegality that go to the merits stage. In addition, the jurisdiction tool is unsuitable where there is misconduct on both sides. By peremptorily dismissing an investor's claim at the jurisdiction stage, the investment tribunals are licensing host States to blatantly violate the rule of law. When States reckon that foreign investor's claims will be dismissed at the jurisdiction stage, they can strip the investment of protection afforded to it under law. Therefore, this binary approach of examining 'the speck in the eye of the investor without ever addressing the beam in the eye of the host state…actually foster what they claim to fight: contempt for the rule of law and, through the creation of perverse incentives, spiralling corruption'.[74] Therefore, Joachim concluded that subject to certain limitations, it is not against international (transnational) public policy to accord protection to contracts and investments tainted by corruption. For instance, where the host State has failed to live up to its own or international minimum standards, it should incur liability as well. The present research concurs that there is a possibility of according protection to investments tainted by corruption. Therefore, it is the aim of this treatise to develop parameters that could be incorporated into IIAs with the view of balancing the liabilities of the foreign investor and host State where there is corruption.

The control of corruption through investment arbitration was discussed by Llamzon.[75] He indicated that the investment arbitration mechanism is one of the instruments that directly deal with corruption. This mechanism is somehow placed in a peculiar position because arbitrators, when faced with allegations of corruption, must formulate their decisions in a way that promotes both foreign investment and protection of foreign investors. The investment framework, including investor-State arbitration, is by nature focused primarily on promoting foreign investment by providing effective protection to foreign investors who would otherwise be in a situation of weakness relative to the host State. Therefore, allegations of corruption by the State and investors pose challenges to the arbitrators on how to reconcile the competing interests.

Llamzon proposed several operative norms that can be employed when decisions must be made on proper sanctions to be imposed on corrupt activities. He suggests that the arbitration

[74] Joachim (n 73 above) 718.
[75] Llamzon (n 6above).

tribunals may analyse corruption from a political-risk perspective, rather than using a traditional typology which classifies corruption along the lines of various forms of bribery or facilitation payments. Arbitration tribunals can analyse corruption in the following manner: What form of government action or inaction did the bribe purchase? Was it protection from commercial risk or from non-commercial, governmental risk? Llamzon avers that IIAs were developed to provide assurances against governmental arbitrariness and to override States' prerogatives to the extent that they violate the investor's rights such as fair and equitable treatment. Therefore if, for instance, the investor pays a bribe to secure an investment already made, so as to prevent the government expropriating it, then the bribe may be deemed as operating as some form of insulation from political arbitrariness. If corruption is employed to shield oneself from political uncertainty, although still illegal and subject to sanction, the investor may be subjected to less onerous treatment because such is consistent with the type of risk that the IIAs were designed to protect foreign investors from.[76] Put differently, corruption can be mitigated in circumstances where it was employed to purchase conduct that is not destructive to fair competition but conduct that is consistent with principles that are the subject of investment protection agreements such as fair and equitable treatment.[77] For example, an investor pays a bribe to neutralise political risks such as regulatory changes in tax rates.[78] Corruption meant to protect the investor from political risks is therefore, more tolerable than that related to economic risks because the former was not intended to distort fair competition or market pressures. Also corruption to avert political risk is tolerated because it is typically led by public officials, while economic risk is investor-led.[79] From this perspective, it is assumed that the public official extorted the foreign investor and the later was pressured to protect its investment from such harassment.

The present study associates itself with the challenges that corruption brings to investor-State arbitrations and the proposed approaches. Llamzon's approach considers the type of corruption or the motivation behind the conduct. Where the conduct is meant to distort fair competition, the sanction should be heavy, but if the corruption was practiced to facilitate a transaction, then

[76] Llamzon (n 6 above) 300.
[77] Fair and equitable principle is '"a broad and widely accepted standard" encompassing such fundamental standards as "good faith, due process, non-discrimination and proportionality", "procedural propriety", "the right to be heard and to present evidence", "proper notice of administrative actions to be taken by the State" and "transparency, protection of legitimate expectations... and freedom from coercion and harassment".' See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227 para 1484.
[78] Llamzon (n 6 above) 301.
[79] Llamzon (n 6 above) 42.

the penalty should be less. The impact of the corrupt act is the determining factor. This approach is consistent with Rose-Ackerman's views that corruption is unacceptable as it hinders development and accordingly it should be admonished in its entirety.[80] Sanctioning corruption proportionate to its type is one way to ensure that all forms of corruption are addressed, including 'petty corruption'. Additionally, in the context of investment, Llamzon's approach provides an alternative to the 'zero-sum' approach, which results in the investor losing its investments once corruption is alleged and proved.

Further, while Llamzon's interests are in investment arbitration, the current study goes beyond arbitral practice. It endeavours to examine anti-corruption clauses in IIAs and provide possible models of anti-corruption clauses in investment agreements. The recommendations made by Llamzon may be incorporated in IIAs with the view of rendering the IIAs more comprehensive and informative on corruption, its consequences, and sanctions.

1.7. Methodology

This research will utilise analytical and comparative methodologies. A comparative methodology will be adopted in addressing the regulation of corruption under international anti-corruption instruments, IIAs and national legal systems, while the analytical approach will be employed to evaluate the strengths and deficiencies of these instruments. The current study consists of desktop research and used primary documentary sources such as IIAs. Secondary sources of information such as journal articles and textbooks were also utilised.

1.8. Structure/chapter outline

The research will be structured as follows.

Chapter 1: Introduction

This chapter introduces the study, outlines the research problem, provides the working hypothesis, enumerates the research questions, discusses the literature review, and specifies the methodology.

Chapter 2: The Conceptual Framework

[80] S Rose-Ackerman 'Corruption and democracy' (1996) 90 *American Society of International Law Proceedings* 83. See also K A Annan 'Foreword' *United Nations Convention against Corruption* (2004) iii; S Konrad 'International law and the fight against corruption' (2008) 102 *American Society of International Law Proceedings* 203; The Lord Phillips of Worth Matravers 'International investment law, arbitration and corruption' (2015) 1 *Turkish Commercial Law Review* 141.

This chapter provides the conceptual framework of the thesis. In particular, it defines the concepts of corruption and investment. It then examines the link between corruption and investment and highlights the main issues which arises in that context.

Chapter 3: The International Anti-Corruption Legal Framework on Combatting Corruption

This chapter considers the international anti-corruption legal framework, with reference to the UNCAC, the Inter-American Convention Against Corruption, the Organisation for Economic Cooperation and Development Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe's Criminal and Civil Law Conventions, the African Union Convention on Corruption and the Southern African Development Committee Protocol Against Corruption.[81] The key aim of this chapter is elucidate the strengths and limits of international anti-corruption instruments in general, and specifically how they combat transboundary corruption in the investment regime. Further to this objective, key provisions will also be identified to form the basis for a proposed anti-corruption clause in IIAs.

Chapter 4: Addressing Transboundary Corruption at National Level with Reference to New Zealand and South Africa.

This chapter explores how corruption is generally dealt with under national laws with reference to New Zealand (least corrupt) and South Africa (mildly corrupt). The choice is influenced by the Corruption Perception Index. This Index was developed by Transparency International (TI) in 1995, and it ranks countries and territories by their perceived levels of public-sector corruption according to experts and businesspeople. It uses a scale of 0 to 100, where zero is highly corrupt and 100 is very clean.[82] Further, South Africa is unique in that it is a developing country, and a capital importer and exporter. New Zealand is a developing country and its uniqueness lies in it being least corrupt. This chapter will discuss the adequacy and shortcomings of the national legal systems in addressing corruption. It will further highlight the relationship between culture and corruption with specific reference to the selected countries whose domestic laws will be discussed.

[81] Besides these multinational and regional efforts, there also exists anti-corruption initiatives from private organisations and financial institutions. The notable organisations in this regard includes the International Chamber of Commerce, Transparency International, World Economic Forum and the World Bank. However, these initiatives fall outside the scope of the current study.

[82] https://www.transparency.org/cpi2018 (accessed 6 November 2019).

Chapter 5: Existing Tools in Addressing Corruption

This chapter examines the legal approaches that international investment arbitrations have employed in addressing corruption. The following three legal tools will be investigated: the legality clause approach, transnational public policy approach and the doctrine of clean hands. The investigations are aimed at determining if the current approaches sufficiently contribute to the eradication of corruption and promotion of accountability.

Chapter 6: Regulation of Corruption under IIAs.

This chapter examines how existing IIAs address corruption. It will provide textual analysis of the IIA provisions on corruption and evaluate the sufficiency of these provisions in dealing with corruption. The examination is aimed at identifying the impacts of these clauses in dealing with corruption in investment arbitrations.

Chapter 7: Conclusion and Recommendations

This chapter presents a summary of the findings, a conclusion and recommendations.

CHAPTER 2

THE CONCEPTUAL FRAMEWORK

This chapter provides the theoretical framework of the thesis. It begins by discussing the concept of corruption and then the concept of investment. It will examine into the nexus between corruption and investment and highlight the main issues which arise in that context.

2.1. The concept of corruption

Corruption is a widespread social problem and a major contributor to social unrest such as the Arab Spring.[83] It cuts across racial divides and country status, whether developing or developed. Corruption is a morally-loaded[84] term which is not easy to define. Huntington defines corruption as 'behaviour of public officials which deviates from accepted norms in order to serve private ends'.[85] This definition contextualises corruption in each society by delimiting it to norms of that society. These can include norms that approve or disprove of certain corrupt activities. Social norms are shared understandings of actions that are obligatory, permitted or forbidden within a society.[86] If, for instance, honesty and transparency are societal norms, any deviation from them will be considered immoral. Regarding corruption, if non-corruption is the prevailing norm in a society, a violation of such generates feelings of guilt which, in turn, deters such kinds of behaviour and encourages compliance.[87]

Shleifer and Vishny define corruption 'as the sale by government officials of government property for personal gain'.[88] In the context of investment, the government official may take a bribe for providing an investment licence or securing an investment contract with the government. Rose-Ackerman defines corruption as 'an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of payoffs'.[89] These definitions

[83] Arab Spring refers to the uprisings that arose independently and spread across the Arab world in 2011. The movement originated in Tunisia in December 2010 and quickly took hold in Egypt, Libya, Syria, Yemen, Bahrain, Saudi Arabia, and Jordan. At its core, the protests were an expression against, *inter alia,* corruption and unemployment. See Llamzon (n 6 above) 3; C Rose *International Anti-Corruption Norms Their Creation and Influence on Domestic Legal Systems* (2015) 4.

[84] G De Graaf 'Causes of corruption: towards a contextual theory of corruption' (2007) *Public Administration Quarterly* 44.

[85] S Huntington *Modernization and corruption in political corruption. A Handbook* (1989) 77.

[86] B Dong, U Dulleck & B Torgler (2009) 'Social norms and corruption' in A Ciccone (Ed.) *Proceedings of the European Economic Association and the Econometric Society European Meeting* (2009) 7

[87] Dong, Dulleck & Torgler (n 86 above) 1-48.

[88] A Shleifer and R W Vishny 'Corruption' (1993) 108:3 *The Quarterly Journal of Economics* 599-617.

[89] S Rose-Ackerman *Corruption and government: causes, consequences, and reform* (1999) 9.

emphasise to corruption by a public official; however, they are not the only actors in corruption. Even in the private sector, corruption is prevalent. In the private sector, corruption is evidenced by corporate agents abusing their powers and making decisions not in tandem with the principal's interests. Examples include taking bribes in exchange for certain benefits such as commercial rights,[90] kickbacks, corporate fraud, collusion and insider trading.[91] Factors such as poor corporate governance and anti-competitive behaviour contribute to the causes of corruption in the private sector.[92] This study concentrates on corruption in the public sector, where the interaction between the State and the foreign investor is more pronounced.

In this study, the working definition of corruption is that provided by the World Bank, which defines corruption as 'the abuse of public office for private gain'.[93] The World Bank further explains that 'public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of State assets, or the diversion of State revenues'.[94] This definition is straightforward and it covers broadly salient phenomena of investment transactions such as competition and profit-making. It is also significant as it covers the interaction of private sector with public sector. Specifically, it covers acts by private individuals who engages in corrupt activities to circumvent public policies and processes for competitive advantage and profit. However, this definition is limited as it does not cover activities between private individuals. This definition fits the present case since this research is interested in the conduct of public officials and their interactions with foreign investors.

[90] A France-Presse 'FIFA corruption scandal: US releases three guilty plea transcripts' *The Guardian.* Tuesday 19 April 2016 https://www.theguardian.com/football/2016/apr/18/fifa-corruption-scandal-us-releases-three-guilty-plea-transcripts (accessed 16 February 2017).
The United States Department of Justice 'Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption' Thursday, December 3, 2015 https://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption (accessed 16 February 2017).
[91] M A Sartor & P W J Beamish *Journal of Business Ethics* (2019), available on https://doi.org/10.1007/s10551-019-04148-1. See also L Ndikumana 'The private sector as culprit and victim of corruption in Africa' (2013) 330 *Political Economy Research Institute Working Paper Series* 18.
[92] J D Sullivan 'Corruption, economic development, and governance: private sector perspectives from developing countries' (2012) 2 *A Global Corporate Governance Forum* 1.
[93] World Bank *Helping countries combat corruption: the role of the World Bank* (1997) 7-8.
[94] (n 93 above).

Corruption is also differently classified. Categories include grand corruption, [95]administrative corruption.[96] State capture[97] and political corruption.[98] These types of corruption are manifested in various forms which include[99] fraud and deceit,[100] embezzlement,[101] bribery,[102] nepotism,[103] kleptocracy[104] and influence peddling.[105]

In the context of foreign investment, Llamzon identifies bribery as the most common form of corruption and accordingly categorises it as transaction bribery and variance bribery.[106] Transaction bribery relates to payments which are made to a public official to accelerate the performance of the official's duty. These payments are not made to secure divergence from the norm but rather to facilitate the transactions. Reactions towards these payments are mixed. Some scholars suggest that these payments are indispensable to the proper functioning of public

[95] Grand corruption is defined as corruption that involves heads of state, ministers, or other senior government officials and serves the interests of a narrow group of businesspeople and politicians as criminal elements. S Rose-Ackerman 'Democracy and 'grand' corruption' (1996) 48:149 *International Social Science Journal* 365-380.
[96] Administrative corruption includes the use of bribery and favouritism to allow certain individual businesses to lower their taxes, escape regulations, or win low-level procurement contracts.
[97] State capture is corruption that is aimed at changing the rules and regulations into rules and regulations that favour the interests of the corruptor.
[98] Political corruption arises when the behaviours of politicians and lawmakers deviate from the principles that guide politics and policies, adapting decisions with abuse of power. Public and common interests are displaced by private interests in decision making.
[99] W S Laufer 'Modern forms of corruption and moral stains' (2014) 12 *Georgetown Journal of Law & Public Policy* 375.
[100] Fraud and deceit is 'the offence of intentionally deceiving someone in order to gain an unfair or illegal advantage (financial, political or otherwise).' In the public domain, a public official who commits fraud manipulates the flow of information for his personal profit. See https://www.transparency.org/glossary/term/fraud. Fraud and corruption have common elements of dishonesty and unlawful gain. Corruption tends to be a fraudulent act committed by officials in power. However, not all fraudulent acts are termed as corruption.
[101] Embezzlement occurs 'when a person holding office in an institution, organisation or company dishonestly and illegally appropriates, uses or traffics the funds and goods they have been entrusted with for personal enrichment or other activities.' https://www.transparency.org/glossary/term/embezzlement
[102] Bribery is 'the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages (taxes, services, donations, favours etc.).'https://www.transparency.org/glossary/term/bribery
[103] Nepotism is form of favouritism when officials favour relatives or close friends for positions in which they hold some decision-making authority. The choice is based on relationship not merit.
[104] Kleptocracy entails obsessive impulse to steal regardless of the economic needs. See J Coolidge & S Rose-Ackerman 'High-level rent-seeking and corruption in African regimes: Theory and cases' (1997) 1780 *The World Bank* and S Rose-Ackerman 'Democracy and 'grand' corruption' (1996) 48:149 *International Social Science Journal* 365-380.
[105] W Slingerland 'The fight against trading in influence' (2011) 10:1 *Public Policy and Administration* 54 describes influence peddling as 'entails a situation where a person misuses his influence over the decision-making process for a third party in return for his loyalty, money or any other material or immaterial undue advantage.' See also Art 12 of the European Union's Criminal Convention on Corruption.
[106] Llamzon (n 6 above) 35-40.

administration in poor States.[107] They are justified by the public officials as a supplement to meagre government salary.[108] Rose-Ackerman considers these payments unacceptable. She avers that, *inter alia*, they contribute to an uncertain business climate and encourage spreading of corruption to other governmental departments.[109]

Variance bribery relates to payments which are made to receive benefit through diverting from the norm. These are outright illegal payments meant to override the application of norms. For example, a bribe is paid to the public official to exercise his discretion in favour of the payer. Llamzon has no kind words for this type of bribe. He likens the overall effect of variance corruption to termites eating away the foundation of a house while leaving the façade alone.[110] This means that variance bribery maintains the appearance of effective laws while undermining it from within through non-compliance.

The occurrence of corruption in foreign investment is as a result of the investor's efforts to minimise the level of uncertainties that affect its investment within the host State. These uncertainties could be political and/or economic. Foreign investors, while they require a predictable environment, are sometimes exposed to political risks such as arbitrary change of policies. While legal instruments exist to offer such protection,[111] investors sometimes insulate themselves from such uncertainties through corruption. In relation to economic uncertainties, foreign investors sometimes resort to corruption to establish an investment or to maximise their returns. So far, trends reflect that foreign investors engage in corruption at the inception of the investment, therefore, to secure an investment.[112] Corruption to hedge political risks is usually

[107] J S Nye 'Corruption and political development: a cost-benefit analysis.' (1967) 61: 2 *American Political Science Review* 417-427 quoted in A P Llamzon *Corruption in international investment arbitration* (2014) 36.
[108] Llamzon (n 6 above) 37.
[109] S Rose-Ackermann 'The challenge of poor governance and corruption' in *Global crisis, global solution* (2004) 16-17.
[110] Llamzon (n 6 above) 39.
[111] The IIAs are meant to offer investors a predictable investment environment. Also, the Multilateral Investment Guarantee Agency provides political risk insurance (guarantees) for projects in a broad range of sectors in developing member countries, covering all regions of the world. It insures eligible projects against losses relating to currency inconvertibility and transfer restrictions; expropriation; war, terrorism and civil disturbances; breach of contract; and non-honouring of financial obligations. See https://www.miga.org/what-we-do (accessed 01 June 2020).
[112] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7, a payment of US$2 million was paid to acquire an investment; *Metal-Tech v Kazakhstan* ICSID Case No ARB/10/3, US$4 million was paid in consultancy fees to persons including the Prime Minister at the inception of investment; *Wena Hotels Ltd v Egypt* ICSID Case No ARB/98/4, Award of December 12, 2000, Egypt alleged that the investment was procured by corruption. See also *OECD Foreign Bribery Report. An analysis of the crime of bribery of foreign public officials* (2014) 8, which indicated that in OECD Member countries investigated, most bribes were paid to obtain public procurement contracts.

led by public officials, while corruption for economic reasons is led by the foreign investor.[113] Since the purpose of engaging in corruption differs, this research explores the possibilities of aligning the existing sanctions and the purpose underlying the corrupt activity.

2.2. Approaches to regulating corruption

Approaches to regulating corruption have been influenced by two theories, namely, the principal-agent theory and the collective action theory.[114] The principal-agent theory is premised on two assumptions: first that there exist conflicts of interests between the principals and agents and second, that the agent has more information than the principals.[115] The principals are the collective body of actors who delegate the performance of certain government tasks to another body of collective actors, known as agents. In this model, corruption occurs when the agent acquires certain information about the task at hand and opts not to disclose this to the principal and betrays the principal's interests by pursuing his self-interests.[116] In this case, corruption can be solved by drawing rules that, *inter alia*, promote transparency and control the exercise of discretion to be exercised by the agent, providing incentives to the agent to modify their behaviour and strengthening sanctions for those who flout these regulations.[117] The contemporary global anti-corruption regime mirrors the principal-agent model, which emphasises reducing opportunities and incentives for corruption and strengthening institutions to combat corruption.

However, while success may be proved in establishing anti-corruption institutions and drafting legal frameworks on corruption, less success has been seen in curbing corruption. Specifically, the shortfall of the principal-agent approach, which contemporary anti-corruption laws are based on, wrongfully assumes that all the principals are 'principled' and thereby willing to hold

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[113] Llamzon (n 6 above) 42.

[114] L D Carson and M M Prado 'Using institutional multiplicity to address corruption as a collective action problem: Lessons from the Brazilian case' (2016) 62 *The Quarterly Review of Economics and Finance* 56-65.

[115] A Persson, B Rothstein & J Teorell 'Why anticorruption reforms fail—systemic corruption as a collective action problem' (2013) 26:3 *Governance: An International Journal of Policy, Administration, and Institutions* 45; L D Carson and M M Prado 'Using institutional multiplicity to address corruption as a collective action problem: Lessons from the Brazilian case' (2016) 62 *The Quarterly Review of Economics and Finance* 57; H Marquette & C Peiffer 'Corruption and collective action' (2015) *Developmental Leadership Program,* University of Birmingham 2.

[116] A Persson, B Rothstein & J Teorell 'Why anticorruption reforms fail—systemic corruption as a collective action problem' (July 2013) 26:3 *Governance: An International Journal of Policy, Administration, and Institutions* 452. See also K Robert *Controlling corruption* (1988); S Rose-Ackerman *Corruption: A study in political economy* (1978); H Marquette & C Peiffer 'Corruption and collective action' (2015) *Developmental Leadership Program,* University of Birmingham 2.

[117] (n 116 above). See also S Rose-Ackerman 'Redesigning the state to fight corruption: Transparency, competition and privatization' (1996) 75 *The World Bank*.

agents accountable for their actions. Studies have shown that in some instances, either the principals are directly involved in corrupt activities or they indirectly condone corruption by not taking action against the agents for corrupt activities.[118]

Corruption can also be viewed from a collective action theory. In this case, corruption should be regarded as a collective problem. This means that when society views corruption as the rule, not the exception, individuals have less incentive to not corrupt themselves. Corruption persists because efforts to curb it are fruitless, since the majority of the general populace is corrupt, including the agents and the principals.[119] Viewing corruption from the collective action lense has significant policy implications, in particular, the need to fashion a different type of strategy meant to address corruption systematically. For example, instead of ''fixing the incentives,' the important thing will be to change actors' beliefs about what "all" other actors are likely to do so that most actors expect most other actors to play fairly'.[120] TI's Integrity Pacts are arguably a model example of a collective action anti-corruption approach.[121] These Pacts involve bringing all the actors together and formally agreeing to refrain from corrupt activities. However, this can only be successful if certain factors exist at the time of these pacts, such as transparency of information, the ability of the actors to monitor each other and the political will of the government involved.[122]

The present study will use the collective action theory. This theory principally explains why corruption persists despite efforts to regulate it at the national and international level. Not only is corruption difficult to monitor and prosecute in highly corrupt countries, but it is also systematically prevalent, and generally, people lack incentives to initiate countermeasures. Where countermeasures have been initiated, they are vague, to ensure the *status quo* is preserved. The issue of corruption viewed from the collective action theory is hence a collective problem rather than an individual problem. The way individuals relate to corruption directly influences societal behaviour towards corruption. In societies where corruption is rife, the cost of principled behaviour is higher than the cost of being corrupt. Therefore, even if regulations and institutional frameworks are available to deal with corruption, these will prove to be ineffective because the general populace lacks shared values such as trust and accountability.

[118] Persson, Rothstein & Teorell (n 116 above) 454-456.
[119] Persson, Rothstein & Teorell (n 116 above).
[120] Persson, Rothstein & Teorell (n 116 above) 464
[121] H Marquette & C Peiffer 'Corruption and collective action' (2015) *Developmental Leadership Program*, University of Birmingham 4.
[122] Marquette & Peiffer (n 121 above).

Adopting this approach makes it possible to enlist of strategies that go beyond strengthening and monitoring mechanisms to combat corruption and to incorporate policies that require reciprocity and trust among the different actors.

However, the said approach does not completely disregard the principal-agent approach; rather, it complements it. Certain factors that are influenced by principal-agent theory, such as the promotion of transparency, must be in existence to enable effective application of the collective action theory. In any event, most of the issues of corruption show a combination of principal-agent conflict and collective theory aspects. Specifically, in the investment arena, the issue of corruption is a result of both principal-agent and collective problems. For example, a government official soliciting a bribe to hasten the investor's application is a principal-agent problem. As a collective problem, other government officials solicit bribes based on the belief that other officials are being corrupt as well. In as much as all the actors understand that it will be advantageous to expunge corruption, they cannot trust that the other actors may refrain from corrupt practices and so they do not refrain from soliciting or paying bribes.[123]

Further, this study has a bias towards Africa,[124] where the issue of corruption is both a problem and a solution. As a solution, it has been averred that in developing countries, where institutions are weak or defunct and suffer fiscal economic constraints, political leaders rely on corruption to redistribute resources to secure their tenure in politics. For individuals, corruption might be the only tool to access services.[125] As a problem it is systematic, and leaders lack political will to curb it. This has resulted in the general populace viewing corruption as normal, not as exceptional. Individuals are not keen to report corruption despite the existence of institutional and legal frameworks to deal with corruption since they believe that it will not change anything. Rather, they might be victimised and lose their jobs.[126] Therefore, the collective action theory is more fitting in these circumstances.

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[123] Persson, Rothstein & Teorell (n 116 above) 457.

[124] According to the UNCTAD's World Investment Report 2019, FDI flow to Africa expanded by 11 per cent to US$46 billion. The rise in flows was mainly due to the continuation of resource seeking investments. See United Nations Conference on Trade and Development *World Investment Report-Special Economic Zones* (2019) 3.

[125] Marquette & Peiffer (n 121 above) 7-8; B Denolf 'The Impact of Corruption on Foreign Direct Investment' (2008) *Journal of World Investment & Trade* 249 for a summary of the following author: S Huntington *Political order in changing societies* (1968) 69.

[126] For general reading on perceptions of corruption in Uganda and Kenya, see Persson, Rothstein & Teorell (n 116 above) 459-463.

2.3. The concept of investment

There is no single definition of what constitutes foreign investment. According to Sornarajah, foreign investment involves the transfer of tangible or non-tangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.[127] FDI should be distinguished from portfolio investment. The former is defined in economic terms as reflecting 'the objective of obtaining a lasting interest by a resident entity in one economy (direct investor) in an entity resident in an economy other than that of the investor (direct investment enterprise). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated'.[128] FDI implies a controlling stake in a business. The latter, portfolio investment, involves movement of money for the purpose of acquiring financial assets that may include shares, bonds, cash and cash equivalents, and commodities. The intention to participate in or influence the management of the investment is absent. Under portfolio investment the investor takes upon himself the risks involved in the making of such investments. The pursuit of foreign investment, usually FDI, leads States to negotiate and conclude IIAs.

The International Monetary Fund (IMF) defines direct investment as 'a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy'.[129] According to the World Trade Organisation (WTO), FDI is a situation in which an investor, residing in the parent country, owns assets in another country, the host country, and aims to manage these assets.[130]

One contentious issue on defining investment is whether the source of the capital for investment should be of international character. One view is that what matters is the nationality

[127] M Sornarajah *The international law on foreign investment* 3rd ed (2010) 1-10.
[128] OECD *Benchmark definition of foreign direct investment : main concepts and definitions* 4th ed https://www.oecd.org/daf/inv/investment-policy/2487495.pdf.
[129] International Monetary Fund *Balance of payments and international investment position manual 6th* ed (2008) para 6.8.
[130] WTO News: Press Releases *Trade and foreign direct investment*, Press/57, October 9, 1996, available at: http://www.wto.org/english/newselpres96_elpr057_e.htm

of the investor, and the source of capital is irrelevant.[131] However, some tribunals have held that the investor should inject the capital into the host State.[132] It would seem that the main view is that the capital need not be of international character for it to be considered an investment.[133] This means that an investment can exist even if the capital used to finance the investment did not cross a border, that is, was acquired outside the host State. This is due to the wording of most IIAs, which includes a broad formulation of the term investment, meaning every kind of asset.[134] Further, in the *Tokios* case, the Tribunal indicated that 'were we to accept the origin of capital as transcending the textual definition of the nationality of the Claimant and the scope of covered investment…we would override the explicit choice of the Contracting Parties as to how to define these terms'.[135] Germany's BIT with Malaysia in 1960 saw the creation of this broad-based formulation found in the majority of IIAs today.[136] However, for the purposes of this research, the focus is on FDI, which gives rise to IIAs and the occurrence of corruption as part of these transactions.

The ICSID Convention does not define the term investment, though it is a requirement to determine jurisdiction of the ICSID Tribunal. Article 25 (1) of the ICSID Convention provides as follows:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another

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[131] E C Schlemmer 'Investment, Investor, Nationality, and Shareholders' in P. Muchlinski *et al*. (eds) *The Oxford Handbook of International Investment Law* (2008).

[132] *SGS v Philippines* ICSID Case No. ARB/02/6, Award of January 29, 2004; *SGS v Pakistan* ICSID Case. No. ARB/01/13, Award of August 6, 2003.

[133] *Tradex Hellas S.A. v Republic of Albania* ICSID Case No. ARB/94/2, Award of April 29, 1999 para 105.

[134] See for instance Art 2(b) of the Turkey-Netherlands BIT (1986); Art 1(1) of the Ukraine-Lithuania BIT (1995) which define investment as follows:

> 'investment' means every kind of asset such as equity, debt, claims and service and investment contracts and includes:
> i. tangible and intangible property, including rights such as mortgages, liens and pledges;
> ii. shares of stock or other interests in a company or interests in the assets thereof;
> iii. a claim to money or a claim to performance having economic value and associated with an investment;
> iv. industrial property rights, including rights with respect to patents, trademark, trade names, industrial designs and know-how and goodwill and copyrights;
> iv. any right conferred by law or contract, and any licences and permits pursuant to law.

Other IIAs define 'investment' from an enterprise-based perspective. An 'enterprise-based' model defines the protected investment in terms of the business organization of the investment through an enterprise. See for instance, Art 1 of SADC Model BIT.

[135] *Tokios Tokeles v Ukrain*e ICSID Case No. ARB/02/18, Award of April 29, 2004 para 82.

[136] M Malik 'Definition of investment in International Investment Agreements' (2009)1 *The International Institute for Sustainable Development* 3.

> Contracting State, which the Parties to the dispute consent in writing to submit to the Centre. When the Parties have given their consent, no Party may withdraw its consent unilaterally.

Thus, ICSID tribunals have designed some criteria to determine whether some transactions qualify as investment. The *Salini* case introduced a clear, four-pronged test that arbitrators should use to determine whether the two companies had in fact made an investment for the purposes of ICSID arbitration. The test required

> (1) a contribution of money or assets,
>
> (2) a certain duration over which the project was to be implemented,
>
> (3) an element of risk, and
>
> (4) a contribution to the host State's economy.[137]

Although ICSID tribunals generally agree on the first three requirements, the fourth criterion is doubtful. ICSID Tribunals have held diametrically opposed views on this matter. While in *LESI v Algeria*[138] it was pronounced that the last criterion is irrelevant, in *Mitchell v DRC*, it was held that this element is decisive for the existence of an investment.[139]

In investment arbitration involving allegations of corruption, defining investment has become more crucial in determining the jurisdiction of the tribunal. In challenging the tribunal's jurisdiction, the host State usually contends that when an investment is tainted with corruption, the tribunal lacks jurisdiction, because for an investment to be recognised, it must have been made in accordance with the laws of the host State. The disagreement concerns whether this requirement relates to the types of investments recognised under the laws of the host State or to the conduct of the investor in acquiring the investment.[140] The different views affect the manner in which the whole dispute will be handled. Accepting the first view entails that if there are allegations of corruption, such will be addressed at the merits stage. Should the view be employed, it follows that corruption is proved and the investor's claims will not be heard due to lack of jurisdiction.

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[137] *Salini Construttori SpA & Italstrade SpA* v *Kingdom of Morocco*, Decision on Jurisdiction, July 16, 2001. See also *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius* PCA Case No. 2018-37.
[138] *Consorzio Groupement L.E.S.I. – DIPENTA v People's Democratic Republic of Algeria* ICSID Case No. ARB/03/08, Award of January 10, 2005.
[139] *Patrick Mitchell* v *Democratic Republic of the* Congo ICSID Case No. ARB/99/7, Annulment Decision of November 1, 2006.
[140] See for instance the Dissenting Opinion of Mr. Bernardo M. Cremades in *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* ICSID Case No. ARB/03/25, Award of August 16, 2007.

2.4. Corruption and investment

The interaction between FDI and corruption has been biased towards the impact of corruption on FDI.[141] However, the use of corruption in determining the validity of an investment has become one of the most contentious issues surrounding the contemporary regulation of FDI. Based on the legality requirement found in most IIAs, corruption has been used as a tool by host States as a defence against an investor's claim, arguing that the investment in issue should not be recognised since it was corruptly secured. Therefore, the legality requirement is perceived as creating an obligation for foreign investors to conform to the domestic laws of the host State, including the applicable anti-corruption obligations. [142] On the other hand, investors have invoked corruption as a sword, contending that State public officials' solicited bribes in breach of fair and equitable treatment.[143] The contemporary debate is over the extent to which international arbitration bodies, including investment tribunals, could be seized with corruption matters and if so, in what form and substance. This is because most of the existing IIAs from which the investment disputes are based on, do not have explicit clauses that provide for corruption. [144]

Corruption is a challenge in investment as it raises fundamental legal and policy questions. First, should the *locus* of corruption determine the forum for settlement of the investment dispute? In other words, at what point and under what circumstances would an allegation of corruption in an investment justify international tribunals to be seized with the matter? This

[141] Denolf B 'The impact of corruption on Foreign Direct Investment' (2008) *Journal of World Investment & Trade* 249; M Habib & L Zurawicki 'Corruption and Foreign Direct Investment' (2002) 33:2 *Journal of International Business Studies* 291; P Egger &H Winner 'How corruption influences foreign direct investment: a panel data study' (2006) 54:2 *Economic Development and Cultural Change* 459-486; K Okada & S Samreth 'How does corruption influence the effect of foreign direct investment on economic growth?' (2014) 43:3 *Global Economic Review* 207-220; F Larraín & J Tavares 'Does foreign direct investment decrease corruption' (2004) 41 *Cuadernos de Economia*217-230; A Al-Sadig 'The effects of corruption on FDI inflows' *Cato Journal* 267; H E Helmy (2013) 'The impact of corruption on FDI: is MENA an exception?'(2013) 27:4 *International Review of Applied Economics* 491-514.

[142] This expansive interpretation of the legality requirement has been extended to other public policy issues such as human rights. See the cases of *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* ICSID Case No. ARB/07/26, Award of December 8, 2016; *Continental Casualty Company v Argentina* ICSID Case No. ARB/03/9, Award of September 5, 2008; *Azurix v Argentina* Annulment Award (2006) para 128. See also, E de Brabendere 'Human rights and International Investment Law' *Grotius Centre Working Paper Series* No 2018/075-HRL; L Peterson 'Investment protection treaties and human rights' in *Human rights, trade and investment matters* (2016) 20; B Simma 'Foreign investment arbitration: a place for human rights?' (2011) 60:3 *The International and Comparative Law Quarterly* 573-596; D Spar 'Foreign Investment and Human Rights' (1999) 42:1 *Challenge* 55.

[143] I C Devendra 'State responsibility for corruption in international investment arbitration' (2019) 10:2 *Journal of International Dispute Settlement* 248. See also the case of *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13.

[144] (n 3 above).

question is crucial when one considers that in most cases, the alleged corruption is perpetrated in the host State and the State is prejudiced by such acts. It is still relevant, even in cases where the corrupt act is not committed within the host State's territory, but it was meant to acquire an investment in the host State's territory.

Second, suppose the right forum is the investment tribunal. Should allegations of corruption determine the arbitrator's approach towards the issue before it? Arbitral awards indicate that the Party alleging corruption tends to affect how the dispute is dealt with. If it is the investor who alleges corruption, usually in the form of attempted extortion by a public official, the issue is dealt with at the merits stage together with other investors' claims.[145] However, if the issue of corruption is raised by the host State, the matter is usually dealt with as a preliminary issue through contesting jurisdiction of the tribunal. The host State's argument is simply that for the tribunal to be seized with the matter; the investment should have been made in accordance with the host State's laws, and any investment made not in compliance with these laws is not a protected investment in terms of the relevant treaty. Therefore, the tribunal lacks jurisdiction over such investment.[146]

Third, since internationally, States are in *ad idem* against corruption, should corruption be regarded as a complete defence against investors' claims? Currently, the State can invoke corruption perpetrated during the establishment or operation of the investment as a defence against the investor's claims.[147] The corruption defence has an effect of precluding any claims by the investor that may arise from the investment or any investment agreement between the investor and the host State. This defence resembles the common-law defence of unclean hands, which bars a claimant from remedy if he is guilty of some misconduct concerning the very matter for which he seeks relief.[148] Scholars have pointed out that this approach creates a perverse incentive that encourages States to expropriate investors' assets or solicit bribes from foreign investors.[149]

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[145] *Rumeli Telekom v Kazakhstan* ICSID Award of July 29, 2008; *EDF (Services) v Romania* ICSID Award of October 2009.

[146] *Azpetrol v Azerbaijan* ICSID Award of September 2009; *Inceysa v El. Salvador* ICSID Award of August 2006; *African Holding Company of America, Inc et Societe Africaine de construction au Congo SARL v Republique du Congo* ISCID 2008.

[147] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7 and *Metal-Tech v Kazakhstan,* ICSID Case No ARB/10/3.

[148] M A Loscot 'Streamlining the corruption defense: a proposed framework for FCPA-ICSID interaction' (2013-2014) 63 *Duke Law Journal* 1201.

[149] Loscot (n 148 above) 1215; R Zachary Torres – Fowler 'Undermining ICSID: How the global anti - bribery regime impairs investor-state arbitration' (2012) 52: 4 *Virginia Journal of International Law* 995; H Raeschke-

There are two opinions regarding the corruption defence. The prevalent view is to consider the whole investment agreement between the host State and investor null and void and unenforceable.[150] The rationale is rooted in principles of contract, which dictate that illegal contracts are null and void and unenforceable. Where Parties resort to fraud, illegal activities and underhanded dealings to acquire a benefit they would not have otherwise obtained, society should not be seen to condone them. A number of awards support this view.[151]

The contrary, and minority view, is to regard the investment agreement between the host State and investor valid and enforceable. The rationale for recognising the contract is due to rules of State responsibility.[152] The rules of State responsibility entail that States must be accountable for violation of international law and make reparation for such violations.[153] The presence of international instruments governing corruption is evidence that corruption is a recognised international wrong. States, therefore, must be accountable for the actions of their organs together with the acts of their public officials. State responsibility further includes meeting contractual obligations despite corrupt activities by their agents.[154] Liability arises in that the agent received a bribe while acting in his capacity as a public official in exchange for exercising his discretion in discharging his public duty, even if the act exceeds his authority or contravenes instructions.[155] Inasmuch as the State might have been a victim of corruption, internationally it will be liable as it has failed to take measures to stop the occurrence of bribery.[156] The State can recoup its losses by suing the public official under its national laws. However, this is rarely done due to various reasons, such as the State alleging lack of capacity. To render the contract invalid means the State will be negating from its international obligations and in the process

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Kessler 'Corruption' in P Muchlinski, F Ortino and C Schreuer (eds) *The Oxford handbook of international investment law* (2008) 594.

[150] H Raeschke-Kessler 'Corruption' in P Muchlinski, F Ortino and C Schreuer (eds) *The Oxford handbook of international investment law* (2008) 594.

[151] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7; *Buenos Aires v [Company A],* ICC Award No. 1110 of 1963; *Frontier AG and Brunner Sociedade v Thomson CSF* ICC Case No. 7664; *Westacre v Jugoimport* ICC Case No. 7047; *Hilmarton v OTV*, ICC Case No. 5622; *Westinghouse and Burns v National Power Corporation* ICC Case No. 6401.

[152] H Raeschke-Kessler 'Corruption' in P Muchlinski, F Ortino and C Schreuer (eds) *The Oxford handbook of international investment law* (2008) 596. For full provisions on these rules see United Nations Draft Convention on Responsibility of States for Internationally Wrongful Acts (2001).

[153] H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *Journal of World Investment & Trade* 15 quoting P E Comeaux & N S Kinsella *Protecting foreign investment under international law: legal aspects of political risk* (1996) 32.

[154] Raeschke-Kessler (n 153 above) 16.

[155] Art 7 of Draft Articles on Responsibility.

[156] Klaw (n 62 above) 77.

profit from its violations of international law.[157] The State responsibility rules render the contract valid even in the face of corruption.

Fourth, 'is it permissible to vary the standards and burdens of proof in order to take due account of the clandestine nature of corruption and allow for the more effective resolution of corruption cases?'[158] Varying standards have been employed and these include 'beyond reasonable doubts',[159] balance of probability, and 'clear and convincing proof'.[160] The first approach, beyond reasonable doubt, entails that the evidence presented against the accused is of such nature that no other explanation can be derived except that the accused committed the crime he is accused of.[161] This standard of proof is used in all criminal proceedings. However, its relevance and applicability in international investment arbitration is questionable. Criminal trials require this high proof because the penalties include loss of freedom, whereas in an international arbitration, which is civil in nature, the arbitrators do not have powers to imprison any of the Parties; they can only determine civil compensation. However, it may still be relevant because corruption is a criminal offence. Further, the offence itself is serious and requires more confidence in the evidence, which is relied on even if no criminal sanctions can be imposed by the tribunal.[162] Cases of corruption are vulnerable to the risk of one Party taking advantage of the ease of the standard of proof, and invoking corruption to claim invalidation of the agreement to escape its obligations.[163]

The second approach, balance of probabilities, applied in civil cases, entails the Party whose evidence carries more weight winning the case.[164] Since investment arbitration is mainly a civil

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[157] Klaw (n 62 above) 77.
[158] Llamzon (n 6 above) 12.
[159] *Dadras International, et al v The Islamic Republic of Iran, et al.*, Award No. 567-213/215-3 (7 Nov. 1995), reprinted in 31 Iran-U.S. C.T.R. 127, 135-36.
[160] *Westinghouse v National Power Corporation, Republic of the Philippines* ICC Case No. 1110; *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13.
[161] J B Weinstein and I Dewsbury 'Comment on the meaning of 'proof beyond a reasonable doubt.'' (2006) 5 *Law, Probability and Risk* 167-173.
[162] *Republic of Iran v United States of America* (2003) 42 I.L.M. 1334, 1384-6.
[163] A Sayed *Corruption in international trade and commercial arbitration* (2004) 103.
[164] V Khvalei 'Standards of proof for allegations of corruption in international arbitration' in D. Baizeau and R Kreindler (eds) *Addressing issues of corruption in commercial and investment arbitration* (2015) 72. The civil standard of proof has been expressed differently. Other formulations include 'preponderance of probability' and 'preponderance of evidence'. One of the clearest explanations to the meaning of 'balance of probabilities' is the one offered by Lord Denning in *Miller v Minister of Pensions* [1947] 3 All ER 372, 373, '[i]f the evidence is such that the tribunal can say 'we think it more probable than not', then the burden is discharged, but if the probabilities are equal, it is not'. In the South African case of *Gates v Gates* 1939 AD 150, 154-5 Watermeyer JA indicated that '[a]ll that it requires is testimony such as carries conviction to the reasonable mind.' See also M Redmayne 'Standards of proof in civil litigation' (1999) 62:2 *The Modern Law Review* 167-195.

action, the application of this approach is more appealing. However, this approach is marred by certain challenges. First, perpetrators of corrupt activities try to leave no incriminating traces of their illegal activities. Usually the agreement regarding corruption will be verbal, so there will be no written evidence except oral testimony.[165] Secondly, arbitrators are ill-equipped to investigate the alleged corrupt activity. They do not have powers to compel any person or official to seize documents; conduct searches and call witnesses, or to seek assistance from the domestic courts. Therefore, arbitrators cannot compel any person to present evidence.[166] This could be a challenge of dealing with corruption under IIAs. The *Hamester* case[167] reflects the difficulties of obtaining evidence in cases involving corruption. Specifically, the Tribunal lamented not being furnished with conclusive evidence to substantiate the allegation of fraud against the investor. Certain documents such as Appendix I, which was supposed to detail the investment, could not be found, and neither was the financing plan set out in accordance with Joint Venture Agreement (JVA) submitted.[168]

The applicable standard of proof is fundamental in a dispute. Regarding corruption, it impacts the validity of the underlying investment agreement. Where corruption is alleged and a lower standard of proof is applied, the contract may be rendered void, and where a higher standard is used, the convincing evidence may not be found, thereby, rendering a potentially void contract valid. Therefore, the absence of settled standard of proof muddles the fight against corruption and impacts the validity of the underlying investment agreement.

Fifth, what type of sanctions can be imposed on those investments tainted with corruption? The *World Duty Free* case speaks of nullifying the investment agreement, and the *Metal-Tech* case provides for the apportionment of costs between the host State and the investor.[169]

Finally, are there any policy considerations that should be considered by the arbitrators when dealing with allegations of corruption? So far, the notion is that bribery is contrary to international public policy and claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld.[170] Judge Lagergren, in the *Buenos Aires* case, seems to leave room for other public policy consideration by indicating that ‘care must be taken to see that

[165] Khvalei (n 164 above) 69.
[166] Khvalei (n 165 above) 69.
[167] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No. ARB/07/24.
[168] *Gustav* case *supra* para 135
[169] *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3 para 422.
[170] *World Duty Free supra* para 157.

one Party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other'.[171]

To date, jurisprudence and IIAs have shed less light on the legal policy issues raised above. Where corruption is admitted, it is dealt with on severe terms that is, denying investment protection. For instance, in the *Metal-Tech* case, where bribery payments of over US$4 million in consultancy fees were made to several officials –including to the Prime Minister's brother– at the inception of the investment, the Tribunal denied jurisdiction due to corruption. This also meant that the host State's counter-claims were not considered.[172] Likewise in the *World Duty Free* case, the Tribunal dismissed the investor's claims of expropriation due to corruption on the underlying contractual agreement between the investor and the State.[173] In both cases, the investor admitted to have paid a bribe to a public official at the inception of the investment.

The foregoing reflects the need to address corruption as one of the core tenets of investment law. The legal investment regime should provide insight on how to deal with these issues in a comprehensive manner, taking into consideration the characteristics of corruption in international investments. For example, some investors are enticed to engage in corrupt activities, particularly in countries with poor governance and rule of law, to secure certainty and stability in their investments. [174] International investment laws should strive to address the fundamental legal and policy questions that arise where corruption is alleged.

2.5. Anti-corruption clauses in IIAs

Corruption is generally defined as the misuse of public office for private benefit,[175] has existence as long as human society. The Watergate scandal of early 1970s[176] in the US brought transboundary corruption to the international limelight. Previously, only corruption in purely national contexts was recognised and dealt with under national laws. In response to this scandal, legislative measures such as the US's Foreign Corrupt Practices Act 1977 (FCPA)

[171] *Buenos Aires v [Company A]* ICC Award No. 1110 of 1963 para 21.
[172] *Metal - Tech v Kazakhstan* ICSID Case No ARB/10/3.
[173] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7.
[174] Llamzon (n 6 above) 5 and H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *Journal of World Investment & Trade* 12.
[175] World Bank 'Helping countries combat corruption: the role of the World Bank' (1997) *World Bank* 7- 8; S Akay 'Corruption and human development' (2006) 26 *Cato Journal* 29.
[176] Multinational Corporations and United States Foreign Policy, Hearings before the Subcomm. On Multinational Corporations of the Senate Comm. of Foreign Relations, 94th Cong. 5 (1975), microformed on CIS No. 76-S381-6 (Congress. Info. Serv.).

were promulgated. This Act informed, to a large extent, other anti-corruption models such as the Organisation for Economic Cooperation and Development (OECD) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (1999). Other notable instruments were created following the OECD Convention.[177] However, these instruments focus on punishing investors who provide funding that fuels corruption, while the public officials who receive the funds elude punishment.

Additionally, international instruments suffer certain defects which weaken efforts to curb corruption in international business transactions. For instance, governments are enjoined to consider legislation as a way of combatting corruption, [178] meaning that enforcement is left to the governments. However modern economies are globally intertwined; hence transboundary corruption cannot be sufficiently and effectively regulated on a purely national legislation level. Globalisation has led to the broadening and deepening of interactions and interdependence among States globally.[179] The link has made it possible for polices adopted in one part of the globe to influence the other side. For instance, the FCPA enacted in the US following various bribery scandals contains anti-bribery provisions targeting both domestic and foreign issuers that list their stock on the US securities exchange and their officers, directors, employees, or agents. This Act has been globalised in that other nations have since adopted laws similar to the FCPA, meant to address corrupt dealings between companies and governments in international business transactions.[180]

Further, globalisation has aided in the flow of capital, including illicit capital, from one State to another. Corrupt officials often take measures to hide their property in other countries or flee abroad to avoid legal proceedings. Therefore, international assistance and cooperation are basic requirements for obtaining information, collecting evidence, seeking property, detecting laundering, processing extraditions, and ultimately combatting corruption.

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[177] Council of Europe Criminal Law Convention on Corruption (1999); Southern African Development Community Protocol on Corruption (2001); African Union Convention on Preventing and Combating Corruption, (2002); United Nations Convention against Corruption (2003); ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005).

[178] See for instance Art 5 and 15 of the UN Convention against Corruption.

[179] T H Cohen *Global political economy: theory and practice* (2000) 10.

[180] M A Geo-JaJa & G L Mangum 'The Foreign Corrupt Practices Act's consequences for U.S. Trade: the Nigerian Example' (2000) 24:3 *Journal of Business Ethics* 247. See also A Kaizer and K Learoyd 'The global impact of the U.S. Foreign Corrupt Practices Act' (2007) 3 *International News* 6; R L Perlman & A O Sykes 'The political economy of the Foreign Corrupt Practices Act: an exploratory analysis' (2017) 9:2 *Journal of Legal Analysis* 154.

Transboundary corruption involves international interests and actors across different jurisdictions. This creates challenges to countering such activities purely at a domestic level, without the cooperation of other countries affected through, *inter alia*, information sharing.[181] The difficulty is not only on evidential issues but also in terms of the applicable laws that govern the interaction between foreign public officials and foreign investors. A foreign investor is granted further protection, in addition to the host State's laws, under an IIA. The IIA lays out the standards of treatment which must be afforded to the foreign investor, including the forum for settling disputes. The occurrence of corruption at the establishment and during the operation of the investment tests these standards. The presence of such an IIA necessitates addressing corruption through international law.

Further, some States may adopt anti-corruption measures that are superficial for fear of rendering themselves less competitive if the laws are robust and the enforcement is strong.[182] It has been argued, mostly by US businesses, that the fear of being prosecuted has made their companies lose business opportunities to compete, since they cannot pay bribes to the foreign public officials. Further, the compliance requirements, which include putting in place preventive measures, establishing complaint accounting procedures and investigating alleged illicit payment, are costly. Therefore, these anti-corruption obligations may render businesses anti-competitive, in contrast with businesses without these anti-corruption requirements and obligations.[183]

All these problems necessitate the adoption or inclusion of anti-corruption clauses in IIAs. The presence of an anti-corruption clause in investment agreements may serve various purposes. First, it may obligate country Parties to an investment agreement to adopt global anti-corruption conventions that one Party may have not been a Party to.[184] Second, the provisions

[181] For in the Lesotho Highlands cases, prosecution for corruption of the foreign investors and local personnel was made successful by the decision of the Switzerland government to grant the prosecution access to Lesotho Highlands Development Authority's Chief Executive Officer Swiss bank accounts as this access provided irrefutable evidence of corruption and implicated several firms. See C Hostetler 'Going from bad to good: combating corporate corruption on World Bank-funded infrastructure projects' (2011) 14:1 *Yale Human Rights and Development Journal* 239. See also the case of *Acres International Limited v The Crown C of A* (CRI) of 2002 CRI/T/144/02; *Lahmeyer International GmbH v Crown* 2004 LSHC 60.

[182] For example, in USA there was empirical evidence that when FCPA was passed, it negatively affected America's competitiveness in its early years when there was no comparable legislation in Europe. See Llamzon (n 6 above) 50.

[183] R L Perlman & A O Sykes 'The political economy of the Foreign Corrupt Practices Act: an exploratory analysis' (2017) 9: 2 *Journal of Legal Analysis* 156.

[184] For instance, Art 21.5 USA - Singapore FTA (2003) reads

> 1. Each Party reaffirms its firm existing commitment to the adoption, maintenance, and enforcement of effective measures, including deterrent penalties, against bribery and corruption in international

may provide clarity on the type of investments that are afforded standard protection offered by the investment treaty. This is achieved by linking investment to other obligations such as continual adherence to domestic laws.[185] For example, if at the time of establishing the investment the foreign investor did not engage in corruption to gain the investment, then such an investment can be protected under the BIT. However, when the foreign investor subsequently engages in any corrupt activities after the establishment, then the said investment loses its protection under the BIT.

Corruption in IIAs is addressed in the following ways. The generation of IIAs concluded before 2000 did not contain express anti-corruption clauses. Where corruption was alleged, the legality clause was used to deny protection of the investment. This clause dictates that investments should be made in accordance with the law that is the law of the host State. An IIA containing such a clause dictates that only investments made in line with laws of the host State will be protected and will fall within the jurisdiction of a tribunal deciding a claim under that investment treaty.[186] The clause is aimed at preventing IIAs from 'protecting investments that should not be protected, particularly because they would be illegal'.[187] For example, in the *Inceysa* case,[188] where the investor had presented false information about its financial condition, experience and ability, the Tribunal declined jurisdiction over the investor's claim because the investment was not made in accordance with law due to fraud, in violation of Article 1 of the BIT between the Kingdom of Spain and El Salvador.

Post-2000, investment policymaking experienced a paradigm shift, in response to changing economic realities and multiple challenges. The imprecise formulation of IIA provisions had allowed investors to challenge core domestic policy decisions in key areas such as environment

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> business transactions. The Parties further commit to undertake best efforts to associate themselves with appropriate international anti-corruption instruments and to encourage and support appropriate anti-corruption initiatives and activities in relevant international fora.

[185] For instance, Art 17 (4) of Morocco-Nigeria BIT state that

> A breach of this article by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment

[186] R Moloo and A Khachaturian 'The compliance with the law requirement in international investment law (2011) 34 *Fordham International Law Journal* 1478. See also *Fakes v Republic of Turkey* ICSID Case No. ARB/07/20 para 115.

[187] *Salini Costruttori S.p.A. v Kingdom of Morocco* ICSID Case No. ARB/00/4, Decision on Jurisdiction para 46. See also *Saluka Investments BV v Czech Republic* UNCITRAL, Partial Award of March 17, 2006 para 201, *Inceysa Vallisoletana S.L. v Republic of El Salvador* ICSID Case No. ARB/03/26.

[188] *Inceysa Vallisoletana S.L. v Republic of El Salvador* ICSID Case No. ARB/03/26; Art 1 of Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and El Salvador.

conservation.[189] This necessitated the need for IIA reform, to enable them to facilitate inclusive growth and sustainable development. To this end, five priority areas for reform were identified: (i) safeguarding the right to regulate, while providing protection; (ii) reforming investment dispute settlement; (iii) promoting and facilitating investment; (iv) ensuring responsible investment and (v) enhancing systemic consistency.[190] While corruption is not explicitly addressed as a priority area, the need to ensure responsible investment captures a variety of issues that relates to foreign investors' behaviour. This has seen various post IIAs expressly providing for matters related to labour, environment, and human rights,[191] and corruption.[192] Their inclusion is meant to foster responsible investor behaviour. The responsibility is on two dimensions: 'maximizing the positive contribution that investors can bring to societies and avoiding negative impacts.'[193]

Nevertheless, the way corruption is addressed is not uniform. The visible approaches are reference in the preamble,[194] subjecting corruption matters to domestic laws and regulations of the Parties,[195] investor's anti-corruption obligation clause,[196] introducing carve-out clauses,[197] and encouraging enterprises to adopt corporate social responsibility measures or principles which address such corruption.[198] By subjecting corruption matters to domestic laws and

[189] *Metalclad Corporation v United Mexican States* ICSID ARB(AF)97/1, Award of August 30, 2000; *S.D. Myers Inc. v Government of Canada* Award of November 13, 2000; *Tecnicas Medioambientales SA (Tecmed) v United Mexican States* ICSID ARB(AF)00/2, Award of May 29, 2003; *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica* ICSID Case No. ARB/08/1, Award of May 16, 2012; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany* ICSID Case No. ARB/09/6, Award of March 11, 2011; *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* ICSID Case No. ARB/14/1, Award of May 16, 2018.
[190] UNCTAD *Reform package for the investment regime* (2018) 22-23.
[191] See for instance Art 16 Canada-Senegal BIT (2014); Art 15 Canada-Côte d'Ivoire BIT (2014); Art 8.16 Canada-Korea FTA (2014); Art 16 Canada-Serbia BIT (2014); Art 16 Canada-Nigeria BIT 2014; Art 15 (2) Canada-Cameron (2014).
[192] About 71 BITs and TIPs alludes to corruption. These include: Afghanistan-US TIFA (2004); Albania-EC Association Agreement (2009); Albania-EFTA FTA (2010); Algeria-EC Association Agreement(2005); ANDEAN-EC Cooperation Agreement (2003); Armenia-EC Cooperation Agreement (1999); Austria-Kazakhstan BIT (2010); Austria-Nigeria BIT (2013); Austria-Tajikistan BIT (2010); Austria-Uzbekistan BIT (2000); Art 1908 Canada-Peru Free Trade Agreement 2009; Art 10 Agreement between Japan and Lao People's Democratic Republic for the Liberalization and Protection of Investment 2008; Art 10 SADC BIT model; Art 21.5 USA-Singapore FTA 2003; Art 8 Japan-Philippines Economic Partnership Agreement 2006; Preamble Norway 2007 Model BIT. See https://investmentpolicyhubold.unctad.org/IIA/AdvancedSearchBITResults (accessed 20 May 2019).
[193] n 190 above, 23.
[194] The preamble of the US-Peru FTA states that Parties agree to 'promote transparency and prevent and combat corruption, including bribery, in international trade and investment'.
[195] Art 18.5 US-Morocco FTA (2004); Art 18.5 US-Oman FTA (2005); Art 21.5 US- Singapore FTA; Art 8 of the 'General Provisions' Chapter of the Japan-Philippines Economic Partnership Agreement (2006).
[196] Art 17 Morocco-Nigeria BIT; Art 10 Southern African Development Community (SADC) Model BIT (2011).
[197] Art 16 Netherlands Model BIT (2018).
[198] Art 16 Canada-Senegal BIT (2014); Art 15 Canada-Côte d'Ivoire BIT (2014); Art 8.16 Canada- Korea FTA (2014); Art 16 Canada-Serbia BIT (2014); Art 16 Canada-Nigeria BIT 2014; Art 15 (2) Canada-Cameron (2014).

regulations of the Parties, this entails that where corruption is alleged, the domestic laws of the Parties where corruption has occurred will apply. For instance, in the *World Duty Free* case, the agreement between the Parties provided for the application of both English law and Kenyan law.[199] Specifically, Article 9(2) (c) provided that 'any arbitral tribunal constituted pursuant to this Agreement shall apply English law'; and Article 10(A) provided that 'This Agreement shall be governed by and construed in accordance with the law of Kenya'. The apparent contradiction of these two provisions posed no challenges to the tribunal as section 2 of the Kenyan Law of Contract Act 1961 provided that the common law of England relating to contract, as modified by the doctrines of equity and Acts of Parliament of the United Kingdom and other Acts specified in the Schedule to this Act, were to apply to Kenya. Therefore, the laws are similar save in cases where Kenya has modified the English common law. [200] In this case, laws relating to contractual illegality were similar as Kenya derived its principles from English common law.

The effect of such a clause in IIAs is that Parties determine what qualifies as corruption and the proper sanctions thereof. This affords them the flexibilities to deal with corruption as dictated by their respective domestic laws, considering the public policy of the host State. However, the challenge of this flexibility is that, if the national anti-corruption rules are superficial, then the corruption cannot be efficiently controlled.

This research fits well with the ongoing IIA reform process, where most States are reorienting their investment policies in a bid to make them more sustainable-development friendly. As States review existing investment policies and prepare model investment treaties, or seek to engage in BITs, there is a great need to provide legal guidance on some of the provisions that they can be include.[201] Since corruption is a contentious issue, the current research will contribute to the ongoing reform process by suggesting an anti-corruption clause that States can adopt in their IIAs. It contributes mainly to reforms relating to responsible investment, as well as other aspects such as reform on dispute settlement to a limited extent. In addition, this work is distinct in that argues that the State should also be accountable for the corrupt activities

[199] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7 para 6. See also the case of *Attorney-General v. Mobil Oil NZ Ltd* 4 ICSID Reports 12 (the parties agreed that an arbitral Tribunal shall apply the law of New Zealand).
[200] *World Duty Free Co. Ltd supra* para 158-159.
[201] For example, South Africa is systematically terminating its BITs and replacing them with domestic legislation, the Investment Protection Act (2015). Countries such as Indonesia, Ecuador and Venezuela have indicated their intensions to discontinue IIAs, see N Butler & S Subedi 'The future of international investment regulation: towards a World Investment Organisation?' (2017) 64 *Netherlands International Law Review* 44.

of its public officials. International anti-corruption instruments and most domestic laws[202] recognise that corruption is a reciprocal act. This is reflected by the criminalisation of corrupt acts such as bribery for both soliciting and accepting bribery.[203] Therefore, the objectives of these instruments are furthered through requiring States to be held responsible for corrupt activities of their public officials. This does not mean that the investor must be totally absolved from any wrongdoing, rather, investors where they partake in corruption, they must be accountable for it. The current approach by investment tribunals is that, where corruption is alleged and proved, the conduct of the State's public official is not considered. Taking into account the conduct of the host State's public officials is essential in determining the final award. The award will reflect the host State's contribution in the acts of corruption.

2.6. Regulation of corruption in national frameworks

In addition to IIAs, domestic laws play a crucial role in regulating FDI. Issues that are raised as breach of international investment law such as expropriation[204] and violation of fair and equitable treatment[205] inevitably call for consideration of the host State's laws.[206] Further to this, questions related to the nationality of an investor, and even the type of investments recognised by a certain State, are determined by domestic laws.

The requirement to adhere to domestic laws is seen in various IIAs, thereby establishing a link between domestic laws and international investment law. Non-compliance with domestic laws has increasingly become a defence by States against investor's claims.[207] Investment tribunals have indicated that compliance with domestic law can be implied in the absence of a treaty

[202] See for instance section 99 of New Zealand's Crimes Act and section 3 of South Africa's PPCAA.
[203] See for instance Art 16 of the UNCAC; Art VI:1 of the IACC and Art 2-5 of the Additional Protocol to the Criminal Law Convention on Corruption; Art 4 (1) of the AU Anti-Corruption Convention; Art 3(1) of the SADC Protocol on Corruption. However, the OECD Convention on Corruption only deals with active bribery.
[204] *Methanex Corporation v USA* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005; *Middle East Cement Shipping and Handling Co SA v Egypt* ICSID Case No ARB/99/6, Award of April 12, 2002; *Quiborax SA v Bolivia* ICSID Case No ARB/06/2, Award of September 16, 2015.
[205] *Glamis Gold Ltd v USA* Award of June 8, 2009; *Biwater Gauff (Tanzania) Ltd v Tanzania* ICSID Case No ARB/05/22, Award of July 24, 2008; *Wena Hotels Ltd v Egypt* ICSID Case No ARB/98/4, Award of December 12, 2000.
[206] For a discussion of the role of domestic laws in international investment arbitration see, J Hepburn *Domestic law in international investment arbitration* (2017); H E Kjos *Applicable law in investor-state arbitration. The interplay between national and international law* (2013).
[207] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (Fraport I)* Award para 336; *Alasdair Ross Anderson et al v Republic of Costa Rica* ICSID Case No. ARB (AF)/07/3 paras 54-7; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic* ICSID Case No. ARB/07/5 para 381.

provision to that effect.[208] Some domestic laws deal with corruption. The *World Duty Free* case reflects the use of domestic laws on corruption in offsetting the claims of the investor. For the purposes of this study, it is necessary to examine domestic legal frameworks in order to assess their role is regulating investor's conduct.

2.7. Conclusion

This chapter has defined corruption and investment. It has established that corruption is generally termed as abuse of office for private gain. There are various forms of corruption; the most common is bribery. In the context of foreign investment, bribery is categorised as either transaction bribery or variance bribery. Corruption in international investment transactions raises crucial issues such as determining the forum for an investment dispute tainted with corruption, the appropriate standard of proof and the types of sanctions that can be imposed for those investments tainted with corruption. Further, the clandestine nature of transboundary corruption makes it difficult to be dealt with at the domestic level. This necessitates international invention in the form of IIAs. The ensuing chapters will discuss these issues in greater detail.

[208] *Ioannis Kardassopoulos v Georgia* ICSID Case No. ARB/05/18 para 182; *Plama Consotrium Ltd v Republic of Bulgaria* ICSID Case No. ARB/03/24 paras 56-73; *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL Final Award of April 23, 2012,paras 178, 184; *Railroad Development Corporation v Guatemala* ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction para 140. For contrary view, see the case of *Anatolie Statie, Gabriel Stati, Ascom SA and Terra Raf Trans Trading Ltd v Kazakhstan* SCC Arbitration 116/2010 Award of December 19, 2013 para 812.

CHAPTER 3

INTERNATIONAL LEGAL FRAMEWORK

3.1. Introduction

The International development of anti-corruption norms is fragmented and primarily driven by countries in response to particular events. For instance, the US Watergate scandal of the early 1970s brought trans-border corruption to the international limelight.[209] Investigations during this scandal revealed cases of abuse of office by the President and exposed that around 400 companies paid up to US$ 300 million to foreign public officials, politicians, or Parties to obtain business in those countries.[210] Though a domestic event, the embarrassment to the US administration influenced the Congress to unanimously approve the 1976 FCPA and to vigorously campaign for anti-corruption measures in different international platforms such as the United Nations (UN), the OECD and the Organisation of American States (OAS). While the turn to the FCPA was rooted in moral convictions that corruption was wrong,[211] subsequent anti-corruption multilateral treaties are motivated by economic development and good governance.[212]

This chapter deliberates on the international anti-corruption framework with reference to the Vienna Convention on the Law of Treaties (VCTL); UNCAC; Inter-American Convention Against Corruption; OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions; CoE's Criminal and Civil Law Conventions; the African Union Convention on Corruption and the SADC Protocol Against Corruption.[213]

The key aim of this chapter is to assess the strength and limits of international anti-corruption instruments in general, and specifically in combatting transboundary corruption in the investment regime. This objective is crucial to this study as the IIAs to be discussed in chapter 6 are part of international law. Therefore, when these IIAs' provisions are interpreted, these international anti-corruption instruments are considered as a source of law on corruption.

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[209] C Rose *International anti-corruption norms their creation and influence on domestic legal systems* (2015) 63; D A Gantz 'Globalizing sanctions against foreign bribery: the emergence of a new international legal consensus' (1997-1998) 18 *Northwestern Journal of International Law & Business* 459; L Posadas 'Combating corruption under international law' (1999-2000) 10 *Duke Journal Of Comparative & International Law* 348-352.

[210] C Rose *International anti-corruption norms their creation and influence on domestic legal systems* (2015) 63.

[211] D A Gantz 'Globalizing sanctions against foreign bribery: the emergence of a new international legal consensus' (1997-1998) 18 *Northwestern Journal of International Law & Business* 457, 459.

[212] A P Jakobi *Common goods and evils? The formation of global crime governance* (2013) 138.

[213] n 81 above.

Furthermore, other IIAs incorporate, by reference, international anti-corruption instruments. For instance, the Guatemala-Trinidad and Tobago BIT (2013) requires States to associate themselves with international instruments such as the UNCAC.[214] It is therefore necessary to discuss these international instruments with a view to understanding their scope and relevance in combatting corruption in foreign investment transactions. Further to this objective, key provisions will also be identified to form the basis for a proposed anti-corruption clause in IIAs.

3.2. The relevance of international law in investment arbitrations

The conventions discussed below form the corpus of international anti-corruption laws. In general, Parties to a dispute have the autonomy to choose the applicable rules of law. For instance, in investment disputes arbitrated under the ICSID, Article 42(1) of the ICSID Convention provides that '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the Parties'. Similar provisions are found in other arbitration fora.[215] In investment arbitration governed by BITs or any other treaty, the investors normally do not have an opportunity to exercise their right to choice of laws.[216] This right would have been exercised by the States at the time of entering the BIT. Nonetheless, most BITs do not contain an express choice of laws. In those BITs in which the choice of laws clause exists, the form varies from one BIT to another. One group provides that the dispute is to be decided 'in accordance with the provisions of the Agreement' itself, [217] and the other provides that the BIT is applicable in conjunction with the principles of international law.[218] Therefore, in the latter

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[214] See for instance Art 17 of the Guatemala-Trinidad and Tobago BIT (2013) which provides that:

> In accordance with their respective laws and regulations, each Contracting Party shall endeavour to:
> ….
> 2. Uphold anticorruption practices in accordance with the United Nations Convention Against Corruption, done at New York, October 31, 2003

[215] See for instance, Art 33(1) of the UNCITRAL Arbitration Rules and Art 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce.

[216] *AAPL v Sri Lanka* 4 ICSID Reports 256 (1997) paras 19-20. However, even if the BIT has indicated the applicable law, in cases where the BIT is silent on the issue at hand, the tribunal may apply the parties' choice of law pertaining such issue. Further, the diversity of legal issues that may arise in a dispute may require the use of different applicable laws. For further reading, see: Z Douglas *The international law of investment claims* (2009) 40; C Schreuer 'International investment law in domestic disputes: the case of ICSID' (1996) 1 *Austrian Review of International and European Law* 89.

[217] Art 9 (4) of the Bulgaria-Albania BIT; Art 8 (3) of the Czech Republic-Ireland BIT (1996). For a comprehensive list, see E Gaillard & Y Banifatemi 'The meaning of "and" in Article 42(1), second sentence, of the Washington Convention: the role of international law in the ICSID choice of law process' (2003) ICSID *Review-Foreign Investment Law Journal* 378.

[218] Art 9 (5) of the Bulgaria-Ghana BIT; Art XI (4) of the Italian Republic and the Government of the Dominican Republic (2006); Art 11 (2) of the Germany -Zimbabwe (1996); Art 9 (5) Venezuela-Netherlands BIT; Art 7 (5) Argentina-Netherlands BIT. E Gaillard & Y Banifatemi 'The meaning of "and" in Article 42(1), second sentence, of the Washington Convention: the role of international law in the ICSID choice of law process' (2003) ICSID *Review-Foreign Investment Law Journal* 378.

case, in addition to the provisions of a specific BIT, the State's international obligations found in various international instruments are a source of law.[219]

In case of a BIT or a treaty being silent on the choice of law, the trend has been that the agreement establishing a particular arbitration forum provides guidance on the applicable substantive law. For instance, for the ICSID forum, in the absence of an agreement between the Parties, the ICSID Convention provide that the 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the governing conflict of laws) and such rules of international law as may be applicable'.[220] In terms of the Stockholm Chamber of Commerce, the 'Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate,'[221] whereas the UNCITRAL forum provides that 'the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'.[222] The ICSID forum designates the specific rules to be applied, and such include international law, whereas in non-ICSID fora arbitrators have to go through the conflict of laws method to determine which system of law is applicable.

While it is generally agreed that international law is applicable in state-investor investment disputes, the debate concerns its relationship with host State's laws. One theory avers that international law is applicable only in those cases where the law of the host State contains gaps on particular issues brought before the tribunal or where there are inconsistences between the host State's laws and international law.[223] In these instances, international law serves a supplementary and corrective function.[224] This the view is supported by most scholars.[225] The

[219] *Antoine Goetz et al. v Republic of Burundi* Award of February 10, 1999 paras 68-69, 94.
[220] Art 42 (2) of the ICSID Convention.
[221] Art 27 (1) of the Arbitration Rules of the Stockholm Chamber of Commerce (2017).
[222] Art 33 (1) of the UNCITRAL Arbitration Rules.
[223] E Gaillard & Y Banifatemi 'The meaning of "and" in Article 42(1), second sentence, of the Washington Convention: the role of international law in the ICSID choice of law process" (2003) ICSID *Review-Foreign Investment Law Journal* 281; G Sacerdoti 'Investment arbitration under ICSID and UNCITRAL Rules: prerequisites, applicable law, review of awards' (2004) 19:1 *Review-Foreign Investment Law Journal* 6; Z Douglas *The international law of investment claims* (2009) 81.
[224] *Amco v Indonesia* Decision on the Annulment of May 16, 1986; *Klockner v Cameroon* Decision on Annulment of May 3, 1985; *LETCO v Liberia* Award of March 31, 1986; *SPP v Egypt* Award of May 20, 1992; *Autopisat v Venezuela* Award of September 23, 2003.
[225] P Kahn 'The law applicable to foreign investments: the contribution of the World Bank Convention on the Settlement of Investment Disputes' (1968) 44 *Indiana Law Journal* 1; P Feuerle 'International law and choice of law under Article 42 of the Convention on the Settlement of Investment Disputes' (1977-78) 4 *Yale Studies in World Public Order* 89; I F I Shihata / A R Parra 'The applicable substantive law in disputes between States and private foreign parties: the case of arbitration under ICSID' (1994) 9 *ICSID Review-Foreign Investment Law Journal* 183; C H Schreuer *The ICSID Convention-a commentary* (2001) 622-631; V C Igbokwee 'Determination, interpretation and application of substantive law in foreign investment treaty arbitrations' (2006) 23:4 *Journal of International Arbitration* 114; H E Kjos *Applicable law in investor-state arbitration: the interplay between*

other view is that international law is an 'independent body of substantive rules which may be applied by itself, and not through the filter of the law of the host State'.[226] Despite these differing views, international law is relevant in international investment disputes. There are indications that tribunals are considering international law not as a supplementary source of law; instead, giving it a more prominent and decisive role.[227]

3.3. Article 50 of the Vienna Convention on the Law of Treaties (1969)

The first formal international response to corruption is found in Article 50 of the VCTL which provides that

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

The presence of this provision in treaty-making is crucial. It is made against the backdrop of a widespread practice during the colonial era, when 'treaties obtained by means of corruption were considered perfectly valid in the relations with States outside the club of "civilized nations"'.[228] Article 50 ushered in a new international relations era governed by free consent. To this end, Article 50 seeks to protect freedom of consent. Evidence showing that a State's representative was corrupted can reflect that the consent was not freely obtained and might not have been the real will of the State. Further, corruption makes the representative lose his status as an agent of the State, and from that moment he/she negotiates as a private individual.[229] However, corruption renders the treaty voidable; therefore, the consent remains attributable to the State until the State invokes corruption to invalidate the treaty. [230]

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national and international law (2013) 213. For a full list see C H Schreuer 'The relevance of public international law in international commercial arbitration: investment disputes' 13, available on https://www.univie.ac.at/intlaw/wordpress/pdf/81_csunpublpaper_1.pdf (accessed 23 June 2020).

[226] E Gaillard & Y Banifatemi 'The meaning of "and" in Article 42(1), second sentence, of the Washington Convention: the role of international law in the ICSID choice of law process' (2003) ICSID *Review-Foreign Investment Law Journal* 281. See also the case of *Wena Hotels v Egypt* Award of December 8, 2000 para 138.

[227] *Amco v Indonesia Decision on the Annulment* Award of May 16, 1986; *CDSE v Costa Rica* Award of February 17, 2000 para 64-65; *Wena Hotels Ltd v Egypt* ICSID Case No ARB/98/4.

[228] A Wiebalck 'Corruption of a representative of a state' in M E Villiger (ed) *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 623.

[229] Wiebalck (n 228 above) 626.

[230] O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of Treaties. A commentary* (2018) 915-916. The Venezuelan's proposed amendment at the Conference, to declare the treaty absolutely void *erga omnes* was rejected as it would have impaired the legitimate rights of other States; see A Wiebalck (n 228 above) 626.

This Article offers protection to States who are victims of corruption. Nevertheless, the protection is minimal since corruption may not be invoked where the State, whose representative was corrupted, expressly agreed after the corruption was discovered that the treaty was valid, or acquiesced in its validity.[231] This is crucial to the current study because it argues that in investment transactions, if a State fails to act when it knows about corruption, it should not be able to treat the resulting transaction as void so as to escape liability.

3.4. United Nations Convention Against Corruption (UNCAC)

The UNCAC is currently the sole global agreement on corruption. The Convention was adopted by the General Assembly of the UN on 31 October 2003 and came into force on 14 December 2005. As of 26 June 2018, it had 140 signatories and 186 Parties.[232]

3.4.1. Background

Anti-corruption initiatives within the UN can be traced back to the early 1970s, when the US urged the United Nations ECOSOC to consider an international convention on corruption. The negotiations were abandoned due to the diversity of opinions between the global North and the South.[233] The South 'refused to discuss "demand" side measures like restrictions on solicitation of bribes and the North resisted linking bribery rules to the proposed UN Code of Conduct for Multinational Corporations'.[234] However, resolutions by ECOSOC in 1972 and 1974, though not binding, indicated rife corruption in developing countries and the need to criminalise it.[235]

Within the UN General Assembly, several resolutions[236] on corruption were made. These include GA Resolution 3514 XXX on measures against corrupt practices of transnational and

[231] Wiebalck (n 228 above) 627.
[232] https://www.unodc.org/unodc/en/corruption/ratification-status.html (accessed 25 October 2019).
[233] The North–South divide is a socio-economic and political divide. The North is more developed and include countries like the United States, Canada, Western Europe, and outermost regions of the European Union, developed parts of Asia as well as Australia and New Zealand. The South is made up of developing countries, which, *inter alia,* lacks appropriate technology and their economies are disarticulated. The South is made of Africa, Latin America, and developing Asia including the Middle East. See O Mimiko *Globalization: the politics of global economic relations and international business* (2012) 47.
[234] P Webb 'The United Nations Convention Against Corruption. Global achievement or missed opportunity?' (2005) 8:1 *Journal of International Economic Law* 192; J Wouters, C Ryngaert & A S Cloots 'The international legal framework against corruption: achievements and challenges' (2013) 14 *Melbourne Journal of International Law* 5.
[235] ECOSOC Resolutions 1721 (LIII) of 1972; 1908 (LVII) of 2 August 1974 and 1913 (LVII) of 5 December 1974.
[236] The UN General Assembly's resolutions are as a rule, recommendatory, especially with regards to Member States 'external relations. They have no binding effect in the operational realm of international peace and security. See South *West Africa (Ethiopia v S Africa; Liberia v S Africa)* (Second Phase) [1966] ICJ Rep 6 para 98. M D Öberg 'The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ' (2005) 16:5 *The European Journal of International Law* 883-884.

other corporations and their intermediaries.[237] In 1976, following this resolution, the drafting of a multilateral agreement commenced, resulting in the Draft International Agreement on Illicit Payment. In May 1979, the Draft International Agreement on Illicit Payments was transmitted through the ECOSOC to the General Assembly, together with several proposals for consideration by the conference of plenipotentiaries. Negotiations failed because developing countries attempted to utilise the platform for a package deal on the conduct of transnational companies.[238]

Other resolutions on corruption came after almost two decades, namely, General Resolution Res 51/59[239] of 28 January 1997 and 51/191[240] of 21 February 1997. In Res 51/59, Member States adopted the International Code of Conduct for Public Officials (ICCPO). Member States' concerns, that corruption endangers the stability and security of societies, undermines the values of democracy and morality and jeopardises social, economic and political development, were reflected in this Resolution.[241] Though the ICCPO did not explicitly mention corruption, it dealt with issues related to corruption, such as receipt of gifts or other related favours that could influence the exercise of a public official's function and conflicts of interest.[242]

In Resolution 51/191 of 21 February 1997,[243] Member States adopted the UN Declaration against Corruption and Bribery in International Commercial Transactions, which text was annexed to this resolution. The UN Declaration, *inter alia*, enjoins Member States to take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions and to criminalise bribery of foreign public officials in an effective and coordinated manner.

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[237] *Measures against corrupt practices of transnational and other corporations and their intermediaries and other involved* GA Res 3514 XXX of 15 December 1975.

[238] A P Jakobi *Common goods and evils? The formation of global crime governance* (2013) 152. According to P Webb 'The United Nations Convention Against Corruption Global achievement or missed opportunity?' (2005) 8:1 *Journal of International Economic Law* 192 ' [t]he South refused to discuss "demand" side measures like restrictions on solicitation of bribes and the North resisted linking bribery rules to the proposed UN code of conduct for multinational corporations'.

[239] *Action against Corruption* GA Res 51/59, UN GAOR, 51st Session, 82nd Plenary Meeting, Agenda Item 101, Supp No 49, UN Doc A/RES/51/59 (28 January 1997).

[240] *UN Declaration against Corruption and Bribery in International Commercial Transactions,* GA Res A/RES/51/191.

[241] See the Preamble to the *Action against Corruption*, GA Res 51/59, UN GAOR, 51st Session, 82nd Plenary Meeting, Agenda Item 101, Supp No 49, UN Doc A/RES/51/59.

[242] *International Code of Conduct for Public Officials* (ICCPO), UN Doc A/RES/51/59, Annex Art 9 and 4.

[243] United Nations: General Assembly Resolution 51/191 containing UN Declaration Against Corruption and Bribery in International Commercial Transactions.

Other corruption-related resolutions include the UN General Assembly Resolution 56/186 of 21 December 2001[244] and Resolution 57/244 of 20 December 2002.[245] These resolutions deal with the need to prevent and combat corrupt practices and encourage the transfer of funds of illicit origin and to the countries of origin with the view of enabling such countries to fund developmental projects.

All Resolutions discussed above carried hortatory language which did not create any legal obligation on Member States. However, their mere existence reflected a level of consensus amongst States for a need to have a global convention that set anti-corruption standards. Crucially, these instruments provided a bedrock for the UNCAC, which was adopted in 2003.[246] The purpose of UNCAC is threefold: to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and to promote integrity, accountability and proper management of public affairs and public property.[247]

3.4.2. Salient provisions of the UNCAC

UNCAC covers several issues. However, this section focuses on selected provisions such as the preamble, preventive measures, and criminalisation of corruption, bribery in the private sector and consequences of corruption. These provisions are critical to appreciating the effectiveness of efforts to combat corruption in international business transactions. The other provisions not discussed do not directly relate to international business transactions.

3.4.3. The preamble

One of the standard clauses found in international treaties is the preamble. A preamble contains the objectives and purpose of a treaty. It outlines why the Parties concluded the treaty. A

[244] *Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin,* UN GA Res 56/186. Fifty-sixth session, Agenda item 96 (a), 90th plenary meeting (21 December 2001).
[245] *Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin,* UN GA Res 57/244. Fifty-seventh session, Agenda item 85, 78th plenary meeting (20 December 2002).
[246] The UNCAC complements the United Nations Convention against Transnational Organized Crime (Palermo Convention) which into force in 2004. The Palermo Convention recognise the relationship between organised crimes and corruption and contains clauses on combatting corruption, that is, Articles 8 -9.
[247] Art 1 of UNCAC.

preamble is significant because it assists in the interpretation of substantive provisions of the treaty.[248]

In the UNCAC's context, the preamble reflects Member States' understanding of the nature of the problem of corruption. It states that corruption is a serious problem and poses threats to the stability and security of societies; undermines the institutions and values of democracy, ethical values and justice; and jeopardises sustainable development and the rule of law. However, the UNCAC does not mention the effect of corruption on international business transactions. This could be due to the North-South tensions alluded to above. Any mention of international business transactions would consequently call for the inclusion of provisions that deal with the conduct of transnational companies.

Further, corruption is closely linked to other forms of crime, such as organised crime and economic crime, including money laundering. The recognition that corruption is a universal phenomenon that affects all societies and economies is vital, making international cooperation to prevent and control it essential.[249] Additionally, Member States recognise that effective implementation of anti-corruption rules requires support and involvement of individuals, civil society, non-governmental organisations and community-based organisations. This reflects that a comprehensive and multidisciplinary approach is necessary in dealing with corruption.

i) Preventive measures

As a means of preventing corruption, UNCAC emphasises certain measures such as developing and implementing or maintaining effective, coordinated anti-corruption policies[250] and creating independent bodies that prevent corruption. These independent bodies would prevent corruption through implementing the anti-corruption policies and disseminating knowledge about corruption.[251] Further, recruiting, retaining and promoting public officials should be based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude.[252] Once recruited, all public officials must be subjected to a code of conduct and must declare their assets and disclose conflict of interests.[253]

[248] M H Hulme 'Preambles in treaty interpretation' (2016) 164 *University of Pennsylvania Law Review* 1298; Report of the International Law Commission to the General Assembly, 21 U.N. GAOR Supp. No. 9, at 221, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Year Book of International Law Communication 169.
[249] See n 181 above.
[250] Art 5 of UNCAC.
[251] Art 6 of UNCAC.
[252] Art 7 (1) of UNCAC.
[253] Art 8 of UNCAC.

In relation to public procurement, States are expected to take necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption. For the management of public finances, States should take measures to promote transparency and accountability, and such measures shall encompass, *inter alia*, procedures for the adoption of the national budget and timely reporting on revenue and expenditure.[254]

These proposed preventive measures are chiefly meant to eliminate impunity of public officials and to promote transparency in the public sector. The preventive measures also cover the role of the private sector and public participation, including civil society, in fighting corruption. The measures are broad, giving room for Member States to modify them according to their legal systems. Significantly, these measures cover three indispensable factors of success in the fight against corruption: 'eliminating impunity, increasing transparency in government administration, and promoting active participation by citizens'.[255]

ii) Criminalisation of corruption

Another basic pillar of UNCAC is the criminalisation of certain activities. Member States are mandated to take legislative measures to criminalise activities such as active and passive bribery[256] of national public officials,[257] and also active bribery of foreign public officials or officials of public international organisations;[258] embezzlement, misappropriation and other diversion of property by a public official;[259] money laundering;[260] obstruction of justice[261] and participation as an accomplice, assistant or instigator in an offence of corruption, or any attempt to commit such an offence.[262] UNCAC also contains other corrupt acts regarded as criminal offences in certain States but not similarly regarded in others. Examples include solicitation or acceptance by a foreign public official of an undue advantage,[263] trading in influence,[264] abuse

[254] Art 9 of UNCAC.
[255] C A Manfroni *The Inter American Convention against Corruption annotated with commentary* (2003) 32.
[256] Active bribery refers to the act of promising or giving the bribe, whereas passive bribery refers to the act of requesting, receiving or accepting a bribe. See Transparency International Glossary https://www.antibriberyguidance.org/guidance/5-what-bribery/guidance.
[257] Art 15 of the UNCAC.
[258] Art 16 (1) of the UNCAC.
[259] Art 17 of the UNCAC.
[260] Art 23 of the UNCAC.
[261] Art 25 of the UNCAC.
[262] Art 27 (1) and (2) of the UNCAC.
[263] Art 16 (2) of the UNCAC.
[264] Art 18 of the UNCAC.

of functions,[265] illicit enrichment,[266] concealment,[267] and preparation for an offence of corruption.[268]

The net effect of giving Member States the discretion to criminalise some offences and leave others dilutes the efforts to effectively combat corruption. As recognised in the Preamble, corruption is a universal phenomenon that affects all societies and economies and can only be sufficiently and effectively regulated when States share the same standards and recognise the same offences. Corruption, in its various facets, is an activity that cannot be effectively prevented and combatted by relying solely on domestic laws, since some States may adopt anti-corruption measures that are weak for fear of rendering themselves less competitive especially if the laws are robust and the enforcement is strong.[269]

iii) Bribery in the private sector

The UNCAC also includes provisions on bribery and embezzlement in the private sector. However, States have discretion to adopt legislative measures and other measures to establish bribery and embezzlement in the private sector as criminal offences.[270] The extension of the Convention to the private sector was a contentious issue during the negotiations. The idea was spearheaded by the EU and supported by Latin American and Caribbean States, who argued that excluding the private sector would be detrimental in implementation of the Convention.[271] The US resisted the inclusion of the private sector on the basis that private sector bribery was not a crime there.[272]

Although Articles 21 and 22 create a non-mandatory framework, Article 12 requires a Member State, 'in accordance with the fundamental principles of its domestic law', to take measures to prevent corruption in the private sector. Further, where appropriate, Member States must provide 'effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures'. A non-exhaustive list of preventive measures is

[265] Art 19 of the UNCAC.
[266] Art 20 of the UNCAC.
[267] Art 24 of the UNCAC.
[268] Art 27 (3) of the UNCAC.
[269] For example, in USA there was empirical evidence that when FCPA was passed, it negatively affected America's competitiveness in its early years when there was no comparable legislation in Europe. See A P Llamzon *Corruption in International Investment Arbitration* (2014) 50.
[270] Art 21 and 22 of the UNCAC.
[271] Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its third session, held in Vienna from 30 September to 11 October 2002, U.N. Doc. A/AC.261/9 (2002) 3.
[272] P Webb 'The United Nations Convention Against Corruption global achievement or missed opportunity?' (2005) 8: 1 *Journal of International Economic Law* 213.

provided in Article 12, including developing codes of conduct and preventing conflict of interests.[273] Also, Member States are obligated to disallow the tax deductibility of expenses that constitute bribes. In contrast to UNCAC, the OECD has only made a non-binding recommendation on tax deductibility of expenses that constitute bribes. [274]

The inclusion of the private sector reflects recognition of the fact that all-inclusive prevention of corruption by government is impossible unless companies are subjected to the same high standards in their dealings with one another as they are in dealings with the government. Also, it has been recognised that some multinational corporations have a huge economic influence. They have some leverage in their relations with States. Therefore, they are actors that cannot be omitted from an international anti-corruption strategy.[275]

iv) Consequences of corruption

UNCAC attempts to address the consequences of corruption in Article 34. It directs Member States to take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. However, States can determine the effect of corruption on underlying transactions, considering the rights of third Parties which were acquired in good faith. In this context, Member States may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument, or take any other remedial action.

It is important to note that this provision contains a safeguard clause that filters the obligations of State Parties in case of conflicting constitutional or fundamental rules. In other words, Article 34 also aspires to be accommodative of the different principles within the Member States. So far, there is no consensus on the civil consequences of corruption in business transactions. The first view is to regard the transaction as valid and enforceable. The rationale for recognising the contract is due to rules of State responsibility.[276] This entails 'the accountability of states for violation of international law, and the requirement that States make

[273] In terms of Art 12 of the UNCAC, the preventive measures proposed includes: promoting cooperation between law enforcement agencies and relevant private entities; promoting the design of standards and procedures meant to safeguard the integrity of relevant private entities, including codes of conduct; promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities; preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities and preventing conflicts of interest.
[274] OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, 11 April 1996, 35 I.L.M. 1311,
[275] Webb (n 272 above) 213.
[276] n 152 above.

reparation for such violations'.[277] The presence of international instruments governing corruption is evidence that corruption is a recognised international wrong. States therefore have to be accountable for the actions of their organs, together with the acts of their public officials. State responsibility further includes meeting contractual obligations despite the corrupt activities of State agents.[278] Liability arises in that the agent receives a bribe while acting in his capacity as a public official in exchange for exercising his discretion in discharging his public duty, even if it the act exceeds his authority or contravenes instructions.[279] Inasmuch as the State might have been a victim of corruption, internationally it will be liable, as it has failed to take measures to stop the occurrence of bribery. [280] In terms of Article 50 of VCTL, the protection afforded to States as victims of corruption is minimal since corruption may not be invoked where the States whose representative was corrupted expressly agreed after the corruption was discovered that the treaty was valid, or acquiesced in its validity.[281] The State can recoup its losses by suing the public official under its national laws. To render the contract invalid means the State will be withdrawing from the treaty and in the process profit from its violations of international law.[282] The State responsibility rules render the contract valid even in the face of corruption.

The second view is to consider the whole investment contract null and void and unenforceable.[283] In this case, the rationale is rooted in principles of contract, which dictate that, illegal deals are null and void and unenforceable. Where Parties resort to fraud, illegal activities and underhanded dealings in order to acquire a benefit they would not have otherwise obtained, society should be seen not to condone them. A handsome number of awards support this view.[284] In the *World Duty Free* case, the State enjoined the Tribunal to decide that the contract on which the investor's claims rely on was unenforceable due to being tainted by

[277] H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *Journal of World Investment & Trade* 15 quoting P E Comeaux & N S Kinsella *Protecting foreign investment under international law: legal aspects of political risk* (1996) 32.
[278] H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *Journal World Investment & Trade* 16.
[279] Art 7 of State Responsibility for International Wrongs.
[280] Klaw (n 62 above) 77.
[281] Wiebalck (n 228 above) 627.
[282] Wiebalck (n 228 above) 627.
[283] Raeschke-Kessler (n 152 above) 594.
[284] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7; *Buenos Aires v [Company A],* ICC Award No. 1110 of 1963; *Frontier AG and Brunner Sociedade v Thomson CSF* ICC case no. 7664; *Westacre v Jugoimport* ICC case No. 7047; *Hilmarton v OTV*, ICC case No. 5622; *Westinghouse and Burns v National Power Corporation* ICC case No. 6401.

corruption.[285] The Tribunal stated that 'contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal'.[286]

The UNCAC also contains a clause on compensation for damages caused by corruption. Article 35 requires each Member State to ensure that entities or persons who have suffered damage from corruption 'have a right to initiate legal proceedings against those responsible for that damage in order to obtain compensation'. This provision gives a private right of action for victims of corruption.[287] For instance, in 2010, BAE Systems Inc. pleaded guilty to an offence of making secret payments of £7.7 million to a Tanzanian middleman for marketing purposes in connection with the sale of a £28 million radar system to the Government of Tanzania.[288] In its settlement with the UK's Serious Fraud Office, BAE included provision of on *ex gratia* payment of £30 million to the government of Tanzania. The compensation payment was to be used for a specific purpose, that is, the purchase of textbooks and other school supplies and equipment.

In practice the payment of compensation takes a long time, especially if it is not subject to a specific court order that dictates the terms and timing of the payment. For example, in the *BAE Systems/Tanzania Radar Defence System* case, BAE took over two years to pay the compensation. The whole purpose of Article 35 can be defeated if the defendant exercises control over the mechanisms and timing of payment. Further, it should be noted that the right in Article 35 does not limit the right of each State to decide the circumstances under which it will make its courts available for such claims, such as rules on *locus standi*.

However, since Article 35 lacks details, Costa Rica has argued that this provision should be construed so as to incorporate or permit for the concept of 'social damages', which refers to compensation for the damage caused to society by corrupt conduct.[289] Costa Rica argues that social damages caused by corruption are manifested in diminished societal welfare, such as in education and health-care services. It even links the concept of social damages to Article 62,

[285] *World Duty Free supra* para 108.
[286] *World Duty Free supra* para 157.
[287] The rights of victims of corruption have also been recognised in various international interstate forums including: the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power GA/RES/40/34 of 29 November 1985; the UN Guiding Principles on Business and Human Rights (2011), which provide a protect, respect and remedy framework and the 2015 UN Doha Declaration on Crime Prevention and Criminal Justice.
[288] BAE Systems/Tanzania Radar Defence System case. http://star.worldbank.org/corruption-cases/node/18470 (accessed 01 February 2018).
[289] C Rose *International anti-corruption norms their creation and influence on domestic legal systems* (2015) 120.

which provides that Member States should take into account the negative effects of corruption on society, and in particular on sustainable development, when implementing the Convention. In line with this concept of social damage, Costa Rica instituted a civil action in 2004 against Alcatel CIT, a French global telecommunications equipment company, claiming monetary compensation for the damage caused by the bribes to 'the people and the Treasury of Costa Rica, and for the loss of prestige suffered by the Nation of Costa Rica (social damages)'.[290] In 2010, Alcatel-Lucent France (the successor to Alcatel CIT) agreed to pay approximately US$10 million to the Costa Rican Government to settle the claims regarding social and moral damages.[291]

From the discussion above, it is submitted that the compensation and consequences of corruption on international business transactions should be addressed in international investment legal frameworks. The legal investment regime should provide insights into how to deal with these issues in a comprehensive manner, taking into consideration the characteristics of corruption in international investments. Investment laws should address the fundamental legal and policy questions that arise where corruption is alleged, such as the rights of third Parties which were acquired in good faith and delineate the scope of compensation for such activities.

v) Strengths and limitations of the UNCAC

The UNCAC's strengths are that it covers an unprecedented breadth of acts of corruption and it pays a great deal of attention to issues like preventive measures, international cooperation and asset recovery. International cooperation is key because of the international reach of corruption. Corruption by nationals of a certain State can occur in the territory of another State. For effective implementation of the domestic laws of the affected State, international cooperation is required. In addition, the proceeds of corruption might be harboured in another State, and their recovery is primarily dependent on the cooperation of the other State.[292]

Nevertheless, the UNCAC suffers certain defects in combatting corruption in international business transactions. Foremost, UNCAC gives excessive discretion on Member States on corrupt practices that they can criminalise domestically. Of the eleven articles on

[290] Rose (n 289 above) 121.
[291] Rose (n 289 above) 121.
[292] See instance, the case of *Attorney General v Reid Attorney General of H.K. v Reid* [1993] UKPC 36, 38 (P.C.) (N.Z.), wherein the Attorney General of Hong Kong went all the way up to the Judicial Committee of the Privy Council in London seeking to recover portions of approximately HK $12.4 million of bribe money that had been converted into immovable property.

criminalisation of corrupt conduct, only five of those provisions are mandatory while the rest are non-mandatory. The mandatory articles address bribery of national public officials; active bribery of foreign public officials and officials of public international organisations; embezzlement, misappropriation or other diversion of property by a public official; laundering proceeds of crime; and obstruction of justice.[293] These mandatory provisions are not novel, since four of them also appear in the UN Convention against Transnational Organised Crime (the Palermo Convention).[294] Such discretion renders one of the purposes of the Convention, which is to create common legal standards in countries' legislation, unattainable. While the goal to attain common legal standards may not be attained due to differing interpretations, common standards are a basic requirement for a harmonised interpretation of norms. With discordant domestic frameworks on combatting corruption, transnational corruption cannot be effectively dealt with because foreign investors are expected to comply with domestic laws when establishing and even operating their investments. Should these domestic frameworks differ, foreign investors might find themselves violating their home States' laws. For example, in the UK, the Bribery Act prohibits facilitation payments, while US laws do not. Should a British investor make facilitation payments in the US, under the UK law he will be held liable, because the UK Bribery Act extends jurisdiction to offences committed both within the UK and outside, provided that such businesses have a 'close connection' to the UK.

Additionally, since the Convention only criminalises private-public corruption, corruption in the private sector appears to lie strictly in the purview of Member States in line with Article 12. Argandona argues that the lack of obligation on Member States to criminalise bribery and embezzlement in the private sector inevitably makes it more difficult to prevent and combat public corruption, especially in the context of globalisation, outsourcing and privatisation of State-owned companies, which has blurred the distinction between private and public sector in most countries.[295]

Further, the protection of sovereignty[296] guaranteed by the UNCAC together with the provisions that permit States to establish or maintain 'an appropriate balance between any

[293] Art 15-17, 23 and 25 of the UNCAC.
[294] Art 5 (participation in an organized criminal group), Art 6 (laundering of proceeds of crime), Art 8 (Criminalization of corruption) and 23 (Criminalization of obstruction of justice) of the United Nations Convention against Transnational Organized Crime, 2004. See also Rose (n 289 above) 107-108.
[295] A Argandona 'The United Nations Convention against Corruption and its impact on international companies' (2007) 74 *Journal of Business Ethics* 491.
[296] Art 4 of the UNCAC.

immunities or jurisdictional privileges accorded to its public officials for the performance of their functions'[297] reflects the international community's hesitance to control the behaviour of public officials. This principle of sovereignty extends even to the review mechanisms established under the Convention.[298] The strict consideration of sovereignty means States can still insist on non-intervention in their domestic affairs, and this has to be respected by other States. The provision runs counter to the overall spirit of the Convention of combatting corruption through requiring States to undertake anti-corruption measures to achieve this goal.

Studies carried by the Corruption and Economic Crime Branch of the United Nations Office on Drugs and Crime have indicated that although a considerable number of countries had undertaken legislative amendments and structural reforms to align with the UNCAC, there were considerable outstanding issues, especially concerning the inadequate execution of measures that are mandatory under the UNCAC. These issues include lack of consistent and dissuasive sanctioning systems and a complete absence of the implementation of some provisions, especially the offence of bribery of foreign public officials and officials of public international organisations.[299] Lack of normative measures with regard to these offences is noticeable in the countries from the Group of Asia Pacific States and the Group of African States.[300] Reasons for such exclusion/omission include misinformed possibilities of contradiction between criminalising the behaviour of foreign public officials and officials of public international organisations and the immunities offered to international public officials mentioned in the Convention on the Privileges and Immunities of the UN.[301]

Nevertheless, the significance of the UNCAC to the present study cannot be understated. It reflects the hesitant attitude of the international community to effectively address corruption. From the early 1970s, when corruption was addressed by the UN system, Member States were not willing to create legally binding obligations due to economic and political interests. The General Council's Resolutions were passed regularly until 2005, when the UNCAC was finally adopted. The political and economic interests that were a drawback in concluding a global anti-corruption treaty are now given propriety in the treaty itself. For instance, the fear of legal

[297] Art 30 (2) of the UNCAC.
[298] Terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption para 37-38.
[299] United Nations Office on Drugs and Crime *State of implementation of the United Nations Convention Against Corruption. Criminalization, law enforcement and international cooperation* 2nd ed (2017) 37-38.
[300] (n 299 above) 37.
[301] (n 299 above) 38.

action against US companies and officials in other countries made private sector corruption receive less attention.[302] This was surprising since the US already had an FCPA prohibiting payment of bribery to obtain business, which led private companies to adopt codes of conduct. An opportunity to decisively deal with corruption was eroded by the global community's timid approach. The above findings buttress the hypothesis of this thesis that the current international anti-corruption framework is inadequate to combat corruption in international business transactions.

3.5. Inter-American Convention against Corruption (IACC)

The IACC is the first legally binding regional anti-corruption treaty, adopted in March 1996 in Caracas, Venezuela. As early as 1992, the Inter-American Juridical Committee warned of the importance of addressing legal problems originating from corruption and the need to have an internal convention within the OAS.[303] The Presidents and Heads of State of OAS Members, in their December 1994 Summit in Miami, discussed corruption as a priority upon recognising that combatting corruption was an indispensable condition for regional stability, peace and development.[304] The Chilean delegation requested the establishment of a Working Group on Probity and Civic Ethics to, *inter alia*, draft the text for the proposed Convention on corruption.[305] The Inter-American Juridical Committee also provided comments on the draft Convention prepared by the Working Group.

The objectives of the IACC are set out in Article II: to prevent, detect, punish, and eradicate corruption by promoting and strengthening mechanisms in each of the Member States and promoting cooperation between the Member States. Thus, the IACC recognises the international reach of corruption and the need to promote and facilitate cooperation between States in order to fight corruption. The need for cooperation is highlighted in the Preamble and

[302] Webb (n 272 above) 214.
[303] Manfroni (n 255 above) ix.
[304] Manfroni (n 255above) xi.
[305] Manfroni (n 255 above) x.

emphasised in Articles XIV,[306] XV[307] and XVI.[308] The cooperation envisaged by the IACC involves individual States, the private sector, civil society and the international community.

3.5.1. Preventive measures

In line with its objective of preventing corruption, the IACC in Article III provides for various preventive measures that the Member States should consider. These include establishing measures and systems requiring government officials to report acts of corruption to appropriate authorities in their performance of public functions; establishing systems for registering the earnings, property and liabilities of public officials; creating oversight bodies for implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts; and creating devices to encourage participation by civil society and non-governmental organisations in efforts to prevent corruption. These preventive measures are similar to those provided in the UNCAC and serve the same purpose of eliminating impunity of public officials, promoting transparency in the public sector and encouraging active participation by educated citizens.[309]

3.5.2. Acts of corruption

The following acts of corruption are prohibited: passive and active bribery; failure by a public official to fulfil his duties for the purpose of illicitly obtaining benefits for himself or for a third party; asset laundering; and participating as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission of the above activities.[310] Member States are obliged to criminalise these acts of corruption within their domestic laws and to facilitate cooperation among themselves.[311] These identified acts of corruption trigger the application of the Convention's mechanisms and commitments, such as the obligation to extradite a person accused of any of the corrupt activities and rendering assistance and cooperation for the purposes of punishing the offender.

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[306] Art XIV of the Inter-American Convention against Corruption (hereinafter 'IACC') requires members to provide mutual assistance and technical cooperation in preventive, investigative, and enforcement efforts, according to their domestic laws.
[307] Art XV of the IACC is dedicated to furnishing assistance among members for the recovery of asset tainted by corruption.
[308] This Article prohibits the rules relating to bank secrecy or confidentiality as the rationale for denying information or assistance to a requesting State Party
[309] Manfroni (n 255 above) 32.
[310] Art VI: 1 of the IACC.
[311] Art VII of the IACC.

Additionally, the IACC also establishes an obligation to prohibit and punish transnational bribery, subject to the Constitutions and fundamental principles of each Member State's legal system.[312] This Article mirrors all the elements of the US's FCPA, enacted in 1976. Transnational bribery occurs when a person from one country bribes a public official of another State in relation to an economic or commercial transaction. This is an offence against free and fair competition because it induces a government to purchase the products of one company to the detriment of others or is used to evade certain restrictions to which other companies are subjected.[313] Transnational bribery is more harmful than domestic corruption since, *inter alia*, it 'allows the enrichment of some national economies to the detriment of others; not only to the detriment of the economy of the country to which the bribed official belongs, but also to the detriment of the economies of the countries where companies reside that have been disqualified from competition because of a corrupt act'.[314]

In the IACC context, the need to forbid transnational bribery is motivated by the ill-effects of corruption on economic development of OAS countries, even more than concerns of unfair completion.[315] This is reflected in the first three paragraphs of the Preamble to the Convention, which emphasises economic development.[316] For this reason the Convention is made applicable to corruption of a 'government official or a person who performs public functions',[317] not just public officials as defined in the UNCAC. This is synonymous with government corruption defined by Shleifer and Vishny as 'the sale by government officials of government property for personal gain'.[318] Its inclusion is significant since some States may lack interest in punishing their public officials. In such cases, the companies residing in the host State that view themselves as harmed by these corrupt practices can institute legal action

[312] Art VIII of the IACC.
[313] Manfroni (n 255 above) 56.
[314] Manfroni (n 255 above) 56. See also R H Sutton 'Controlling Corruption through Collective Means: Advocating the Inter-American Convention against Corruption' (1996) 20:4 *Fordham International Law Journal* 1437-1441.
[315] Llamzon (n 6 above) 57.
[316] The Preamble to the IAAC provides:

> 'THE MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES, CONVINCED that corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples;
> CONSIDERING that representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance;
> PERSUADED that fighting corruption strengthens democratic institutions and prevents distortions in the economy, improprieties in government and damage to a society's moral fibre…'

[317] Art VI of the IACC.
[318] A Shleifer & R W Vishny 'Corruption' (1993) 108:3 *The Quarterly Journal of Economics* 599.

against the host State for failure to take measures to stop the occurrence of bribery[319] and thus indirectly promoting unfair competition. In the investment regime, there is even a possibility of the host State having violated the obligation of fair and equitable treatment.[320] The investor may argue that the fair and equitable treatment was denied to it because it did not pay a bribe.[321] However, the application of this provision is limited. Transnational bribery will not be regarded as an act of corruption under the Convention but will be regarded as illegal in those signatory countries that have incorporated this offence into their domestic legal systems.

The IACC also requires Member States to make illicit enrichment an offence under their laws, provided that it would not contravene fundamental principles of their legal systems.[322] Illicit enrichment is the 'significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income'.[323] Illicit enrichment creates legal challenges because it reverses the burden of proving the commission of an offence by placing it on the suspect to show how he obtained his assets. Essentially, it challenges the presumption of innocence recognised in criminal cases. However, other OAS Member States such as Honduras and Jamaica have since recognised illicit enrichment as a criminal offence.

3.5.3. Strengths and limitations

The IACC has adopted a transnational approach in combatting corruption. This is evidenced by its emphasis on cooperation in investigation, prosecution and extradition of offenders. These provisions[324] translate specific individual efforts of individual countries into a regional movement,[325] unlike the FCPA, which emphasises criminalisation and a regulatory approach

[319] Klaw (n 62 above) 77.
[320] See (n 77 above). Tribunals have also adopted definitions or descriptions that include protection of legitimate expectations (*Tecmed v Mexico* ICSID Case No ARB (AF)/00/2, Award of 29, May 2003; *CMS v Argentina* Award of May 12, 2005*);* denial of justice (*Loewen v United States of America* ICSID Case No. ARB (AF)/98/3); lack of due process (*Metalclad v Mexico* Award of August 30, 2000 paras 91 and 97; *Waste Management, Inc. v Mexico* ICSID Case No. ARB (AF)/00/3) and abusive treatment such as harassment, coercion, abuse of power by the host State (*Saluka v Czech Republic* Partial Award of March 17, 2006 para 308; *Desert Line Projects LLC v Yemen* ICSID Case No. ARB/05/17 paras 179, 185-187, 190 and 193). See also UNCTAD *Fair and Equitable Treatment UNCTAD Series on International Investment Agreements II: A Sequel* (2012); M Sornarajah *The international law on foreign investment* 3rd ed (2010) 349 -539.
[321] H Tezuka 'Corruption issues in the jurisdictional phase of investment arbitration' in D Baizeau & R Kreindler (eds) *Addressing issues of corruption in commercial and investment arbitration* (2015) 54.
[322] Art IX of the IACC.
[323] Art 20 of the United Nations Convention against Corruption (2005). See also Art IX of Inter-American Convention against Corruption (1997); Art 8 of the African Union Convention on Preventing and Combating Corruption (2003) and Art 6 (3) (a) of ECOWAS Protocol on the Fight against Corruption (2001).
[324] See Art XIII-XVI of the IACC.
[325] R H Sutton 'Controlling corruption through collective means: advocating the Inter-American Convention against Corruption' (1996) 20: 4 Article 10 *Fordham International Law Journal* 1473.

targeting both individuals and corporations. Overall, the IACC has broader provisions on corruption. For instance, its provisions on bribery are not restricted to bribery in connection with business transactions but also bribery that relates to 'any act or omission in the performance of that official's public function'.[326]

Further, Member States are also pushed to consider criminalising a series of further offences on improper use of classified or confidential information or government property by an official for personal gain and diversion of State property, monies or securities.[327] All offences identified in the Convention, once adopted, are extraditory offences, and States are mandated to cooperate even if other States have not criminalised such an act.

However, the IACC has some weaknesses. Its definition of a public official is narrow: it does not include officials or agents of a public international organisation. Also, the IACC does not explicitly recognise acts such as facilitation payments[328] as offences, thereby increasing barriers to trade and unfair competition.[329] Further, it is hesitant to affirmatively criminalise transnational bribery without subjecting it to Members' domestic laws, despite its harm as alluded above.

The extent of the IACC's impact in combatting corruption within the OAS is still unclear. The average score on the 2016 Corruption Perceptions Index was 44 out of 100 for the Americas, an indication that corruption remains a major problem.[330] One of the empirical studies so far conducted on the impact of the IACC in four Member States (Guatemala, Honduras, Jamaica, and Trinidad and Tobago) has indicated that these countries' scores on perception indexes did not improve, and in some instances actually worsened, after ratification.[331] Altamirano contends that the IACC has not been effective at reducing actual corruption because it has

[326] Art VIII of the IACC.
[327] Art XI of the IACC.
[328] The Transparency International's definition of facilitation payments is 'a small bribe, also called a 'facilitating', 'speed' or 'grease' payment; made to secure or expedite the performance of a routine or necessary action to which the payer has legal or other entitlement.'
[329] R H Sutton 'Controlling Corruption through Collective Means: Advocating the Inter-American Convention against Corruption' (1996) 20: 4 Article 10 *Fordham International Law Journal* 1474. For contrary view see L Posadas 'Combating Corruption Under International Law' (1999-2000) 10 *Duke Journal Of Comparative & International Law* 388, who argues that the language used to define the scope of the offense in Art. VIII, "in connection with any economic or commercial transaction" can be read to include conduct such as facilitation payments since such payments are always made in connection with a business transaction.
[330] https://www.transparency.org/news/feature/americas_sometimes_bad_news_is_good_news accessed 8 February 2018.
[331] G D Altamirano 'The Impact of the Inter-American Convention Against Corruption' (2007) 38 *University of Miami Inter-American Law Review* 539.

failed to create a credible threat of sanctions for public officials within the various Member States.[332] Additionally, corruption is a pandemic deeply rooted in most of Latin American's historical, social, economic and institutional situations and requires reforms that go beyond law.[333] However, the importance of the IACC lies in creating this necessary and important step in the fight against corruption and in forming a systematic approach towards the problem.

For the purpose of this thesis, the IACC framework shows that fighting corruption does not merely require enacting laws. Other factors such as historical, social, economic and institutional situations must be considered when enacting anti-corruption laws. For instance, it is difficult to monitor and enforce anti-corruption laws, no matter how good they are, if the institutional frameworks are weak and people's access to public information is poor with no public participation in scrutinising the actions of public officials. Also, historical events such as colonisation can explain the capacity of certain States to deal with corruption. During the colonial period, the colonisers took control of resources and lucrative opportunities. Two scenarios were created: leadership was associated with wealth, and those hoping to access the controlled resource had to bribe their way in, thereby entrenching the practice of bribery in the system. At independence, new governments inherited economies that were almost completely dominated by a small number of well-connected elites and highly centralised governments. This is evident in some Latin American and African countries.[334] As long as the above elements exist in some host States seeking to domesticate anti-corruption conventions such as the IACC, corruption cannot be adequately addressed. Effective ways to address corruption require a strong institutional apparatus, a solid legal body, and a clear and strong political will.[335]

3.6. OECD Anti-corruption legal framework

3.6.1. Background

The moral crusade against corruption by the US through the FCPA created economic disadvantages to US firms because they were unable to export to certain countries with weak

[332] Altamirano (n 331above).
[333] Altamirano (n 331 above).
[334] E A Lynch 'Corruption and corrosion in Latin America' (January-February 2019) *Military Review* 117. See also L Angeles & K C Neanidis 'The persistent effect of colonialism on corruption' (2015) 82: 326 *Economica* 319-349; M M Mulinge & G N Lesetedi 'Interrogating our past: colonialism and corruption in Sub-Saharan Africa' (1998) 3:2 *Journal of Political Sciences* 15-28; J Svensson 'Eight questions about corruption' (2005) 19:3 *Journal of Economic Perspectives* 26; J Udombana 'Fighting corruption seriously? Africa's anti- corruption Convention' (2003) 7 *Singapore Journal of International & Comparative Law* 447-488.
[335] *Special Report Corruption: The Achilles Heel of Latin American Democracies*, September 2016 https://ideasbr.llorenteycuenca.com/wp-content/uploads/sites/8/2016/09/160913_DI_rep_corruption_LatAm_ENG.pdf (accessed 25 October 2019) 16.

anti-corruption regulations, while OECD members could export without restrictions. Under the FCPA, companies and individuals can be held civilly and criminally liable for corruption even if committed outside the US, provided that either the company or person involved is a US national, or the companies are organised under US laws, or the company has its principal place of business in the US. FCPA's scope also extends to companies that are listed on stock exchanges in the US or are required to file periodic reports with the Securities and Exchange Commission. It was estimated that between 1994 and 1996, US corporations lost around US$11 billion due to bribery by competing firms.[336]

An amendment to the FCPA in 1988 required the President to negotiate an FCPA-like agreement within the OECD framework, since OECD Members represented America's primary business competitors. The negotiations were not successful because OECD countries felt that the US wanted to internationalise the FCPA. Other crucial concerns raised by the OECD countries centred on the difficulties in detecting and proving bribery outside their territories and the fear of disadvantaging countries' OECD companies based in countries without anti-corruption laws.[337]

3.6.2. OECD Recommendations

The first non-binding anti-corruption instrument adopted by the OECD was the Recommendation on Bribery in International Business Transactions. The 1994 Recommendation marks the shift from diagnosing corruption as not merely a moral problem but also an economic problem that distorts international competitive conditions.[338] It recommended, *inter alia*, that Member countries should take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions. Domestic actions that Members may take to meet the goal of combatting corruption included developing civil, commercial and administrative laws and regulations so that bribery would be illegal.[339]

[336] Jakobi (n 238 above) 138-139; Llamzon (n 6 above) 50.
[337] Jakobi (n 238above) 139.
[338] See Preamble :

> 'Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;'

[339] Art III of OECD Recommendation on Bribery in International Business Transactions (1994).

A revision of the 1994 Recommendation was made and adopted in 1997. [340] It covered five areas: the criminalisation of bribery of foreign public officials; the tax deductibility of bribes; accounting requirements, auditing and control practices; public-procurement regulations; and international legal and related cooperation. Members also agreed on the common elements of criminal legislation of bribery such as criminalising bribery of foreign public officials in order to obtain or retain business.[341] In terms of enforcement, such should not be 'influenced by considerations of national economic interest, fostering good political relations or the identity of the victim'.[342]

In line with contemporary initiatives for fighting corruption, the OECD adopted the Recommendation for Further Combatting Bribery of Foreign Public Officials in International Business Transactions in 2009.[343] It recommends that governments should encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics and Compliance, included as Annex II to the Recommendation. The 2009 Recommendation targets facilitation payments, improvement of reporting mechanisms and whistleblower protection.

Facilitation payments deserve special attention. The OECD framework does not define facilitation payments. TI's definition of facilitation payments is 'a small bribe, also called a "facilitating", "speed" or "grease" payment; made to secure or expedite the performance of a routine or necessary action to which the payer has legal or other entitlement'.[344] Nonetheless in terms of OECD Commentary on Article 1 (1) of the OECD Convention, small facilitation payments do not constitute payments made 'to obtain or retain business or other improper advantage', and accordingly, making such payments is not an offence. It was averred that such forms of payment could be addressed by means such as support for programmes of good

[340] Revised Recommendation of the Council on Combating Bribery in International Business Transactions (adopted by the Council at its 901st Session on 23 May 1997 [C/M (97)12/PROV]).
[341] Art 3 of the Annex to the Revised Recommendation of the Council on Combating Bribery in International Business Transactions (adopted by the Council at its 901st session on 23 May 1997 [C/M (97)12/PROV]).
[342] Art 6 of the Annex to the Revised Recommendation of the Council on Combating Bribery in International Business Transactions (adopted by the Council at its 901st session on 23 May 1997 [C/M (97)12/PROV]).
[343] Other instruments within the OECD to fight corruption are the OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service (2003); Recommendation on Bribery and Officially Supported Export Credits (2006); OECD Recommendation on the Tax Deductibility of Bribes to Foreign Officials (2009); OECD Principles for Transparency and Integrity in Lobbying (2010); OECD Recommendation on Public Procurement (2015) and OECD Recommendation of the Council on Public Integrity (2017).
[344] https://www.transparency.org/glossary/term/facilitation_payments (accessed 21 October 2019).

governance; and criminalisation was not seen as a practical or effective complementary action.[345] Scholars who support legalising facilitation payments argue that these payments are indispensable to the proper functioning of public administration in poor States to augment the government officials' salaries.[346] Rose-Ackerman considers these payments unacceptable. She avers that they contribute to an uncertain business climate and encourage the spread of corruption to other governmental departments.[347] However, the Recommendation led to the OCED's new position on these payments. It specifically calls on governments to review their approach to facilitation payments and encourages companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures. This is an important development in fighting international corruption.

3.6.3. OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions

The OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions was adopted in 1997 and came into force in 1999. As of 9 March 2018, this Convention had been adopted by 35 OECD countries and 8 non-OECD countries. Its primary objective is to criminalise foreign official bribery through national legislation. The Convention applies the concept of 'functional equivalence', which requires Members to adjust their domestic laws so that they achieve the purpose and effect of the treaty. This does not require a uniform language in the laws or a change of fundamental legal principles, but merely the enactment of laws that provide similar results. This Convention is the first and only international anti-corruption instrument focused on active bribery involving foreign public officials. However, it does not apply to bribery that is purely domestic or where the beneficiary is not a public official. Further, the bribe should have been paid with the intention to secure a business advantage. Unlike the UNCAC, which recognises different forms of corruption, this Convention only recognises bribery. Therefore, the Convention has a limited application influenced by its historical background, alluded to above.

As regards sanctions, the Convention provides that the criminal penalties must be 'effective, proportionate and dissuasive' and in cases of natural persons can include deprivation of

[345]OECD Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on 21 November 1997 para. 9.
[346] J S Nye 'Corruption and political development: a cost-benefit analysis.' (1967) 61:2 *American Political Science Review* 417-427 quoted in A P Llamzon *Corruption in international investment arbitration* Oxford (2014) 36.
[347] S Rose-Ackermann 'The challenge of poor governance and corruption' in *Global crisis, global solution* (2004) 16-17.

liberty.[348] Where criminal responsibility is not possible, other non-criminal sanctions must be imposed which are effective, proportionate and dissuasive sanctions, including monetary sanctions.[349] As to what is proportionate in terms of Article 3 (1), the Convention and Recommendations lack guidelines. For instance, disqualifying a company from future government contracts may cause disproportionate harm to innocent employees who would lose their jobs. At the same time, it can be necessary as a way of deterring companies from engaging in corrupt practices.[350]

Article 5 reiterates the 1997 Revised Recommendation that considerations of national economic interest and State-State relations must not influence the investigation and prosecution of the bribery of a foreign public official. However, the *BAE Systems* case involving government-to-government arms deals between the UK and Saudi Arabia, reflects that in reality enforcement of anti-corruption efforts can be influenced by national, economic or even political relations. In this case, the UK agreed to supply defence equipment and aircraft to Saudi Arabia in return for oil. To facilitate the deal, it was alleged that BAE paid bribes to senior Saudis through a secret slush fund. In 2004, the Serious Fraud Office initiated investigations into the alleged bribery. The investigations were halted in 2006 at the instructions of the Prime Minister, Tony Blair, averring that the investigations threatened national security. Saudi Arabia had threatened to withdraw counter-terrorism assistance and intelligence if the investigations had continued. It had further threatened to withdraw from a £10 billion deal to buy Eurofighter Typhoons.[351]

In some cases, provisions like Article 5 are impractical, especially in those instances where the regulator and the regulated become too intertwined and share the same ideologies and even threats. The regulator may be captured to ensure non-enforcement of law.[352] Also, in cases where governments understand the importance of the country's economic and national interests that are shaped by transnational business agreements such as the UK-Saudi Arabia deals, Article 5 is impractical to enforce.

[348] Art 3 (1) of the OECD Convention on Bribery.
[349] Art 3 (2) of the OECD Convention on Bribery.
[350] Llamzon (n 6 above) 52.
[351] J van Erp, W Huisman, G V Walle with assistance of J Beckers (eds.) *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (2015) 49.
[352] (n 351 above).

The Convention has strong implementation and monitoring mechanisms, involving three phases.[353] The first phase is an evaluation of whether the country has implemented the Convention in its national laws; this is determined by answers to questionnaires and legal materials submitted. The second phase focusses on the enforcement of the implementing legislation in practice; this is done through examining the structures in place for dealing with foreign bribery cases, the level of resources deployed and personnel training. Questionnaires are used and on-site visits can be conducted. Civil society is also permitted to provide information or opinions subject to consultation with the country being examined. The third phase is to maintain an up-to-date assessment of the structures put in place by the Member to the Convention. It concentrates on three pillars, namely, the progress made by the Member to the Convention on weaknesses identified in the second phase; issues raised by changes in the domestic legislation or institutional framework of the Member and the enforcement efforts and results; and other key group-wide cross-cutting issues. An additional phase exists (Phase 4) that focuses on enforcement and cross-cutting issues tailored to specific country needs and outstanding recommendations from Phase 3.

3.6.4. Strength and limitations

The OECD anti-corruption legal framework developed gradually through adoption of recommendations and ultimately a binding treaty. Most Members and Parties have since altered their domestic legislation to meet the OECD Convention and Recommendations. The OECD's approach to fighting corruption includes regulations on accounting procedures and proper bookkeeping and transparency in taxation. What is clear is that the Convention is limited to the act of bribery by foreign public officials. It focusses only on the supply side of corruption, that is, active bribery. It has been argued that the Convention was purposefully crafted to deal with active bribery, since it is easy to regulate corporations that are subject to the jurisdiction of States that are able to enforce anti-corruption laws more effectively than to enforce anti-corruption norms against public officials.[354] The failure to sanction the recipient is a major defect of this Convention. It is commonly understood that bribery is a bilateral act and therefore any meaningful effort to combat it should equally involve the recipient. Consequently, the effectiveness of the OCED legal framework in addressing transnational corruption is limited since only one form of corruption is addressed, that is, active bribery. Other corrupt activities

[353] http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase1countrymonitoringoftheoecdanti-briberyconvention.htm (accessed 02 February 2018).
[354] Llamzon (n 6 above) 67.

such as influence peddling are not addressed.[355] Also, the legal framework is restricted in its application to OECD Members.

Another defect noted is that it is not clear whether the Convention applies to the bribery of family members of foreign public officials.[356] However, it appears that the Convention would cover family members of a foreign official to the extent that the payment is effectively passed to the foreign public official or the foreign public official indirectly benefitted from it. The Convention recognises that bribery can be committed through intermediaries, and family members may act as intermediaries.[357] In addition, the Good Practice Guidance on Implementing Specific Articles of the Convention states that a legal person cannot avoid responsibility by using intermediaries, including related legal persons.[358]

The OECD anti-corruption legal framework is instrumental to the current study. It is the sole framework that addresses bribery of foreign public officials involved in international business transactions, focusing more on the supply side of corruption. True, errant companies have paid millions in fines, and some have been barred from transacting with the World Bank.[359] However, the current thesis argues that this not enough. Since there is a growing realisation that combatting corruption is ideal for the development of States, there is a need to focus also on the demand side of corruption. The defects of the OECD presents an opportunity to deal with the demand side of corruption through establishing a framework that examines the culpable conduct of public officials.

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[355] Influence peddling is 'a situation where a person misuses his influence over the decision-making process for a third party in return for his loyalty, money or any other material or immaterial undue advantage', see W Slingerland 'The fight against trading in influence' (2011) 10:1 Public *Policy and Administration* 54.

[356] L Posadas 'Combating Corruption under International Law' (1999-2000) 10 *Duke Journal of Comparative & International Law* 381.

[357] Art 1 of the OECD Convention against Bribery.

[358] Annex 1: Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Council on 26 November 2009. The use of intermediaries in international business transactions is rife. For instance in the *Mastermind Intermediary Case*, the intermediary bribed foreign public officials to obtain confidential information such as specifications of future public procurements. The intermediary then approached potential bidders in the procurement and sold this information to his preferred bidder, *see* OECD *Typologies on the Role of Intermediaries in International Business Transactions* Working Group on Bribery in International Business Transactions Final Report (9 October 2009) 29. See also H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *Journal of World Investment & Trade* 13.

[359] World Bank Listing of Ineligible Firms & Individuals http://web.worldbank.org/external/default/main?contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266 (accessed 01 March 2018).

3.7. European Instruments

In Europe, transboundary corruption was at some point tolerated or justified as a means of attaining business objectives overseas. In countries such as France, Germany and Switzerland, bribes paid to foreign public officials for business reasons were tax-deductible. Only in the late 1990s were these laws changed in order to comply with the OECD Convention on Bribery.[360] Besides the OECD framework, there also exists a detailed anti-corruption framework through the Council of Europe.

3.7.1. Council of Europe

The CoE was founded by the Treaty of London on 5 May 1949. It currently has 47 Member States and all 28 EU Members.[361] The CoE principally aims to defend human rights and parliamentary democracy. It is composed of two bodies, the Committee of Ministers and the Parliamentary Assembly, as well as three institutions, the European Court of Human Rights, the Commissioner for Human Rights and the Congress of Local and Regional Authorities.

The first anti-corruption initiative within the CoE goes back as far as 1981, when the organisation agreed on a Recommendation on economic crimes.[362] Though corruption was not explicitly mentioned, the Recommendation listed offences which should be regarded as economic crimes: fraudulent practices and abuse of an economic situation by multinational companies, and fraudulent procurement or abuse of State or international organisations. The above activities are considered as corrupt activities in modern anti-corruption laws.

At its 1994 Malta Conference, the CoE recommended the adoption of an international convention on corruption. Between 1994 and 1999, Working Groups developed two conventions, namely, the Criminal Law Convention on Corruption (1999)[363] and the Civil Law Convention on Corruption (1999).[364] Since corruption jeopardises the very foundations of

[360] See for instance, the German's Act of Combatting Bribery of Foreign Bribery Officials in International Business Transactions of 10 September 1998.
[361] On the 23rd of June 2016, UK voted to leave the European Union. In terms of Article 50 of the Treaty of Lisbon, any EU member state which decides to exit the EU, must notify the European Council and negotiate its withdrawal with the EU. The parties are given two years to reach an agreement. The UK was officially meant to exit from EU on Friday 29 March 2019. That deadline has been extended to 31 October 2019.
[362] Council of Europe: Recommendation on Economic Crime Recommendation No. R (81) 12 of the Committee of Ministers to Member States on Economic Crime (Adopted by the Committee of Ministers on 25 June 1981 at the 335th meeting of the Ministers' Deputies).
[363] It is supplemented by Additional Protocol to the Criminal Law Convention on Corruption (2003).
[364] Other important soft law anti-corruption instruments within the CoE are the Twenty Guiding Principles against Corruption (Resolution (97) 24); the Recommendation on Codes of Conduct for Public Officials (Recommendation No R 2000(10)) and the Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns(Recommendation Rec(2003)4).

CoE's essential values, that is, 'the rule of law, the stability of democratic institutions, human rights and social and economic progress'[365] fighting corruption is one of its priorities. These Conventions are discussed below.

i) The Criminal Law Convention on Corruption

The aim of this Convention is to develop common standards regarding certain corruption offences and to deal with the substantive and procedural law matters relating to corruption. It mandates Members to establish criminal offences within their domestic laws regarding passive and active bribery of domestic public officials, foreign public officials, officials of international organisations, members of domestic and international parliamentary assemblies, judges and officials of international courts.[366] It also covers bribery in both the private and public sectors. Besides the act of bribery, the Convention also recognises the act of trading influence and calls upon Members to establish it as a criminal offence within their domestic laws.[367] Sanctions established under domestic laws relating to corrupt activities should be effective, proportionate and dissuasive, including deprivation of liberty, which can give rise to extradition.[368] All criminal offences established under this Convention are extraditable.[369]

The Convention also introduces a novel provision with regard to rules on international cooperation in corruption issues. In terms of Article 28, a Member may spontaneously forward information without prior request to another Member to enable it to initiate or carry out investigations or proceedings concerning corruption. This provision is meant to eliminate the need for a prior request for the transmission of information that may assist a Member in investigating or instituting legal proceedings. In justifying this provision, the Working Group indicated that it occurs more often that an authority investigating a corruption offence in its own territory comes across information revealing that an offence might have been committed in the territory of another State.[370]

[365] Explanatory Report to the Civil Law Convention on Corruption Strasbourg, 4.XI.1999 para 1.
[366] Art 2-11 of the Criminal Law Convention on Corruption. The Additional Protocol to the Criminal Law Convention on Corruption Strasbourg, 15.V.2003 extends to the acts of passive and active bribery by domestic arbitrators, foreign arbitrators, domestic jurors and foreign jurors (Art 2-5).
[367] Art 12 of the Criminal Law Convention on Corruption.
[368] Art 17 of Criminal Law Convention on Corruption.
[369] Art 27 of Criminal Law Convention on Corruption.
[370] Explanatory Report to the Criminal Law Convention on Corruption Strasbourg, 27.I.1999 para 131.

Additionally, the Convention permits reservations or declarations.[371] However, these reservations or declarations are subject to certain restrictions. They can only be made at the time of ratification and no Member may enter reservations to more than five of the provisions mentioned.[372] Reservations are valid for three years unless they are expressly renewed. The reservations are motivated by the fact that the Convention criminalises a broad range of corrupt activities, some of them novel to Members. Within the OECD anti-corruption framework to which most CoE Members belong, offences such as bribery of members of domestic and international parliamentary assemblies and judges of domestic and international courts, and trading in influence are alien. Hence, a balance had to be struck between the Members' interests of enjoying flexibilities in adapting to conventional obligations, on the one hand, and ensuring the liberal implementation of the Convention, on the other.[373]

ii) The Civil Law Convention on Corruption

This Convention was drafted against the backdrop of Principle 17 on the 20 Guiding Principles for the Fight against Corruption,[374] which specifically indicated that States should 'ensure that civil law takes into account the need to fight corruption and, in particular, provides for effective remedies for those whose rights and interests are affected by corruption'. Hence, Members of the CoE saw the possibility of fighting corruption from a civil law perspective. Following the adoption of the Criminal Law Convention on Corruption, the CoE finalised the Civil Law Convention on Corruption, aimed at fighting corruption through civil law remedies.

The Civil Convention seeks to provide a framework which enables victims of corruption to claim civil remedies.[375] The definition of corruption provided in the Convention is wide enough to encompass both private and public sector corruption; hence persons affected by corruption arising from whichever sector can defend their rights and interests.[376]

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[371] In terms of Art 37 Members reserve the right not to establish as criminal offence, acts identified in Art 4 (bribery of members of domestic parliamentary assemblies), Art 6 (bribery of members of foreign parliamentary assemblies), Art 8 (passive bribery in the private sector), Art 10 (bribery of members of international parliamentary assemblies), Art 12 (trading in influence) and Art 5 relating to passive bribery of foreign officials.

[372] Art 37 (4) of Criminal Law Convention on Corruption.

[373] Explanatory Report to the Criminal Law Convention on Corruption Strasbourg, 27.I.1999 para 142.

[374] Resolution (97) 24 on the 20 Guiding Principles for the fight against Corruption.

[375] Art 1 of the Civil Law Convention on Corruption Strasbourg, 4.XI.1999.

[376] Art 2 of the Civil Law Convention on Corruption reads:

> '" corruption" means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.'

The Convention is not self-executing, but it establishes minimum standards that States are required to implement in their domestic laws. Measures to be taken at national level include providing internal laws that create liability for individuals and the States. As regards personal liability, the internal laws should at least provide the following conditions for one to claim damages arising from corruption: proof that the defendant has committed, or authorised, the act of corruption, or failed to take reasonable steps to prevent the act of corruption; proof that the plaintiff has suffered damage; and proof of a causal link between the act of corruption and the damage.[377]

The above are the prerequisites for a claim of damages arising from corruption. Culpable behaviour of the giver or recipient has to be demonstrated by the plaintiff. Employers are also liable for the corrupt conduct of their employees if, for instance, they fail to put in place appropriate measures to prevent the occurrence. Besides alleging the culpable behaviour of the defendant, the Plaintiff has to exhibit that he suffered loss as a result of the defendant's acts of corruption. The claim of damage should be substantiated and, most importantly, directly linked to the act of corruption complained of. Hence, unsubstantiated claims of loss do not give a right to compensation. In other words, the damage suffered must be an ordinary damage, such as loss of profit, and not an extraordinary consequence of corruption.[378]

As regards liability of States, a State is required to afford, in its internal laws, appropriate procedures enabling a person who suffered damage as a result of an act of corruption by the State's public officials in the exercise of their functions to seek civil remedies.[379] Compensation claims can be made against the State or the relevant authority. This provision, unlike Article 4, does not contain the conditions to be satisfied by the plaintiff in its claim. This gives room for the State to establish such conditions and procedures in their domestic laws. There is also a possibility, in terms of this Article, for a State to sue its public officials for the reimbursement of any loss suffered as a result of the latter's actions. However, it is not clear whether this provision creates international liability for States for damages suffered as a result of corruption perpetrated by public officials in the exercise of their functions. The responsibility of host States for corrupt acts of its public officials is a key issue in investment arbitration. Currently, the arbitral framework does not explore the extent of a host State's liability where corruption

[377] Art 4 of the Civil Law Convention on Corruption.
[378] Explanatory Report Civil Law Convention on Corruption para 45.
[379] Art 5 of the Civil Law Convention on Corruption.

of public officials is alleged. At most, tribunals refuse to impute corrupt acts of public officials on the State.[380]

Further, Members are expected to provide rules which allow compensation to be reduced or disallowed, having regard to all the circumstances, if the plaintiff has by his or her own fault contributed to the damage or to its aggravation.[381] This is an exception to the right to full compensation provided for in Article 3. The provision calls for an interrogation of the conduct of the plaintiff or victims of corruption. The Explanatory Note accompanying this Convention stresses that it must be the culpable behaviour of the victim that should affect the victim's right to compensation.[382] The behaviour of the victim has to be evaluated by the judge in order to determine whether the victim contributed to his/her own loss. For example, if the State or employer discovers that the employee received a bribe, but then took no steps to avoid a repetition of the event or even punish the employee, a claim for compensation might be reduced or even rejected owing to the State's or employer's contribution to the aggravation of the financial damage suffered.[383]

The Convention also addresses the validity of contracts tainted by corruption.[384] Foremost, all contracts providing for corruption must be considered null and void. Indeed, most European countries recognise that contracts for illegal purposes such as providing for corruption are null and void.[385] Secondly, in the case of contracts whose consent has been undermined by corruption, the internal laws should provide for the possibility of Parties applying to the courts for the contract to be declared void.[386] This has been illustrated in the renowned *World Duty*

[380] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7.
[381] Art 6 of the Civil Law Convention on Corruption.
[382] Explanatory Report Civil Law Convention on Corruption para 53.
[383] Though not directly linked to claim of compensation arising from corruption, international tribunals had refused to entertain or give effect to corruption allegation where the State had failed to prosecute or punish the public officials under its domestic laws. In the case of *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ICSID Case No. ARB/84/3 the tribunal highlighted that Egypt's failure to implicate the particular officials in the alleged acts of corruption was a reason for not entertaining its 'repeated allusions' to corruption.[383] Similarly in the *Wena Hotels v Egypt* Award, 8 December 2000 (2002) 41 ILM 896 para 116, because of Egypt's failure to prosecute alleged corrupt officials, the tribunal was 'reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with [investor] was illegal under Egyptian law.'
[384] Art 8 of the Civil Law Convention on Corruption.
[385] Art 15:101 of Principles of European Contract Law state that: 'A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.' For English Law, on illegality, see *Patel v Mirza* [2016] UKSC 42; Soleimany *v Soleimany* [1999] 1 QB 785 and *Westacre Investments Inc. v Juogoimport-SPDR Holding Co.* Ltd. [2000] 1 QB 288. See also H L MacQueen 'Illegality and immorality in contracts: towards European principles' (January 26, 2010). Available at SSRN: https://ssrn.com/abstract=1542528 or http://dx.doi.org/10.2139/ssrn.1542528.
[386] Art 8 (2) of the Civil Law Convention on Corruption.

Free case, where the Tribunal was asked to determine, *inter alia*, whether Kenya was legally entitled to avoid a contract obtained through bribery.[387] Though this case does not rely on Article 8 (2), it reflects the right of the State or victim of corruption to apply to court for the contract to be declared void. In the context of the Civil Law Convention, the contract is regarded as valid until it has been declared void. This provision acts as an additional remedy to the right to compensation provided in Article 4. It further permits flexibility on the part of the State to determine whether it is in the State's interests to preserve the integrity of the contractual arrangement because of public interest, even if tainted by corruption.[388]

The CoE anti-corruption framework is comprehensive, covering both criminal and civil law, and offering substantive normative guidelines and standards. The Civil Law Convention is of great significance to this thesis. It addresses, *inter alia*, the responsibility of host States for corrupt acts of its public officials, the consequences of corruption on contracts tainted by corruption and aspects of contributory negligence of victims of corruption. These are key issues in investment arbitration, and they will be explored further with the possibility of incorporating them in investment agreements.

Investment tribunals have been called upon to determine allegations of corruption in investment transactions and to consider the validity of the transactions. The IIAs that form the bases of the disputes do not contain direct provisions on corruption and the consequences of corruption. The aspect of contributory negligence that seeks to reduce the compensation that is due to a victim of a civil wrong, if it can be proved that the victim 'may have contributed to the occurrence of the wrong or to the resulting loss through a failure to take reasonable care of her affairs prior to (becoming aware of) the wrong',[389] is also absent. Therefore, the Civil Law Convention presents a good example in drafting the model anti-corruption clause. In particular, the Civil Law Convention presents an opportunity to examine the conduct of the State. The current investment arbitral trend of determining liability is one-sided. At no point is the conduct of the host State examined, including if it tried to prevent the occurrence of corruption in the first place and whether, upon getting notice of the act of corruption complained of, it took steps to remedy the situation.

[387] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7.
[388] Llamzon (n 6 above) 56.
[389] S Harder 'Contributory negligence in contract and equity' (2014) 13 *Otago Law Review* 307.

3.8. African Union Convention on Preventing and Combatting Corruption

Of the ten countries considered most corrupt in the world, seven are in Africa.[390] The types of corruption witnessed in Africa range from high-level political graft to low-level bribes to police officers or customs officials. Its roots are largely attributed to colonisation[391] and to some extent the slave trade.[392] Some authors aver that corruption was an unknown phenomenon in Africa before colonisation, following the Berlin Conference of 1884-1885.[393] The colonisers eroded the traditional structures, institutions and values and made them subservient to the economic and political needs of the imperial powers. This paved the way for modern corruption, in which individuals, especially leaders, abuse office to amass wealth for personal gain. Post-independence, most African countries inherited deeply corrupt institutions, laws and values from colonial governments, and the new governments mimicked the opulent lifestyles of the colonisers.[394] For these reasons, it has been averred that 'corruption through Western eyes, is HIV-like, a trans-cultural "disease" that must be surgically removed from all sovereign states,' without attempting to engage in exploring or understanding 'corruption' in its indigenous context. [395]

As regards slave trade, Manning avers that 'slavery was corruption: it involved theft, bribery, and exercise of brute force as well as ruses. Slavery thus may be seen as one source of precolonial origins for modern corruption'.[396] The slave trade caused the corruption of previously established legal systems in that some people were falsely accused of certain crimes and then sentenced to slavery. Judicial penalties such as flogging, exile or compensation were replaced by enslavement at the instigation of the leaders. Further, in order to protect themselves

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[390] These are, Somalia, South Sudan, Sudan, Guinea Bissau, Libya, Democratic Republic of Congo and Equatorial Guinea https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf (accessed 03 Jun. 2020).

[391] J Udombana 'Fighting corruption seriously? Africa's anti- corruption Convention' (2003) 7 *Singapore Journal of International & Comparative Law* 453; W Gumede 'Why fighting corruption in Africa fails' *Pambazuka News* Oct 12, 2017 https://www.pambazuka.org/governance/why-fighting-corruption-africa-fails (accessed 21 Feb. 18).

[392] N Nunn 'The long-term effects of Africa's slave trades (2008) 123:1 *Quarterly Journal of Economics* 139-176. P Manning *Slavery and African Life* (1990) 124.

[393] n 391 above. See also M M Mulinge & G N Lesetedi 'Interrogating our past: colonialism and corruption in Sub-Saharan Africa' (1998) 3:2 *Journal of Political Sciences* 15-28.

[394] W Gumede 'Why fighting corruption in Africa fails' *Pambazuka News* Oct 12, 2017 https://www.pambazuka.org/governance/why-fighting-corruption-africa-fails (accessed 21 February 2018).

[395] W De Maria 'The new war on African ''corruption'': just another neo-colonial adventure', paper presented at the 4th International Critical Management Studies Conference, Cambridge University, 4-7 July 2005, 5 quoted in I Carr 'Corruption, the Southern African Development Community Anti-corruption Protocol and the principal-agent-client model' (2009) 5:2 *International Journal of Law in Context* 169.

[396] P Manning *Slavery and African Life Occidental, Oriental and African Slave Trades* (1990) 124.

and their communities from being raided, leaders paid tributes in the form of slaves which were often obtained through the judicial system which they had corrupted.[397]

Notwithstanding these historical facts, since the early 1990s African governments have made initiatives to deal with corruption both at the domestic and the regional levels. At the regional level, within the African Union (AU), initiatives such as the 1990 Declaration on the Fundamental Changes Taking Place in the World and their Implications for Africa, the 1994 Cairo Agenda for Action Relaunching Africa's Socio-economic Transformation, and the Plan of Action against Impunity adopted in 1996 underscored the need to *inter alia* observe principles of good governance, rule of law and popular participation by the African peoples in the governance processes. In July 2002, when a Declaration relating to the New Partnership for Africa's Development (NEPAD), called for setting up a coordinated mechanism to combat corruption effectively were made. Exactly a year later, the AU Assembly of Heads of State and Government adopted the Convention on Preventing and Combatting Corruption (AU Anti-Corruption Convention).[398]

This Convention is aimed at promoting and strengthening mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors; promoting and facilitating cooperation among State Parties, and harmonising the policies and legislation between State Parties for the purposes of prevention, detection, punishing and eradication of corruption in Africa.[399] The obligations of the States are underscored by principles such as respect for democratic principles, the rule of law and good governance; respect for human rights; transparency and accountability; and condemnation and rejection of acts of corruption.[400] No other international anti-corruption convention carries these principles. This good governance approach underlying these principles attests to a profound awareness of the fact that, in the African context, without real socio-economic and institutional reforms, corruption cannot be combatted.[401]

The Convention's scope relates to the following acts of corruption: bribery (passive and active in both private and public sector); act or omission in the discharge of duties; diversion of funds;

[397] N Nunn 'The long-term effects of Africa's slave trades (2008) 123:1 *Quarterly Journal of Economics* 144.
[398] Other notable regional instruments within Africa are the SADC Protocol on Corruption (2001) and ECOWAS Protocol on the fight against corruption (2001).
[399] Art 2 AU Anti-Corruption Convention.
[400] Art 3 AU Anti-Corruption Convention.
[401] T R Snider & W Kidane 'Combating Corruption through international law in Africa: a comparative analysis' (2007) 40: 3 *Cornell International Law Journal* 744.

influence peddling;[402] illicit enrichment;[403] the use or concealment of proceeds derived from any of the above acts; and participating, in whatever manner and capacity, in committing the above acts of corruption.[404] Most of these acts are similar to those identified in Article VI: 1 of the IACC. States are required to adopt legislative and other measures to facilitate the criminalisation of these acts of corruption.[405]

Significantly, Members are called to 'strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party 'is subject to the respect of the national legislation in force. This is significant because most African countries, in a bid to attract foreign investors, relax their domestic laws and in some cases do not subject the investors to the same standard of treatment they apply to domestic investors and nationals. This discrimination on the application of laws violates the rule of law,[406] which is important in controlling corruption, and the presence of weak rule of law implies a high level of corruption.[407]

States are able to exercise jurisdiction over acts of corruption contained in the Convention in scenarios where the breach is committed wholly or partially inside its territory; or the offence is committed by one of its nationals outside its territory or by a person who resides in its territory or the alleged criminal resides in its territory and it does not extradite such person to

[402] Art 4 (1) (f) describes influence peddling as:

> the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of

[403] Art 4 (1) (g) provides for illicit of enrichment but does not define it. In terms of the IACC, Art IX describes illicit enrichment as the "significant increase in the property of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."

[404] Art 4 (1) AU Anti-Corruption Convention.

[405] Art 5 (1) AU Anti-Corruption Convention.

[406] The Rule of Law has been defined by The United Nations Security Council as:

> 'A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency' United Nations Security Council *The rule of law and transitional justice in conflict and post-conflict societies* (2004) section 3, paragraph 6.

[407] H F D Mendonça & D A Fonseca 'Corruption, income, and rule of law: empirical evidence from developing and developed economies' (2012) 32: 2 *Brazilian Journal of Political Economy* 310-311; *Combating corruption for development: the rule of law, transparency and accountability* http://unpan1.un.org/intradoc/groups/public/documents/un/unpan005786.pdf (accessed 30 June 2018).

another country; or when the offence, although committed outside its jurisdiction, affects its vital interests, or consequences of such offence impact on the State's interests.[408] However, the Convention emphasises that a person cannot be tried twice for the same offence.[409] This provision prohibits double jeopardy, in line with the Convention's human rights and good governance approach. *Per contra*, the US, in line with prosecutions under the FCPA, has indicated that the principle of double jeopardy does not prohibit dual prosecution by US and foreign sovereign officials of the same act.[410]

Torres-Fowler has lamented that this double jeopardy, as evidenced by the current global anti-corruption laws and ICSID awards, undermines investor's protection.[411] This specifically arises in cases where the State raises corruption as a defence in a bid to avoid liability for breach of BIT provisions such as expropriation. In the *World Duty Free* case, the State successfully raised this defence and the Tribunal emphasised that once corruption has been proved, the investor loses its protection under the investment agreement.[412] The investor is placed in an untenable position, losing the investment since it is tainted by corruption and also being prosecuted for corruption in the home country; for example, in the US this is done through the Foreign Practices Act. The investor, given the two evils, may opt to walk away from the investment rather than to tarnish its image defending itself while the State stands to benefit from the tainted dealing.[413] This is illustrated by the *Siemens* case, in which the investor opted to abandon the ICSID arbitration proceedings against Argentina upon evidence of corruption being presented against it.[414]

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[408] Art 13 (1) AU Anti-Corruption Convention.
[409] Art 13 (2) AU Anti-Corruption Convention.
[410] *Chukwurah v United States*, 813 F. Supp. 161, 167 (E.D.N.Y. 1993). See also *Health v Alabama*, 474 U.S. 82 (1985). In the *Health v Alabama* case, the Court explained that the double jeopardy clause is rooted in the dual sovereignty doctrine, in that a crime is an offense against the sovereignty of the state. Therefore, 'when a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses. Since States are separate sovereign, each State has separate interests in the enforcement of its own laws which 'by definition can never be satisfied by another State's enforcement of its own laws. Thus, each state is justified a *priori* in prosecuting an individual for an offense no matter how many prosecutions already have been brought for the same conduct in the courts of other governments,' R J Allen, B Ferrall and J Ratnaswamy, 'The double jeopardy clause, constitutional interpretation and the limits of formal logic' (1991) 26 *Valparaiso University Law Review* 285.
[411] R Z Torres-Fowler 'Undermining ICSID: How the global anti-bribery regime impairs investor-state arbitration' (2012) 52: 4 *Virginia Journal of International Law* 995.
[412] *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7.
[413] R Z Torres-Fowler 'Undermining ICSID: How the global anti - bribery regime impairs investor-state arbitration' (2012) 52: 4 *Virginia Journal of International Law* 995.
[414] In the case of *Siemens A.G. v. Argentine Republic*, the investor had been awarded a contract by the Argentine government to replace the then existing national identification booklets with state-of-the-art national identity cards. However, almost four years later, due to ongoing financial crisis, the government passed a law that

However, it can be reasonably argued that since the investor placed itself in this position by paying the bribe, then it is justified that the investment is lost because it was gained through unlawful means. Also, since the State is a victim of corruption, it must gain the benefit of the tainted deal. This argument is based on the assumption that one Party has clean hands and the other is blameless. In reality, transboundary corruption is not straightforward and there is no side which is blameless.[415] For this reason the rules of State responsibilities have to be examined closely to determine which acts are attributable to the State. For instance, Article 7 of the ILC's Responsibility of States for Internationally Wrongful Acts (2001) [416] provides that 'the conduct of…a person…empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the … person acts in that capacity, even if it exceeds its authority or contravenes instructions'. This provision has a direct bearing on acts of corruption committed by public officials, and its application can bar the State from alleging that it is a victim of corruption. Nevertheless, the application is not that easy in international investment transactions tainted with corruption. The involvement of agents and intermediaries can complicate the analysis of the degree of agency. It is also difficult to consider how a State may be liable if the corruption is freely consummated at the inception of the investment. Such acts would reasonably fall outside the authority of the public official as contemplated by Article 7, as such points to private activity by the public official and meant for private gain. Therefore, it is only *ultra vires* official conduct which is attributable to the State.[417]

A unique feature of this Convention is that it links corruption to human rights. This is evident in the Preamble and one of the objectives of the Convention, that of promoting socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights

introduced new unfavourable and non-negotiable terms which according to Siemens amounted to expropriation. Siemens brought the dispute to ICSID and won an arbitral award of $217 million. After the arbitral decision it was discovered by German authorities that Siemens was involved in systematic corrupt practices and had paid over $105 million in bribes to Argentine officials in order to procure the national identity card contract. Argentina upon being aware of these acts of corruption, it applied for a revision of the award. Siemens instead of defending the proceeding, it opted to discontinue the ICSID arbitration proceedings against Argentina, walking away entirely from the $217 million award.

[415] Llamzon (n 6 above) 261.

[416] The Responsibility of States for Internationally Wrongful Acts are a set of provisions detailing the elements that lead to, preclude, or otherwise affect the responsibility of States for internationally wrongful acts. These rules have been largely adopted in their entirety as applicable to all forms of international dispute resolution, and international investment arbitration.

[417] Llamzon (n 6 above) 260; I C Devendra 'State responsibility for corruption in international investment arbitration' (2019) 10 *Journal of International Dispute Settlement* 248-287.

as well as civil and political rights.[418] Other human rights provisions are the right of access to information[419] and the right to a fair trial in criminal proceedings.[420] Undeniably, corruption denies people full realisation of socio-economic rights such as access to health care, clean water and food through, for example, exploiting a nation's natural resources for personal gain of public officials instead of the citizens. However, the Convention falls short in addressing the remedies for individuals whose human rights have been desecrated as a result of corruption.[421] It prescribes criminal penalties, and civil remedies are omitted.

The Convention does not explicitly address the bribery of foreign public officials, as was prescribed in the UNCAC, OECD and IACC. Bribing of foreign public officials by multinational companies is prevalent in Africa and it is the root of many corrupt administrations.[422] It is usually done with the intention to retain business or other undue advantages in the conduct of international business transactions. This makes the Convention ineffective in dealing with transnational corruption, since foreign public officials fall outside the ambit of the Convention because States are not obliged to put in place measures to deal with corruption involving foreign public officials.

Furthermore, the effectiveness of the Convention is diminished by the presence of numerous claw-back clauses. For instance, under Article 8, States are required to establish an offence of illicit enrichment 'subject to the provisions of their domestic laws'. Similar wording is found in Article 14, which calls on States to guarantee the right to a fair trial, and Article 18 on cooperation and mutual assistance. These clauses permit supremacy of national laws and can compromise the uniform application of the Convention by States.[423]

With regard to monitoring and enforcement, the Convention creates an Advisory Board on Corruption.[424] This Board is mandated to, *inter alia*, promote and encourage adoption and application of anti-corruption measures, collect and document information on the nature and

[418] Art 2 (4) of the AU Anti-Corruption Convention.
[419] Art 9 of the AU Anti-Corruption Convention.
[420] Art 14 of the AU Anti-Corruption Convention.
[421] K Olaniyan 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal' (2004) 4 *African Human Rights Law Journal* 75.
[422] See for instance, the bribery of the former Kenyan President Moi made by the investor not only in order to obtain an audience with President Moi but above all to obtain during that audience the agreement of the President on the contemplated investment. *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7 36-41. See also J Udombana 'Fighting corruption seriously? Africa's anti-corruption Convention' (2003) 7 *Singapore Journal of International & Comparative Law* 464-5
[423] Olaniyan (n 421 above) 86.
[424] Art 22 (1) of the AU Anti-Corruption Convention.

scope of corruption and related offences, collect information and analyse the conduct and behaviour of multinational corporations operating in Africa, and disseminate such information to national authorities. Importantly, the Board submits a report to the Executive Council on the progress made by each State in complying with the provisions of the Convention. However, the Board lacks judicial powers to ensure uniform implementation of the Convention and carries no express provision that allows mutual evaluation of each country's performance in implementing the Convention.

Since the current study has a bias towards Africa, the AU Convention on Corruption is significant. It offers a glimpse into the approach that Africa intends to adopt in order to solve the problem of corruption. Corruption in Africa is both a problem and a solution. As a solution, political leaders rely on corruption to redistribute resources to secure their tenure in politics, and for individuals, corruption could be the only tool to access services.[425] As a problem, it is systematic, and leaders lack political will to curb it. This has made the general populace view corruption as the norm and not the exception. Individuals are not keen to report corruption despite the existence of institutional and legal frameworks to deal with corruption because they believe that it will not change anything.[426] The above discussion has highlighted that the AU Convention on Corruption is ineffective in combatting transboundary corruption because it does not explicitly address the bribery of foreign public officials. The absence of an explicit anti-corruption provision relating to bribery of foreign public officials creates an opportunity for proposing an anti-corruption clause in IIAs to which African States are a party.

3.9. The SADC Protocol on Corruption

All fifteen SADC Member States signed the SADC Protocol against Corruption[427] in Malawi on 14 August 2001.[428] The Protocol is a product of a regional roundtable on Ethics and Governance of SADC Ministers of Justice and Attorneys General that was held in Zimbabwe

[425] H Marquette & C Peiffer 'Corruption and collective action' (2015) *Developmental Leadership Program,* University of Birmingham 7-8; B Denolf 'The Impact of Corruption on Foreign Direct Investment' (2008) *Journal of World Investment & Trade* 249 for a summary of the following author: S Huntington *Political Order in Changing Societies* (1968) 69.

[426] For general reading on perceptions of corruption in Uganda and Kenya, see Persson, Rothstein & Teorell (n 116 above) 459-463.

[427] The SADC Protocol is relevant to the current study since one of the countries discussed in Chapter 4, South Africa, is a Party to this Convention. South Africa's anti-corruption domestic laws are influenced by international instruments including the SADC Protocol.

[428] Southern Africa Development Community (SADC) is made up of Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

in 2000, in which they agreed to fight corruption within the SADC Region. At this forum, delegates acknowledged that corruption was a serious international problem that subverts the cultural, economic, social and political foundations of society and, importantly, requires international cooperation.[429]

According to the SADC Protocol,

> Corruption: means any act referred to in Article III and includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public or private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and is aimed at obtaining undue advantage of any kind for themselves or for others.[430]

Essentially, corruption is abuse of office for private gain by either a public official or an agent in the private sector. The act of corruption involves one taking advantage of his position so as to obtain an unmerited or unwarranted advantage.

The objectives of the SADC Protocol are similar to the AU's Convention on Corruption, namely promoting and strengthening mechanisms to detect, punish and eradicate corruption in the public and private sector; promoting cooperation among States and fostering harmonisation of policies and domestic legislation.[431] The acts of corruption covered by the Protocol include bribery (passive and active), influence trading and diversion of property.[432] States are obliged to adopt legislative and other measures to establish these measures as criminal offences.[433] These acts are almost identical to those of the AU, except that in the SADC Protocol, acts such as omission of duty may be committed by 'a public official or any other person', thereby also applicable to the private sector.[434]

Like the UNCAC, the SADC Convention lists preventive measures that States undertook to adopt. These measures include adopting standards of conduct by public officials; adopting mechanisms to protect whistleblowers; creating or strengthening systems of hiring and procurements of goods and services; adopting mechanisms to promote access to information;

[429] D D N Nsereko & Z Kebonang 'The SADC Protocol against Corruption: Example of the region's response to an international scourge' (2005) 1 *University of Botswana Law Journal* 86.
[430] Art 1 of the SADC Protocol on Corruption.
[431] Art 2 of the SADC Protocol on Corruption as compared with Art 2 (1)-(3) of the AU Convention on Corruption.
[432] Art 3 (1) of the SADC Protocol on Corruption.
[433] Art 7 (2) of the SADC Protocol on Corruption.
[434] Art 4 (1) (c) of the AU Anti-Corruption Convention.

and establishing institutions for the purposes of implementing the mechanisms for preventing, detecting, punishing and eradicating corruption.[435]

Corruption involving foreign officials is provided for in Article 6 (1) of the Protocol. This calls upon States, subject to their domestic laws, to prohibit and punish offering or paying any article of monetary value, to an official of a foreign State, in connection with any economic or commercial transaction. This provision, which is meant to cater for corruption in international business transactions, is laudable. However, it only regulates active corruption and turns a blind eye to passive corruption, the offence committed by accepting a bribe. As indicated above, bribing a foreign official in business transactions violates free and fair competition.[436]

One glaring defect in the Protocol is the omission of a provision relating to sanctions or penalties in cases of commission of an offence or non-compliance with prescribed measures. The AU Convention suffers from the same defect, in contrast to other instruments such as the UNCAC[437] and OECD.[438] A holistic approach includes prescribing sanctions, whether criminal, civil or administrative. The AU and SADC seem to take it for granted that the domestic laws of the Members can sufficiently punish the offenders. In the worst-case scenario, AU and SADC Members consider corruption as a moral wrong to be sanctioned morally. Sanctions should be at least effective and dissuasive, and should include criminal and non-criminal sanctions. In the absence of a clause that mandates Members to adopt measures for sanctioning non-compliance with anti-corruption laws, the calls to combat corruption will remain political rhetoric that cannot be achieved in practice.

3.10. Asia-Pacific anti-corruption instrument – the Asia-Pacific Economic Cooperation (APEC) Santiago Commitment to Fight Corruption and Ensure Transparency

The APEC[439] Santiago Commitment to Fight Corruption and Ensure Transparency[440] was founded in 1989 ‘to support sustainable economic growth and prosperity in the Asia-Pacific

[435] Art 4 of the SADC Protocol on Corruption.
[436] Manfroni (n 255 above) 56.
[437] Art 30 of the UNCAC.
[438] Art 3 of the OECD Convention on Bribery.
[439] The Asia-Pacific Economic Cooperation (APEC) Santiago Commitment to Fight Corruption and Ensure Transparency is relevant to the current study since one of the countries discussed in Chapter 4, New Zealand, is a Member. New Zealand’s anti-corruption domestic laws are influenced by international instruments including APEC instruments.
[440] New Zealand is one of the founding members of APEC.

region'.[441] It comprises 21 members.[442] At a summit held in Santiago, Chile in 2004, APEC leaders acknowledged the threat which corruption poses to good governance and economic growth in the region. They agreed to fight corruption and improve transparency in both the public and private sectors. The leaders endorsed the Santiago Commitment to Fight Corruption and Ensure Transparency and the APEC Course of Action on Fighting Corruption and Ensuring Transparency.

Among other things, the Santiago Commitment and the APEC Course of Action oblige Member States to ratify and implement the UNCAC, strengthen transparency in the public sector and government institutions, encourage integrity in the private sector, assist Member States to prevent corruption, and integrate civil society, NGOs, the private sector and international organisations in fighting corruption and strengthening integrity in the Asia-Pacific region. APEC also established the APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET) in 2014. The ACT-NET acts as an informal inter-economy network for information sharing and for exchanging best practices and techniques among anti-corruption and law enforcement authorities in the Asia-Pacific region. It also affords an informal platform for bilateral or multilateral case cooperation, subject to the purview of individual member organisations, in areas of common interest such as corruption and bribery.[443]

The APEC currently does not seek to create new anti-corruption norms. It works within the existing international instruments and obliges Members to ratify and domesticate these international instruments. If the UN system does not provide adequate mechanisms to ensure compliance with the UNCAC, the APEC can within its framework ensure that compliance is achieved. For instance, in December 2012, the APEC's Anti-Corruption and Transparency Working Group published its Final Project Report on the Implementing the Asia-Pacific

[441] https://www.apec.org/About-Us/About-APEC/Mission-Statement (accessed 30 August 2019).
[442] The other founding members are Australia; Brunei Darussalam; Canada; Indonesia; Japan; Korea; Malaysia; the Philippines; Singapore; Thailand; and the United States. China; Hong Kong, China; and Chinese Taipei joined in 1991. Mexico and Papua New Guinea followed in 1993. Chile acceded in 1994. And in 1998, Peru; Russia; and Viet Nam joined.
[443] https://www.apec.org/-/media/Files/Groups/ACT/ACT-NET-Terms-of-Reference-2016.pdf (accessed 30 August 2019).

Economic Cooperation Anti-Corruption Code of Conduct for Business. The Report indicated that there were adequate anti-bribery laws in New Zealand.[444]

3.11. Other international anti-corruption initiatives

Besides multinational and regional efforts, there are also anti-corruption initiatives from private organisations and financial institutions. The notable organisations in this regard include the International Chamber of Commerce, TI, the World Economic Forum and the World Bank. A brief summary of their activities will be provided below.

a) International Chamber of Commerce (ICC)

The ICC was set up in 1919 to 'to promote international trade and investment as vehicles for inclusive growth and prosperity'.[445] It took the lead in denouncing corruption within business transactions and developed rules, the Rules of Conduct to Combat Extortion and Bribery, to deal with corruption. Its rules have been constantly updated since 1977, when they were first published, to mirror global anti-corruption instruments such as the UNCAC. The Rules are meant to be self-regulating measures to be adopted by businesses as good commercial practices.[446]

The ICC as an organisation has significantly contributed to combatting corruption through its dispute resolution services. The organisation has an International Court of Arbitration, established in 1923, and an International Centre for Alternative Dispute Resolution (ADR), which provides mediation and other forms of ADR. Disputes are referred to the ICC by virtue of an arbitration clause contained in contracts or treaties or separate arbitration agreements. The ICC has been confronted with disputes involving corruption as far back as 1963 in the ICC Case No.1110.[447] In this case, Judge Lagergren, in declining jurisdiction, indicated that 'corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations'.[448] ICC and International Centre for Settlement of Investment Disputes (ICSID) jurisprudence have been fundamental in highlighting the challenges of addressing transnational corruption in commercial transactions arbitrations, such as whether the dispute should be dismissed because of alleged corruption, the applicable

[444] Implementing the APEC Anti-Corruption Code of Conduct for Business Final Project Report 98-99. Available on https://www.apec.org/Publications/2013/01/Implementing-the-APEC-Anti-Corruption-Code-of-Conduct-for-Business+&cd=2&hl=en&ct=clnk&gl=bw (accessed 2 July 2020).
[445] https://iccwbo.org/about-us/who-we-are/our-mission/ (accessed 28 February 2018).
[446] ICC *ICC Rules on Combating* (2011 ed) 5.
[447] *Buenos Aires v [Company A]* ICC Award No. 1110 of 1963.
[448] (n 447 above) para 20.

standard of evidence, and whether public international law will prevail over the law chosen by the Parties.[449]

b) World Bank

The World Bank Group (WBG) is an umbrella group of international financial institutions, established in 1944 during the Bretton Woods conference.[450] It has twin goals of ending extreme poverty and building shared prosperity. The WBG consists of the following institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency, and the ICSID.[451]

The World Bank has various sanctions that can be levied on corrupt companies and/or individuals. One of the sanctions includes the public naming and shaming of entities involved in corruption. These entities and individuals are further barred from future WB-funded projects.[452] The sanctions are a deterrent since they translate to loss of income to entities involved. The loss is compounded by the cross-debarment agreement reached in 2010 by the World Bank and four regional development banks, namely, the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank.[453] Under this agreement, a debarment decision will be eligible for cross-debarment if the decision relates to fraud, corruption, collusion or coercion; if the period for the bar is at least one year; and if the decision is not based on a decision of national or other international authority.[454] Cross-debarment has made it more difficult for corrupt entities to do business with multilateral development banks and has

[449] A R Mahamed 'How should international arbitrators tackle corruption issues?' (2009) 24:1 *ICSID Review Foreign Investment Law Journal* 119; Tezuka (n 321 above) 51-68.
[450] https://www.brettonwoodsproject.org/2019/01/art-320747/ (accessed 02 July 2020).
[451] https://www.worldbank.org/en/about/history/the-world-bank-group-and-the-imf (accessed 02 July 2020).
[452] World Bank *Listing of ineligible firms & individuals* http://web.worldbank.org/external/default/main?contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266 (accessed 01 March 2018). See also World Bank *Sanctions system: tackling fraud & corruption through a two-tier administrative process* https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/2019/may/OSDFactSheetApril2019.pdf (accessed 01 March 2018).
[453] These Multilateral Development Banks signed the Agreement on Mutual Enforcement of Debarment Decisions on 9 April 2010.
[454] http://siteresources.worldbank.org/INTDOII/Resources/Cross_Debarment_Brief.pdf (accessed 13 March 2018).

multiplied the deterrent factor of a single sanction, which would otherwise be less effective. To date, a number of entities have been cross-debarred pursuant to the Agreement.[455]

The WBG has also contributed immensely towards combatting corruption, through the ICSID, an institution devoted to international investment dispute settlement. The ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[456] It acts as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts. The ICSID has been confronted with disputes involving corruption in investments protected by investment treaties or arising from investment contracts. The ICSID's jurisprudence, like the ICC's, has been essential in highlighting the challenges of addressing transnational corruption in foreign investments arbitrations, such as whether the dispute should be dismissed because of alleged corruption and the extent in which corruption should be used as a defence by the host State for non-compliance with its investments obligations.[457]

3.12. Conclusion

It is undeniable that international efforts to combat corruption have gained momentum. In addition to multinational and regional efforts, private organisations and financial institutions have various anti-corruption initiatives. Anti-corruption efforts have ceased to be concerned with protecting specific business interests or local traditions. They are now aimed at achieving a universal good thorough rationalising personal and societal relations under mutual frameworks that promote transparency, accountability and participation, as exhibited in the various instruments discussed above.[458] Various factors account for the successful establishment of anti-corruption norms, including the end of Cold War era that allowed better implementation of obligations under international treaties, and pressure by international and domestic actors on governments to make them more accountable.[459]

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[455] On the 1st of February 2018, the World Bank announced the debarment of three companies (Gavinor, S.R.L., J.C. Segura Construcciones S.A., and a joint-venture, Constructura J.C. Segura Construcciones S. A.-Gavinor S.R.L.-UTE) for 18 months in connection with the companies' fraudulent practice of knowingly misrepresenting work progress during a contract under the Second Provincial Agricultural Development Project in Argentina. The Bank indicated that the debarments qualify for cross-debarment by other multilateral development banks under the Agreement for Mutual Enforcement of Debarment Decisions that was signed on April 9, 2010. See story on http://www.worldbank.org/en/news/press-release/2018/02/01/world-bank-group-announces-debarment-of-three-companies-in-argentina (accessed 13 March 2018).

[456] Art 1 (1) Convention on the Settlement of Investment Disputes between States and Nationals of other States (1966).

[457] Tezuka (n 321 above) 51-68.

[458] Jakobi (n 238 above) 138.

[459] J McCoyr & H Heckel 'The Emergence of a global anti-corruption norm' (2001) 38 *International Politics* 68-69.

From a theoretical perspective, the discussed frameworks that emphasise adopting preventive measures that increase accountability, openness, integrity and participation replicate the influence of the principal-agent approach to corruption.[460] The principal-agent model is one the approaches employed to regulate corruption, discussed in the previous chapter.[461]

Substantively, all the international instruments contain general principles and prohibitions, urging States to take the responsibility of enacting and enforcing anti-bribery laws. In instruments such as the UNCAC, the AU Convention and IACC, certain acts of corruption are left to the discretion of the States, whether to consider them crimes or not.[462] In essence, these treaties were not meant to change anti-corruption domestic laws. Countries already had legislative measures in place prohibiting corruption in one way or another; thus the calls to adopt legislative measures are rhetorical or a crusade rather than a reform exercise.[463] Perhaps, to some extent, these treaties were instrumental in introducing novel acts which might be considered as amounting to corruption, such as the IACC's improper use of classified information (Article XI).

Further, all the instruments essentially cover the same areas: prevention, criminalisation and international cooperation. Bribery has received universal condemnation, and the OECD framework concentrates on bribery of foreign public officials. The underlining purpose of these international instruments is to promote integrity and accountability in public affairs and facilitate international cooperation in the fight against corruption.

The above discussion also reflects that certain acts of corruption have not attained universal condemnation, unlike bribery. These include trade in influence, illicit enrichment and abuse of function. Criminalisation of trade in influence is mandatory under the IACC but not under the UNCAC, while criminalisation of illicit enrichment and abuse of functions or positions is not

[460] I Carr 'Corruption, the Southern African Development Community Anti-corruption Protocol and the principal-agent-client model' (2009) 5:2 *International Journal of Law in Context* 161-162.
[461] The other approach is the collective action theory approach. See L D Carson and M M Prado 'Using institutional multiplicity to address corruption as a collective action problem: lessons from the Brazilian case' (2016) 62 *The Quarterly Review of Economics and Finance* 56-65; A Persson, B Rothstein & J Teorell 'Why anticorruption reforms fail—systemic corruption as a collective action problem' (July 2013) 26: 3 *Governance: An International Journal of Policy, Administration, and Institutions* 450; H Marquette & C Peiffer 'Corruption and collective action' (2015) *Developmental Leadership Program,* University of Birmingham 2.
[462] See for instance within the UNCAC the following acts of corruption: trading in influence (Art 18), abuse of functions (Art 19) illicit enrichment (Art 20), and embezzlement in the private sector (Art 22). With regards to the IACC, States may consider criminalizing acts such as: improper use of classified or confidential information or government property by an official for personal gain and diversion of state property, monies or securities (Art XI).
[463] Llamzon (n 6 above) 66 citing WM Riesman *Folded lies: bribery, crusades, and reform* (1979) 157.

mandatory under the IACC, UNCAC and AU Convention. In the UNCAC, the AU Convention and the IACC, States are called to consider adopting laws to criminalise these non- mandatory acts. Countries such as Argentina, Colombia, Brazil, India, Egypt, Senegal, Sierra Leone and Malawi[464] have since included illicit enrichment as a crime in their criminal laws. The discretion creates an impression that some acts of corruption are more important than others and offends the very essence of these instruments, that is, to strive to promote and strengthen measures to prevent and combat corruption.

With specific reference to corruption in international business transactions, prominence is placed in the UNCAC and the OECD on criminalising bribery of foreign public officials but not national public officials. While this may limit corruption, it nevertheless does not translate to changes in the behaviour of domestic public officials. The lack of consensus to subject domestic public officials to global anti-corruption measures creates an impression that the ongoing international efforts are merely symbolic and not reflective of a commitment to punish or change the behaviour of domestic public official.[465] Hence, the same zeal exhibited in subjecting foreign public officials to global anti-corruption measures should be extended to making domestic public officials accountable in the international sphere. The trend of combatting corruption is chiefly criminalising it and is universally affirmed in all treaties. However, the consequences of corruption are not universally agreed upon. The UNCAC and the CoE Civil Law Convention provide for a possibility of civil sanctions such as compensation. To be fair, it will be impractical to expect the treaties to give specific principles on these complex issues, especially if one reflects on the drafting history behind these instruments. The need to balance Member's interests of enjoying flexibility in adapting to conventional obligations, on the one hand, and to ensure the wide acceptance and implementation of the conventions, on the other, has always been an underlying factor in drafting these instruments.

The CoE framework is unique because of its multidisciplinary approach onto confronting corruption. Corruption is dealt with from criminal, civil and administrative law points of view. From the civil law perspective, a unique feature is the provision relating to contributory

[464] In the Malawian case of *State v Mzumar* Criminal Case No 47/2010, the accused, a public officer in the Department of Immigration was charged with three counts of possession of unexplained property, contrary to s32 (2) (c) of the Malawian Corrupt Practices Act of 1995, for *inter alia* having possessed between 1 January to 21 December 2008 asserts in the sum of about US$62 000, disproportionate to his known sources of income amounting to about US$3 000. Accused was convicted on all accounts and sentenced to twelve months in prison.
[465] Llamzon (n 6 above) 69.

negligence. This provision seeks to reduce the compensation that is due to a victim of a civil wrong if it can be proved that the victim 'may have contributed to the occurrence of the wrong or to the resulting loss through a failure to take reasonable care of her affairs prior to (becoming aware of) the wrong'.[466]

Overall, this discussion has shown some of the shortcomings of the international instruments. Regarding the UNCAC, the following weakness were demonstrated: excessive discretion of corrupt practices that can be criminalised, private sector corruption not adequately provided for, and too much protection of sovereignty. The shortcomings of the IACC include a narrow definition of public officials and transnational bribery not affirmatively criminalised. The OECD's major weakness is its emphasis on criminalising only the supply side of bribery. The AU anti-corruption Convention suffers the defects of not addressing bribery of foreign public officials and containing numerous claw-back clauses. The SADC Protocol and the AU Convention lack a clause that mandates Members to adopt measures for sanctioning non-compliance with anti-corruption laws. Since some IIAs incorporate by reference these anti-corruption provisions, it follows that those IIAs' anti-corruption frameworks have the same weakness. Therefore, the weaknesses of the international instruments present an opportunity to propose a model anti-corruption clause in IIAs that seeks to combat transboundary corruption in the investment regime.

[466] S Harder 'Contributory negligence in contract and equity' (2014) 13 *Otago Law Review* 307.

CHAPTER 4

ADDRESSING TRANSBOUNDARY CORRUPTION AT NATIONAL LEVEL WITH REFERENCE TO NEW ZEALAND AND SOUTH AFRICA.

4.1. Introduction

Corruption is a problem in every country. It mirrors a country's legal, economic, cultural and political institutions.[467] Countries respond to this phenomenon in various ways, including putting in place legislative and non-legislative measures to prevent and combat corruption. Although there are various anti-corruption international instruments, discussed in chapter 3 that go a long way in setting international standards on corruption, their provisions are not self-executing. They ultimately require governments to consider legislation as a way of combatting corruption. Since the international community relies heavily upon national laws to enforce international anti-corruption norms, it is important that these domestic anti-corruption laws are examined to understand their effectiveness in preventing and combatting transboundary corruption.

This chapter explores how corruption is generally dealt with under national laws. In addition, to IIAs, domestic laws play a crucial role in regulating FDI. Various issues raised in investment disputes relate to the national laws of the host State. Non-compliance with domestic laws is also a defence by States against investor's claims.[468] A number of investment tribunals have indicated that compliance with domestic laws can be implied in the absence of a treaty provision to that effect.[469] Some domestic laws deals with corruption.[470]

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[467] J Svensson 'Eight questions about corruption' (2005) 19:3 *Journal of Economic Perspectives* 20.

[468] *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6; *Fraport v Philippines* ICSID Case No. ARB/11/12; *Alasdair Ross Anderson et al v Republic of Costa Rica* ICSID Case No. ARB (AF)/07/3; *Inceysa Vallisoletana SL v El Salvador* ICSID Case No. ARB/03/26. In the following cases, the investor alleged breach of domestic law by the State: *Joseph Lemire v Ukraine* ICSID Case No ARB/ 06/ 18, Decision on Jurisdiction and Liability, January 14, 2010, the investor alleged that Ukraine's conduct of the tender process breached the fair and equitable treatment; *Sergei Paushok v Mongolia* (UNCITRAL) Award on Jurisdiction and Liability, April 28, 2011, the claimants argued that the imposition of a new tax violated FET because it was enacted in a non-transparent manner, 'in less than one week and [with] no consultation', para 304;

[469] *Jan Oostergetel and Theodora Laurentius v Slovak Republic* UNCITRAL Final Award, April 23, 2012 paras 178, 184; *Railroad Development Corporation v Guatemala* ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010 para. 140; *Plama Consotrium Ltd v Republic of Bulgaria* ICSID Case No. ARB/03/24 paras 138-139. However, in the case of *Anatolie Statie, Gabriel Stati, Ascom SA and Terra Raf Trans Trading Ltd v Kazakhstan* SCC Arbitration V (116/2010), Award December 19, 2013 para 812, the Tribunal refused to infer a requirement of compliance with domestic law in the absence of treaty language to this effect.

[470] See for instance the case of *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6; *Fraport v Philippines* ICSID Case No. ARB/11/12; *World Duty Free Co. Ltd. v. Republic of Kenya* ICSID Case No. ARB/00/7.

New Zealand and South Africa will be used as case studies in the regulation of trans-border corruption. The choice of country studies is influenced by the Corruption Perception Index, which measures national levels of corruption. New Zealand is perceived as one of the least corrupt countries, whereas South Africa is perceived as a mildly corrupt country.[471]South Africa also has domestic laws that specially seek to regulate foreign investors. This chapter's discussions are based on the assumption that inasmuch as it is fitting for a country to exercise jurisdiction over matters of corruption occurring within its territory, not all countries have the capacity to deal with transboundary corruption, especially developing countries.[472] This assumption is based on studies that have revealed high levels of corruption in developing countries.[473] All five countries at the bottom of the 2019 Corruption Perceptions Index are developing countries, and two of them are African States.[474] African States are faced with certain challenges when attempting to deal with transnational corruption. The first challenge emanates from how to deal with offences that were committed outside their jurisdiction. For instance, a local public official is bribed by a corporation based outside the host State. While the local public official will be prosecuted, the challenge is bringing to book the foreigner who appears to be safe, being outside the jurisdiction of the State. The second challenge relates to investigations of crimes with a transnational element. Since jurisdiction is ordinarily territorial, investigations and prosecution outside the State's jurisdiction require the assistance of authorities in other States and their willingness to assist.[475] The discussion below illustrates the

[471] As per the Corruption Perceptions Index 2018, New Zealand ranked 2/180 and South Africa was 78/180.

[472] Due credit has to be given to some nations that have made significant enforcement efforts to combat corruption in cross – border transactions such as the United States of America. See for instance prosecutions under US's Foreign Corrupt Practices Act; cases such as *SEC v Archer-Daniels-Midland Co*., No. 13-cv-2279 (C.D. Ill. 2013); *SEC v Weatherford Int'l Ltd*., No. 4:13-cv-03500 (S.D. Tex. 2013) (Weatherford and its subsidiaries made improper payments to government officials in Angola, Algeria, Albania, and Iraq to win lucrative oil services contracts and to gain significant market share.).

[473] B A Olken & R Pande 'Corruption in developing countries (2012) 4 *Annual Review of Economics* 479–509; M H Khan 'Governance and anti-corruption reforms in developing countries: policies, evidence and ways forward' (2006) *G-24 Discussion Paper No. 42, United Nations*; J Svensson 'Eight questions about corruption' (2005) 19:3 *Journal of Economic Perspectives* 19; D Treisman 'The causes of corruption: a cross-national study' 1998 http://www.isr.umich.edu/cps/pewpa/archive/archive_98/19980019.pdf (accessed 14 /06/2016);Transparency International *Corruption Perceptions Index* (2019) https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf (accessed 09 June 2020).

[474] Transparency International *Corruption Perceptions Index* (2019) https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf (accessed 09 June 2020). See also C Pring & J Vrushi 'Global corruption barometer Africa 2019: Citizens' views and experiences of corruption' available on https://images.transparencycdn.org/images/2019_GCB_Africa3.pdf (accessed 09 June 2020).

[475] J Hatchard 'Combating transnational crime in Africa: problems and perspectives' (2006) 50:2 *Journal of African Law* 145-146.

shortcomings of domestic legislative frameworks in combatting transboundary corruption and explains why the same should be dealt with at the international level through IIAs. This chapter also provides, from an arbitration point of view, a preview of the host State's laws that the investor is expected to adhere to when establishing an investment. Failure to adhere to these laws, as will be addressed in chapter 5, affects the validity of an investment.

4.2. New Zealand

According to TI's 2018 Corruption Perceptions Index (CPI), New Zealand's public sector is the second least corrupt in the world.[476] New Zealand is not a corruption-free country, but, compared to other countries that are attracting critical comments, it shows up extremely favourably.[477] What follows is an exposition of New Zealand's anti-corruption legislative framework, with the view of setting the scope of investor's anti-corruption obligations in New Zealand and eliciting understanding about how transboundary corruption is dealt with.

4.2.1. International instruments

New Zealand has signed four BITs, and only two with China and the government of Hong Kong are in force.[478] China and Hong Kong are a constant source of investment, accounting for three quarters of New Zealand's FDI.[479] The BITs with China and Hong Kong contain the provisions on treatment of investors found in most BITs. They apply to investments made in accordance with the laws of the Parties.[480] The BITs do not contain obligations of investors; rather, they restrict the conduct of the host State towards the investor.

New Zealand is also a signatory to several international and regional anti-corruption instruments which include the UNCAC, the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, and the APEC Santiago Commitment to Fight Corruption and Ensure Transparency. The scope of these instruments was discussed in the previous chapter.

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[476] 2018 CPI New Zeeland is ranked the second least corrupt country. https://www.transparency.org/country/NZL (27 March 2019). At the inception of this research in 2017, New Zeeland was the least country in the world. The current least-corrupt country is Denmark, see https://www.transparency.org/cpi2018 (accessed 10 November 2019).

[477] R Gregory 'Governmental corruption in New Zealand: A view through Nelson's telescope?' (2002) 10:1 *Asian Journal of Political Science* 18.

[478] As of June 2020, New Zealand had four BITs and 16 Treaties with Investment Provisions. https://investmentpolicy.unctad.org/international-investment-agreements/countries/150/new-zealand (accessed 19 June 2020).

[479] KPMG International *Foreign Direct Investment in New Zealand: Trends and insights* (2015) 3.

[480] Art 2 (1) of the New Zealand and China Agreement on the promotion and protection of investments (1988) and Art 2(1) of the Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments (1995).

4.2.2. Domestic legislation

New Zealand has a 'cordial, liberal and non-discriminatory' FDI policy.[481] Foreign investments in New Zealand are governed by the Overseas Investment Act of 2005. In terms of this Act, investing in sensitive land (including residential and farm land), significant business assets, and/or fishing quota requires consent from the Overseas Investment Office (OIO).[482] However, this Act does not provide a framework regulating the conduct of foreign investors in New Zealand. Therefore, with regard to corruption, foreign investors' obligations are found in other pieces of legislation, especially the Secret Commissions Act of 1910[483] and the Crimes Act of 1961 as amended.[484] Although these laws do not explicitly define corruption, the Serious Fraud Office adopted for its operational purposes an approach which defines corruption as 'behaviour on the part of officials in the public or private sector in which they improperly and unlawfully enrich themselves or those close to them, or induce others to do so, by misusing the position in which they are placed'.[485] In short, corruption is abuse of entrusted power for personal gain.

Further, in *Field v R*,[486] the New Zealand Supreme Court pronounced on the meaning of the word 'corruptly'. This case involved Mr Taito Philip Field, a Member of Parliament, who was charged under Section 103 of the Crimes Act of 1961.[487] He had provided immigration assistance to various Thai nationals. In return he received from them plastering, painting and tiling services of substantial value in respect of his private properties. He did not pay anything for these services. The prosecution contended that he had corruptly accepted benefits in connection with acts carried out by him in his role as a Member of Parliament. In his defence, Mr Field averred that the unpaid work undertaken by the Thai immigrants was a gift and not a *quid pro quo* for his activities on their behalf.

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[481] J Raguragavan 'Foreign direct investment and its impact on the New Zealand economy: cointegration and error correction modelling techniques' unpublished PhD thesis, Massey University, 1994 55. Available on https://mro.massey.ac.nz/bitstream/handle/10179/1644/02_whole.pdf?sequence=1&isAllowed=y (accessed 22 June 2020).

[482] Section 10 of the Overseas Investment Act, 2005.

[483] The Secrets Commissions Act incorporates amendments made by the Criminal Procedure Act, 2011 and Secret Commissions Amendment Act, 2015.

[484] The latest amendment is the Crimes Amendment Act No 4 of 2019.

[485] B Upton 'New Zealand' in J Pickworth & J Dimmock (eds.) *Bribery & Corruption* 3rd ed (2015) 1.

[486] *Field v R* [2011] NZSC 129. See also *Borlase v R* [2017] NZCA 541 (CA).

[487] Section 103 (1) of the Crimes Act provides that:

> Every member of Parliament is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, to be done or omitted, by him or her in his or her capacity as a member of Parliament.

The Supreme Court indicated that an official would have acted corruptly where he would 'accept money or like benefits in return for what has been done in an official capacity'.[488] The Court further indicated two overlapping reasons why such acts are wrong:

> The first reason is that the offering and acceptance of substantial benefits in relation to official acts is corrupt because it has the tendency to promote corruption – a tendency which is not dependent upon an antecedent bargain or promise. This tendency arises because the giving and acceptance of such benefits creates an environment in which
>
> (a) an official who receives such benefits will come to expect similar benefits in the future and is likely to act accordingly; and
>
> (b) members of the public who know about, or suspect, what has happened will come to believe that unless they too provide such benefits, they will not receive dispassionate consideration and, if prepared to provide such benefits, will receive corresponding advantages.[489]
>
> …
>
> The second and associated reason why the provision of gratuities to officials is corrupt is that there is a fundamental inconsistency between the performance of official functions and the acceptance of private rewards for doing so. In large measure this is a corollary of the first reason in the paragraph above. But associated with this are related expectations about the way in which those in official positions, including Members of Parliament, can be expected to act'.[490]

Thus, according to the Court, corruption is wrong because it promotes more corrupt activities.

a) Secret Commissions Act of 1910

The Secret Commissions Act of 1910 governs corruption in the private sector. Under this Act, it is a criminal offence to corruptly give, agree or offer to give an agent a gift or other consideration so as to induce or reward an agent's actions with respect to their principal's affairs or business.[491] The offence is committed even where the consideration or gift is given to a third party connected or related to the agent.[492] Further, the agent is guilty of an offence if

[488] *Field v R* [2011] NZSC 129 para 59.
[489] *Field v R* [2011] NZSC 129 para 61.
[490] *Field v R* [2011] NZSC 129 para 62.
[491] Section 3 (1) of the Secret Commissions Act.
[492] Section 3 (2) of the Secret Commissions Act.

he corruptly accepts a bribe, in whatever form, for himself or for any other person.[493] The Secret Commissions Act also contains other corruption-style offences, such as an agent's failure to disclose to the principal a pecuniary interest in a contract;[494] an agent intentionally delivers false receipts to the principal;[495] and providing a false receipt to an agent with the intention to deceive a principal.[496]

It is not a defence to a charge under the Secret Commissions Act to claim that the gift, received or granted was of a customary nature.[497] For instance, it may be a custom in some communities to give cash gifts to the community leaders before a meeting with them is conducted. However, the courts are at liberty to consider such a gift to be legal if they are satisfied that such practice or usage is honest and reasonable. In determining the legality, the Court may give regard to the circumstances that such gifts were paid or made under such practice or usage prior to this Act which rendered the acceptance of such gift lawfully without any breach of duty by the agent.[498] In the example given, should the leader refuse a meeting because no gift was given, then the said gift can be termed as a bribe which the leader is not permitted to receive by law.

The issue of customary practices is significant in dealing with corruption. One can claim that the gift received or given was not illegal but is culturally sanctioned. Although the *World Duty Free* case did not arise in New Zealand, it reflects the use of customary practices as a defence against allegations of corruption.[499] In this case the Defendant, in defending against allegations of corruption, amongst other things, averred that gifts of this kind were a customary practice[500] and culturally sanctioned in Kenya, and therefore legal.[501] The Tribunal rejected this argument

[493] Section 4 (1) of the Secret Commissions Act.
[494] Section 5 (1)-(2) of the Secret Commissions Act.
[495] Section 7 of the Secret Commissions Act.
[496] Section 6 of the Secret Commissions Act.
[497] Section 11 (1) of the Secret Commissions Act.
[498] (n 497 above).
[499] Had this arisen in New Zealand, the Court was expected to determine if such practice was honest and reasonable. In so determining this, the Court would examine if the payment made under such practice or usage were lawfully receivable by the agent without any breach of his duty towards his principal or whether such payments allowed in respect of services lawfully rendered by the agent to such third party without injury or loss to the principal and without any breach by the agent of his duty towards his principal. Looking at the circumstances which are characterised by concealment and the motives of the payments, being to be granted audience and favour from the President, the New Zealand Court would have considered such practice dishonest and unreasonable.
[500] The customary practice in consideration was known as 'Harambee', which translates from Kiswahili loosely as 'pulling together for the good of the community'. The concept of Harambee had its root in the African culture where societies made collective contribution toward individual or communal activities. See *World Duty Free case* para 134.
[501] *World Duty Free* case *supra* para 110.

and indicated that the concealed payments made by Defendant's agent to President Moi and Mr. Sajjad could not be considered as a personal donation for public purposes. The payments were regarded as bribes, made not only to obtain audience with the President but also to obtain, during that audience, the agreement of the President on the contemplated investment.[502] In line with the Tribunal's argument, had the payments been made as a personal donations for public purposes, perhaps they would have been regarded as lawful.

When regulating corruption, one of the crucial questions relates to the appropriate sanctions. Most laws on corruption mainly provide for criminal sanctions to punish the transgressor and deter would-be-criminals.[503] The inclination towards criminal sanctions is chiefly motivated by the corrosive nature of corruption in the society. Civil remedies have also been recognised as a tool to address corruption. Specifically, besides betraying endowed trust, corruption also causes tangible damages to the society or particular persons. Hence, those who have suffered losses due to corruption have to be compensated. In these instances, civil sanctions are directed at delivering restorative justice.[504]

In New Zealand's context, the penalty for committing any of the offences is imprisonment for a term not exceeding 7 years.[505] In line with the OECD's recommendation,[506] the Act provides for unlimited fines for individuals and corporate offenders. However, other sanctions such as forfeiture or seizure of the gift unlawfully obtained are not provided for. Further, civil remedies that permit a defrauded principal to recoup some of the losses he has suffered as a result of the agent's corrupt activities are not provided for in New Zealand's domestic laws.

b) Crimes Act of 1961

Amongst other things, this Act deals with corruption in the public sector. Domestic bribery and corruption and foreign bribery are covered by this Act. Offences enumerated relate to

[502] *World Duty Free* case *supra* para 136.
[503] E van der Does de Willebois 'Using civil remedies corruption and asset recovery cases' (2012) 45:3 *Case Western Reserve Journal of International Law* 618.
[504] Restorative justice 'is a theory of justice that emphasizes repairing the harm caused by criminal behaviour. It is aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.' Measures of restorative justice include reparation, restitution and community services. See United Nations Office On Drugs and Crime *Handbook on restorative justice programmes criminal justice* (2006) 7; E van der Does de Willebois 'Using civil remedies corruption and asset recovery cases' (2012) 45:3 *Case Western Reserve Journal of International Law* 617.
[505] Section 13 of the Secret Commissions Act.
[506] Recommendation 3 and 4 of Phase 3 Report on implementing the OECD Anti-Bribery Convention in New Zealand, October 2013.

corruption and bribery of judicial officers,[507] Ministers,[508] parliamentarians,[509] law enforcement officers,[510] and other public officials[511] and the corrupt use of official information.[512] In all instances, bribery occurs when a person corruptly gives, receives, accepts or obtains a bribe, whether directly or indirectly, for themselves or any other person, with intent to influence that person to act or refrain from acting in their official capacity. A bribe is defined as 'any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect'.[513] Penalties for individuals convicted of bribery and corruption of domestic public officials range from a maximum of 7 to 14 years' imprisonment to an unlimited fine for individuals and corporations.[514]

The Act also criminalises bribery of foreign public officials within and outside New Zealand.[515] It is an offence to corruptly give or offer or agree to give a bribe to a person with the intention of influencing a foreign public official in respect of any act or omission by that foreign public official in his or her official capacity in order to obtain or retain business, or obtain any improper advantage in the conduct of business.[516] However, no offence would have been committed if the act committed was primarily meant to ensure or expedite the performance of a 'routine government action'[517] and the value of the benefit was 'small'.[518] Such payments are more ordinarily referred to as facilitation payments. It is significant to note that this exception, of facilitation payments, is only applicable to foreign public officials.

New Zealand is one of the five countries in the world that provide an exception for facilitation payments under their relevant foreign anti-bribery laws.[519] It has been argued that the public generally condones facilitation or grease payments because they do not usually involve an

[507] Section 100-101 of the Crimes Act.
[508] Section 102 of the Crimes Act.
[509] Section 103 of the Crimes Act.
[510] Section 104 of the Crimes Act.
[511] Section 105 of the Crimes Act.
[512] Section 105A of the Crimes Act.
[513] Section 99 of the Crimes Act.
[514] See for instance sections 100 (1) and (2) of the Crimes Act in relation to judicial corruption.
[515] Section 105C-105E of the Crimes Act.
[516] Section 105C (2) of the Crimes Act.
[517] Section 105C (1) of the Crimes Act defines 'routine government action' in relation to the performance of any action by a foreign public official, as not including decisions as whether to grant a new business or continue the existence of a business or the terms of the business and actions outside the scope of the ordinary duties of that official.
[518] Section 105C (3) of the Crimes Act.
[519] J Jordan 'The OECD's call for an end to "corrosive" facilitation payments and the international focus on the facilitation payments exception under the Foreign Corrupt Practices Act' (2011) 13:4 *University of Pennsylvania Journal of Business Law* 889.

outright injustice on the part of the payer, since the payer is entitled to what is requested. It is further claimed that these payments are unavoidable, especially in countries where salary wages are poor, the public officials are unprofessional and there is disorganisation in government offices.[520] However, in the case of New Zealand, the above conditions do not exist to warrant the existence of the facilitation payment exception. Even the OECD has been critical of this exception.[521]

With regard to bribery outside New Zealand, it is an offence for anyone to commit an act outside New Zealand, which, if committed in New Zealand, would constitute an offence.[522] This provision applies to citizens, ordinary residents, bodies corporate incorporated in New Zealand and corporations sole incorporated in New Zealand.[523] In cases where the act has been committed outside of New Zealand and the laws of the principal foreign public official recognise such as lawful, then that act will not be regarded as an offence in New Zealand.[524]

Instituting criminal proceedings involving Ministers and Parliamentarians requires leave from a High Court judge.[525] With regard to other public officials, including foreign public officials, prosecution requires the leave of the Attorney General who, before giving such leave, may make such inquiries as he or she thinks fit.[526] A sitting judge may not be prosecuted for a bribery or corruption-related offence except by the Attorney General in pursuance of a resolution of that House of Representatives.[527] These provisions act as safeguards, since the bribery and corruption-related clauses are too wide. Further, the consent required 'would ensure that oppressive and unfair prosecutions were not brought'.[528] The Attorney General expressed this rationale in Parliament during the debate on the Secret Commissions Act. He noted that:

> as the Bill stands it is wide enough in scope to hit cases which may be innocent, but it is only by making it wide that you can get at cases which are distinctly dishonest. We have had illustrations of how impossible it is to draft an effective clause which will not

[520] A Argandoña 'Corruption and companies: the use of facilitating payments' (2005) 60:3 *Journal of Business Ethics* 251.
[521] Jordan (n 519above) 889.
[522] Section 105D (1) of the Crimes Act.
[523] Section 105D (2) Of the Crimes Act.
[524] Section 105E (1) of the Crimes Act.
[525] Section 102 (3) and section 103 (3) of the Crimes Act.
[526] Section 106 (1) of the Crimes Act.
[527] Section 106 (2) of the Crimes Act.
[528] *Field v R* [2011] NZSC 129 para 64.

> hit some case that does not deserve to be punished. The safeguard resorted to is to throw on the shoulders of some officer – here the Attorney-General – the duty of seeing that the case in which he is proceeding is one which deserves to be punished.[529]

In the *Field* case, the Supreme Court indicated that adopting an approach that is too broad to Section 103 and similar anti-bribery clauses in the Act creates a 'risk of criminalising activity involving unexceptionable token gifts or other benefits',[530] which could not have been the intention of the legislature. To solve this problem, the Court introduced a '*de minimis* defence in relation to gifts of token value which are just part of the usual courtesies of life'.[531] Of course, the extent of the gift and the particular context in which it occurs will inform this defence.

The Crimes Act establishes extra-territorial jurisdiction in respect of offences with transnational aspects, including corruption.[532] Extra-territorial jurisdiction is the 'broad application and enforcement of national laws to subjects acting beyond the borders of a given country'.[533] Jurisdiction is claimed by virtue of the person to be charged being a New Zealand citizen; or an ordinary resident in New Zealand; or found in New Zealand and not been extradited; or a body corporate, or a corporation sole, incorporated under the law of New Zealand. Further to this, Attorney General's consent is needed for prosecution of bribery which occurred outside New Zealand.[534]While the exercising of extra-territorial jurisdiction has played an important role in changing the domestic behaviour of foreign bureaucracies in some countries such as Germany,[535] the effectiveness of these enforcement mechanisms depends on various factors such the actors, norms and processes involved. Also, there are controversies surrounding its application. It has been argued that 'using extraterritoriality to govern the activities of the multi-national corporates in foreign countries is moral imperialism'.[536] Imperialism is achieved by imposing cultural and moral values of one country on another, which other country might not share. Additionally, even though extra-territorial enforcement might limit the occurrence of corruption, it can negatively affect the attraction of FDI in

[529] *Field v R* [2011] NZSC 129 para 41.
[530] *Field v R* [2011] NZSC 129 para 64.
[531] *Field v R* [2011] NZSC 129 para 65.
[532] Section 7A of the Crimes Act.
[533] B Hock 'Transnational bribery: when is extraterritoriality appropriate?' (2017) 11 *Charleston Law Review* 307.
[534] Section 106 of the Crimes Act.
[535] S C Kaczmarek & A L Newman 'The long arm of the law: extraterritoriality and the national implementation of foreign bribery legislation' (2011) 65:4 *International Organization* 755.
[536] Hock (n 533 above) 311. See also P M Nichols 'The myth of anti-bribery laws as transnational intrusion' (2000) 33 *Cornell International Law Journal* 645; S R Salbu 'Extraterritorial restriction of bribery: a premature evocation of the normative global village' (1999) 24 *Yale Journal of International Law* 231.

developing countries. Multinational companies may shy away from certain markets for fear being prosecuted in their home countries.[537]

In the case of New Zealand, on the face it, the extra-territorial jurisdiction clause is a useful mechanism of dealing with corruption that occurred outside its territory. However, these efforts may be undermined by the condition of seeking the Attorney General's consent for prosecuting bribery that occurred outside New Zealand. While the consent may be vital for information gathering and sharing with foreign State counterparts for a successful prosecution, it can also act as an impediment. The requirement to seek Attorney General's consent may allow economic and political considerations to take precedent over the need to prosecute. This means that there is a possibility of some cases involving corruption not being prosecuted because the Attorney General withheld his/her consent.[538]

c) Serious Fraud Office (SFO)

The SFO is established in terms of the Serious Fraud Office Act of 1990. It is the lead law-enforcement agency for investigating and prosecuting serious financial crime, including bribery and corruption. The Serious Fraud Office Act bestows on the Director of the SFO vast powers, including powers to assume from the police the responsibility for investigating any case that the Director believes on reasonable grounds to involve serious or complex fraud.[539] The decision by the Director to investigate any matter, or to take proceedings related to such matter, cannot be challenged, reviewed or quashed in any court.[540]

The SFO Act also deals with the issue of legal professional privilege. The legal professional privilege has its roots in English common law. It provides that no legal practitioner can be compelled, without the express consent of his client, to disclose statements made to him by his client in professional confidence or to produce documents made in the same circumstances.[541]

[537] A Cuervo-Cazurra 'Who cares about corruption?' (2006) 37 *Journal of International Business Studies* 807.
[538] However, at the time of writing there was no evidence of the Attorney General withholding his/her consent. For an instance in which corruption investigations were halted due to political and security considerations, see the case of BAE systems referred to in Chapter 3. For further reading factors that affects compliance with anti-corruption laws, see: S C Sáenz 'Explaining international variance in foreign bribery prosecution: a comparative case study' (2015) 26 *Duke Journal of Comparative & International Law* 291-296.
[539] Section 11 of the Serious Fraud Office Act.
[540] Section 20 of the Serious Fraud Office Act.
[541] *Greenough v Gaskell* [1833] 1 M & K 98; *Walter Lilly & Company Ltd v Mackay & Anor* [2012] EWHC 649 (TCC) (15 March 2012).

The privilege does not apply in instances such as where a legal practitioner's services are sought to enable or aid in the commission of a crime or fraud.[542]

This protection afforded by law attracts money launderers and related offenders and can frustrate investigators. In terms of the SFO Act, the Director may request from a legal practitioner the last known name and address of his client, if he believes that the client is connected with any investigation.[543] Also, for the purposes of this Act, privileged information excludes information or documents consisting wholly of payments, income, expenditures or financial transactions of a specified person, if it is contained in, or comprises the whole or part of, any book, account, statement or other record prepared or kept by the legal practitioner in connection with a trust account of the legal practitioner.[544] Such disclosures are instrumental in detecting commission of any offence.

Even though SFO has been successful in dealing with corruption in New Zealand, the 2020 Performance Improvement Framework (PIF) has revealed some challenges in its performance. One of the challenges is that the SFO is a small Auckland-based agency, currently operating at the fringe of the New Zealand public and private sectors. Its single focus on serious fraud and its small size means it is often overlooked or is not well-equipped to participate in strategic discussions or work programmes in the justice sector.[545] For it to play a greater role in serious fraud and anti-corruption, the SFO needs to establish strong and embedded relationships with other public sector justice agencies. This will enable it to participate in both policy and operational discussions relating to combatting financial crime and corruption.[546]

d) Critique of New Zealand's anti-corruption framework

The above discussion showed that it is an offence to engage in bribery and corruption in both the public sector (under the Crimes Act 1961) and the private sector (under the Secret Commissions Act 1910), including for corrupt acts conducted outside of New Zealand. Generally, New Zealand's anti-corruption laws are not unique. Some of the provisions are closely reflected in legislative provisions in countries such as Canada and the UK.[547] This

[542] *In re Grand Jury Procs.,* 867 F.2d 539, 541 (9th Cir. 1989).
[543] Section 24 (2) of the Serious Fraud Office Act, 1990.
[544] Section24 (4) of the Serious Fraud Office Act, 1990.
[545] Performance Improvement Framework-Review for the Serious Fraud Office 17. Available on https://ssc.govt.nz/assets/SSC-Site-Assets/SAPG/PIF-Report-SFO-March-2020.pdf (18 May 2020).
[546] (n 545 above).
[547] Both Canada and United Kingdom are scored 82 / 100 and ranked 8 out of 180 in the Corruption Perceptions Index 2017. In the *Field v R* [2011] NZSC 129 para 47, the Supreme Court indicated that section 103 of the Crimes Act:

demonstrates the recognition that corruption is a widespread phenomenon that needs to be addressed. From an investment perspective, these norms are crucial and investors are expected to comply with these laws when establishing and operating their investment.

The extra-territorial effect of New Zealand's legislation assists in deterring companies from perpetuating corruption outside New Zealand for fear of being prosecuted back home. However, concerns have been raised regarding the broadening of jurisdiction beyond the territory of one State. It has been noted that this could give rise to conflicting assertions of civil or criminal jurisdiction, conflicts of laws, dual criminality and double jeopardy.[548] In reality, these conflicts do not arise as there is an appalling lack of enforcement by States of anti-corruption norms.[549]

Further, it is noted that there are robust provisions on bribery of foreign public officials in line with the OECD Bribery Convention. However, there has been no prosecution involving foreign bribery in New Zealand, although there are several ongoing investigations.[550] One concern with the clause is the requirement to obtain the leave of the Attorney General before pursuing legal action against foreign public officials. This creates the possibility of insulating some foreign public officials from prosecution based on national, economic or even political interests. It is submitted that this discretion, if exercised erratically may hamper efforts to deal with transboundary corruption.

Scholars have shed light on why New Zealand has enjoyed the reputation of being one of the least corrupt countries in the world. The most important factor has been New Zealand's strong egalitarian ethos.[551] The early settlers, having been suppressed before in the British society due to class divisions, were more committed to fairness than freedom. At some point, New

(a) is closely reflective of the drafting of s 100 of the Canadian Criminal Code as enacted in 1954;
(b) in its application to Members of Parliament, based on s 100 of the Canadian Criminal Code as enacted in 1954 and s 131 of the Canadian Criminal Code of 1892; and
(c) can be traced back to the language used in s 111 of the 1879 draft Criminal Code (UK) which was carried through into s 108 of New Zealand's Criminal Code Act 1893, s 126 of our Crimes Act 1908 and s131 of the Canadian Criminal Code of 1892.

[548] G Ferguson *Legal Regulation of Global Corruption under International Conventions and under US, UK and Canadian Law* 2nd ed (2017) 23. https://track.unodc.org/Academia/Pages/TeachingMaterials/GlobalCorruptionBook.aspx (accessed 10 July 2019)

[549] (n 548 above).

[550] Bribery and Corruption 2019. New Zealand https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/new-zealand.

[551] D Zirker 'Success in combating corruption in New Zealand' (2017) 6:3 *Asian Education and Development Studies* 238-248.

Zealand's emphasis on fairness and equality, coupled with rigorous control over government officials, led it to be labelled a fascist State.[552] While the egalitarian ethos is reflected in other societies such as Sweden and Norway, they do not account for low corruption levels; rather, 'egalitarianism itself reflects a social ethos which places a relatively low emphasis on acquisitive and competitive values, especially those which define social status overwhelmingly as a function of wealth'.[553] As the society developed, fairness became and remained a cultural norm.

The second factor that accounts for New Zealand's reputation is the establishment of a professional public bureaucracy. The ethos of fairness and honesty was inoculated into the public services sector from the inception of the Department of Public Works in 1876. For instance, the Hunt Commission, which was established to investigate favouritism in the public service, produced a report which recommended,

> Block all 'back doors' of entrance to the public service. Promote from within the service. Appoint and promote on the basis of merit. Provide for free transfers of officers between departments. With an enlightened and modern point of view, it defined the objects of personnel administration to include 'entry by competitive examination, probation before final admission, [and] promotion by merit, and pensions on retirement'.[554]

Further, expectations of egalitarian fair dealing were reinforced by the introduction of the institution of the Ombudsman in 1962 and the provision of official information to the public as early as the 1980s.[555] The incentive to be corrupt was further reduced by handsome salaries.[556]

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[552] In an article by a 'Special correspondent', entitled 'Life in New Zealand now ruled by decree; even chicken raising is regulated by state', the New York Times reported that:

> The nooks and corners that [New Zealand] has explored in its Fascist rule may be seen from the fact that it has forbidden the building of any more movie theatres without permission, on the ground that there are already more than enough, has refused to issue any more leases to coal operators to mine on State lands because of over-production of coal, and has even determined to register and control all persons who own ten hens or more and sell eggs….Slowly this democracy is turning into a Fascist State. When it completes the cycle it will do so with a thoroughness which will fill the Black Shirts with envy (New York Times, December 11, 1930)

[553] R Gregory and D Zirker 'Clean and green with deepening shadows? A non-complacent view of corruption in New Zealand' in J S T Quah (ed) *Different paths to curbing corruption: lessons from Denmark, Finland, Hong Kong, New Zealand and Singapore* (2013) 115.

[554] n 551 above, 241.

[555] n 551 above.

[556] n 551 above.

Another important factor is the influence of British legal, bureaucratic and political heritage.[557] New Zealand's laws, such as the Secret Commissions Act of 1910, the Crimes Act of 1961 and the Public Service Act of 1912, and even New Zealand's Westminster parliamentary system, reflect Britain's colonial legacy. The similarities of these laws to British laws have been indicated above. However, their importance lays a foundation in establishing a strong public service ethos, made to be accountable from the inception of the State itself. The Public Service Act of 1912 was instrumental in curbing the rampant political patronage that had hitherto characterised public service employment in the preceding decades. The British presence brought a strong Calvinist culture which emphasised hard work, honesty and impartiality.[558]

The size and geographical location of New Zealand is another contributory factor to the country's reputation. New Zealand is a small country located in the south-western Pacific Ocean. Due to its remoteness, it has largely remained quarantined from international influences which would otherwise threaten its social fabric.[559] Even with an increase in immigration from the 1950s, social propriety remained highly prized.[560]

What is apparent from the above is that New Zealand's reputation is based on a deep-seated culture of fairness. This culture permeates professional conduct and is reflected in laws and even cases. In the *Field* case, the Court emphasised that it is simply wrong for a public official to receive any payment or gift for official acts, outside of his salary.[561] This finding buttresses previous studies stressing that cultural values have a bearing on how one perceives corruption.[562] Cultural values impose a real challenge in defining and eradicating corruption. In the case of New Zealand, good cultural practices coinciding with sound laws made it possible for the country to become one of the least corrupt countries in the world.

Studies of New Zealand suggest that law is not the sole relevant issue in confronting corruption. New Zealand's low levels of corruption are also attributed to other factors such as the egalitarian ethos and cultural values. This does not mean laws are irrelevant. The society still

[557] n 551 above.
[558] n 551 above.
[559] Gregory and Zirker (n 553 above) 115.
[560] n 559 above.
[561] *Field v R* [2011] NZSC 129 para 59
[562] B W Husted and Instituto Tecnologico y de Estudios 'Wealth, culture, and corruption' (1999) 30: 2 *Journal of International Business Studies* 339-359; A Seleim & N Bontis 'The relationship between culture and corruption: a cross-national study' (2014) 10:1 *Journal of Intellectual Capital* 165-184; E McLaughlin 'Culture and corruption: an explanation of the differences between Scandinavia and Africa' (2013) *American International Journal of Research in Humanities, Arts and Social Sciences* 85.

needs to know the conduct that is prohibited and the sanction thereof. The identified factors are relevant in explaining the corruption status in a country. Notably, while culture can assist in the prevention of corruption at the national level, such cannot be the same at the transnational level. Transboundary corruption takes advantage of the absence of uniform cultural values. Since it is challenging, if not impossible, to wait until all people and nations share the same cultural values, then international instruments can be utilised to create standard norms that are not influenced by or whose existence is independent of certain cultural values.

4.3. South Africa

Corruption in South Africa is systematic, epidemic and pervasive.[563] In the 2018 Corruption Perception Index, South Africa ranked 73rd out of 180 countries.[564] The effects of corruption and the importance of combatting it in South Africa have been addressed in the case of *African Association of Personal Injury Lawyers v Heath.*[565] In this judgement, Chaskalson J remarked that

> Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State'.

4.3.1. International framework

Since 1994, South Africa has signed 50 BITs.[566] However, some never came into force and others have been terminated. South Africa's first BIT was with the United Kingdom in 1994. South Africa adopted the SA-UK BIT as the draft model in concluding subsequent treaties. [567] The main features of the BIT relates to treating investors fairly and equitably, prohibiting discrimination and expropriation, and adjudication of disputes through international investor-

[563] M Merchant 'A captured state? corruption and economic crime', in G Carbone (ed.) *South Africa: the need for change* (2016) 35-54; D Bernstein and N Shaw 'South Africa' in M F Mendelsohn (ed) *The anti-bribery and anti-corruption review* 3rd ed (2014) 227.
[564] https://www.transparency.org/country/ZAF (accessed 07 February 2019).
[565] 2001 1 SA 883 (CC) para 4.
[566] https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa (accessed 17 June 2020)
[567] M Mohammad 'Process matters: South Africa's experience exiting its BITs' *GEG Working Paper, 2015/97 No. 8*. However, the BIT with Zimbabwe departs from the norm as it provides exceptions to the national treatment clause and promotes affirmative actions.

State arbitration. Hence, the BITs imposed obligations on the State and gave certain rights to the investors. Some of these obligations ran counter to South African's domestic laws. For instance, the national treatment clause in the BITs contained no exceptions which would allow the State to grant preferential treatment to local firms.[568] The South African Constitution[569] and the Broad-Based Black Economic Empowerment Act 53 of 2003 provides for affirmative measures to redress historical imbalances. Regarding corruption, the BITs to which South Africa is Party to, do not have an explicit clause on corruption.

However, since 2007 South Africa began to change its investment policy. This was triggered by a realisation that its comprehensive and far-reaching social policy of black empowerment was conflicting with its obligations under BITs. A case in point is that of *Foresti v The Republic of South Africa*.[570] In this case, private investors alleged that the South Africa's Mineral and Petroleum Development Act (MPDA) and Mining Charter, which sought to encourage greater ownership of mining industry assets by historically disadvantaged South Africans (HDSA), was expropriatory. In line with the Broad-Based Black Economic Empowerment Act, the Mining Charter required mining companies to achieve 26% HDSA ownership of mining assets by 2014 and to publish employment equity plans directed towards achieving a baseline 40% HDSA participation in management by 2009. These South African laws were made in line with its Constitution and meant to address historical imbalances, thereby pursuing a legitimate public interest goal.

While the *Foresti* case triggered the review in South Africa, globally there were concerns being raised in international policy circles pertaining the merits of international investment treaties. For instance, within UNCTAD there were intense discussions on the need to modernise existing BITs by embedding sustainable development objectives into investment treaties. UNCTAD even developed a set of principles and guidelines to achieve this. [571]

The review process South Africa took was concluded in 2010. The major finding was that there was a disconnection between FDI flow and BITs. Evidence presented indicated that South Africa's large investments were from non-treaty partners such as US and India. It further reaffirmed that the existing BITs constrained policy space of developing countries and gave investors room to challenge regulations of public interest. Following this review, landmark

[568] Mohammad (n 567 above) 7.
[569] Section 9 (2) of the South African Constitution.
[570] *Piero Foresti, Laura de Carli and Others v The Republic of South Africa* ICSID Case No. ARB (AF)/07/01.
[571] UNCTAD *Phase 2 of IIA reform: modernizing the existing stock of old-generation treaties* (2017).

decisions were made by the South African cabinet. The core decisions were to 'develop an investment legislation to codify BIT provisions into domestic law; terminate first generation BITs after offering the partners the possibility to renegotiate; develop a South African Model BIT as basis for any new agreement; and establish an inter-ministerial committee to oversee the process'.[572] South Africa has since developed domestic legislation, the Protection of Investment Act[573] that regulates investment. However, some BITs are still in force; hence there is a dual legal framework.[574]

In addition to the BITs, South Africa is also a party to various international conventions that deal with corruption. It has signed and ratified both the UNCAC (2003) and the AU Convention on Preventing and Combatting Corruption (2003). South Africa is also party to the SADC Protocol against Corruption (2001). The provisions of these instruments were discussed in the previous chapter. In the *Glenister* case,[575] the Court indicated that

> The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty of international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.

To this end, the Prevention and Combatting of Corrupt Activities (2014) was promulgated to give effect to these international instruments.

South Africa joined the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions and related instruments in 2007. In line with this Convention's implementation processes, South Africa has undertaken the monitoring phases, which focus on implementation, effectiveness and enforcement of the Convention. In July 2013, an evaluation team from the OECD Working Group on Bribery in International Business Transactions undertook an on-site visit to Pretoria and Johannesburg as part of the Phase 3

[572] Mohammad (n 567 above) 12.
[573] Protection of Investment Act 22 of 2015.
[574] However, some BITs are still in force; hence there is a dual legal framework. As of 26 July 2020, the following BITs with South Africa were still in force: South Africa-Zimbabwe BIT (2009); Nigeria-South Africa BIT (2000); Russian Federation-South Africa BIT (1998); Greece-South Africa BIT (1998); Finland-South Africa BIT (1998); Senegal-South Africa BIT (1998);South Africa-Sweden BIT (1998); Mauritius-South Africa BIT (1998); China-South Africa BIT (1997); Iran, Islamic Republic of-South Africa BIT (1997); Cuba-South Africa BIT (1995); Korea, Republic of-South Africa BIT (1995). See https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa (accessed 26 July 2020).
[575] *Hugh Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 183.

evaluation of South Africa's implementation of the Convention. With regard to South Africa's approach to instances involving foreign bribery, the Working Group noted with concern the lack of foreign bribery enforcement actions and the seemingly passive approach to and lack of significant investigative efforts in existing foreign bribery investigations.[576] Such malaise has been attributed to political and economic considerations, and to influencing the investigation and prosecution of foreign bribery.[577] Consequently, the Working Group recommended, amongst other things, that efforts be increased to proactively detect, investigate and prosecute foreign bribery; measures must be taken first to ensure that national economic interests and the identities of the natural or legal persons involved do not influence the investigation or prosecution of foreign bribery cases, and second to increase the financial resources available to law enforcement authorities charged with fighting corruption to ensure the effective investigation and prosecution of foreign bribery cases.[578]

However, certain strengths were noted and these included well-drafted provisions on the foreign bribery offence; the presence and utilisation of freezing orders and confiscation measures in terms of the Prevention of Organised Crime Act; and the establishment of social and ethics committees within publicly-listed and State-owned enterprises meant to prevent and detect corruption. In general, the review mechanisms provided by some of the international instruments, such as the OECD Convention on Bribery, are essential in ensuring compliance with international standards by Member States. Nevertheless, the presence of such provisions does not directly translate to enforcement, as reflected in the case of South Africa.

4.3.2. Domestic legislation

Foreign investment in South Africa is governed by the Protection of Investment Act (2015). This Act forms the basis of investment protection in the country and lays down various investor obligations. Some of the obligations allude to corruption. In addition to this Act, there is a plethora of legislation which impacts foreign investor's conduct. With specific reference to corruption, the key laws include the Constitution of the Republic of South Africa (1996),[579] the

[576] Phase 3 Report on South Africa by the OECD Working Group on Bribery page 12. Available at http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf (accessed 27 March 2019).
[577] n 576above.
[578] Phase 3 Report on South Africa by the OECD Working Group on Bribery pages 70-75. Available at http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf (accessed 27 March 2019).
[579] In terms of section 217 of the South African Constitution, all state organs are enjoined to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Therefore, organs of the state are expected to ensure transparency in all public procurement processes and even investigate allegations of in procurement processes.

Prevention and Combatting of Corrupt Activities Act (1994), the Protected Disclosures Act (2000),[580] the Competition Act (1998),[581] the Prevention of Organised Crime Act (1998),[582] the Promotion of Access to Information Act (2000),[583] the Promotion of Administrative Justice Act (2000),[584] the Public Finance Management Act (1999) and its Regulations[585] and the Companies Act (2008). However, the Prevention and Combatting of Corrupt Activities Act (PCCAA) is the chief anti-corruption statute in South Africa. What follows is a discussion of the key legislation that deals with corruption of foreign investors in South Africa

a) Protection of Investment Act

The Protection of Investment Act (PIA) was enacted in 2015 and came into force in 2018. The PIA is a product of South Africa's review process of its foreign investment policy. The South African government is the view that the new investment policy framework 'provide adequate protection to all investors, including foreign investors, and it will ensure that South Africa's constitutional obligations, like sustainable development, are upheld, while allowing government to retain the policy space to regulate in the public interest'.[586]

Objectives

The chief purpose of the PIA is to provide a legal framework for the protection of investments in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors.[587] Further to this, the Act serves to affirm

[580] This Act establishes a framework for employees to disclose information about criminal or other irregular conduct in the workplace. It further provides for the protection against victimisation and reprisals as a result of such disclosures.
[581] Certain activities such as price collusion or bid-rigging are prohibited and these amount to any offence in terms of 12 and 13 of the Prevention and Combatting of Corrupt Activities Act.
[582] The main objective of this Act is to combat organised crime; money laundering; criminal gang activities and racketeering activities.
[583] This Act promotes transparency by providing how one can access information held by the state. This enables one to challenge the government decisions and even unearth corruption in the process. This Act in fact gives effect to section 32 of the South Africa's Constitution which provides for access to information.
[584] This Act promotes procedural and substantive fairness in the decision-making process by all public bodies on all matters that affect the public. It further bestows the people with the right to request written reasons for decisions they disagree with. This Act creates and promotes transparency, just like the Promotion of Access to Information Act. It disincentive people from acting in a corrupt manner for fear of defending themselves publicly.
[585] The Treasury Regulations create obligations on organs of the state to investigate corruption within the sphere of public procurement, inform the relevant treasury of such steps; report any conduct that may constitute an offence to the police. See also the Municipal Finance Management Act No. 56 of 2003 which sets out the requirements for dealing with public finances at the local government level and provides for various disclosures to be made in the financial statements of a municipalities.
[586]South African Government News Agency 'Bill to help modernise SA's investment regime: Davies.' Available on: https://www.sanews.gov.za/south-africa/bill-help-modernise-sas-investment-regime-davies (accessed 7 May 2020).
[587] Section 4 (a) of the Protection of Investment Act.

South Africa's sovereign right to regulate investments in the public interest and to confirm the application of the Bill of Rights in the Constitution to all investors and their investments in the Republic.[588]

These objectives are made against the backdrop of States' general dissatisfaction with the existing international investment framework, which is unbalanced, as it only imposes obligations on the State and rights on the investors, and is blind to the rights of the State and obligations of the investor.[589] Inbuilt in this unbalanced relationship is the restriction placed on the State's regulatory space to pursue issues of public interest such as environment and human rights.

Therefore, through the PIA, South Africa seeks to regain its regulatory space and protect investments in a manner that balances investment protection and investors' obligations and rights. South Africa places itself within the broader global debate on the need to reform the existing international investment legal framework. To this end South Africa can adopt legislation that addresses issues such as corruption, environment, human rights and labour. This right to regulate is expressly alluded to in Section 12 of the PIA and indicates that the State can exercise this right to uphold the values and principles espoused in Section 195 of the South African Constitution. These are principles governing public administration that include requirements of transparency and professional ethics.

Scope of application

The PIA is applicable to all investments made in accordance with the requirements set out in section 2 the Act.[590] Section 2 provides for the definition of an investment. It states,

> 2. (1) For the purpose of this Act, an investment is—
>
> (a) any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit;

[588] Sections 4 (b)-(c) of the Protection of Investment Act.
[589] J E Stiglitz 'Regulating Multinational Corporations: towards principles of cross-border legal frameworks in a globalized world balancing rights with responsibilities (2007) 23 *American University International Law Review* 457, 468.
[590] Section 4 of the Protection of Investment Act (hereinafter 'PIA').

(b) the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or

(c) the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic, has an effect on an investment contemplated by paragraphs (a) and (b) in the Republic.

Section 2 (1) (a) partially captures what is termed the legality clause in international investment law. This is the requirement that an investment must be made in accordance with the host State's laws. The legality clause it is a common provision in IIAs. [591] However, the section adds other requirements, that of committing resources of economic value over a reasonable period, and in anticipation of profit. These requirements capture the tribunals' criteria for determining if a certain transaction qualifies as an investment.[592] Therefore, only the transactions that meet the above requirements are recognised. The investor must comply with all South African laws in establishing, acquiring or expanding an investment.[593] The laws to be complied with include those that relate directly to the establishment of investment such as the Companies Act and other laws of general application, such as anti-corruption laws. Should an investor bribe a public official in setting up an enterprise, such enterprise will not be recognised as a lawful investment under the PIA. The importance of the legality clause in dealing with corruption will be explored in chapter 5.

Further, the definition of investment does not make a distinction between foreign and domestic investment. The lack of distinction is crucial. It was indicated above that the existing investment discourse is focused on foreign investors and ignores domestic investors. By not differentiating the two, it follows that both investors are afforded similar protection and expected to adhere to the laws of South Africa in establishing and operating their investment. In fact, the PIA provides that foreign investors and their respective investments will receive a level of physical security, 'as may be generally provided to domestic investors in accordance with minimum standards of customary international law, subject to available resources and

[591] See for instance Art 1 (1) of the Sweden-Bosnia BIT; Art 1 of the Italy-Morocco BIT.
[592] See for instance *Consorzio Groupement L.E.S.I. - DIPENTA v People's Democratic Republic of Algeria* ICSID Case No. ARB/03/08.
[593] Section 7 of the PIA.

capacity',[594] and also receive legal protection of investments in accordance with the right to property in terms of the South African Constitution.[595]

Dispute resolution

In terms of section 13 (1) of the PIA, an aggrieved foreign investor may approach the Department of Trade and Industry to facilitate the resolution of such dispute by appointing a mediator. However, this does not preclude an investor from approaching any competent court, independent tribunal, or statutory body within South Africa for the resolution of the investment dispute.[596] Further, the government may consent to State-to-State international arbitration in subject to the exhaustion of domestic remedies.[597]

Section 13 is an important departure from the traditional investor-State dispute resolution mechanisms contained in IIAs, which permits investor-State arbitration. South Africa argues that the investor-State dispute resolution 'opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration' and 'is of growing concern to constitutional and democratic policy-making'. [598] Therefore, if South African courts are seized with investment disputes, it will be easier to predict the outcome, thereby promoting certainty.[599] Also, courts are likely to take into account the socio-economic objectives underlying the domestic laws or policies being challenged by the foreign investor. Importantly, courts will be at the centre of determining whether a balance of investment protection and public interest has been achieved.

The challenge with the provision is that it leaves foreign investors exposed to the risk of political considerations that might render their home State reluctant to pursue State-to-State arbitration on their behalf. Further, with regard to disputes involving corruption, cases involving high-profile figures might not be timeously prosecuted. The 'arms deals' case, which will be discussed below, reflects this. There are also high possibilities of judicial structures

[594] Section 9 of the PIA.
[595] Section 10 of the PIA.
[596] Section 13 (4) of the PIA.
[597] Section 13 (5)-(6) of the PIA.
[598] https://www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in-africa/investment-projection-legislation-in-south-africa/ (accessed 04 May 2020).
[599] L Mhlongo 'A critical analysis of the Protection of Investment Act 22 of 2015' *South Africa Public Law Journal*, (Forthcoming) 17.

being undermined by corruption. The ongoing allegations of State capture, to be discussed below, are testimony to this possibility.[600]

The PIA does not have an exclusive provision providing for corruption. However, as indicated above, the requirement that investment must be made in accordance with South African laws implies that investors must comply with all South African laws, including anti-corruption laws. For this reason, it is imperative to discuss the chief legislation that provides for corruption, that is, the PCCAA.

b) The PCCAA

The PCCAA creates a general offence of corruption. In broad terms, it is an offence for a person to directly or indirectly accept or give any gratification to any person or for the benefit of another person in order to act to influence a person to act in a manner that amounts to abuse of authority or unauthorised exercise of powers, or is designed to achieve unjust results.[601] The offence covers both passive and active corruption. 'Gratification' is defined broadly to include donations, gifts and protection from litigation.[602] Public officials are allowed to accept gifts offered as part of a formal exchange and all gifts from sources other than family members exceeding R350 must be disclosed.[603] Further, the PCCAA enumerates corruption in relation

[600] State of Capture: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses. Report No. 6 of 2016/2017. See also K B Shai 'South African state capture: a symbiotic affair between business and state going bad (?)' (2017) 9:1 *Insight on Africa* 62-75.

[601] Section 3 of the PCCA. See also the case of *S v Shaik & others* 2007 1 SCA in which the accused were charged of committing corruption in contravention of the repealed section 1(1) (a) of the Corruption Act 94 of 1992. Section 1(1)(a) read:

> Any person—
> (a) who corruptly gives or offers or agrees to give any benefit of whatever nature which is not legally due, to any person upon whom—
> (i) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law, or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or
> (ii) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect of such duty, with the intention to reward the person upon whom such power has been conferred or who has been charged with such duty because he so acted.

[602] Section 2 of the PCCA.

[603] Chapter 3, Regulations E. (f) of the Code, Government Notice No. 21951: Public Service Regulations (GN 1 of 5 January 2001).

to specific persons, *viz* [604] public officers,[605] foreign public officials, agents, members of the legislative authority, judicial officers and prosecuting authorities.[606] However, South Africa has not prosecuted any case of bribery or corruption of foreign public officials.

Unlike the New Zealand legislative framework, the PCCAA also provides for corruption in specific matters, and these are witness and evidential matters; receiving gratification payments in an employment relationship; contracts; procurement and tenders; auctions; sporting events; gambling games; acquisitions of private interests in contract; and agreement or investment of public body.[607] By enumerating specific matters, the PCCAA brings to the fore the corrupt matters that confront people more often in their daily lives. While these matters may translate less substantially in terms of dollar value, they are equally detrimental, and failure to tackle them may cement the common mentality that corruption is simply inevitable.[608]

In relation to corruption in contracts, it is an offence to accept or give gratification in order to improperly influence the promotion, execution or procurement of any contract with a public body, a private organisation or corporate organisation.[609] Similarly, agreeing or giving any gratification to any person for the purpose of promoting any candidate or influencing the result of an election, in order to obtain or retain a contract is an offence.[610] Conflict of interest is addressed in section 17, which generally forbids a public officer from acquiring a private interest in a contract, agreement or investment emanating from or connected with a public body in which s/he is employed or was made on account of that public body. However, such prohibition is not applicable to cases where the interest is acquired by virtue of being a shareholder in a listed company, or where the conditions of employment do not prohibit the acquisition of such interests.[611]

It is well established that the procurement process is a fertile ground for corruption, mainly due to the complexity of the processes, the large sums involved and the presence of unsupervised discretion. Procurement corruption can take various forms, including price collusion, improper

[604] See Part 2 of the PCCA.
[605] *Selebi v S* 2012 1 All SA 332 (SCA).
[606] *S v Kgantsi* 2007 JOL 20705 (W) unreported.
[607] Part 4 of the PCCA.
[608] J Wouters, C Ryngaert & A Cloots 'The international legal framework against corruption: achievements and challenges' (2013) 14 *Melbourne Journal of International Law* 8-9. See generally E Lavallée, M Razafindrakoto & F Roubaud 'What generates corruption: a micro-analysis on African data' (2010) 24:3 *Revue d'economie du développement* 5.
[609] Section 12 (1) of the PCCA.
[610] Section 12 (2) of the PCCA.
[611] Section 17 (2) of the PCCA.

exercise of discretion, and slack enforcement of contractual clauses in order to supply sub-standard products.[612] In the South African context, the Constitution mandates all State organs to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost effective.[613] Further, section 13 of the PCCAA criminalises attempts to influence the procuring process, including offering or accepting gratification in order to withdraw a tender. The provisions on conflict of interests are also useful in combatting procurement corruption.

The penalty for corruption in procuring matters and contracts is between five years' and life imprisonment, depending on the jurisdiction of the Court in which the matter is tried.[614] In addition to the mandatory imposed sentences, the court may order that the particulars of the offender be endorsed on the Register of Tender Defaulters.[615] Further restrictions include termination of any agreement that has been concluded, taking into account the duration of the contract, urgency of the services to be delivered, the extent in which the agreement has been executed and the costs of termination.[616] Therefore, before reaching its decision on terminating or upholding a tainted contract, the government has to undertake a balancing exercise, weighing the different interests involved. Such interests could include the effect of termination of the performance of the contract on the citizens expected to benefit directly or indirectly and the monetary implications for the government's coffers. The same has to be done by the court when affirming the government's decision to terminate a contract. In other words, the government has to exercise restraint before terminating a contract tainted with corruption.

The same restraint has been witnessed in cases where a contract is impinged due to procedural irregularities. In those circumstances, the courts can invalidate tender awards if the irregularities are clear and significant to undermine competitiveness.[617] Other factors of significance are the presence or extent of blameworthy conduct on the part of the successful

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[612] S Williams & G Quinot 'Public procurement and corruption: the SA response' (2007) 124:2 *The South African Law Journal* 342.
[613] Section 217 of the Constitution of South Africa. See also *KOPM Logistics (Pty) Ltd v Premier, Gauteng Province and Others* 2013 (3) SA 240 (ECP); *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356; *Allpay Consolidated Investment Holdings v The Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC).
[614] Section 26 (1) of the PCCA.
[615] Section 28 (1) of the PCCA.
[616] Section 28 (3) (a) (i) of the PCCA.
[617] *AllPay Consolidated Investment Holdings & Others v The Chief Executive Officer of the South African Social Security Agency & Others* 2013 4 SA 557 (SCA) para 21. See also the case of *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd & Another2010 4 SA 359 (SCA.)*

tenderer,[618] the nature of the contract resulting from the tender,[619] the practical legal implications of invalidating the tender award and the various interests including those of the public, especially the beneficiaries.[620]

The aspect of public interest, especially the beneficiaries, was discussed in the *AllPay Consolidated Investment Holdings (No 2)* case.[621] AllPay, an unsuccessful tenderer, contested the award of a tender by the South African Social Security Agency (SASSA) to Cash Paymaster Services (Pty) Ltd. It alleged gross irregularities with the bidding process, centred on 'Bidders Notice 2', which changed the bidding terms related to biometric verification. The Request for Proposals required biometric verification as a preferential mode at the payment stage, whereas Bidders Notice 2 changed that to a mandatory requirement. AllPay alleged that this change was not done in accordance with the Request for Proposals, and its import was not adequately explained. It caused uncertainty and confusion for certain members of the Bid Evaluation and Adjudication Committees, and eventually made AllPay to be scored lowly. The Constitutional Court held that the decision to award the tender to Cash Paymaster was constitutionally invalid for two reasons: SASSA's failure to ensure that the empowerment credentials claimed by Cash Paymaster were objectively confirmed, and vagueness of Bidders Notice 2, which did not specify with sufficient clarity what was required of bidders in relation to biometric verification. However, the Court suspended the declaration of invalidity, pending the determination of a just and equitable remedy.[622]

In its submissions for the determination of a just and equitable remedy, SASSA argued that because of the practical implications, the tender should not be set aside. It further contended that the 'contract is too far advanced to be undone, and that it is strongly in the interests of grant beneficiaries that the contract be allowed to run to completion'.[623] The Court emphasised there is a public interest of having a procedurally correct process, but this had to be balanced against the essential need for uninterrupted service delivery in line with the constitutional

[618] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 26.
[619] *Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 4 SA 488 (C).
[620] *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 29.
[621] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) 2014 ZACC 12.
[622] *AllPay Consolidated Investment Holdings & Others v The Chief Executive Officer of the South African Social Security Agency & Others (No 1)* 2013 4 SA 557 (SCA).
[623] n 621 above, para 16.

obligations. It pointed out that in the context of public procurement matters generally, priority should be given to the public good. This meant that the public interest had to be assessed not only in relation to the immediate consequences of invalidity, but also in relation to the effect of the order on future procurement and social security matters.[624] The Court made the following order: declared the contract for the Payment of Social Grants between SASSA and Cash Paymaster Services (Pty) Ltd, invalid; suspended the declaration pending the decision of SASSA to award a new tender; and, if the new tender was not awarded, the declaration of invalidity of the contract was to be further suspended until completion of the five-year period for which the contract was initially awarded.[625]

In addition to termination, the National Treasury determines the period of restrictions but such must not be less than five years or more than ten years.[626] The effect of restrictions is that further tender offers will be ignored and the offender or their enterprises will be disqualified from making offers or obtaining any agreement.[627] The exclusions indicate government's lack of tolerance for corruption, and they act as deterrent measures against violating anti-corruption legislation. Exclusions are also punitive because not only do they cause immediate financial loss to the excluded tenderer, they also cause damage to the firm's reputation, thereby affecting its capacity to obtain business in other sectors.[628]

Upon termination of the agreement tainted with corruption, the government is entitled to recover any damages incurred or sustained as a result of the tender process or the conclusion of the agreement.[629] Crucially, an unsuccessful tenderer can also recover damages for pure economic loss resulting from fraudulent conduct by a procuring entity's officials in the course of a tender process. This was addressed in the case of *Minister of Finance and Others v Gore NO*.[630] In this case, two senior government employees fraudulently conspired with the representatives of the winning tendering company, Nisec. These two employees assisted Nisec

[624] n 636 above, para 32.
[625] n 636 above, para 78. Chapter 7 proposes that one of the factors that a Tribunal must consider in determining the award is the cost of terminating the investment transaction. Therefore, this decision by the court supports this proposal, on the need to examine economic effects of terminating an illegally acquired investment.
[626] Section 28 (3) (a) (ii) of the PCCA. See also the case of *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & Anor* 2011 1 SA 327 (CC) A.
[627] Section 28 (3) (b) of the PCCA.
[628] Williams & Quinot (n 625 above) 347; R Kramer 'Awarding contracts to suspended and debarred firms: are stricter rules necessary?' (2005) 34 *Public Contract Law Journal* 543.
[629] Section 28 (3) (c) of the PCCA.
[630] 2007 1 SA 111 (SCA). See *Gore NO v Minister of Finance and Others*, [2008] ZAGPHC 338, for compensation which was paid to the unsuccessful tenderer.

in preparing the tender documents on the government's premises, and they further negotiated employment contracts for themselves with Nisec in addition to receiving substantial bribes which were paid into their wives' accounts. Still further, one of the employees, Louw, who oversaw the evaluation committee, used his position to lie, conceal and manipulate the entire process in order to secure the award for Nisec. Since the employees' actions, though fraudulent, closely resembled what they were employed to do, the employer (the government) was held vicariously liable for their actions. [631]

South African courts have been seized with numerous cases involving lack of fairness or transparency in the public-procurement process[632] and procurement corruption.[633] In *South African National Roads Agency Ltd v Toll Collect Consortium*, the court indicated that it would not hesitate to interfere with tender awards if the process was infected with illegality and where there was impropriety or corruption.[634] Even where practical considerations such as financial implications have been taken into account and performance is almost complete, a tender award can be set aside due to corruption.[635]

Like New Zealand's Crimes Act, the PCCAA has extra-territorial jurisdiction. Even if corrupt acts were committed outside South Africa, the courts have jurisdiction by virtue of the offender being a citizen, or an ordinary South African resident, or was arrested in South Africa, or the company is incorporated in South Africa.[636] Also, acts committed outside South Africa are regarded as if committed in South Africa if the acts were meant to affect a public body, or business or a person in South Africa, and the person is in South Africa and was not extradited.[637]

The 'arms deal'

South Africa's confrontation with corruption is incomplete without mention of the arms deal, a deal completed as part of the South African military procurement programme. The arms deal

[631] *Minister of Finance and Others v Gore NO* 2007 1 SA 111 (SCA) para 30.
[632] *AllPay Consolidated Investment Holdings & Others v The Chief Executive Officer of the South African Social Security Agency & Others* 2013 4 SA 557 (SCA); *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 1 SA 356 (SCA); *Dr JS Moroka Municipality v Bertram (Pty) Ltd* 2014 1 All SA 545 (SCA); *Esorfranti Pipelines (Pty) Ltd v Mopani District Municipality (40/13)* 2014 ZASCA 21.
[633] *Transnet Ltd v Sechaba Photoscan* (Pty) 2005 1 SA 299 (SCA); *South African National Roads Agency Limited v The Toll Collect Consortium* 2013 6 SA 356 (SCA); *Minister of Finance and Others v Gore NO* 2007 1 SA 111 (SCA); *S v Tshopo and Others* (29/12) 2012 ZASCA 193.
[634] 2013 6 SA 356 para 27.
[635] *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 2 All SA 513 (SCA)
[636] Section 35 (1) of the PCCA.
[637] Section 35 (2) of the PCCA.

is crucial for the purposes of this study as it serves to illustrate the challenges of dealing with corruption involving foreign companies, their local subsidiaries and public officials. It also illustrates the ineffectiveness of domestic laws in prosecuting corruption and the influence of politics in undermining prosecutions. Companies involved included BAE Systems Operations Limited (UK) and BAE Land Systems South Africa; Saab (Sweden) and its local subsidiary Saab Grintek Defense; and Thales (France) and its local subsidiaries, Thales Avionics SA, Thales South Africa Systems, Thales Air Defense Ltd and Thales Optronics Ltd.

During the period 1996-1999, the South African government commissioned the purchase of R30 billion worth of armaments, submarines and frigates from a French-German consortium, and fighter jets from a British-Swedish consortium. It was alleged that bribes of over one billion rand were paid to facilitate the deal. A joint investigation into the arms deal, comprising the Public Protector Selby Baqwa, the Auditor General, and the National Prosecutor, Bulelani Ngcuka, was initiated. The joint investigators reported to Parliament in 2001, implicating former defence minister Joe Modise and Chippy Shaik of corruption, but concluded that there were no grounds to believe that government had acted improperly or illegally.

However, in 2003, new claims of irregularities in the tender process were unearthed. A letter was produced by Nigel Bruce, a Democratic Alliance M P, revealing that one of the bidders, African Defence Systems (ADS) was allowed to drop its bid after the closing date, from R32.4 million to R29.64 million a day. The change of figures allowed ADS to secure the sub-contract. Further allegations of corruption were made in 2011, through the press, that then Minister of Transport, Mac Maharaj, received 1.2 million French francs as a bribe from the French company Thales.

In the prosecution of Schabir Shaik on allegations of corruption in relation to the arms deal, a senior government official, Jacob Zuma, was implicated.[638] It was the State's case that 'over the period of time from October 1995 to 30 September 2002, and taking place in or about Durban, Shaik, or one or other of his accused companies, gratuitously made some 238 separate payments of money, either directly to or for the benefit of Mr Jacob Zuma, who held high political office throughout this period…the object being to influence Zuma to use his name and political influence for the benefit of Shaik's business enterprises or as an ongoing reward for

[638] *S v Shaik & others* 2007 1 SA 240 (SCA).

having done so from time to time'. The Court found Shaik guilty of corruption. Twelve days after the judgement Zuma was relieved of his duties as the Deputy President.

Investigations were initiated by the Scorpions against Zuma on allegations that he solicited a R500 000 per annum bribe to quash investigations into the arms deal. The investigators announced that while there was *prima facie* evidence of corruption, it would not prosecute Zuma due to lack of cooperation by the French authorities. However, in 2005 Zuma was formally charged with various counts of racketeering, money laundering, corruption, and fraud. Due to the National Prosecution Authority's (NPA) inability to finalise investigations on time, the matter was struck off the roll in 2006 in the Pretoria High Court. The NPA withdrew corruption charges in 2009 against Zuma, due to the charge of abuse of process which violated the accused's constitutional guarantees, but charges were reinstated on appeal. Since then Zuma has been fighting permanent stay of proceedings on bases such as unreasonable delay, which includes charge delay and trial delay, occasioned by the conduct and inconsistent decisions of the NPA in the past 16 years.[639] Recently, the Court dismissed Zuma's application for stay of proceedings. Hence, Zuma will stand trial for corruption together with Thales, a French company involved in the arms deal.[640] Thales is accused of agreeing to pay Zuma an annual bribe of R500 000 for protection from an investigation into the arms deal.

In September 2011, the then-President Jacob Zuma set up a commission of inquiry, known as the Arms Procurement Commission or Seriti Commission. The terms of reference of the Commission included investigations on

> 1.5 Whether any person(s), within and/or outside the Government of South Africa, improperly influenced the award or conclusion of any of the contracts awarded or concluded in the SDPP procurement process and, if so:
>
> > 1.5.1 Whether legal proceedings should be instituted against such persons, and the nature of such legal proceedings; and

[639] *S v Zuma and Another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and Others* (CCD30/2018, D12763/2018).
[640] n 652 above.

1.5.2 Whether, in particular, there is any basis to pursue such persons for the recovery of any losses that the State might have suffered as a result of their conduct.[641]

In its Report, the Commission found that there was no evidence to substantiate the various allegations of fraud, corruption or malfeasance that\ were directed at government officials and senior politicians.[642] Further, there was no evidence to prove that government officials received corrupt payments or that their decisions were unduly influenced. Two civil society groups, Corruption Watch (CW) and the Right2Know Campaign, filed for a review of the Commission's findings in Pretoria High Court.[643] In setting aside the Commission's Report, the Court indicated that 'the Commission failed to enquire fully and comprehensively into the issues which it was required to investigate on the basis of its terms of reference'.[644] For instance, one witness Advocate Hlongwane, was allowed to 'ramble on about all manner of complaints about the motivations for the allegations against him which had little to do with the terms of reference of the Commission nor did he address any of the allegations levelled against him'[645] and no questions were put to him by the Commission despite damning reports by the SFO affidavit and the further affidavits from the Directorate of Special Operations (DSO) and the NPA.[646] Further, the Commission's refusal to initiate diplomatic processes to access information held by the German, Swiss, Swedish, West Indian and Liberian authorities that was relevant to its investigations, seriously hobbled its investigation.

On the other hand, foreign companies implicated in the scandal such as BAE were investigated in their countries. In 2010 BAE acknowledged a 'serious accounting offence' and settled with the SFO for GBP 30 million.[647] Nonetheless, the UK investigations against BAE only led to corporate settlements without establishment of personal responsibility.

One of the lessons that can be drawn from the arms deal is that although South Africa has robust anti-corruption mechanisms, corruption involving high-profile figures and foreign companies is difficult to deal with in South Africa. Political considerations seem to be given

[641] *Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission) Report* Volume 1 December 2015 page 3.
[642] *Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Package (Arms Procurement Commission) Report* Volume 1 December 2015 para 659
[643] *Corruption Watch and Another v Arms Procurement Commission and Others* 2019 4 All SA.
[644] n 656 above, para 53.
[645] n 656 above, para 64.
[646] n 656 above, para 57.
[647] https://sites.tufts.edu/corruptarmsdeals/the-south-african-arms-deal/ (accessed 20 May 2020).

priority over justice. At the time of writing, only two convictions, those of Tony Yengeni[648] and Shabir Shaik, have been made in relation to the arms deal, while Zuma is yet to have his day in court. The arms deal cast a shadow of doubt on South Africa's capacity to effectively handle corruption cases in line with the PIA. This will be compounded by the PIA's dictates on the need to balance public interests and the protection of investments. The criteria set by the PCCAA might be a useful tool in achieving this balance.

c) Companies Act

In terms of the PIA, an investment is defined as 'any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit'.[649] Therefore investors intending to invest in South Africa have to establish an enterprise. The PIA recognises both incorporated and unincorporated enterprises.[650] Enterprises are incorporated in terms of the Companies Act.[651] There are three types of profit-making companies: a private company, a personal liability company and public company.[652] While the Companies Act covers an array of issues, this study will only explore the statutory obligations imposed on companies as they relate to the prevention and curbing of corruption.

There are specific provisions in the Companies Regulations that are meant to deal with corruption. Regulation 43 of the Companies Regulations makes it mandatory for certain companies to establish 'social and ethics committees'. The concerned companies are State-owned companies, listed public companies and any other company that has in any two of the previous five years has a 'public interest score' above 500 points.[653] The social and ethics

[648] *S v Yengeni* (A1079/03) 2005 ZAGPHC 117. During the arms deal, Tony Yengeni, was Member of Parliament and the chairman of the Parliamentary Joint Standing Committee on Defence. He was charged of corruption in terms of section 1(1) (b) (i) of the Corruption Act, No 94 of 1992. He was accused of unlawfully and corruptly receiving a benefit (a new Mercedes Benz 4x4 motor vehicle), which was not legally due to him, from Daimler-Benz Aerospace South Africa (Pty) Ltd, with the intention that he should commit and/or omit any act in relation to his powers and/or duties to further the interests of Daimler-Benz Aerospace AG and/or Daimler-Benz Aerospace South Africa (Pty) Ltd.

[649] Section 2 (1) (a) of the PIA.

[650] Section 1 of the PIA.

[651] Act No. 71 of 2008.

[652] Section 8 (2) of the Companies Act.

[653] Regulation 43 of the Companies Regulation, 2011. The 'public interest score' is calculated in terms of regulation 26 (2) of the Companies Regulations as:

> (a) a number of points equal to the average number of employees of the company during the financial year;
> (b) one point for every R 1 million (or portion thereof) in third party liability of the company, at the financial year end;

committee (SEC) must monitor the company's activities, including the company's standing in terms of the OECD recommendations regarding corruption.[654] This means that the SEC is responsible for ensuring that the company implements and complies with the OECD recommendations on corruption. These recommendations are discussed in chapter 3 and primarily meant to prevent or reduce the occurrence of corruption in companies. The statutory requirement on the establishment of the SEC in certain companies should 'give prominence to the value attached to concerns beyond profit-making',[655] and such concerns include corruption. Indeed, financial performance should not trump societal values such as integrity, fair competition and human rights.[656]

The Companies Act also offers protection to whistleblowers.[657] Those who disclose information in terms of the Companies Act are given immunity from civil, criminal and administrative liability for that disclosure.[658] The protection extends to shareholders, directors, prescribed officers, company secretaries, and a registered trade union that represents employees of the company, and suppliers of goods or services to a company or an employee of such suppliers. Further, companies are required to maintain systems and procedures for facilitating whistleblowing and to publicise these policies.[659]

As a general rule, once a company is incorporated, it is a juristic person and has all legal powers and capacity of an individual.[660] This legal personality means that the company can sue and be sued in its own name[661] and can be found guilty of corruption. Further, the Criminal Procedure Act provides that a corporate body may be held directly liable for any offence, whether under any law, be it common law or statute, arising from acts performed or omitted by the directors

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(c) one point for every R 1 million (or portion thereof) in turnover during the financial year; and (d) one point for every individual who, at the end of the financial year, is known by the company-
(i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
(ii) in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company.

[654] Regulation 43 (5) (a) of the Companies Regulations, 2011.

[655] M K Havenga 'The Social and Ethics Committee in South African company law' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 285.

[656] N L Joubert 'Reigniting the corporate conscience: reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange' in C Visser and J P Pretorius (eds) *Essays in Honour of Frans Malan* (2014) 183-184.

[657] Section 159 of the Companies Act.

[658] Section 159 (4) (b) of the Companies Act.

[659] Section 159 (6) of the Companies Act.

[660] Section 19 (1) of the Companies Act

[661] *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 1 SA 945 (A); *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A).

or company officers.[662] In the *Coetzee* case, the Constitutional Court described section 332 of the Criminal Procedure Act as a 'comprehensive set of provisions designated to facilitate the criminal prosecution of corporations, their directors and servants and members of associations'.[663] In practice, companies involved in illegal activities can obtain corporate leniency in exchange of full disclosure of their illegal activities to the authorities. [664] However, it does give the State access to information which facilitates prosecution for corruption.

In addition to corporate liability, directors and prescribed officers can be held personally liable for certain activities such as acquiescing in the carrying on of the company's business despite knowing that it was being conducted for fraudulent purposes.[665] The provisions of the Companies Act that creates liabilities for both company and directors is line with international instruments dealing with corruption. They also encourage companies and directors to conduct business in a prudent manner.

d) South Africa's anti-corruption bodies

There is a long-standing debate concerning the institutional form and configuration of anti-corruption bodies. Two models are recognised: single agency and multi-agency. In South Africa, the National Planning Commission (NPC) prefers the multi-agency approach and favours the strengthening of the existing multi-agency anti-corruption framework. The Council for the Advancement of the South African Constitution (CASAC), however, prefers the single agency model and calls for the adoption of a new and independent body responsible and accountable for investigating corruption.[666]

Unlike New Zealand, which has a single-agency model,[667] South Africa has a multiple agency approach to anti-corruption. It has at least ten agencies with a role in anti-corruption, including the Auditor General, Public Protector, Public Service Commission, Independent Complaints Directorate, South African Police Service Commercial Branch, National Prosecuting Authority, Directorate for Priority Crime Investigation (the 'Hawks'), the Special Investigations Unit, and the Financial Intelligence Centre.

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[662] Section 332(1) of the Criminal Procedure Act No. 51 of 1977.
[663] *S v Coetzee & Others* 1997 3 SA 527 CC.
[664] D Loxton 'South Africa' in J Pickworth & Deborah Williams (eds) *Bribery & Corruption* 1st ed (2013) 173.
[665] Section 77 (3) (c) of the Companies Act.
[666] CASAC proposes a new independent agency to investigate acts of corruption. http://www.casac.org.za/wp-content/uploads/2016/09/corruption-campaign-media-release.pdf (accessed 5 February 2019).
[667] The Serious Fraud Office (SFO) is the lead law enforcement agency for investigating and prosecuting serious financial crime, including bribery and corruption.

The Public Protector (PP) is established in terms of section 181 of the Constitution. Its mandate is to support and strengthen constitutional democracy. As an administrative oversight body, the PP is authorised to investigate, report on and remedy improper conduct in all State affairs. These powers were confirmed in the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*.[668] The PP has been instrumental in unearthing and remedying corruption in the public sector. For instance, in the allegations of maladministration, corruption and misappropriation and failure by the South African government to recover public funds from ABSA Bank, the PP referred the matter to the Special Investigating Unit in order to investigate alleged misappropriated funds given to various institutions and also to recover monies unlawfully given to ABSA.[669] The PP's remedial actions were challenged by the Reserve Bank and ABSA Bank on the basis that some of the remedial actions were aimed at amending the Constitution to deprive the Reserve Bank of its independent power to protect the value of the currency. The remedial actions violated the doctrine of the separation of powers guaranteed by section 1(c) of the South African Constitution and were procedurally unfair.[670] Punitive costs orders were sought against the PP both in her official and personal capacity. The Constitutional Court found that the personal cost order was appropriate since the Public Protector had acted in an irresponsible manner, lacking openness and transparency in performing her functions.[671]

The Directorate for Priority Crime Investigation is a division within the South African Police Service. This entity focuses on serious organised crime, serious corruption and serious commercial crime. There also exists a Special Investigating Unit (SIU). The SIU is an independent statutory body that was established by the President.[672] The SIU conducts investigations and reports the outcomes of its investigations to the President. The Specialised

[668] 2016 ZACC 11.
[669] https://accountabilitynow.org.za/wp-content/uploads/2017/06/Report-8-of-2017-2018-Public-Protector-South-Africa.pdf. See also *Report No. 30 of 2018/19 on an investigation into allegations of maladministration, corruption and unconscionable use of public funds by the uMzimkhulu Local Municipality*. http://www.pprotect.org/sites/default/files/legislation_report/Umzimkhulu.pdf (12 February 2019) and the *Report 6 of 2016/2017 on the investigation into alleges improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State Owed Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta's family businesses*. http://saflii.org/images/329756472-State-of-Capture.pdf (accessed 18 February 2019).
[670] *South African Reserve Bank v Public Protector and Others* 2017 6 SA 198.
[671] *Public Protector v South African Reserve Bank* 2019 9 BCLR 1113.
[672] Special Investigating Units and Special Tribunals Act, Act 74 of 1996 and Proclamation R118 of 31 July 2001.

Commercial Crime Unit exists within the National Prosecuting Authority and is responsible for economic crimes such as corruption.

The crucial question is whether the existence of multiple bodies, each with varying responsibilities for combatting corruption, has mutually enhanced or hindered the ability of the South African government to effectively deal with corruption. There is no straightforward answer. The UN Office on Drugs and Crime has noted that the 'issue of a single anticorruption agency needs to be put in perspective', especially in cases where 'fragmentation, insufficient coordination, poor delineation of responsibility and assimilation of corruption work impacts on the resourcing and optimal functioning of [multiple] agencies'[673] In other words, a single, all-powerful agency has to be considered as the preferred anti-corruption agency model in cases where multiple agencies lack coordination in combatting and enforcing anti-corruption rules. Currently, in South Africa, the general notion is still the one expressed by the Heath Special Investigating Unit, that

> We are dealing with a multi-headed dragon and various different kinds of swords are required to attack the different types of heads of the dragon. The Unit is therefore of the view that the various organisations all have a role to play in the fight against corruption and maladministration.[674]

One of the main disadvantages of a multi-agency approach is the occurrence of intra-branch institutional conflicts and the vulnerability of various institutional forms to collective political interests. The dissolution of the Directorate for Special Operations and Serious Economic Offences (the 'Scorpions') and the experience of the arms deal illustrates these challenges. The Scorpions were a unit of the National Prosecuting Authority, tasked with investigating and prosecuting organised crime, corruption, serious and complex financial crime and racketeering and money laundering. It has been notorious for raiding houses of high-ranking African National Congress politicians, including the then-Deputy President Jacob Zuma, and investigating alleged corruption in the arms deal.

[673] United Nations Office on Drugs and Crime, *Department of Public Service and Administration Country corruption assessment report* (2003).
[674] L Camerer 'Tackling the multi-headed dragon, evaluating prospects for a single anticorruption agency in South Africa' (1999) Occasional Paper, No. 38. Pretoria: Institute for Security Studies. See also V Naidoo 'The politics of anti-corruption enforcement in South Africa' (2013) 31: 4 *Journal of Contemporary African Studies* 533.

Following the Khampepe Commission of Inquiry into the mandate and location of the DSO,[675] the Scorpions were merged with the SA Police Service. The Khampepe Commission addressed the legal role, institutional placement, jurisdictional mandate and possible abuse of power of the Scorpions. Its findings reflected the challenges of apportioning responsibility in cases where there is a shared role in criminal investigations, and of identifying which executive institution is responsible for what aspects of anti-corruption enforcement. In the Scorpions' case, the Scorpions were housed in the National Prosecuting Authority, whose political oversight was vested in the Minister of Justice and Constitutional Development, whereas the South African Police Service, statutorily mandated to investigate all criminal matters, operated under the political oversight of the Minister for Safety and Security. The National Prosecuting Authority was also accountable for the policing functions of the Scorpions, which overlapped with the political functions of the Minister for Safety and Security. Inasmuch as there was nothing unconstitutional in the Scorpions sharing a mandate with the SAPS, the framework was susceptible to the jurisdictional conflict that arises in executing shared mandate.

The independence of the Hawks, which replaced the Scorpions, was impugned in the *Glenister* case.[676] It was indicated by the Court that the provisions creating the DPCI were inadequate to insulate it from political influence, especially in its structure and functioning.[677] Two crucial factors rendered the Scorpions not independent, *viz* lack of security of tenure and political oversight. In terms of tenure, the members of the new Directorate enjoyed no specially entrenched employment security. It was the Court's view that 'adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously',[678] and 'the absence of specially secured employment may well disincline members of the Directorate from reporting undue interference in investigations for fear of retribution'.[679]

With regard to political oversight, the Court indicated that the power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI creates risks of executive and political influence in investigations and on the entity's functioning.[680] The composition of the said Ministerial Committee included the Ministers for Police, Finance, Home Affairs,

[675]The Khampepe Commission of inquiry report (February 2006) http://www.justice.gov.za/commissions/2008_khampempe.pdf (accessed 18 February 2019).
[676] *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347.
[677] n 676 above, para 208.
[678] n 676 above, para 222.
[679] n 676 above, para 224.
[680] n 676 above, para 229.

Intelligence and Justice. The powers of the Ministerial Committees to issue policy guidelines, select the national priority offences and request performance and implementation reports from the DPCI, 'lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence'.[681]

Based on this, the Court concluded that that the statutory structure creating the DPCI offended the constitutional obligation resting on Parliament to create an independent anti-corruption entity, which is both intrinsic to the Constitution itself and which Parliament assumed when it approved the relevant international instruments, including the UN Convention.[682] It declared that chapter 6A of the South African Police Service Act 68 of 1995 was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the DPCI. This declaration of constitutional invalidity was suspended for 18 months in order to give Parliament the opportunity to remedy the defect. In September 2012, the South African Police Service Act 68 of 1995 was amended to align with this Constitutional Court order.[683] To a greater extent, the amendment has afforded the DPCI, though not an exclusive anti-corruption body, independence and capacity to discharge its mandate. Nevertheless, the DSO/DPCI transition reflects the uncongenial institutional environment in which specialised anti-corruption entities have functioned in South Africa.[684]

4.3.3. Critique of South Africa's anti-corruption legal framework

The above discussion suggests that South Africa has a very complicated structure for dealing with corruption**,** and the powers of different parts of the structure have been subjects of debate and litigation. However, the legislature has taken steps to combat this problem through enacting the PCCAA and complementary laws. The PCCAA is broadly drafted and reflects South Africa's commitment to abide by its international and constitutional obligations. For instance, both passive and active corruption are covered in line with the UNCAC, the SADC Protocol against Corruption and the OECD Convention. The Companies Act's requirements for establishing social and ethics committees reflects the OECD's guidelines for multinational enterprises,[685] while the restriction requirements for companies and individuals whose business conduct is tainted with corruption mirror the World Bank debarment policy. Important for this

[681] n 676 above, para 236.
[682] n 676 above, para 248.
[683] South African Police Service Amendment Act No. 10 of 2012.
[684] V Naidoo 'The politics of anti-corruption enforcement in South Africa' (2013) 31: 4 *Journal of Contemporary African Studies* 538.
[685] Section 72 (4) of the South Africa's Companies Act.

thesis is the effect of corruption on the validity of a contract. The PCCAA provides that a balancing exercise must be undertaken before the government decides to terminate a contract.

On the face of it, South Africa's anti-corruption legislative framework is comprehensive. Ironically, even if corruption is perceived as widespread, there has not been any foreign bribery enforcement action, and there is apparently a passive approach to, and lack of significant investigative efforts in, existing foreign bribery investigations.[686] Therefore, the issue concerns implementation and enforcement of existing anti-corruption laws. Various reasons can account for this. Foremost, South Africa inherited an institutional legacy of corruption which was created by the apartheid government. Conditions of secrecy, oppression and authoritarian rule promoted corruption. Rent-seeking behaviour was rife in the homelands during the apartheid period.[687] Even during the transitional period, the State-sponsored economic empowerment was employed as a tool for creating camaraderie networks within the ruling party's members (ANC) and government at large.[688] This eroded the government's will and political motivation to effectively police corruption, since the same people had benefitted from corruption. The patronage ties established during the apartheid period made it 'difficult for deeds of corruption by those old comrades to be publicly acknowledged or denounced by the ANC'.[689] These strong ties are still visible in contemporary South Africa. For instance in the *Shaik* case,[690] even when the court had found that benefits accrued to Shaik were as result of Zuma's interventions, Zuma initially received strong support from various sectors including trade unions, the ANC Youth League and the South African Communist Party.

The theory of colonialism as one of the factors that explains the presence of corruption in some countries has been discussed by various scholars.[691] In general, this theory argues that institutions are persistent and inherited. These institutions (whether social, economic or political) in former colonies were aimed at benefitting the colonisers and not the natives. They were further created in such a manner that would continue to safeguard the coloniser's interests

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[686] Phase 3 Report on South Africa by the OECD Working Group on Bribery page 12. Available at http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf (accessed 27 March 2019).
[687] H Jonathan 'Political corruption: before and after apartheid' (2005) 31: 4 *Journal of Southern African Studies* 783.
[688] Naidoo (n 684 above) 524-525.
[689] Jonathan (n 687 above) 783.
[690] *S v Shaik & Others* 2008 2 SA 208 (CC) paras 48, 80.
[691] L Angeles & K C Neanidis 'The persistent effect of colonialism on corruption' (2015) 82:326 *Economica* 319-349; M M Mulinge & G N Lesetedi 'Interrogating our past: colonialism and corruption in sub-Saharan Africa' (1998) 3:2 *Journal of Political Sciences* 15-28; J Svensson 'Eight questions about corruption' (2005) 19:3 *Journal of Economic Perspectives* 26.

long after they had relinquished direct control.[692] The independent governments inherited such institutions, including putting in place constitutional structures that enhanced the concentration of power in one office, thereby continuing the legacy of corruption.[693] A recent empirical study has since reflected that 'European settlement leads to higher levels of corruption for all countries where Europeans remained a minority in the population, for all developing countries'.[694]

In all colonised countries, the colonisers placed themselves at the top of the social structure. In the case of South Africa, the Europeans acquired land they preferred and banished Africans to 'reserves'.[695] The net effect was that the more powerful an elite was, the more likely it was to engage in corrupt activities. Therefore, corruption is viewed as a 'by-product of traits of fraudulent antisocial behaviour derived from British, French and other colonial rulers'.[696]

However, the identity of the coloniser is also crucial. In colonies that were over-regulated, for example under French or socialist governments, corruption is generally rife, compared to former English colonies.[697] This phenomenon has been attributed to the superiority of administration of justice imposed on the colonies by the British rulers.[698] The case of New Zealand illustrates this fact. Nevertheless, the irony is that South Africa was under British rule from 1795 to 1803 and from 1806 to 1961,[699] and the precepts of administrative justice seem not to have paid off in South Africa due to apartheid.

Further, the issues of risk and trust can also account for the persistence of corruption in South Africa. The new ANC government lacked capacity to run a modern State and had to rely on the incumbent experts, the very bureaucracy it distrusted. With this, the ANC had to manage the immense risks of transition, while relying on a bureaucracy in which they had no trust. It is argued that in these circumstances the government tends to prioritise political reliability of officials and political stability over probity or effectiveness of public services.[700] This can account for lack of enforcement of anti-corruption rules, especially in the public sector. In

[692] Mulinge & Lesetedi (n 691 above).
[693] Mulinge & Lesetedi (n 691 above) 22.
[694] Angeles & Neanidis (n 691 above) 321.
[695] Angeles & Neanidis (n 691 above) 321.
[696] Mulinge & Lesetedi (n 691 above) 18.
[697] J Svensson 'Eight questions about corruption' (2005) 19:3 *Journal of Economic Perspectives* 26.
[698] D Treisman 'The causes of corruption: a cross-national study' (2000) 76:3 *Journal of Public Economics* 426-427.
[699] E Oliver & W H Oliver 'The colonisation of South Africa: a unique case' (2017) 73:3 *HTS Teologiese Studies/ Theological Studies* https://hts.org.za/index.php/hts/article/view/4498/10038 (accessed 20 February 2019).
[700] Jonathan (n 687 above) 776.

contrast, professional public bureaucracy was promoted in New Zealand, from the inception of the Department of Public Works in 1876. One way of promoting a professional public bureaucracy is through strict implementation of rules.

In addition, the enforcement framework is designed along the organisational control approach. Certain challenges are seen in this model. The framework is susceptible to jurisdictional conflict that arises in executing shared mandates, as indicated in the DSO/DPCI case. The structures of anti-corruption enforcement mechanisms within public services departments also may not be conducive for encouraging disclosure, especially in instances where the directors are required to investigate corruption behaviours of their seniors. These hierarchical lines can be employed to suppress the reporting of corrupt activities and their consequent investigations. Additionally, the public services departments generally lack capacity to investigate cases of alleged corruption reported on the National Anti-Corruption Hotline and referred to them.[701] All these can account for the collective inaction against transgressors within the public sector.[702] With such a climate, one wonders how effective domestic laws are in combatting corruption in an investment regime.

4.4. Challenges of combatting corruption at the domestic level

The preceding discussion compared two countries, one considered the least corrupt, New Zealand, and another substantially corrupt, South Africa. New Zealand is a Member of OECD, and South Africa is an OECD key partner. Their association with OECD means that their anti-corruption laws are influenced by the OECD Convention against Bribery and its various Recommendations. Both countries have also ratified the UNCAC; hence their laws are crafted to meet their international obligations. Further, both countries regulate bribery of foreign public officials, and the legislative framework confers extra-territorial jurisdiction in matters of corruption. The enforcement frameworks are also similar, along the organisational control approach. Historically, both countries were once under British rule. Amongst the dissimilarities is that New Zealand is a developed country and capital exporter while South Africa is a developing country[703] and both a capital importer and exporter within the African context.

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[701] Parliamentary Monitoring Group *Prohibition on Public Servants doing business with State & Anti-Corruption Hotline* 21 November 2018 https://pmg.org.za/committee-meeting/27587/ (accessed 18 February 2019).
[702] Naidoo (n 684 above) 530-531.
[703] For the characteristics of developing countries, see, http://www.economicsdiscussion.net/developing-economy/characteristics-developing-economy/common-characteristics-of-developing-countries-economics/29990 (accessed 22 March 2019).

In general, developing and capital-importing countries are a breeding ground for corrupt activities, rendering them more corrupt than capital-exporting countries. It is suggested that the need to attract FDI makes developing countries turn a blind eye to corruption or motivates selective or weak implementation of anti-corruption laws. Most of the countries in which corruption is rife are in dire need of investment in crucial areas such as infrastructure development.[704] The environment might be risky, but the higher the risk, the higher the return. Further, a developing country may lack the capacity to detect, investigate and prosecute corruption, if alleged, since the relevant institutions are still developing or partially functioning. Competition amongst investors also drives investors to engage in corrupt activities to acquire the business opportunities.

Ordinarily, one would expect that a corrupt investor would be held liable through the implementation of the extra-territorial jurisdiction clauses, even if the capital-importing country has not prosecuted the corrupt investor. However, not all countries have extra-territorial jurisdiction clauses in their legislation, and where they exist, the clause arrangements differ. For instance, Argentina does not exercise territorial jurisdiction over legal persons for the offence of foreign bribery, while Colombia cannot sanction foreign legal persons for acts committed on its territory.[705] In Brazil, for the nationality jurisdiction to be applicable to legal persons, one has to satisfy that the legal person is both incorporated in and headquartered in Brazil.[706] In the Czech Republic and the UK, jurisdiction over a foreign legal person is asserted in acts committed outside of its territory when that legal person conducts business in or owns property in these territories, while Norway asserts universal jurisdiction for foreign bribery offences regardless of whether the offence was committed in Norway and/or the person involved is a Norwegian national.[707] In the context of New Zealand, the Attorney General's permission is needed before pursuing a case involving bribery of a foreign public official. The differing levels of development and lack of uniform extra-territorial jurisdictional clauses are deficiencies in national laws that militates against efforts in preventing and combatting transboundary corruption.

[704] Llamzon (n 6 above) 4-5.
[705] OECD (2016), The liability of legal persons for foreign bribery: a stocktaking report, page 112 https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf (accessed March 22, 2019.
[706] n 705 above.
[707] n 705 above.

In addition, political and security considerations may cause one country not to investigate and prosecute corruption offences. The same considerations were highlighted in the case of South Africa, which has not proactively detected, investigated and prosecuted cases of corruption involving foreign entities. The OECD evaluators on the implementation of the Anti-Bribery Convention in South Africa noted that South Africa has not prosecuted any foreign bribery cases. Since 2007, when South Africa joined OECD, only six cases involving foreign bribery were reported but no conviction has yet been secured.[708] The evaluators believe that in addition to lack of technical capacity, the political and economic considerations may be influencing the investigation and prosecution of foreign bribery.[709]

Additionally, corruption itself undermines the capacity of institutions to effectively deal with the same. Hence, where the institutions have been captured, the nature of attention given to corruption is significantly diminished, and ultimately it is difficult to effectively address corruption. The case of South Africa and the various ongoing allegations of State capture illustrate this.[710] In this scenario, complaints were brought to the PP's Office, alleging improper and unethical conduct by the President (Jacob Zuma) and other State functionaries in relation to improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Entities (SOEs), thereby resulting in improper and possibly corrupt awards of State contracts and benefits to the Gupta family's businesses. The findings by PP indicated, *inter alia,* improper conduct by the President in allowing members of the Gupta family and his own son to engage or to be involved in the process of removal and appointing of various members of Cabinet and possible conflict of interest. As remedial action, the PP recommended the setting up of a judicial commission of inquiry to investigate and make recommendations regarding all allegations of state capture, corruption and fraud in the public sector.[711]

Outside the developing/developed dichotomy, there also exist other reasons that justify the need to deal with corruption at the international level. Corruption can hold a whole nation's market, and even the judiciary, hostage. The markets consist of sophisticated relations between producers and consumers and various sets of relations between economic actors and social,

[708] Phase 3 Report on implementing the OECD Anti-Bribery Convention in South Africa (March 2014) 10. Available at: https://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf
[709] n 708 above, 12.
[710] n 600 above.
[711] https://www.sastatecapture.org.za/site/files/documents/2/LEGAL_TEAM_OPENING_ADDRESS.pdf (accessed March 28, 2019).

political, legal and civil institutions. These relations are governed by codes of behaviour meant to promote fair competition. Corruption removes fair competition by creating an asymmetric context where certain competitors are excluded. The consumer's freedom of choice is also limited. Those who benefit from corruption have less incentive to address corruption, since it allows them a certain degree of protection from full market competition. In the end, the whole market is held hostage by corruption.

Further, corruption can affect the judiciary system. Judicial corruption 'includes all forms of inappropriate influence that may damage the impartiality of justice, and may involve any actor within the justice system, including lawyers and administrative support staff'.[712] Where such has transpired, legal security wanes as the courts do not exercise their power for the common good but rather to the briber's benefit. All this has an effect of destroying trust in trading and investment and financially hurting those who fairly compete in the market.[713] Therefore, a corrupted judiciary cannot be trusted to effectively address corruption.

Crucially, in the investment regime, the nature of transboundary corruption itself renders domestic laws inadequate. Transboundary corruption involves large volumes of money, or money's worth, and many players and, frequently, senior government officials. Such government officials usually possess tremendous influence in the administration and even in justice systems, making it difficult for one to investigate corruption. Consequently, the governments to which corrupt officials involved in a transnational operation belong, may be less interested in criminalising corrupt activities or may selectively decide which conduct to prosecute. The act of bringing corruption to the international forum serves to remedy the defects of the domestic anti-corruption fora. It affords an opportunity for redress to countries whose companies have been injured by the corrupt practices of those that do not respect rules of fair play. [714] It is in the interest of the international community to see that rules of fair competition are uniformly adhered to. Corruption has an effect of undermining these rules. It is precisely for the above reasons that corruption occurring in the investment regime has to be assigned to international fora where such factors are absent, or alternatively have less influence on the manner in which corruption is dealt with.

[712] S Gloppen 'Courts, corruption and judicial independence' in T Søreide & A Williams *corruption, grabbing and development: real world challenges* (2014) 69.
[713] Manfroni (n 255 above) 7.
[714] Manfroni (n 255 above) 57.

With regard to the countries that were studied, one underlying factor that explains the presence or absence of corruption is cultural values. The findings seem to suggest that laws are not the sole determining factor in fighting corruption: cultural values also play a role. Unlike South Africa, New Zealand values fairness and honesty. Cultural values, therefore, can promote or impede efforts to combat corruption. However, it is impossible to wait until all people share the same cultural values. Therefore, it is imperative for some form of independent and impartial international judicial entity, such as the ICSID, to be seized with the task of combatting corruption, and to a greater extent to enforce existing anti-corruption norms.

States might be wary of giving international arbitrations powers to enforce positive norms and possibly shape a State's legal framework. Such curtailment is necessary, however, as it seeks to resolve some of the State's governance problems by exposing the misconduct of public officials and forcing governments to enforce their existing laws. Overall, this will enhance the State's investment climate and attractiveness as a destination for FDI. Nevertheless, this would not be complete solution, but due to the international arbitrators' persuasive precedential value and the punitive aspect of the award itself, such would serve as deterrents.[715]

4.5. Conclusion

This chapter has discussed how corruption is generally dealt with under national laws. New Zealand and South Africa were employed as case studies. The discussions highlighted some of the salient provisions that regulate corruption, indicating that both countries have robust anti-corruption legal frameworks. Nevertheless, certain factors render these frameworks inadequate in combatting transboundary corruption arising in international investment transactions. These factors include the manner in which the extra-territorial jurisdiction clauses are drafted; the role of economic, political and security considerations in investigating and prosecuting corruption; and the nature of transboundary corruption itself. While all the factors are important, the transboundary nature of corruption necessitates the intervention of judicial bodies. By nature, transboundary corruption involves international interests and actors across different jurisdictions. This creates challenges in countering such activities, purely at the domestic level, without the cooperation of other countries. Further, the occurrence of corruption within an FDI framework means that international laws and IIAs must be applied, and international judicial bodies such as the ICSID are best suited to deal with such. For these reasons combatting

[715] Llamzon (n 6 above) 213.

transboundary corruption arising from the investment regime must be assigned to international judicial bodies such as the ICSID.

CHAPTER 5

EXISTING LEGAL TOOLS IN ADDRESSING CORRUPTION

5.1. Introduction

International investment arbitrations have been seized with disputes involving allegations of corruption. In most of these cases, the host State invokes corruption as a defence against the foreign investor's claims.[716] Extreme cases involve the foreign investor alleging unlawful expropriation or unfair treatment by the State due to the foreign investor's refusal to offer bribes to public officials.[717] In all these instances, investment arbitrators have to determine jurisdiction and substantive issues brought by the Parties.

The way allegations of corruption are dealt with is strongly affected by the unique features of investment arbitration. First, the investor's substantive rights are derived from an investment agreement such as a Bilateral Investment Agreement (BIT). Therefore, arbitrators must interpret anti-corruption provisions in the BITs and determine if Parties have acted contrary to these provisions or not. Investment arbitrators rarely employ domestic laws unless the Parties have included it in their choice of laws. Cremades succinctly made an analogy of the legality clause in an investment arbitration, with claims of validity of contract under international commercial arbitration. He indicated that

> the legality of the investment in investment arbitration has its analogy in international commercial arbitration in the validity of the contract. If the applicable law does not insist on the separability of the arbitration agreement from the main contract, then respondents quickly seek to subvert the arbitral process by challenging the validity of the main contract. Similarly, the phrase 'according to the laws and regulations of the Host State' might provide the Achilles Heel of investment arbitration if jurisdiction depends on the Claimant passing a full legal compliance audit.[718]

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[716] *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru* Case No. ARB/03/4; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru* ICSID Case No. ARB/03/4; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v La République démocratique du Congo* ICSID Case No. ARB/05/21; *Tsa Spectrum De Argentina S.A. v Argentine Republic* ICSID Case No. ARB/05/5; *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6.

[717] *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13.

[718] *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* ICSID Case No. ARB/03/25 Dissenting Opinion of Mr. Bernardo M. Cremades para 37.

Second, unlike international commercial arbitrations, investment arbitration agreements, especially under the auspices of ICSID, are not subject to review by the courts of the place of arbitration unless the investor intends to enforce the foreign arbitral award under the New York Convention on Enforcement of Foreign Arbitral Awards.[719] International law also plays a key role in the interpretation of the investment agreement's provisions.[720]

It was argued in the previous chapter that combatting corruption through international investment arbitration offers an opportunity of solving some of States' governance problems by exposing the corrupt conduct of public officials and forcing governments to enforce their existing laws. However, the lack of explicit provisions in most of the existing investment agreements makes investigating allegations of corruption a daunting task to the arbitrators, leading arbitrators to devise various approaches in addressing allegations of corruption. Therefore, this chapter examines the legal approaches that international investment arbitration has employed in addressed corruption. Arbitral jurisprudence reflects three approaches: the legality clause approach, transnational public policy approach and the doctrine of clean hands. These investigations are aimed at determining if the current approaches sufficiently contribute to the eradication of corruption and promotion of accountability. A brief examination of IIA clauses that Parties to an investment dispute rely on will be undertaken shortly, after which the discussion will consider the three approaches mentioned above.

5.2. IIA clauses relevant to corruption

IIAs concluded before year 2000 contain standard provisions covering definitions such as investment, legality clause, national treatment clause, most-favoured nation clause, expropriation clause, repatriation of investment and returns clause, fair and equitable treatment clause, and dispute settlement clause. Regarding corruption, the legality clause and the fair and equitable treatment clause have been invoked by the host State in support of its corruption defence.

The legality clause is typically expressed as follows: 'Subject to its laws and regulations, each Contracting Party shall admit investments of investors of the other Contracting Party'.[721] The

[719] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

[720] M A Raouf 'How should international arbitrators tackle corruption issue?' (2009) 24:1 *ICSID Review, Foreign Investment Law Journal* 128-129.

[721] Art II (2) Canada-Uruguay BIT (1991). The provisions for post 2000 IIAs are typically drafted as follows:
ARTICLE 2 Scope of Application

term investment is typically defined as[722] 'any kind of asset held or invested either directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:…'.[723] Arbitrators have been called to determine if the legality clause is restricted to the types of investment legally recognised by the host State, or if it includes the investor's conduct in establishing the investment. For example, in the case of *Fraport case*[724] the Respondent objected to the Tribunal's jurisdiction on the basis that the investor's investment was made contrary to Philippine law; therefore, it could not be regarded as an investment within the meaning of Article 1 (1) of the German-Philippine BIT (1997). The host State alleged, *inter alia*, that the investor had engaged in corruption and fraud when it made its initial investment. This case will be fully discussed below.

A typical fair and equitable treatment (FET) clause provides as follows:

> (2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.[725]

FET clauses are meant to protect the investor against the various types of circumstances which manifest unfairness. Such situations may include the arbitrary cancellation of licences, harassment of an investor through unjustified fines, and penalties or other hurdles disruptive to

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> (1) This Agreement shall apply to investments made prior to or after its entry into force by investors of one Contracting Party in the area of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party.

[722] The definition in Canada-Uruguay BIT is an 'asset-based' definitions. There also exist other types of definitions such as 'enterprise-based' definition. See for instance, section 2 of South Africa's Protection of Investment Act. For further reading, see M Malik *Best practices series - definition of investment in International Investment Agreements* The International Institute for Sustainable Development (2009).

[723] Art I (a) Canada-Uruguay BIT (1991). See also Art 1(f) Canada-South Africa BIT (1995) which has similar wording.

[724] *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* ICSID Case No. ARB/03/25.

[725] Art 2 Uganda-United Kingdom BIT (1998).

the investor's business.[726] The application of this standard in corruption cases was witnessed in the *EDF* case. In this case, the investor alleged that the bribes requested by the host State's agency were a violation of the FET obligation. The Tribunal consented that a request for a bribe by a State agency was a violation of the fair and equitable treatment obligation owed to the investor pursuant to the BIT, as well as a violation of international public policy.[727]

5.3. The legality clause

The legality clause requires that an investment be made in accordance with host State laws and regulations, and is a common provision in bilateral and multilateral investment treaties. [728] There is a wide consensus that the legality clause is an international legal principle, applicable even in cases where it is not explicitly mentioned in an investment treaty. It is regarded as a 'tacit condition, inherent in every BIT, since it cannot be understood under any circumstance that a State is offering the benefit of protection through investment arbitration when the investor, to reach that protection, has committed an unlawful action'.[729] This clause has been referred to and interpreted on numerous occasions as well.[730] Disagreements arise over whether the legality clause creates a condition for the exercise of the right to arbitration and the extent of the scope of compliance with host State's laws and regulations.

The legality clause is instrumental in distinguishing a valid investment from an invalid investment. These involve the type of assets involved and recognised by the host State. Typical features of investments include a certain duration, regularity of profit and return, element of risk, substantial financial and non-financial commitment, and a significant degree of development for the host State.[731] These characteristics act as benchmarks or yardsticks to help

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[726] UNCTAD *Fair and Equitable Treatment - UNCTAD series on issues in International Investment Agreements II* (2012) 6-7.
[727] *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13 para 221.
[728] See for instance Art 1 (1) of the Sweden-Bosnia BIT; Art 1 of the Italy-Morocco BIT.
[729] *SAUR International v Argentine Republic* ICSID Case No. ARB/04/4 para. 306.
[730] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* ICSID Case No. ARB/00/4; *Saipem S.p.A. v People's Republic of Bangladesh* ICSID Case No. ARB/05/7; *Inceysa Vallisoletana S.L v Republic of El Salvador* ICSID Case No. ARB/03/26; *Tokios Toheles v Ukraine* ICSID Case No. ARB/02/18; *Desert Line Projects LLC v Yemen* ICSID Case No ARB/05/17; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan* ICSID Case No. ARB/05/16; *SAUR International v Argentine Republic* ICSID Case No. ARB/04/4; *Saba Fakes v Turkey* ICSID Case No ARB/07/20; *Vladislav Kim et al v Republic Of Uzbekistan* ICSID Case No. ARB/13/6; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru* Case No. ARB/03/4; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru* ICSID Case No. ARB/03/4; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v La République démocratique du Congo*, ICSID Case No. ARB/05/21.
[731] OECD *Definition of investor and investment in International Investment Agreements. International investment law: understanding concepts and tracking innovations* (2008) 61; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No. ARB/07/24 para 113.

a tribunal in assessing the existence of an investment, but they need not be satisfied cumulatively, and any number of elements may suffice to characterise an economic operation as an investment in a given case.[732] To that end, only investments made according to the host State laws are regarded as valid investments and deserving of protection.[733] In essence, investments intentionally structured to defeat the host State's laws do not qualify as investment. For instance, in the *Fraport* case,[734] the investor deliberately structured its investment to circumvent the Philippines' constitutional and statutory nationality restrictions. The investor acquired shares in a Philippine company (PIATCO) and other various small companies and simultaneously established binding arrangements with the same, designed to interfere in the management, operation, administration and control of PIATCO. Such acts were prohibited by the Philippines' Anti-Dummy Laws.[735] The tribunal held by majority that an investment purposefully structured in violation of the host State's laws was excluded as an investment protected by BIT due to its illegality.[736]

The extent to which an investor is expected to comply with the host State's laws has been discussed in various cases. In the *LESI* case, the tribunal was of the view that an investment loses treaty protection only when made 'in violation of fundamental principles in force'.[737] Similar views were expressed in the *Desert Line* case[738] and the *Rumeli* case. [739] However, in the *SAUR* case, the tribunal referred to 'serious violation of the legal regime'.[740] Therefore, according to these tribunals, the investor does not have to comply with all the laws of the host State. What matters is compliance with the fundamental legal principles of that State and only serious violations will invoke the legality clause.

[732] *Saba Fakes v Turkey* ICSID Case No ARB/07/20 para 99.
[733] *Salini Costruttori S.p.A. & Italstrade S.p.A. v Kingdom of Morocco* ICSID Case No. ARB00/4; *Consortium Groupement LESI-Dipenta v Algeria* ICSID Case No. ARB/03/08 para 24 (unofficial translation from the original French text available at www.worldbank.org/icsid).
[734] *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* ICSID Case No. ARB/03/25.
[735] Presidential Decree No. 715 May 28, 1975 Amending Commonwealth Act No. 108, is commonly known as the Anti-Dummy Law. Philippine law limits non-citizens equity ownership to 40%, known as the 40/60 rule. This law outlaws use of proxy arrangement / dummy arrangement in order to circumvent the equity restrictions.
[736] *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* ICSID Case No. ARB/03/25paras 467-468.
[737] *LESI SpA and Astaldi SpA v Algeria* ICSID Case No ARB/05/3 para 83.
[738] *Desert Line Projects LLC v Yemen* ICSID Case No ARB/05/17 para 104.
[739] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan* ICSID Case No. ARB/05/16.
[740] *SAUR International v Argentine Republic* ICSID Case No. ARB/04/4 para 306.

The difficulty rests in identifying fundamental principles from non-fundamental principles of a particular State. The Tribunal in the *Fakes* case attempted to shed light on this difficulty.[741] In this case, the Claimant alleged that he was a shareholder in Telsim, a mobile company incorporated in 1993 under Turkish law. The Uzans, a prominent family in Turkey, had 67% shareholding in this company, between February 2003 and May 2006. Following investigations and convictions between July and August 2003 on fraud and money-laundering, the Uzans' assets were frozen. On February 13, 2004, the government, through Turkey's Savings Deposit Insurance Fund (SDIF), obtained an injunction against Telsim's assets. The SDIF proceeded to appoint Telsim's directors and seized the rights attached to Telsim's shares, apart from the right to receive dividends. On December 13, 2005, the SDIF sold most of Telsim's assets to Vodafone for an amount of approximately USD 4.5 billion.

The Claimant alleged that he acquired the shares in Telsim on July 3, 2003. He indicated that on January 2, 2003, the Board of Directors had authorised Mr Uzan to sell shares in Telsim. The legal adviser to Mr Uzan had indicated to the Claimant that the structure of the transaction was that a third party would be the legal owner of the relevant shares in Telsim, but Mr. Uzan had beneficial rights over them. It was the Claimant's claim that by selling Telsim's assets, the State had expropriated his property in violation of the Netherlands-Turkey BIT.

The State objected to the jurisdiction, alleging that the investment was made in violation of the laws and regulations of the Republic of Turkey and thus did not qualify as a protected investment under Articles 2(1) and (2) of the Netherlands-Turkey BIT. It alleged violation of Article 413 of the Turkish Commercial Code, which required that share certificates must be signed "by at least two persons authorized to sign on behalf of the company." To the extent that the temporary share certificates bear only the signature of Mr. Hakan Uzan, the State argues that these certificates were not valid under Turkish law. Also, the 'arrangement' between the claimant and Mr Uzan did not meet the criteria of an investment under Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT. In order to resolve these issues, the Tribunal had to determine if the Netherlands-Turkey BIT imposed a condition of legality of the investment and, if so, what the scope and content of such requirement was. The Tribunal indicated that not all violations of the host State's laws would result in the illegality of the investment within the meaning of the BIT and would preclude such investment from benefitting from the substantive protection offered by the BIT. Only violations

[741] *Saba Fakes v Turkey* ICSID Case No ARB/07/20.

'related to the very nature of investment regulation'[742] are considered fundamental. The Tribunal considered that denying substantive protection to those investments that would have violated domestic laws that are unrelated to the very nature of investment regulation, would run counter to the object and purpose of investment protection treaties. In cases of breach of other domestic laws, the host State can take appropriate action within its domestic legal framework. Therefore, there should be a connection between the breach and the investment. This is applicable even in cases of corruption. Soliciting bribery in other areas but not related to the investment would not result in the illegality of the investment.

In the *Vladislav Kim* case,[743] the tribunal analysed the substantive scope of the legality requirement. The representation of the factual background of this case differed considerably between the investor and the State. The investor alleged that it held a portfolio in cement manufacturing assets, cement plants and related assets, in Kazakhstan, Kyrgyzstan, and Russia. These assets were held through a Cypriot holding company, UCK, and its subsidiaries. In a bid to grow its portfolio, the investor acquired Uzbek companies (BC and KC) between the period of 2005 and 2006, with the help of intermediaries. Due to their lack of knowledge of the host State's Stock Exchange regulations, the investor entered into two complementary agreements: one with the stockbrokers and the other with the sellers. The brokers' agreement, Tashkent Share Purchase Agreements (SPAs), was executed by the brokers to record title transfer in the shares. After the acquisition of these companies, the investor sought to prepare for an initial public offering of shares. As part of these preparations, the investor had to produce audited accounts of United Cement Group Plc. (UCG). The sellers of BC and KC wanted to keep the acquisitions confidential. However, the investor provided UCG's auditors with the Tashkent SPAs and not the other agreement by and between the investor and sellers.

The investor further alleged that from early 2010, its business interests were subjected to a campaign of harassment by the government. The harassment took place under the guise of official and lawful action by offices and agencies of the Uzbek government. The investor's cement production facilities were investigated, and some employees arrested; business activities were disrupted, and company property confiscated. The courts even ordered the cession of 51% shareholding in BC in favour of the Uzbek government and ordered the seizure of currency in KC's accounts. The Uzbek government also brought a civil claim to seek the

[742] n 741 above, para 119.
[743] *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6.

transfer of 12% of Claimants' shares in KC to over 1 400 individuals that the Uzbek government claimed were deceived or coerced into selling their shares. As a result of the above actions, the investor alleged that the government violated its obligations under the BIT.[744]

The government denied the investor representation of the factual background. It contended that the investment was a sham involving corruption and fraud by the investor in violation of Uzbek law and to the detriment of existing shareholders in BC and KC. It further argued that there was no evidence to indicate that the investor held shares in BC or KC or that they were in control of the various companies in the complex corporate structure that the investor purported to use to manage their investments in the cement industry in Uzbekistan and other markets. Also, the investor made a false disclosure regarding the agreed purchase price of the BC and KC shares. This violated Uzbek law and amounted to securities fraud. This was done by the investor in order to avoid taxes and fees to the stock exchange, and to improperly improve the prospects of the Initial Public Offering that it sought for UCG.

The government further alleged that the investor breached Uzbekistan's national laws by making off-the-books, offshore payments of US$33.98 million to Ambassador Gulnara Karimova, in exchange for a relationship of trust and her influence on her father, the then-President of Uzbekistan. In addition, through its alleged subsidiary, Caspian Resources, the investor coordinated systematic bribing of numerous Uzbek government officials. The government argued that, considering the illegal activities by BC and KC, the Uzbek government brought criminal proceedings against the managers of BC and against the Uzbek government officials who participated in the Claimants' bribery scheme.

The government objected to the Tribunal's jurisdiction and the admissibility of the claims. It contended that it had consented under the BIT to arbitrating legal disputes arising out of investments that were made in compliance with its laws but did not consent to arbitrating legal disputes arising out of unlawful investments. In this context, the government argued that since the investment was made in violation of Uzbek laws, through fraud and deceit, the Tribunal lacked jurisdiction, and/or the investor's claims were inadmissible under the BIT, the ICSID Convention and principles of international public policy.[745] Furthermore, it argued that corrupt

[744] Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Uzbekistan on Promotion and Reciprocal Protection of Investments, signed in Almaty, Kazakhstan, on 2 June 1997 and entered into force on 8 September 1997.
[745] *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6 para 171 (hereinafter '*Vladislav Kim et al* case').

payments which were made to a relative of a government official by the investor rendered the investor's claim inadmissible.

In discussing the scope of the legality clause, the Tribunal first noted that previous decisions restricted the scope of legality to violations of fundamental laws of the host State and to a variety of rule-like statements in the governing scope. One of the challenges presented by such analysis was that the rule-like statements were 'not necessarily phrased in ways that can be applied easily to other Host State laws, or adapted to the variety of legal systems encountered by ICSID tribunals'.[746] This was compounded by the fact that these rule-like statements were in several instances constructed without reference either to the text of the treaty in question or to underlying principles.[747] Further, the fact that minor or trivial non-compliance was excluded from the legality requirement did not establish that the legality requirement was limited to violations of fundamental laws.[748]

In the Tribunal's view, a more principled approach guided by the principle of proportionality was the appropriate test in determining whether the legality clause had been violated. To this end only 'noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State'[749] could be denied protection under a treaty. This had an effect of delimiting the scope of the legality clause to the significance of the violation complained of, and not to whether the law is fundamental.[750] It indicated that while the gravity of the law itself was a central part of the examination, it was not the sole focal point. The seriousness of the violation to the host State was to be determined by the overall outcome of the violation.

Moreover, according to the Tribunal, the application of the principle of proportionality meant that disputes had to be examined on a case-by-case basis. This examination would entail 'examining both the seriousness of the investor's conduct and the significance of the obligation not complied with so as to ensure that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined'.[751] The case-by-case application of the legality requirement would involve three

[746] *Vladislav Kim et al* case paras 384.
[747] *Vladislav Kim et al* case paras 384-385.
[748] *Vladislav Kim et al* case para 395.
[749] *Vladislav Kim et al* case para 396.
[750] *Vladislav Kim et al* case para 398.
[751] *Vladislav Kim et al* case para 404.

steps which included assessing the significance of the investor's obligation, assessing the seriousness of the investor's conduct, and evaluating 'whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the host State to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined'.[752]

In assessing the significance of the investor's obligation, the Tribunal set out various issues which had to be considered, such as the level of sanction provided in the law, the level of compliance and the actions taken by the State to investigate or prosecute the alleged act of non-compliance. A low sanction might suggest that the obligation was less significant, while a heavy penalty, such as forfeiture of property, would suggest that the obligation was more significant.[753] The seriousness of the investor's conduct could be deciphered from considerations such as the investor's intentions, the level of due diligence by an investor and the investor's subsequent conduct. Regarding the latter, continued investment in the asset might indicate that the investor pursued the investment in good faith.[754]

Employing this test to allegations of corruption, the Tribunal examined Article 211 of Uzbek's Criminal Code on bribe-giving. The assessment was meant to examine the circumstances of the investor's act in concert with the seriousness of the obligation in the law. In the Tribunal's view, a prohibition on bribery or corruption of governmental officials was a matter of great importance to the host State. This was indicated in the text of Article 211 which criminalises bribery, that is, "knowingly illegal" act with intent on the part of the investor to gain a particular advantage, and imposing heavy penalties for bribery by public officials of imprisonment from five to ten years. [755] The Tribunal looked at 'the content of the statute to determine whether,

[752] *Vladislav Kim et al* case para 408.
[753] *Vladislav Kim et al* case para 406.
[754] *Vladislav Kim et al* case para 407.
[755] Article 211 of the Criminal Code, entitled 'Bribe-giving' provides:

> Bribe-giving, that is, knowingly illegal provision of tangible valuables to an official, personally or through an intermediate person, or of pecuniary benefit for performance or non-performance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe shall be punished with fine up to fifty minimum monthly wages, or correctional labor up to three years, or arrest up to six months, or imprisonment up to three years.
>
> Bribe-giving:
> a) repeatedly, by a dangerous recidivist or a person who has previously committed crimes punishable under Articles 210 or 212 of this Code;
> b) in large amount –shall be punished with imprisonment from three to five years.
> Bribe-giving:
> a) in especially large amount;

owing to a breach of its terms, the investment in this dispute falls outside the scope of application of the Treaty as described in Article 12 of the BIT'.[756] However, the State's objection of jurisdiction on grounds of corruption was dismissed, since it failed to prove that an excess payment by the Claimants to Ms Karimova was in violation of Article 211 of the Uzbekistan Criminal Code, so as to render the claim inadmissible under Article 12 of the BIT.[757]

This case is significant in various ways. It seeks to limit the ambit of the legality clause by subjecting it to the principle of proportionality, drawing out various factors that must be considered in determining whether the investment must be granted protection. While the proportionality principle has been widely used in other fields,[758] its application in determining legality in investment arbitration is very novel. It is an attempt to promote the primary objective of investment treaties, that is, protection of *bona fide* investments.

Further, issues that arbitration tribunals are enjoined to examine create great inroads to the legislative, executive and judiciary powers of the host State. States have the sovereign right to determine the substance of their laws, which are to their socio-political and economic demography. The *Kim* case seems to suggest that the level of compliance and actions taken by the State can indicate that the obligation created is insignificant. However, the absence of compliance may even be explained by other factors such as a State's lack of capacity to deal with alleged act of non-compliance. For example, in the South African context, no cases of foreign bribery have as yet been prosecuted, despite numerous investigations being conducted. South Africa alleges that it does not have the technical capacity to deal with such complicated matters.[759]

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b) in the interests of an organized group;
c) by an authorized official – shall be punished with imprisonment from five to ten years.

[756] *Vladislav Kim et al* case para 559.

[757] *Vladislav Kim et al* case para 591.

[758] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969 3; *Brazil-Aircraft* WT/DS46/ARB para 3.51; *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/ para 292; *Tecnicas Medioambientales Tecmed SA v The United Mexican States* Award of May 29, 2003. See also, X Han 'The application of the principle of proportionality in Tecmed v Mexico' (2007) 6:3 *Chinese Journal of International Law* 636; B Kingsbury and S Schill 'Investor-state arbitration as governance: fair and equitable treatment, proportionality and the emerging administrative law' (2009) *New York University Public Law and Legal Theory Working Papers* 29.

[759] Phase 3 Report on implementing the OECD Anti-Bribery Convention in South Africa (March 2014) 12. Available at: https://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf.

5.3.1. Legality clause as a jurisdictional requirement

Defining an investment has been central in determining the jurisdiction of the arbitrating tribunal. The jurisdiction *ratione materiae* of the ICSID extends to 'any dispute arising out of an investment'.[760] In *Inceysa* case[761] the Tribunal held that it had no jurisdiction on various grounds, including that the investment was not made in accordance with El Salvador's laws. In this case, the investor had fraudulently represented its capability in order to secure a contract with the Republic of El Salvador. The Tribunal in the *Inceysa* case broadly defined investor obligations to comply with the host State's laws. It indicated that the investor is legally bound to comply with other fundamental, generally recognised principles of law, such as the principle of *nemo auditur propriam turpitudinem allegans* (i.e., nobody can benefit from his own wrong), good faith, international public policy and prohibitions of unlawful enrichment, fraud, corruption and deceit.[762]

Similarly, in the *Fraport* case[763] discussed above, non-compliance with national laws was interpreted as a jurisdictional requirement. The Tribunal held by majority that an investment purposefully structured in violation of the host State's laws was excluded as investment protected by BIT due to its legality. This illegality affronted the host State's offer of arbitration under the treaty, and consequently the tribunal lacked jurisdiction.[764]

However, the dissenting opinion in the *Fraport* case indicated that the legality clause should not be interpreted as a jurisdictional bar. The arbitrator pointed out that

> The purpose of these provisions is not to condition the right to arbitrate on the minute compliance by the investor at all times and in all respects with the domestic law and regulation of the Host State. It was not the intention, for example, that a Host State might escape responsibility for unfair or expropriatory acts because the investor did not comply with domestic regulation relating to the expression of corporate names. Such an argument has been raised before an international arbitral tribunal and was properly rejected because 'to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty'.[765]

[760] Article 25 of the ICSID Convention.
[761] *Inceysa Vallisoletana S.L v Republic of El Salvador* ICSID Case No. ARB/03/26, Award of August 2, 2006.
[762] n 761 above, paras 67-77.
[763] *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No. ARB/03/25.
[764] n 763 above, para 467.
[765] n 763 above, dissenting opinion of Mr. Bernardo M. Cremades para 36. See also *Tokios Tokeles v Ukraine*, ICSID Case No. ARB/02/18paras 83-86.

It was further argued that if the legality of the investor's conduct was a jurisdictional issue and the legality of the Respondent's conduct a merits issue, then the host State was placed in a powerful position which offended the fundamental principles of procedure,[766] because only the conduct of the investor is scrutinised while the host State's conduct is never addressed. Therefore, it is important to distinguish the conduct of the investor from the nature of investment. The nature of investment is the one determined by the legality clause and a jurisdictional issue. Specifically, the tribunal must determine if the nature of investment is permitted under the host State's domestic laws. For example, are shares considered an investment in terms of the BIT? If the answer is in the affirmative, then the tribunal has jurisdiction.[767]

Having separated the nature of investment from the conduct of the investor, the next question is to determine the investor's conduct. In principle, the correct time and context to consider and evaluate the proof and consequences of illegality is at the merit stage. The merit stage allows the tribunal to investigate the State's conduct too, including any counter-claims by the investor. To discuss the conduct of the investor at the jurisdiction phase leave the investor without any remedy, and the host State secure and immune in a gross violation of a BIT.[768]

This case is significant in various ways. First, it illustrates that if an investor deliberately breaches domestic laws, the dispute will unlikely proceed past the jurisdictional phase. Second, it addresses the issue of whether all types of illegally made investments would result in their exclusion from the jurisdiction of the tribunal. The Tribunal indicated that errors made in good faith, including offending arrangements not central to the profitability of the investment, may be excluded from the legality requirement. This averment mirrored the Tribunal's conclusion in the *Tokios* case, wherein it was indicated that 'to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty'.[769]

In the *Hamester* case[770] involving alleged breach of various BIT provisions, including the expropriation clause and the Joint-Venture Agreement by Ghana, the State objected to the jurisdiction of the Tribunal on the ground that there was no investment in accordance with

[766] n 763 above, dissenting opinion of Mr. Bernardo M. Cremades para 37.
[767] n 763 above, dissenting opinion of Mr. Bernardo M. Cremades para 38.
[768] n 763 above, dissenting opinion of Mr. Bernardo M. Cremades para 39.
[769] *Tokios Tokelės v Ukraine* ICSID Case No. ARB/02/18 para 86.
[770] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No. ARB/07/24.

Ghanaian law under Article 10 of the BIT.[771] The State alleged that the JVA was tainted with fraud from its inception and in its performance throughout the years. Some of the fraudulent activities included drawing false invoices. The Tribunal made a distinction between the 'legality as at the initiation of the investment…and legality during the performance of the investment'.[772] Illegality at the initiation of the investment is a jurisdictional issue, whereas legality in the subsequent life of the investment is a merit issue.

This case is significant because it clearly states when illegality is a jurisdictional issue or a merit issue. Even Cremades, in his dissenting opinion in the *Fraport* case, endorsed this distinction.[773] Nevertheless this distinction does not diminish the important principle that 'an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law'.[774]

Corruption as a specific ground of denying the jurisdiction of a tribunal has been raised in the following cases: *Metal-Tech*,[775] *Lucchetti*,[776] *African Holding Company of America, Inc. et Societe*,[777] *TSA Spectrum*,[778] and *Vladislav Kim et al*.[779] The common argument raised by the host State's objection to jurisdiction is that any investment made by illegal means such as corruption should not be considered to have been made in accordance with the laws and regulations of the host State. It is understood that laws prohibiting corruption fall within the

[771] Art 10 of the BIT and stated that

> [t]his Treaty shall also apply to investments made prior to entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation.

[772] n 770 above, para 127.
[773] n 763 above.
[774] n 770 above, para 123.
[775] *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3.
[776] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru* Case No. ARB/03/4, the State alleged that the domestic judgement in favour of the investor were procured by corruption. In the procurement of the judgments in Lucchetti's favour. In the annulment proceedings, the investor alleged that the Tribunal based its decision of alleged corruption regardless of the truth or falsity of the allegations and not affording the investor an opportunity to refute the claims – *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru* ICSID Case No. ARB/03/4 para 32.
[777] *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v La République démocratique du Congo* ICSID Case No. ARB/05/21.
[778] *TSA Spectrum De Argentina S.A. v Argentine Republic* ICSID Case No. ARB/05/5.
[779] *Vladislav Kim et al supra* case.

subject-matter scope of the legality requirement; hence anti-corruption laws must also be examined when identifying compliance of the investor.

In the *Lucchetti* case, [780]the State alleged that domestic judgements in favour of the investor, the very source of the dispute before the Tribunal, were procured by corruption. The Tribunal briefly discussed the issue of corruption, but in reaching its decision only entertained the question whether the claim brought by Lucchetti fell within the scope of Peru's consent to international adjudication under the BIT. It ultimately concluded that the Tribunal lacked jurisdiction on *rationae temporis* grounds. The investor applied for an annulment of the award, alleging, *inter alia*, that the Tribunal based its decision on alleged corruption regardless of the truth or falsity of the allegations and did not afford the investor an opportunity to refute the claims, thereby breaching fundamental rule of procedure within the meaning of Article 52(1) (d) of the ICSID Convention[781] and the presumption of innocence.[782] The Tribunal concluded that since the alleged illegalities were not examined, Lucchetti's right to presumption of innocence was violated.[783]

In the *TSAR* case, the host State alleged a breach of the legality clause.[784] It alleged that the investor bribed local public officials in order to obtain a telecom concession. The Tribunal briefly discussed this ground and indicated that based on available materials, it could not determine if the concession was illegally obtained. It further signalled that if there had been no other jurisdictional obstacles, the Tribunal would have joined the issue of corruption to the merits of the case.[785]

In the *Metal-Tech* case,[786] Metal-Tech had a joint-venture agreement with the government-owned companies AGMK and UzKTJM. The venture was meant to modernise the Uzbek

[780] n 776 above.
[781] Article 52(1) of the ICSID Convention, provides that:
> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based.

[782] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru* ICSID Case No. ARB/03/ paras 32, 50.
[783] n 782 above, para 124.
[784] n 778 above.
[785] n 778 above, para 176.
[786] *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3.

molybdenum industry. Metal-Tech was to contribute its technology, know-how and access to international markets, as well as part of the financing needed for a new plant. On 28 January 2000, Metal-Tech, UzKTJM and AGMK incorporated Uzmetal as a limited liability corporation. Metal-Tech was to receive a 50% share in the venture in exchange for an initial capital contribution of US$500 000.[787] The total value of the project was expected to exceed US$19 million.

However, in May 2006, the Public Prosecutor's Office for the Tashkent Region initiated criminal proceedings 'on the ground that officials of Uzmetal had abused their authority and caused harm to Uzbekistan'.[788] Thereafter, the Uzbek Cabinet passed a resolution abrogating Uzmetal's rights to purchase raw materials. According to Metal-Tech, this resolution also cancelled its exclusive right to export Uzmetal's refined molybdenum oxide. AGMK notified Uzmetal of its intention to terminate the supply contract in force. In December 2006, UzKTJM requested that Uzmetal pay UzKTJM's share of the dividends. A legal battle ensued, and Uzmetal was placed under liquidation for failure to pay the dividends. The liquidation process lasted until November 2009, and in December 2009, Uzmetal was delisted from the State registry of legal entities.

On 26 January 2010, Metal-Tech submitted a Request for Arbitration to ICSID, alleging violation of various provisions of the Israel-Uzbekistan BIT. Uzbekistan objected to the jurisdiction of ICSID. It argued that the Tribunal lacked jurisdiction over the dispute because the investment was made and operated in violation of Uzbek law. In particular, the investor promised to pay several individuals to obtain or influence the government's approval of its investment project.

In analysing the objection raised by the host State, the Tribunal signalled that the subject-matter scope of the legality requirement covered corruption as well.[789] It concluded that various payments made to different individuals, including consultants' fees, were illegal payments made to obtain an investment. Therefore, the investment was not established in 'accordance with the laws and regulations of the Contracting Party in whose territory the investment is made', as required by Article 1(1) of the Israel-Uzbekistan BIT. Further, since Article 1(1) of the BIT defined investments to mean only investments implemented in compliance with local

[787] n 786 above, para 15.
[788] n 786 above, para 37
[789] n 786 above, para 165.

law, the Tribunal lacked jurisdiction because Metal-Tech's investment was made contrary to Uzbek's laws.

The above discussion illustrates that the scope of the legality clause is not precise, and there is uncertainty about whether it should be employed as a jurisdictional bar. Different tests have been employed by the tribunals in order to determine its parameters. In the absence of consensus, the *Vladislav Kim* case attempts to offer a solution based on the proportionality principle. However, there are certain challenges of employing the legality clause in arbitrating investment disputes involving corruption or tainted with corruption.

The first challenge is that it is problematic to rely on domestic anti-corruption laws in order to determine the investment agreement's scope of application, mainly because national criminal laws vary in quality from one country to another. Corruption is widely recognised, but its precise facets are varyingly defined. Further, defining the legality of an investment based on national laws poses a risk of State Parties using 'their legislative, executive and judicial powers to escape their responsibilities, including their obligation to arbitrate'.[790] Arguably, States may be incentivised to abuse their national law-making powers. Inasmuch as such conduct may violate investment treaty provisions, such as the fair and equitable treatment provision, once the tribunal lacks jurisdiction due to corruption, the substantive violations by the host State will never be addressed. This has the effect of making host States immune to other gross violations under the BIT.

5.4. Transnational public policy

Transnational public policy has an elusive definition. It has been taken to refer to 'the type of public policy consideration that is quasi-universal in nature',[791] 'quasi-universal' in that there is a broad consensus in the international community regarding certain issues, such as corruption. The consensus is evidenced by the existence of one or more international instruments.[792] Transnational public policy has also been described as a concept that 'involves the identification of principles that are commonly recognised by political and legal systems

[790] n 763 above, dissenting opinion of Mr. Bernardo M. Cremades para 29.
[791] J D Fry 'Désordre public international under the New York Convention: wither truly international public policy' (2009) 8 *Chinese Journal of International Law* 88. For general discussion of this concept see, J D M Lew 'Transnational public policy: its application and effect by international arbitration tribunals' (2018) *CEU Ediciones Fundación Universitaria San Pablo.*
[792] P Mayer 'Effect of international public policy in international arbitration?' in L A Mistelis and J D M Lew (eds), *Pervasive problems in international arbitration* (2006) 62.

around the world'.[793] In some cases, it has been described as a concept 'composed of mandatory norms which may be imposed on actors in the market either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world'. [794] The ambiguity arises because it is a product of comparative studies.

It is challenging to draw the contours of the contents of transnational public policy.[795] However, it includes 'fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by…"civilised nations"'.[796] Some of these fundamental rules and principles have been created or imposed by non-State actors.[797] In other words, all those principles which are 'supported [widely], if not [universally], or as possessing, owing to their importance, a particular force and a particular imperative nature, will deserve to be considered as included in the concept on transnational public policy'.[798] Corruption, terrorism and drug trafficking are some examples of transnational public policy issues that have a universal conception of public policy or a supranational meaning.[799]

Transnational public policy is contrasted with international public policy[800] in that transnational public policy refers to the values mutually shared by nations and goes beyond nations. It is not tied to the domestic sphere of public policy of any national legal system. Further, transnational public policy is less restrictive, since it represents the common

[793] M Hunter & GC Silva 'Transnational public policy and its application in investment arbitrations' (2003) 4:3 *Journal of World Investment* 367.
[794] C Kessedjian 'Transnational public policy' in A J Van Den Berg (ed) *International arbitration 2006: back to basics?: ICCA international arbitration congress - International Council for Commercial Arbitration Congress Series No. 13* (2007) 861.
[795] H Fazilatfar 'Transnational public policy: does it function from arbitrability to enforcement?' (2012) 3 *City University of Hong Kong Law Review* 292.
[796] P Mayer & A Sheppard 'Final ILA report on public policy as a bar to enforcement of international arbitral awards' (2003) 19: 2 *Arbitration International* 529.
[797] Kessedjian (n 794 above) 861.
[798] P Lalive 'Transnational (or truly international) public policy and international arbitration' in P Sanders (ed) *Comparative arbitration practice and public policy in arbitration: ICCA International Arbitration Congress - International Council for Commercial Arbitration Congress Series No. 3* (1987) 289.
[799] Lalive (n 798 above) 306-307.
[800] The concept of international public policy is 'confined to violation of really fundamental conceptions of legal order in the country concerned' per J D M Lew 'Transnational public policy: its application and effect by international arbitration tribunals' (2018) *CEU Ediciones* 20. In the *World Duty Free v Kenya* ICSID Case No. ARB/00/7 para. 138, the Tribunal expressed that 'although this name suggests that it is in some way a supra-national principle, it is in fact no more than domestic public policy applied to foreign awards and its content and application remains subjective to each State'.

fundamental values of the world community, whereas international public policy is narrow and reflects a 'particular or selfish character'.[801]

The main function of transnational public policy is that 'it directly or positively influences the decision of the arbitrators, whenever fundamental and universal notions of contractual morality or the fundamental interests of international trade are involved'.[802] In the case of a legality clause, transnational public policy is useful in determining the arbitrability of certain disputes, such as those involving corruption. In the *ICC Case No.1110*, [803] the Claimant sought to recover commission due to him from the Defendant. Evidence presented showed that a major portion of commission was used to pay bribes to the employees of the Argentine government. Judge Lagergren, in declining jurisdiction, indicated that 'corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations'.[804]

With regard to investment arbitration, an interesting case is the *World Duty Free* case.[805] In this case, the State enjoined the Tribunal to decide that the contract on which the investor's claims relied on was unenforceable due to being tainted by corruption.[806] In 1989, the Claimant entered into an agreement with the Kenyan government, pursuant to which the former was to construct, maintain and operate duty-free complexes at two airports in Kenya. In order to be able to do business with the Government of Kenya, the investor made a 'personal donation' to Mr Daniel arap Moi, the then-President of the Republic of Kenya. This donation amounted to US$2 million and was part of the consideration paid to obtain the contract. In about 1992, the Claimant was asked by the President to assist his emissaries, in obtaining secret funds to finance his re-election campaign. The emissaries, through a company called Goldenberg International Ltd, devised a plan to provide illicit funds for the re-election campaign. This plan included drawing falsified documents purporting to indicate the export of gold and diamonds to a foreign consignee. These falsified documents were then presented to the Treasury and the Central Bank of Kenya for export compensation. On one of the documents, the Claimant was shown as a consignee of non-existent gold and diamonds. In the prosecutions that followed

[801] M A Buchanan 'Public policy and international commercial arbitration' (1988) 26:3 *American Business Law Journal* 514.
[802] Lalive (n 798 above) 313.
[803] *Buenos Aires v [Company A]* ICC Award No. 1110 of 1963.
[804] n 803 above, para 20.
[805] *World Duty Free supra.*
[806] *World Duty Free supra* para 108.

(the Goldenberg trial), the Claimant denied being part of the fraud scheme and agreed to testify. Due to the company's link to the trial, the government requested that the Claimant be placed under a receivership. The Claimant's Chief Executive Officer was deported. It was the Claimant's contention that the Government of Kenya had expropriated its property and rights under the 1989 Agreement in using its executive and judiciary agents and his handpicked purported receivers. The following breaches to the Agreement were identified: i) use of World Duty Free in the Goldenberg fraud; ii) illegal expropriation of the Company; iii) placing of World Duty Free in receivership; iv) damage suffered from appointing a receiver; v) Court refusal to protect World Duty Free from crime; vi) unlawful deportation of the company's Chief Executive Officer; vii) final judgement in defiance of ICSID; and viii) registration of a duplicate World Duty Free during the pendency of the ICSID proceedings.[807] Because of these breaches, the Claimant sought restitution or, in the alternative, compensation for the losses suffered.

On its part, the Respondent sought to have the claim dismissed on the basis that the 1989 Agreement was procured by paying a bribe to the then-President of Kenya, Daniel arap Moi. Since the payment of such a bribe was a criminal act, it rendered the resulting contract void and unenforceable. Further, as a matter of public policy, the Claimant's claims could not be heard. As a matter of applicable law, the contract was voidable and was validly voided by the Kenyan government. The Tribunal considered whether a bribe was paid, and whether the 1989 Agreement had been procured as a result of such a payment. It also examined the consequences of the bribe on the enforceability and the validity of the Agreement, both under *ordre* public international and the applicable laws.[808]

The Tribunal examined the concept of international public policy. It indicated that international public policy was 'no more than domestic public policy applied to foreign awards and its content and application remains subjective to each State'.[809] However, the term international public policy has sometimes been used to signify 'an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora'.[810] This is properly referred to as 'transnational public policy' or 'truly international public policy'. Therefore, transnational public policy is widely accepted more than international public policy. The

[807] *World Duty Free supra* para 74.
[808] *World Duty Free supra* para 129.
[809] *World Duty Free supra* para 138.
[810] *World Duty Free supra* para 139.

Tribunal averred that the presence of various international instruments condemning bribery, and domestic cases emphasising the same, showed that bribery is contrary to domestic public policy as well as transnational public policy.[811] Consequently, in dismissing the matter, the Tribunal held bribery to be 'contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal'.[812]

The main challenge with transnational public policy is its vagueness. Its precise contours are unknown. It has been argued that the uncertainty of this concept would pose a real risk of ambiguity in the application of the policy.[813] Further, the generalised reference by arbitrators to transnational public policy, without any indication to a particular legal system or a set of rules, is worrisome.[814] For these reasons, it has been stressed that tribunals must tread cautiously in applying this concept and 'must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards'.[815] However, it is now widely acknowledged that a transnational public policy against corruption and bribery exists.[816]

Even if a transnational public policy against corruption exists, the illegality of some acts are not unequivocal since this varies from one jurisdiction to another.[817] For example, facilitation

[811] *World Duty Free supra* para 146-147.
[812] *World Duty Free supra* para 157.
[813] M Pryles 'Reflections on transnational public policy' (2007) 24:1 *Journal of International Arbitration* 6.
[814] A Redfem 'Comments on commercial arbitration and transnational public policy' in A J Van Den Berg (ed), *International arbitration 2006: back to basics?: ICCA International Arbitration Congress - International Council for Commercial Arbitration Congress Series No. 13* (2007) 874, 875. See also M Reismann 'Law, international public policy (so-called) and arbitral choice in international commercial arbitration' in AJ Van Den Berg (ed) *International arbitration 2006: back to basics?: ICCA International Arbitration Congress - International Council for Commercial Arbitration Congress Series No. 13* (2007) 851.
[815] *World Duty Free case* para 14.1.
[816] J D M Lew 'Transnational public policy: its application and effect by international arbitration tribunals' (2018) *CEU Ediciones* 32; B M Cremades Román & D J A Caims 'Trans-national public policy in international arbitral decision-making: the cases of bribery, money laundering and fraud' in A Berkeley & K Karsten (eds), *Arbitration: money laundering, corruption and fraud* (2003) 68; M Pieth 'Trans-national commercial bribery: challenge to arbitration' in A Berkeley & K Karsten (eds) *Arbitration: money laundering, corruption and fraud* (2003) 45; J D M Lew & L A Mistelis *Comparative international commercial arbitration* (2003) 423. It is worth noting that the International Law Association Committee has expressly mentioned that the prohibition against corruption and bribery is part of transnational public policy. See P Mayer & A Sheppard 'Final ILA report on public policy as a bar to enforcement of international arbitral awards' (2003) 19 *Arbitration International* 256-257.
[817] D Baizeau 'Introduction: definitions and scope of the topic' in D Baizeau & R H Kreindler (eds) *Addressing Issues of corruption in commercial and investment arbitration dossiers of the ICC Institute of World Business Law* (2015) 10.

payments are regarded illegal in the UK while considered legal in the US, New Zealand, Canada and Australia. The ICC Rules on Combatting Corruption and the Convention on Combatting Bribery of Foreign Public Officials in International Business Transaction do not label such as bribery, hence their legality is independently determined by each State. The same applies to acts such as gifts and the purchase of personal influence. In the latter case, the French courts recognise influence peddling as contrary to transnational public policy, whereas English courts, even if they condemn this practice, do not regard it part of transnational public policy.[818] Therefore, it remains unclear how tribunals will determine such issues since as a transnational rule, tribunals would be expected to either deny jurisdiction or invalidate a transaction tainted with corruption.

5.5. The doctrine of clean hands

Tribunals have examined the investor's misconduct, including corruption, using the clean hands doctrine. This doctrine has English Common-Law origins and is explained through the maxim, 'he who comes into equity must come with clean hands'.[819] The doctrine is rooted in public policy and seeks to preserve and promote judicial integrity, justice and public interest.[820] In its application, the doctrine is essentially meant to protect the legal system and the defendant. Lawrence argues that

> Allowing an unclean plaintiff to recover would not only abet him in his inequitable conduct, but would also raise doubts as to the justice provided by the judicial system…Courts use the doctrine to ensure a fair result. Where the plaintiff's conduct is such that it would be unjust to allow him a remedy, courts can use the doctrine as a bar to remedy. Therefore, withholding assistance from the unclean plaintiff allows courts to prevent a wrongdoer from enjoying the fruits of his transgression.[821]

Further, the application of this doctrine is a matter of discretion by the arbitrators or courts. It merely acts as a guide to the tribunal, rather than as a rule. Hence, there are possibilities of a

[818] Lew (n 816 above) 38. See also M Hwang & Lim 'Corruption in arbitration-law and reality' para 50-58. Available on https://www.arbitration-icca.org/media/4/97929640279647/media013261720320840corruption_in_arbitration_paper_draft_248.pdf (accessed 20 February 2019).
[819] C LeMoullec 'The clean hands doctrine: a tool for accountability of investor conduct and inadmissibility of investment claims' (2018) 84:1 *The International Journal of Arbitration, Mediation and Dispute Management* 14.
[820] O J Herstein 'A normative theory of the clean hands defense' (2011) 17 *Legal Theory* 6; W J Lawrence 'Application of the clean hands doctrine in damage actions' (1982) 57 *Notre Dame Law Review*. 674.
[821] W J Lawrence 'Application of the clean hands doctrine in damage actions' (1982) 57 *Notre Dame Law Review*. 675.

tribunal refusing to apply this doctrine, 'where public interest or the gravity of the violation of the plaintiffs' rights outweighed the severity or egregiousness of the plaintiffs' prior iniquitous or wrongful conduct…even if the plaintiffs' hands were patently "unclean"'.[822]

The existence of this doctrine as a general principle recognised by civilised nations has been questioned. In the *Guyana* case, the Tribunal indicated that 'the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent'.[823] Even in the *Yukos* case, the Tribunal stated that it was 'not persuaded that the clean hands doctrine exists as a "general principle of law recognised by civilised nations"'.[824]

Nevertheless, the clean hands doctrine has been used in investment arbitration as a ground for defeating investor claims due to corruption. In the *Niko Resources* case, [825] the State sought to dismiss the jurisdiction of the Tribunal on the basis that the investor had committed acts of corruption and therefore it may not benefit from the ICSID arbitration clause or protection under any agreement between itself and the investor. Specifically, corruption rendered the investor's hands unclean. The investor admitted that it paid bribes to the Bangladesh Energy Minister so as to persuade him 'to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko' and 'to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts'.[826] The Tribunal had to examine if any instance of bribery and corruption in which the investor might have been involved deprived it from having its claims considered and ruled upon by the Tribunal.

In discussing the clean hands doctrine, the Tribunal indicated the elements that have to be satisfied:

(i) the breach must concern a continuing violation,

(ii) the remedy sought must be 'protection against continuance of that violation in the future', not damages for past violations and

[822] O J Herstein 'A normative theory of the clean hands defense' (2011) 17 *Legal Theory* 5. See for instance, the following American domestic cases: *Gen. Leaseways, Inc. v Nat'l. Truck Leasing Assoc.* 744 F.2d 588, 597 (7th Cir. 1984); *Republic Molding Corp. v B.W. Photo Utilities* 319 F.2d 347, 350 (9th Cir. Cal. 1963); *Novadel-Agene Corp. v Penn* 119 F.2d 764, 766 (5th Cir. 1941); *Byron v Clay* 867 F.2d 1049, 1051 (7th Cir.) 1989.
[823] *Guyana v Suriname* Award Permanent Court of Arbitration ICGJ 370 (PCA 2007) para 418.
[824] *Yukos Universal Limited (Isle of Man) v Russian Federation* Award PCA Case No AA 227, ICGJ 481 (PCA 2014) para 1358.
[825] *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and Production Company Limited and others,* ICSID Case Nos ARB/10/11 and ARB/10/18.
[826] n 825 above, para 377.

(iii) there must be a relationship of reciprocity between the obligations considered.[827]

In its assessment, the Tribunal found that the alleged violations by the investor were not continuing, but merely consisted of two bribery acts that had been completed long ago; the remedy which the investor was seeking did not concern protection against this past violation; and there was no relation of reciprocity between the relief which the investor was pursuing in this arbitration and the acts in the past which the host State characterised as involving unclean hands.[828] Also, even after the bribery scandal became public knowledge, the government went ahead to conclude an agreement with the investor. Therefore, to the extent that the investor's hands were unclean, the host State disregarded this situation. The host State could not, therefore, rely on these events to deny jurisdiction under an arbitration agreement which they then accepted.[829]

This case is remarkable in various ways. First, despite admission of corruption, the Tribunal proceeded to deal with the merits of the matter. Therefore, corruption was not given outcome-determinative effect. Second, the Tribunal, despite its hesitations on the existence of the clean hands doctrine, contextualised how this doctrine had to be applied by alluding to the elements that had to be satisfied. Third, the extent to which the host State acted in relation to the alleged wrongs by the investor determined whether this doctrine could be applied. Where the host State is notified of the wrongs but does nothing to show its disapproval, it is estopped from invoking this doctrine. Lastly, the case opens the door to the additional requirement of having to prove that the corrupt behaviour brought about the intended benefit.[830] In other words, the investor must have benefitted from the corruption. This is by far the most difficult element to prove, even more than the act itself.

In the *Yukos* case, involving a string of alleged misconduct such as submitting fraudulent tax claims, the host State objected to jurisdiction on the grounds that the Claimant had come to the Tribunal with unclean hands. It contended that the Claimant's unclean hands would either render the Tribunal to lack jurisdiction, or the Claimants' claims to be inadmissible, and/or deprive the Claimant substantive protections of the Energy Charter Treaty (ECT). In discussing this objection, the Tribunal observed that the text of the ECT did not contain any express

[827] n 825 above, paras 481-5.
[828] n 825 above, para 483.
[829] n 825 above, para 484.
[830] S Nappert 'Rising corruption as a defence in investment arbitration' in D Baizeau & R Kreindler (eds.) *Addressing issues of corruption in commercial and investment arbitration* (2015) 179.

reference to a principle of clean hands, nor did it contain an express requirement that investments be made in accordance with the laws of the host country. In the absence of such, the Tribunal had to consider whether, reading the ECT as a whole, it may be understood that the protection of investments was based on their legality, or on the good faith of the investor. It also considered whether the principle of clean hands could be relevant to the arbitration pursuant to Article 26(6) of the ECT,[831] and lastly, if the alleged 'bad faith and illegal conduct' of the Claimants fell within the scope of any unclean hands or similar principle applicable in the ECT context.[832]

The Tribunal noted that illegality or breach of domestic law does not provide a compelling reason to bar an investor from seeking remedies, including challenging imposed sanctions. To deny an investor from making its case before an arbitral tribunal based on the same alleged violations, the existence of which the investor seeks to dispute on the merits, undermines the purpose and object of an investment treaty.[833] Therefore, the unclean hands argument could not deprive the Tribunal its jurisdiction. To this end, the Tribunal placed the clean hands doctrine and the legality requirement at par with respect to the establishment of the investment.[834] The pairing is inevitable, as both principles respond to the same problem, that of the Claimant's wrongdoings. Both principles seek to 'reinforce the idea that arbitral protection can only be given to the "good investor"'.[835] This decision echoes the sentiments of the Tribunal in *Fraport II*, wherein it stated that denying protection for investments illegally established was based 'on rules of international law, such as the "clean hands" doctrine or doctrines to the same effect'.[836]

In the *Hesham* case,[837] the Tribunal dismissed the investor's claims on the explicit basis of the clean hands doctrine. The dispute arose as the result of a bailout advanced to the investor by the central bank of the Republic of Indonesia. Following reports in the local newspapers that the bailout was marred with illegality and corruption, Indonesia's Corruption Eradication

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[831] Art 26(6) of the ECT reads:

> A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

[832] n 824 above, paras 1346 -1348.

[833] n 832 above, para 1355.

[834] A L Llamzon 'Case comment Yukos Universal Limited (Isle of Man) v The Russian Federation - the State of the 'unclean hands' doctrine in international investment law: Yukos as both Omega and Alpha (2015) 30:2 *ICSID Review* 320-321, 323.

[835] Llamzon (n 834 above) 323.

[836] *AG Frankfurt Airport Services Worldwide v Philippines* ICSID Case No. ARB/11/12 paras 328-332. See also M.deAlba 'Drawing the line: addressing allegations of unclean hands in investment arbitration' (2015) 1 *Revistade Direito Internacional* 324.

[837] *Hesham Talaat M. Al-Warraq v Republic of Indonesia* UNCITRAL, Final Award of December 15, 2014.

Commission and the Attorney General's Office began criminal investigations into the investor. The investor, Al-Warraq, was tried *in absentia* and convicted of theft, corruption and money-laundering. His assets were also confiscated. The investor instituted proceedings under the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (OIC) and the United Nations Commission on International Trade Law's (UNCITRAL) Arbitration Rules alleging, *inter alia*, expropriation and violation of fair and equitable treatment.

On the question of admissibility of the investor's claims, the host State contended that the investor's claims were inadmissible since he came to the Tribunal with unclean hands due to his convictions of theft, corruption and money-laundering. It further argued that 'the integrity of the Tribunal requires that a convicted criminal and a fugitive from justice cannot be allowed to abuse the OIC Agreement by submitting a claim that is tainted by his own fraud and corruption'.[838] In determining the host State's contentions, the Tribunal examined Article 9 of the OIC Agreement, which reads,

> The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

The Tribunal noted that Article 9 was an explicit provision that bound an investor to observe certain norms of conduct. It prohibits the investor from taking any actions that would disrupt the public interest and also prevents the investor from 'trying to achieve gains through unlawful means', such as through fraud and corruption.[839] It was found that the investor had breached this Article through committing actions that were fraudulent, such as using the investment assets (Bank Century) to obtain a private loan. By failing to uphold Indonesian laws and regulations and in acting in a manner prejudicial to the public interest, the investor breached Article 9 of the OIC Agreement. Accordingly, the Tribunal found that the investor's conduct fell within the scope of application of the clean hands doctrine, and therefore, he could not benefit from the protection afforded by the OIC Agreement.[840]

[838] n 837 above, para 164.
[839] n 837 above, paras 631-632.
[840] n 837 above, para 647.

This decision has been a subject of criticism, specifically for failing to consider the status and content of the clean hands doctrine. It nevertheless solidified a jurisprudential trend in which investor-State tribunals have found investor claims to be inadmissible due to serious investor misconduct.[841] Further, the clean hands doctrine provides an alternative mechanism of dealing with misconduct of both the investor and host State, which is impossible if investor's wrongdoings are addressed at the jurisdictional stage. In the *Glencore Finance (Bermuda) Limited* case, the Tribunal indicated that the objection, based on unclean hands, raised by the host State could not be addressed without examining the merits of the dispute.[842] Though the Tribunal in the *Hesham* case did not explicitly allude to this, the manner in which the Tribunal reached its various conclusions reflects such asymmetrical analysis. Even though the investor was barred from pursuing his claim and obtaining damages, the Tribunal unequivocally concluded that the host State had failed to accord the investment fair and equitable treatment recognised in international investment law.[843]

Instead of seeking to establish the existence of the clean hands doctrine as a stand-alone principle in international law, the Tribunal anchored its analysis to a specific provision, that is, Article 9 of the OIC Agreement. This is essential, especially in light of certain tribunal awards disputing the existence of this doctrine and its applicability in barring investors' claims in an arbitration. In the *Yukos* case, the Tribunal dismissed the use of this doctrine due to lack of a 'specific textual hook', such as the legality clause, an implicit clean hands requirement in the ECT, and the clean hands doctrine as a general principle of international law, which would apply to bar the investor's claims because it had so-called unclean hands.[844]

The clean hands doctrine was also utilised in the *Spentex* case (unpublished).[845] The Tribunal ruled that the exorbitant fees promised to consultants on the eve of the tender process evidenced corruption. It found corruption to be a violation of good faith, and therefore an investor with unclean hands could not be heard. This led to the dismissal of the investor's claims under the Dutch BIT.

[841] A Newcombe & J Marcoux 'Case comment Hesham Talaat M. Al-Warraq v Republic of Indonesia imposing international obligations on foreign investors' (2015) 30: 3 *ICSID Review* 530-531.
[842] *Glencore Finance (Bermuda) Limited v Plurinational State of Bolivia* PCA Case No. 2016-39 (Procedural Order No. 2: Decision on Bifurcation) para 47.
[843] Newcombe & Marcoux (n 841 above) 530-531.
[844] Moullec (n 819 above) 27.
[845] *Spentex Netherlands, B.V. v Republic of Uzbekistan* ICSID Case No. ARB/13/26.

The above cases reflect that another way of dealing with corruption in investment arbitration is through the application of the clean hands doctrine. Arbitral case law reflects that tribunals apply this doctrine through different avenues: as an implicit requirement in investment treaty,[846] as a general principle of international law,[847] as a matter of international or transnational public policy,[848] and through the inherent powers of the arbitral tribunal to regulate proceedings.[849]

5.6. Conclusion

This chapter has highlighted the existing concepts being employed in combatting corruption in investment arbitrations. It is a daunting task for arbitrators to arbitrate matters employing these different approaches. Since the international investment framework was never originally meant to solve disputes involving corruption, these approaches have acted as stop-gap measures to the problem of corruption. All these approaches can act as jurisdictional bars. Nevertheless, their weakness, except the clean hands doctrine, is in seeking to investigate only the conduct of the investor. Further, due to the absence of binding precedent in investment arbitration, universal and smooth application of these various principles or doctrines cannot be ascertained. Arguably, these weaknesses can be mitigated by having explicit treaty-based provisions, empowering tribunals to decide disputes based on prescribed parameters.

[846] n 837 above. See also R H Kreindler 'Corruption in international investment arbitration: jurisdiction and the unclean hands doctrine' in K Hobér (ed) *Between East and West: sssays in Honour of Ulf Franke Juris (*2010) 31.
[847] *Yukos Universal Limited (Isle of Man) v Russian Federation* PCA Case No AA 227, ICGJ 481 (PCA 2014); *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and Production Company Limited and others* ICSID Case Nos ARB/10/11 and ARB/10/18, Decision on Jurisdiction (19 August 2013).
[848] *Churchill Mining and Planet Mining Pty Ltd v Indonesia* ICSID Case No. ARB/12/14 and 12/40 para 550.
[849] *Libananco Holdings Co Ltd v Turkey* ICSID Case No. ARB/06/8 para 78. See also A Newcombe 'Investor misconduct: jurisdiction, admissibility or merits?' in C Brown & K Miles (Eds) *Evolution in investment treaty law and arbitration* (2011) 194.

CHAPTER 6

REGULATION OF CORRUPTION UNDER IIAS

6.1. Introduction

Most IIAs do not provide a framework for dealing with corruption. As a result, they do not provide any functional framework for arbitrators to resolve corruption claims. This means litigants have adopted various approaches, such as the clean hands doctrine discussed in chapter 5, in order to defeat investors' claims. However, a handful of recent IIAs contains some provisions that explicitly allude to corruption.[850] The growing acknowledgement of corruption in IIAs has perhaps been motivated by States' concerns that older investment agreements did not cater for a balance between investment protection and public policy objectives, such as the need to protect public interests.[851]

This chapter examines how existing IIAs address corruption. It will provide a textual analysis of IIA provisions on corruption and evaluate the sufficiency of these provisions in dealing with corruption. The examination is aimed at identifying the impacts of these clauses in dealing with corruption in investment arbitrations.

6.2. Corruption clauses in 'old' generation IIAs

'Old' generation IIAs refer to treaties concluded before 2000; they comprise 95% of all IIAs in force.[852] Most of these IIAs were concluded in the 1990s, during such a period when there was light IIA jurisprudence. These older treaties typically contain similar, broadly-worded definitions and substantive provisions, and few safeguards. UNCTAD reports that, as of the end of 2016, most State-investor disputes filed involved treaties concluded before 2010.[853] The broad and vague formulations of IIA provisions have enabled investors to challenge core domestic policy decisions, such as financial regulation and environmental issues. Cases of corruption have also been dealt with under these investment treaties, even though IIAs were not originally designed to deal with this kind of litigation.

[850] Art 1908 Canada-Peru Free Trade Agreement 2009; Art 10 Agreement between Japan and Lao People's Democratic Republic for the Liberalization and Protection of Investment 2008; Art 10 SADC BIT Model; Art 21.5 USA-Singapore FTA 2003; Art 8 Japan-Philippines Economic Partnership Agreement 2006; Preamble Norway 2007 Model BIT.
[851] (n 4 above) 124.
[852] n 571 above, 3.
[853] n 571 above, 4.

In theory, all IIAs contain a provision that alludes to corruption in form of the legality clause. As discussed in chapter 5, virtually all IIAs require investment to be done or established in accordance with the laws of the host State. The legality clause is an international legal principle, applicable even in cases where it is not explicitly mentioned in an investment treaty. It is regarded as a 'tacit condition, inherent in every BIT, since it cannot be understood under any circumstance that a State is offering the benefit of protection through investment arbitration when the investor, to reach that protection, has committed an unlawful action'[854] Failure to adhere to this legality requirement has severe consequences to the investor; specifically, the investment will not be protected under the investment agreement. Various cases have demonstrated this point.[855]

However, the discussion in the previous chapter has illustrated that the scope of legality clause is not precise, and it is not settled whether it should be employed as a jurisdictional bar or not. Also, diverse tests have been employed by the tribunals in order to determine the clause's parameters. In the absence of consensus, the *Kim et al* case attempted to offer a solution based on the proportionality principle. Further, there are certain challenges of employing the legality clause is arbitrating investment disputes involving corruption or taint of corruption.

Foremost, it is problematic to rely on national law in order to determine the investment agreement's scope of application, principally because national criminal laws differ from one country to another. While corruption is widely recognised, its precise facets are diversely defined. Additionally, defining the legality of an investment based on national laws poses a risk of State Parties using 'their legislative, executive and judicial powers to escape their responsibilities, including their obligation to arbitrate'.[856] Arguably, States may be incentivised to abuse their national law-making powers. Inasmuch as such conduct may violate investment treaty provisions, such as fair and equitable treatment, once the tribunal lacks jurisdiction due to corruption, the substantive violations by the host State will never be addressed. All these challenges necessitate the drafting of clear corruption provisions in IIAs.

[854] *SAUR International v Argentine Republic* ICSID Case No. ARB/04/4 para 306.
[855] n 730 above.
[856] n 763 above, dissenting opinion of Mr. Bernardo M. Cremades para 29.

6.3. Corruption clauses in 'new' generation IIAs

Some of the new generation IIAs contain provisions which explicitly allude to corruption.[857] Nevertheless, the way corruption is addressed is not uniform. The visible approaches are referenced in the preamble: subjecting corruption matters to domestic laws and regulations of the Parties, investor's anti-corruption obligation clauses, carve-out clauses, and corporate social responsibility clauses. So far, none of these provisions have been invoked in any investment dispute. Therefore, their interpretation or application is yet to be known. The following section discusses some of these clauses in the new generation of BITs.

6.3.1. Reference to corruption in the preamble

Preambles of some IIAs refer to corruption. Examples of such can be found in the BITs for Burkina Faso-Canada (2015); Austria-Nigeria (2013); Austria-Kazakhstan (2010) and the Iraq-US Trade and Investment Framework Agreement (TIFA) (2005). One can only speculate about the reasons some States opt to address corruption in the preamble and not in the text. In the case of the Iraq-US TIFA 2005, the US might have seen no need to include substantive anti-corruption clauses in the TIFA since its domestic anti-corruption laws are expansive. The inclusion in the Preamble might be merely a reminder to the Parties of the need to consider anti-corruption international efforts. As for Austria, the BITs it concluded are essentially modelled on or influenced by its Model Investment Treaty (2011). The Model Investment Treaty's Preamble emphasises the need for all governments and civil actors alike to adhere to international anti-corruption efforts. Other States such as Nigeria and Kazakhstan do not have model BITs. Therefore, Austria's inclusion of corruption in the Preamble is merely following its Model Investment Treaty.

A preamble contains the objectives and purpose of a treaty. It is useful in interpretation of the treaty. In terms of Article 31 (1) of the VCLT, a treaty has to be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The context is composed, in addition to the text, of the

[857] About 71 Bilateral Investment Treaties (BITs) and Treaties with Investment Provisions (TIPs) alludes to corruption. These include: Afghanistan-US TIFA (2004); Albania-EC Association Agreement (2009); Albania - EFTA FTA (2010); Algeria-EC Association Agreement(2005); ANDEAN-EC Cooperation Agreement (2003); Armenia-EC Cooperation Agreement (1999); Austria-Kazakhstan BIT (2010); Austria-Nigeria BIT (2013); Austria- Tajikistan BIT (2010); Austria-Uzbekistan BIT (2000); Art 1908 Canada-Peru Free Trade Agreement 2009; Art 10 Agreement between Japan and Lao People's Democratic Republic for the Liberalization and Protection of Investment (2008); Art 10 SADC BIT Model; Art 21.5 USA - Singapore FTA(2003); Art 8 Japan-Philippines Economic Partnership Agreement 2006; Preamble Norway Model BIT (2007). See https://investmentpolicyhubold.unctad.org/IIA/AdvancedSearchBITResults (accessed 20 May 2019).

preamble and annexes. [858] The preamble is, therefore, part of the text and is included in the text-and-context analysis.[859] For clarity, preambles impose no legal duty enforceable under an IIA. They facilitate interpretations of the IIA's substantive provisions that consider the obligations of the investors and the host States.[860] In the *Siemens* case, the Tribunal indicated that in interpreting the various provisions alleged to have been violated by the host State, the Tribunal 'shall be guided by the purpose of the Treaty as expressed in its title and preamble'.[861]

In analysing the scope of the legality requirement, tribunals have relied on preamble language as well. In the *Kim et al* case, the Tribunal indicated that the substantive limits placed by the legality requirement were essential in achieving a State's objectives of promoting economic cooperation and encouraging investments. These objectives are found in the BIT. Therefore, in line with these objectives, the legality requirement found in the BIT was not intended to include minor acts of non-compliance as a basis for denying jurisdiction. [862] Further, in the *Yukos* case, the Tribunal, in rejecting the proposition that illegality in the performance of the investment would lead also to a lack of jurisdiction or inadmissible claims, employed an object-purpose analysis of the ECT. It indicated that there were no compelling reasons to deny altogether the investor's right to invoke the ECT as such 'would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits'.[863]

While the preamble offers tremendous assistance in interpreting treaty provisions, the challenge is the approach of interpretation, that is, either restrictive or effective interpretation. The tribunals have been struggling with these competing approaches. The recent *Kim et al* case even adopted a principled approach guided by the principle of proportionality. Hence, the way corruption will be addressed is ultimately influenced by the interpretation approach employed by the concerned tribunal.

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[858] Art 31 (2) of the Vienna Convention on the Law of Treaties.
[859] M H Hulme 'Preambles in treaty interpretation' (2016) 164 *University of Pennsylvania Law Review* 1298; UN *Report of the International Law Commission to the General Assembly* 21 U.N. GAOR Supp. No. 9 221, U.N. Doc. A/6309/Rev.1 (1966).
[860] N Bernasconi-Osterwalder & L Johnson 'Commentary to the Austrian Model Investment Treaty' (2012) *The International Institute for Sustainable Development* 37. See also Art 31 (2) of the Vienna Convention on the Law of Treaties.
[861] *Siemens A.G. v The Argentine Republic* ICSID Case No. ARB/02/8 para 81.
[862] *Vladislav Kim et al supra* para 394.
[863] n 824 above, para 1355.

Therefore, in cases where corruption is alluded to in the preamble, the effect is that such reference offers a broad picture of the relationship between the agreement and the need to combat corruption. As indicated in the *Kim et al* case, in the absence of an explicit anti-corruption provision, the preamble will be of great assistance in determining if an investment tainted with corruption deserves legal protection or not. However, in whatever manner the tribunal interprets a certain treaty provision, the adopted interpretation must further the objectives of the concerned treaty.

6.3.2. Subjecting corruption matters to domestic laws and regulations of the Parties

One group of IIAs enjoins States to adopt or maintain anti-corruption measures in accordance with their domestic laws and regulations. Although these treaties refer to domestic laws, their formulation are different. The following IIAs illustrate this.[864]

a) Japan-Oman BIT (2015)

> Article 8 Measures against Corruption
>
> Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.

This Japan-Oman BIT merely provides an assurance that Parties will take measures and efforts to prevent and combat corruption in matters covered by the Agreement. Those measures and efforts are to be done in line with the respective Party's laws and regulations. For instance, if Japan is to require Oman investors to adopt an anti-corruption code of conduct, that requirement must be permitted by Japanese law. Therefore, after an investment has been established, a Party cannot seek to introduce measures not sanctioned by its law. The introduction of new regulatory measures might give rise to a breach of the State's obligation under the Japan-Oman BIT, such as the legitimate expectations under fair and equitable treatment. In the *Tecmed* case, the Tribunal indicated that the fair and equitable treatment clause in the BIT 'require[s] the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment'.[865] The tribunal further stated that

[864] See also Art 11 Japan-Ukraine BIT (2015); Art 17 Agreement between Japan and Mongolia for and Economic Partnership (2015).
[865] *Técnicas Medioambientales Tecmed, S.A. v Mexico*, ICSID Case No. ARB (AF)/00/2 para 154.

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[866]

Therefore, should the host State act in a manner not consistent with the investor's legitimate expectations, including adopting well-intended anti-corruption measures, a breach of the fair and equitable standard may suffice.

b) Guatemala-Trinidad and Tobago BIT (2013)

> ARTICLE 17 GENERAL PROVISIONS
>
> In accordance with their respective laws and regulations, each Contracting Party shall endeavour to:
>
> …
>
> 2. Uphold anticorruption practices in accordance with the United Nations Convention Against Corruption, done at New York, October 31, 2003
>
> The provisions of this Article shall not be subject to the Mechanism for the Settlement of Disputes between an Investor of one Contracting Party and the other Contracting Party to the Mechanism for the Settlement of Disputes between the Contracting Parties established in Articles Ten (10) and Fourteen (14) respectively of this Agreement

The Guatemala-Trinidad and Tobago BIT refers to the need to uphold anti-corruption practices in accordance with the UNCAC. Interestingly, both Parties are Members of the IACC and the UNCAC but opted to deal with corruption under the global anti-corruption instrument. This could be attributed to the fact that the UNCAC has robust provisions covering some issues not included in the IACC, such as prevention of money-laundering and creation of criminal, civil or administrative liability of legal persons who participate in the commission of corruption and corruption-related offences. Also in terms of the UNCAC, Members are mandated to criminalise active and passive bribery of foreign public officials and officials of public international organisations,[867] whereas in the IACC, the establishment of the criminal offence

[866] n 865 above.
[867] Art 16 of the UNCAC.

of transnational bribery is not fully mandatory.[868] By opting for the UNCAC, the Parties are recognising and promoting the global efforts that have been made in dealing with corruption.

This clause does not explicitly call upon Parties to legislate or take measures regulating corruption in investment. Parties will merely attempt to uphold anti-corruption practices provided under the UNCAC. These attempts will be done in accordance with the respective laws and regulations of Parties. The attempts are not defined or measurable. The language employed here reflects a lack of serious intent to create legal obligations on both the State and foreign investors.

This BIT also raises a critical question on the relationship of the UNCAC and each State's domestic laws and regulations. Apparently, precedent is given to domestic law when dealing with corruption. Parties will use their domestic laws to fulfil the aims of the UNCAC. This approach is not surprising, since the UNCAC which the Parties alluded to guarantees protection of the principle of sovereignty.[869] Therefore, it is within the sovereign right of Parties to determine the measures they will take to uphold the anti-corruption standards in the UNCAC.

Further, the Guatemala-Trinidad and Tobago (2013) BIT makes it clear that the provision alluding to corruption is not subject to arbitration.[870] This provision does not create any obligation; therefore, this provision serves no more than informing of the Parties' intention to uphold the UNCAC.

c) United States-Morocco Free Trade Agreement (FTA) of 2004

Article 18.5 states that

1. The Parties reaffirm their resolve to eliminate bribery and corruption in international trade and investment.

2. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offence under its law, in matters affecting international trade or investment for:

   (a) a public official of the Party or a person who performs public functions for the Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or

[868] Art VIII of the IACC.
[869] Art 4 of the UNCAC.
[870] Art 17 (2) of the Guatemala-Trinidad and Tobago BIT (2013).

other benefit, such as a favour, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(b) any person subject to the jurisdiction of the Party intentionally to offer or grant, directly or indirectly, to a public official of the Party or a person who performs public functions for the Party any article of monetary value or other benefit, such as a favour, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(c) any person subject to the jurisdiction of the Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and

(d) any person subject to the jurisdiction of the Party to aid or abet, or to conspire in, the commission of any of the offences described in subparagraphs (a) through (c).

3. Each Party shall make the commission of an offence described in paragraph 2 liable to sanctions that take into account the gravity of the offence.
4. Each Party shall strive to adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery described in paragraph 2.
5. The Parties recognise the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment. The Parties shall work jointly to encourage and support appropriate initiatives in relevant international fora.

This FTA covers trade, procurement and investment. The anti-bribery clause in this FTA opens by reaffirming the Parties' desire to eliminate bribery and corruption in international trade and investment. As a means of achieving this, Parties are mandated to adopt or maintain legislative or other measures which establishes certain acts as criminal offences. For certainty, the FTA lists the acts that should be criminalised and these are active and passive bribery of foreign public officials in order to obtain or retain business, or other improper advantage in the conduct of international business, and aiding or conspiring in the commission of such acts. The FTA also provides for the need to adopt or maintain appropriate measures to protect whistleblowers and encourages cooperation in dealing with cases of bribery and corruption. Interestingly, being an FTA, the scope of the anti-corruption clause must be determined, whether exclusive to

investment or including trade as well. Article 18.5 (1) reflects that its scope extends to trade issue as well. Furthermore, Article 9.11 of the FTA relating to procurement practices incorporates Article 18.5 (Anti-Corruption) and obliges each Party to adopt or maintain procedures to declare ineligible for participation in the Party's procurements, either indefinitely or for a specified time, suppliers that the Party has determined to have engaged in fraudulent or illegal action in relation to procurement. Therefore, an anti-corruption clause found in an FTA may have a wide scope of application depending on the intentions of the Parties. As in the present case of the US-Morocco FTA, the Parties intended it to be applicable to various areas such as procurement, trade and investment.

This FTA directs the Parties' lawmakers to take all necessary measures, legislative or otherwise, to prevent and combat corruption. For avoidance of doubt, it specifies the actions that should be criminalised in the domestic laws of each Party. Therefore, Parties are not at liberty to determine which acts to criminalise. This creates uniformity in the laws of the Parties to this FTA. What might differ would be the sanction of the identified acts. This provision is not different from other anti-corruption clauses found in international agreements such as the UNCAC and OECD Convention on Foreign Bribery discussed in chapter 3. These international conventions discussed in chapter 3 are not self-executing; they must be incorporated into domestic laws, and so is the US-Morocco FTA. It nevertheless creates an obligation on the Parties to legislate on the specific issues included in the FTA.

In an investment arbitration, this clause reflects the States' intentions to deal with bribery of foreign public officials. The tribunal would have to examine the domestic laws of the States to elicit the expected conduct of investor, as it relates to bribery. Also, Article 18.5 (2) (c) of the US-Morocco FTA applies to both bribery perpetrated at the establishment and operation of an investment. Should other forms of corruption arise in the investment transaction, those will be governed by the host State's domestic laws.

d) Agreement between Japan and Mongolia for an Economic Partnership (2015)

Article 1.7 Corruption against Measures

> Each shall in accordance with its laws and regulations, take appropriate measures to prevent and combat corruption of its public officials regarding matters covered by this Agreement.

The Japan-Mongolia EPA creates an obligation on the Parties to take appropriate measures to prevent and combat corruption of its public officials in accordance with the Parties' domestic

laws and regulations. This Agreement differs from the ones discussed above as it seeks to limit anti-corruption measures to activities of public officials only, meaning that corruption involving private entities or the private sector is not included. The expectation of the Parties is the adoption of appropriate measures that prevent and combat corruption in the public sector and not the private sector. This is a worrisome provision, especially in light of a general recognition of the presence of corruption in the private sector and the need to combat it. Further, this provision creates an impression that investors only interact with public officials. What of those instances where services are supplied by the private sectors on behalf of the host State/government?

Overall, anti-corruption clauses which take this approach suffer the serious defect of not being arbitrable; therefore, their input in preventing and combatting corruption in investment transactions is limited. They merely inform the tribunal of the host State's commitments or assurances to deal with corruption. Further, such clauses afford States some degree of flexibility in dealing with corruption, dictated by a State's public policy. However, the challenge of this flexibility is that if the national anti-corruption rules are superficial, corruption cannot be efficiently controlled. Some States may even intentionally adopt anti-corruption measures that are superficial for fear of rendering themselves less competitive especially if the laws are robust and the enforcement is strong. In the US, for example, there was empirical evidence that when the FCPA was passed in 1977, it negatively affected America's competitiveness in its early years when there was no comparable legislation in Europe. [871]

These clauses also operate on the assumption that Parties to IIAs have the political will to legislate corruption and that the activities regarded as corrupt are similar. With regard to the first issue on political will, studies have established that in countries where corruption is rife, lack of political will to combat corruption is the main reason for its continued existence.[872] For example, in the case of South Africa, it is alleged that State-sponsored economic empowerment programmes promoted during the transition period created camaraderie networks within the ruling party's members (ANC) and government. These networks to a large extent eroded the government's will and political motivation to effectively police corruption as the same persons

[871] Llamzon (n 6 above) 50.
[872] N Hopkinson & Pelizzo R 'The role of government and parliament in curbing corruption in Central and Eastern Europe' in R Stapenhurst, N Johnston & R Pelizzo (eds) *The role of Parliament in curbing corruption* (2006) 251-263; S Kpundeh & P Dininio 'Political will' in R Stapenhurst, N Johnston, & R Pelizzo (eds) *The role of Parliament in curbing corruption* (2006) 41-48.

had benefitted from corruption.[873] Of course, cognisance must be given to other countries that exhibited political will in combatting corruption, such as Rwanda and Malaysia.[874] For those countries, these clauses will go a long way to combat corruption in investment transactions. Inasmuch as these States can deal with corruption within domestic jurisdictions, such clauses are a necessary reminder to the anti-corruption call and will affirm these States' resolution to fight corruption.

Further, the second assumption is that activities regarded as corrupt are similar. This is a flawed assumption. Some domestic laws have a narrow scope of activities that can be regarded as corruption. For instance, corrupt activities such as influence peddling and illicit enrichment are not recognised in Zimbabwe.[875] Therefore, it follows that where influence peddling is the subject matter in an investment arbitration, such will never be considered as corruption under the domestic laws of Zimbabwe. The same applies to activities such as facilitation payments, which are illegal in the UK but permissible in the US. The similarity of offences regarded as corrupt is essential in creating minimum standards and eliciting response in tackling them. Also, in the application of extra-territorial jurisdiction clauses, an investor can a raise a defence that the complained act was not a criminal offence in the other country.

6.3.3. Investor's anti-corruption obligation clause

Another set of IIAs contain explicit anti-corruption obligations of the investor. The Morocco-Nigeria BIT and the SADC Model BIT (2011)[876] illustrate this. The Moroccan BIT provides as follows.

a) Morocco-Nigeria BIT

> ARTICLE 17 ANTI-CORRUPTION
>
> 1) Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations
> 2) Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or

[873] Naidoo (n 684 above) 524-525.
[874] D W Brinkerhoff 'Unpacking the concept of political will to confront corruption' (2010) 1 *U4 Brief* 1.
[875] n 22 above.
[876] Art 10 of the SADC Model BIT (2011).

a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relations to an investment.

3) Investors and their Investments shall not be complicit in any act described in Paragraph 1 above, including incitement, aiding and abetting, and conspiracy to commit of authorisation of such acts.

4) A breach of this article by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.

5) The States Parties to this Agreement, consistent with their applicable law, shall prosecute and where convicted penalise persons that have breached the applicable law implementing this obligation.

b) SADC Model BIT (2011)

Article 10 •• Common Obligation against Corruption

10.1. Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an Investment.

10.2. Investors and their Investments shall not be complicit in any act described in Paragraph 10.1, including incitement, aiding and abetting, and conspiracy to commit or authorisation of such acts.

10.3. A breach of this article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.

10.4. The State Parties to this Agreement, consistent with their applicable law, shall prosecute and where convicted penalise persons that have breached the applicable law implementing this obligation.

These provisions create an obligation on the investor, prohibiting it from engaging in bribery, prior to and after establishing an investment. The investor must also not abet or be complicit in bribery activities. A breach of this obligation is regarded as a breach of the domestic laws of the host State Party concerning the establishment and operation of an investment. Therefore, domestic laws will be employed to determine the appropriate penalty for such breach. For instance, in terms of South African law, the penalty for corruption in procuring matters depends on the Court which tries the matters, and it varies from five years to life imprisonment. [877] The laws also provide for restrictions such as listing in the Register of Tender Defaulters.[878]

The challenges of combatting corruption at the domestic level or employing domestic mechanisms were highlighted in chapter 4. As indicated, the different levels of development in States involved and lack of uniform extra-territorial jurisdictional clauses are deficiencies in national laws that militate against efforts in preventing and combatting transboundary corruption. This can be exacerbated by political and security considerations, which may cause one State not to investigate and prosecute corruption offences. Political and security considerations affect both developing and developed countries, differing only in degree.

Nevertheless, the obligation clauses are also instrumental in informing the investor of its expected conduct, prior to and after the establishment of the investment. They make it clear that an investment attained by bribery in breach of the relevant treaty provision is a breach of the treaty and domestic law related to the establishment and operation of the investment. However, this does not directly translate to an investment losing protection under the BIT. An investment will lose protection if the domestic laws provide so. In the case of South Africa discussed in Chapter 4, the PIA is instrumental in determining whether an investment acquired by bribery is regarded as an investment in terms of this Act. By virtue of the definition of an investment in the PIA that requires an investment to be made in accordance with domestic laws, an investment acquired by bribery ceases to be recognised as an investment in terms of the treaty. It therefore ceases to have dispute settlement rights. The provisions of the Morocco-Nigeria BIT and SADC Model BIT are consistent with arbitral decisions relating to corruption

[877] Section 26 (1) of the PCCAA.
[878] Section 28 (1) of the PCCAA.

in the making of an investment that has denied investment arbitration rights due to corruption.[879]

Building up the effect of corruption in dispute settlement, the obligation clause raises the following probing and interrelated questions:

i) Should all acts of corruption be dealt with at jurisdiction level, or is there a possibility of proceeding to merits on certain acts of corruption?
ii) Corruption is a bilateral act. By punishing one entity, the investor, and deflecting the State's accountability, is the system not promoting bad governance? Does this not also incentivise States/public officials to solicit bribes from investors?
iii) If these clauses oblige States to investigate and prosecute corruption-related crimes, what would be the effect if the State did not do so but raised corruption as a ground of objecting to jurisdiction or denying the investment treaty protection?
iv) Overall, does this clause provide an effective way of addressing corruption?

This thesis calls for the accountability of both the host States and the investor. It proposes the drafting of treaty provisions that attempt to answer the above questions and also incorporate provisions of reciprocity and State accountability,[880] in line with the collective action theory approach, which this study advocated in Chapter 2. This approach requires an incorporation of policies that require reciprocity and trust among the different actors.

6.3.4. Corporate social responsibility clauses

Other sets of IIAs have introduced corruption as a corporate social responsibility issue.[881] The following IIAs illustrate this.

a) Canada-Senegal BIT (2014)

Article 16 Corporate Social Responsibility

[879] *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* ICSID Case No. ARB/03/25; *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru* Case No. ARB/03/4; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru* ICSID Case No. ARB/03/4; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v La République démocratique du Congo* ICSID Case No. ARB/05/21; *TSA Spectrum de Argentina S.A. v Argentine Republic* ICSID Case No. ARB/05/5.
[880] This will be discussed in Chapter 7.
[881] Art 16 Canada-Senegal BIT (2014); Art 15 Canada-Côte d'Ivoire BIT (2014); Art 8.16 Canada- Korea FTA (2014); Art 16 Canada-Serbia BIT (2014); Art 16 Canada-Nigeria BIT 2014; Art 15 (2) Canada-Cameron (2014).

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. Such enterprises are encouraged to make investments whose impacts contribute to the resolution of social problems and preserve the environment.

b) Canada-Côte d'Ivoire BIT 2014

> Article 15 Health, Safety and Environmental Measures and Corporate Social Responsibility Standards
>
> …
>
> 6. Each Party shall encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

Corporate social responsibility (CSR) 'refers to the integration of an enterprise's social, environmental, ethical, and philanthropic responsibilities towards society into its operations, processes, and core business strategy in cooperation with relevant stakeholders'.[882] CSR is basically a self-regulating business model, and it is voluntary. It is not clear which internationally recognised standards of CSR the BIT alludes to. There are various global

[882] A Rasche, M Morsing & J Moon 'The changing role of business in global society: CSR and beyond' *Corporate Social Responsibility, Strategy, Communication, Governance* (2017) 6. See also M Ismail 'Corporate Social Responsibility and its role in community development: an international perspective' (2009) 2:9 *The Journal of International Social Research* 199.

instruments of CSR and these include ISO 26000 Guidelines for social responsibility,[883] UN Global Compact,[884] Global Sullivan principles[885] and the Global Reporting Initiative.[886]

In general, the inclusion of the CSR is significant. Foremost, it signals that States are aware of the fact that corporates have significant impact in the communities they operate in. To this end, they must take responsibility through self-regulatory measures such as the adoption of codes of conduct. However, vague construction of these anti-corruption clauses in the BITs may be interpreted as a cynical effort meant to create an impression that Parties are doing something towards the anti-corruption cause.

Nevertheless, it has been recognised that CSR codes can be a valuable instrument for improving the local quality of life for communities where they are operating, including fighting corruption.[887] The adoption of anti-corruption standards by corporates may assist communities in improving local efficiency and in spreading better standards. If a community realises that an investor is willing to take responsibility, the investor gains respect and creates a spill-over of the good standards on the community itself.

The primary challenge is the non-enforceability of CSR measures. Companies are merely encouraged to adopt certain standards and may opt not to do so. The host State cannot force the investor to engage in CSR. Hence, the manner in which corruption is dealt with by the

[883] ISO 26000:2010 Guidance on social responsibility.
[884] UN Global Compact (2010). Available on unglobalcompact.org (accessed 12 November 2019).
[885] The Global Sullivan Principles of Social Responsibility were created in 1997 by Reverend Sullivan, "to support economic, social and political justice by companies where they do business; to support human rights and to encourage equal opportunity at all levels of employment, including racial and gender diversity on decision making committees and boards; to train and advance disadvantaged workers for technical, supervisory and management opportunities; and to assist with greater tolerance and understanding among peoples; thereby, helping to improve the quality of life for communities, workers and children with dignity and equality". The Principles are available on https://www.jussemper.org/Resources/Corporate%20Activity/Resources/Global%20Sullivan%20Principles.pdf (accessed 12 November 2019).
[886] The Global Reporting Initiative (GRI) is an independent international organization that introduced sustainability reporting since 1997. It developed GRI Sustainability Reporting Standards which are meant to support companies in *inter alia*, protecting the protect environment and improve society, while at the same time thriving economically by improving governance and stakeholder relations, enhancing reputations and building trust. https://www.globalreporting.org/information/about-gri/Pages/default.aspx (accessed 11 November 2019). See also A Alpana 'CSR standards and guidelines: an analytical review' (2014) 3:4 *International Organization of Scientific Research Journal of Economics and Finance* 52-60.
[887] C Krishnamurti, S Shams & E Velayutham 'Corporate social responsibility and corruption risk: a global perspective.' (2018) 14 *Journal of Contemporary Accounting and Economics* 1-21; F Gao *et al* 'Commitment to social good and insider trading.' (2014) 57 *Journal of Accounting and Economics* 149-175; J Lu *et al* 'Corporate Social Responsibility and corruption: implications for the sustainable energy sector' (2019) 11 *Sustainability* 4128; L M Costa 'Corruption and corporate social responsibility codes of conduct: the case of Petrobras and the oil and gas sector in Brazil' (2018) 6 *Rule of Law and Anti-Corruption Journal* 3.

investor is dependent on the willingness of the investor. Further, suppose the investor decides to adopt anti-corruption measures or principles; what are the implications of such in a dispute involving corruption? Would the adoption operate as a mitigation measure? Overall, this provision is not informative to the tribunal regarding how to proceed when faced with a dispute that involves corruption.

6.3.5. Carve-out clauses

Other IIAs contain a carve-out clause. The Netherlands Model BIT (2018) illustrates this. This Model provides as follows:

> Article 16
>
> Scope of application
>
> 1. The Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.

Carve-out clauses generally circumscribe the treaty's scope of application or the limits of specific clauses. These clauses are a useful safeguard in protecting a State's right to regulate. Nevertheless, the carve-out clauses are also instrumental in informing the investor of its expected conduct, prior to and after the establishment of the investment. In this instance, the BIT limited the scope of arbitrable claims. An investment acquired by corruption ceases to be recognised as an investment in terms of the treaty and no longer has dispute settlement rights. This provision is consistent with arbitral decisions relating to corruption in the making of an investment that have denied investment arbitration rights due to corruption.[888]

This Model BIT addresses a highly contested topic in investment arbitration, corruption, and provides a clear position on it. For clarity, jurisdiction is only denied where corruption was perpetrated at the time of establishment of the investment. In line with the *Hamester* case,[889] the BIT makes a distinction between corruption at the initiation of the investment and corruption during the performance of the investment. Corruption or illegality at the initiation

[888] *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6; *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru* Case No. ARB/03/4; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v The Republic of Peru* ICSID Case No. ARB/03/4; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v La République démocratique du Congo* ICSID Case No. ARB/05/21; *TSA Spectrum de Argentina S.A. v Argentine Republic* ICSID Case No. ARB/05/5.

[889] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24.

of the investment is a jurisdictional issue, whereas corruption in the subsequent life of the investment is a merit issue. Therefore, corruption during the life of the investment is dealt with at the merit stage. Nevertheless, a carve-out clause raises a crucial issue on its effectiveness in addressing corruption. No matter the point at which corruption is perpetrated, it remains a bilateral act. Hence, by denying jurisdiction, the system may create incentives for public officials to solicit bribes from investors, since they know that their acts will not be examined.

6.4. Conclusion

The above discussions show how corruption is dealt with in contemporary IIAs. The approaches are not uniform. The bulk of anti-corruption clauses in the IIAs are couched as general principles and prohibitions, enjoining the host States to enact and enforce anti-corruption norms. These instruments are of less functional value to investment arbitrators when faced with allegations of corruption. Only the IIAs that contain carve-out clauses set out obligations, informing the investor of expected conduct, prior to and after the establishment of the investment. However, even these carve-out clauses are limited in their efficiency in combatting corruption in international business transactions, since they focus on the conduct of the investor only. There is a general consensus that corruption is a bilateral act and any meaningful attempt to deal with it requires bilateral enforcement and sanctioning as well. Therefore, this study calls for the accountability of investors and States regarding corruption. It proposes drafting of treaty provisions that attempt to protect investors and investments and promote State accountability as well.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1. Introduction

This study examined the challenges and prospects of preventing and combatting corruption in international investment laws. It examined how corruption is defined; discussed the efficiency of the international anti-corruption legal framework in dealing with corruption; explored the capacity of domestic laws to effectively curtail corruption in investment business transactions; and examined the manner in which corruption is currently dealt with by international investment tribunals and IIAs. This chapter presents a summary of findings, conclusion and recommendations.

7.2. Summary of findings

In chapter 2, the research addressed conceptual issues, specifically, the concept of corruption and the concept of investment. It further looks at the link between corruption and investment and highlighted the key issues that arise in that context. The discussion showed that it is difficult to define corruption. Nevertheless, the commonly accepted definition is abuse of authority for private gain. It was further shown that bribery is the most common form of corruption. It highlighted that corruption is a challenge in investment because it raises fundamental legal and policy questions, such as whether in arbitration, corruption should be regarded as a complete defence against investor's claims.

Chapter 3 of the thesis discussed the international anti-corruption legal framework. It showed that international efforts to combat corruption have gained momentum. Anti-corruption efforts have since ceased to be about protecting specific business interests or local traditions. It is now aimed at constructing a universal good through rationalising personal and societal relations under mutual frameworks that promote transparency, accountability and participation of various entities. The research found that international anti-corruption instruments contain general principles and prohibitions that urge States to take sole responsibility for enacting and enforcing anti-corruption laws. In some instruments, certain acts of corruption are left to the whims of the States regarding whether to consider them crimes. The trend of combatting corruption is chiefly to criminalise it, and this is universally affirmed in all treaties. Nonetheless, the consequences of corruption are not universally agreed upon. With specific reference to corruption in international business transactions, there is an emphasis on criminalising bribery of foreign public officials and not national public officials. While this may limit corruption, it nevertheless does not translate to a change of behaviour in domestic

public officials. The lack of consensus to subject domestic public officials to global anti-corruption measures creates an impression that the ongoing international efforts are merely symbolic and will do nothing to punish or change the behaviour of domestic public officials. The need to balance Member's interests of enjoying flexibilities in adapting to conventional obligations, on one hand, and ensuring the wide acceptance and implementation of the conventions, on the other hand, has always been an underlying factor in drafting these instruments. Therefore, specific principles on complex issues of corruption are not covered. Further, international treaties were not meant to change anti-corruption domestic laws. Countries already had legislative measures in place prohibiting corruption in one way or another; hence the calls to adopt legislative measures were of less significant value. Therefore, international agreements are not adequate to combat investment corruption.

The capacity of domestic laws to effectively curtail investment corruption was examined in chapter 4. The study established that despite both New Zealand and South Africa having anti-corruption legislation in place, these measures appear to be more effective in New Zealand than in South Africa. Cultural issues seem to play a greater role for this disparity. Additionally, certain factors render South Africa's domestic framework inadequate to combat transboundary corruption arising in international investment transactions. These factors include the role of economic, political and security considerations in investigating and prosecuting corruption and the nature of transboundary corruption itself. For these reasons transboundary corruption arising in the investment regime must be assigned to international judicial bodies such as the ICSID.

Chapter 5 discussed how corruption is currently dealt with by international investment tribunals. The study showed that there are three different approaches: the legality clause approach, the transnational public policy approach and the doctrine of clean hands. However, due to the absence of binding precedent in investment arbitration, universal and smooth application of these various principles or doctrines cannot be ascertained. What is apparent from the use of these approaches is that, except for the clean hands approach, they are predisposed to deal with the conduct of the investor alone and not the conduct of the foreign public officials. It was therefore concluded that legal certainty could be achieved by having an

explicit treaty-based provision, empowering tribunals to decide disputes based on prescribed parameters.[890]

Chapter 6 evaluated the way corruption is provided for by contemporary IIAs. It showed that the approaches are not uniform. The bulk of anti-corruption clauses in the IIAs are expressed along similar lines to the international anti-corruption instruments discussed in chapter 3; containing general principles and prohibitions and enjoining the host States to enact and enforce anti-corruption norms in accordance to their domestic laws. These instruments are of less functional value to investment arbitrators when faced with allegations of corruption. They do not inform the arbitrators on how to proceed. Further, they are premised on flawed presumptions, that Parties to IIAs have the political will to legislate on corruption and that the activities regarded as corrupt are similar in different countries. Only the IIAs that contain explicit obligations and carve-out clauses set out obligations, informing the investor of expected conduct, prior to and after the establishment of the investment. However, even these clauses are limited in their efficiency in combatting corruption in international business transactions since they focus on the conduct of the investor only. There is a general consensus that corruption is a bilateral act and any meaningful attempt to deal with it requires bilateral enforcement and sanctioning as well.

7.3. Conclusion

The research statement asserted that the current international investment legal framework is inadequate in combatting corruption in foreign investment transactions. This statement has proved true since the existing framework lacks uniformity in the approaches to dealing with corruption. Contemporary approaches towards combatting corruption are flawed because they seek to sanction the supply side of corruption that is investors, but not the demand side, foreign public officials. This approach reflects the agent-principal model. Thus, there is a need to develop a legal framework, reflective of a collective action approach, addressing corruption in IIAs and arbitrations. Such an approach would establish that corruption is not purely a principal-agent problem but a collective problem that requires collective solutions that are reciprocal.

[890] See Chapter 5.

7.4. Recommendations

The study recommends the adoption of an anti-corruption clause in IIAs that creates a legal framework to promote accountability of both the foreign investor and the State. The clause should be structured as follows

AB. ANTI-CORRUPTION

1. Investors and their Investments shall not, prior to the establishment and afterwards, act in any manner contrary to the United Nations Convention Against Corruption.
2. Where there is an alleged corruption, the matter should be dealt with by arbitrators, and a finding of corruption should be considered in the assessment of an appropriate award.
3. In assessing the appropriate award, and based on the principle of proportionality, the Tribunal shall consider, amongst others, the following factors:
   (i) the nature of the investment agreement;
   (ii) the extent to which the investment agreement has been executed;
   (iii) the costs involved in upholding or terminating the investment agreement; and
   (iv) the extent to which the host State and the Investor took measures to prevent the occurrence of and/or remedy the act of corruption complained of. Such measures to include:

   (a) inquiry on preventive measures and
   (b) inquiry on remedying the act of corruption

The aspects of the model clause are discussed below.

Clause AB 1 - 'Investors and their Investments shall not, prior to the establishment and afterwards, act in any manner contrary to the United Nations Convention Against Corruption.'

This clause stipulates the expected conduct of investors prior to and after the establishment of the investment. The provisions of the UNCAC inform the investors of conduct that is illegal. Therefore, if the investor acts in a manner contrary to the UNCAC's provisions, it amounts to breach of an obligation. Currently, the UNCAC is the sole global anti-corruption instrument and covers numerous acts that are considered as corruption. Presently, 186 countries are Parties to this Convention, signifying universal recognition of this Convention. Parties may also consider linking the obligation to other international instruments such as the AU Convention and the OECD Convention. They could even specify the acts they will consider as corrupt,

such as bribery of foreign public officials. The advantage of linking the whole Convention is to prevent prioritising of certain acts of corruption over others. While bribery is the most common form of corruption, there also exist other forms of corruption such as influence peddling, which are equally detrimental.

For the arbitrators, this clause will oblige them to apply the stipulated Convention, employing the relevant definitions contained therein and having recourse to the commentary of the Convention, if any.[891] The net effect is that domestic anti-corruption laws are less relevant in these circumstances, unless the Convention itself permits the use of such.[892] As indicated in chapter 4, domestic laws, whether in developing or developed countries, are restricted in the manner in which they are capable of dealing with transboundary corruption involving investors. The limitations include the restricted way extra-territorial jurisdiction clauses are drafted; the role of economic, political and security considerations in investigating and prosecuting corruption; and the nature of transboundary corruption itself. Employing international law serves to remedy the defects of domestic anti-corruption laws, including domestic provisions that are vaguely constructed. In any event, States will not be prejudiced if their domestic laws are not directly employed, since most States have laws against corruption in one form or the other, all reflective of international standards.

Clause AB 2 - 'Where there is an alleged corruption, the matter should be dealt with by arbitrators, and a finding of corruption should be considered in the assessment of an appropriate award.'

This provision is meant to empower the arbitrators to investigate allegations of corruption. In IIAs with no explicit anti-corruption clause, corruption is raised as a ground of denying the jurisdiction of a tribunal.[893] However, most tribunals combine jurisdictional issues with

[891] S Mbiyavanga 'Combating corruption through international investment treaty law' (2017) 1:2 *Journal of Anti-Corruption Law* 149.

[892] For instance, in terms of Art 34 on UNCAC, a Member State can take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. Art 34 thus aspires to be accommodative of the different principles within the Member States.

[893] See for instance the following cases: *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v The Republic of Azerbaijan* ICSID Case No. ARB/06/15; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru* Case No. ARB/03/4; *Inceysa Vallisoletana S.L v Republic of El Salvador* ICSID Case No. ARB/03/26; *TSA Spectrum De Argentina S.A. v Argentine Republic* ICSID Case No. ARB/05/5; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and Production Company Limited and others*, ICSID Case Nos. ARB/10/11 and ARB/10/18; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v La République démocratique du Congo* ICSID Case No. ARB/05/21; *Vladislav Kim et al v Republic Of Uzbekistan* ICSID Case No. ARB/13/6.

merits.[894] This could be attributed to the fact that if there were other grounds of rejecting the investor's claim, the tribunals would rather decide on that instead of on corruption grounds. A failure to make an affirmative finding of jurisdiction could also be grounds for annulment of the award, pursuant to Article 52(1) (b) of the ICSID Convention.[895]

The proposed provision deals with a situation in which there is an explicit anti-corruption clause and where issues of corruption are dealt with on merits. Once it is considered as a merits issue, tribunals will inevitably have to examine the conduct of both the host State and the investor. The examination of conduct of both Parties is consistent with international conventions and most domestic laws, which criminalise corrupt activities of all Parties involved in the corrupt act. At this point the validity of the investment must be determined. Therefore, this clause will address the following issues that carve-out clauses raise:

i) If merits are not addressed, at what point would the host State's conduct be investigated, since most domestic and international anti-corruption laws recognise both passive and active bribery/corruption?

ii) Corruption is a bilateral act. By punishing one entity, the investor, is the system not promoting bad governance by deflecting the accountability of the State? Does this not also incentive States/public officials to solicit bribes from investors?

Where a host State is acquainted with the fact that its conduct will be investigated too, it will be incentivised to deal with corruption. In any event, anti-corruption policies are meant to protect the citizens and consumers, who pay for corruption through higher prices and taxes, and not Parties to the conflict.[896]

Clause AB 3 - The factors the Tribunal should consider

[894] Cases includes: *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3; *Methanex Corporation v United States of America* NAFTA/UNCITRAL Final Award of the Tribunal on Jurisdiction and Merits 2005; *International Thunderbird Gaming Corporation v The United Mexican States* UNCITRAL, January 2006; *F-W Oil Interests, Inc. v The Republic of Trinidad and Tobago* ICSID Case No. ARB/01/14; *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* ICSID Case No. ARB/03/25; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan* ICSID Case No. ARB/05/16; *EDF (Services) Limited v. Romania* ICSID Case No. ARB/05/13.

[895] Mbiyavanga (n 891 above) 149.

[896] H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *Journal of World Investment & Trade* 16.

Current jurisprudence reflects a zero-sum approach, which results in the investor losing its investments once corruption is alleged and proved. The host State is justified for not upholding its obligations, and the investor ultimately cannot reclaim its investment or damage suffered. Instead of deterring would-be offenders, this approach appears to indirectly and unintentionally incentivise the host State to promote bribery in order to unjustly enrich itself, because the recipients (public officials) of bribery are not liable, and anti-bribery laws in most domestic fora are enforced with relative infrequency. Because of this, public officials can demand bribes with impunity. Therefore, host States find it advantageous not to condone corruption, but at the same time employ corruption as a defence against investor's claims. Also, by saying the investor cannot pursue its rights within the investment realm, it plainly means that States seek to profit from their own illicit conduct.

The State can only act by and through its agents,[897] and it is responsible for the conduct of these agents or representatives, even when they exceed their powers.[898] In cases where the public official solicits a bribe, authorities suggest that those acts are attributed to the State itself in public international law.[899] For instance in the *EDF* case, the Tribunal found that solicitation of a bribe by a State agency would be a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy.[900]

While States do not explicitly instruct their agents to solicit bribes for public perception reasons, they nevertheless acquiescence to corruption by failing to implement anti-corruption laws.[901] In the *Fraport* case, the tribunal pointed out that 'principles of fairness should require

[897] *German Settlers in Poland*, Advisory Opinion, 1923, P.C.I.J., Ser. B, No. 6, 22.
[898] Arts. 4, 5 and 7 of the Responsibility of States for Internationally Wrongful Acts (November 2001); J Crawford *The International Law Commission's Articles on State Responsibility: introduction, text and commentaries* (2002) 106-109; M N Shaw *International Law* 6th ed (2008) 786.
[899] S Alekhin & L Shmatenko 'Corruption in investor-state arbitration-it takes two to tango' (2018) 4 *New Horizons of International Arbitration* 150. The contrary view is that since corrupt activities are never 'cloaked with governmental authority' such acts should not be attributed to the State. In the case of *Yeager v Iran* Partial Award No. 324-10199-1 of November 2, 1987 92–112, the Tribunal decided that the act of an Iran Air agent who demanded extra money to issue an air ticket was not attributable to the State as the agent acted in his private capacity rather than on behalf of the State.
[900] *EDF (Services) Limited v Romania ICSID Case No ARB/05/13 Romania* para 221.
[901] R Z Torres-Fowler 'Undermining ICSID: How the global anti - bribery regime impairs investor-state arbitration' (2012) 52: 4 *Virginia Journal of International Law* 998. For contrary view see Br Greenwald 'The viability of corruption defenses in investment arbitration when the state does not prosecute' https://www.ejiltalk.org/the-viability-of-corruption-defenses-in-investment-arbitration-when-the-state-does-not-prosecute/ (accessed 3 October 2019). Also in the case of *Fraport v Philippines* ICSID Case No. ARB/11/12 paras 385-386, the Tribunal rejected the claimant's argument that Philippines should be estopped from raising an illegality of investment defense since the State did not undertake any effort to prosecute this matter internally.

a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defence when it knowingly overlooked them and endorsed an investment which was not in compliance with its law'.[902] Acquiescence is a matter of inference, and legal effects only attach to a failure to act when a State does not assert a claim in circumstances that would have required action.[903] Should the State seek to challenge this and allege lack of resources, it has to be put to the strictest standard of proof. Therefore, in order to address this unjust effect, the proposed Clause AB 3 seeks to direct the tribunal to take into account certain factors in determining the appropriate relief. Built into this process is the application of the principle of proportionality.

Cognisance must be given to the fact that one of the general principles recognised by civilised nations is that illegal contracts are unenforceable. This is encapsulated in the maxim *ex turpi causa non oritur action*.[904] Courts should not be seen to come to the aid of a man who founds his course of action upon an illegal act. [905] A further consequence is that if one of the Parties has performed an illegal act, he is unable to claim return of his performance on the ground of unjustified enrichment due to the *in pari delicto potior conditio possidentis* rule (*pari delicto* rule), which means 'in equal fault the condition of the possessor is more favourable'.

The application of the *pari delicto* rule can lead to gross injustice. In domestic courts, this rule has been relaxed in order to do simple justice between Parties so as to prevent unjust enrichment.[906] On this basis, Clause AB 3 seeks to provide the factors that a tribunal has to take into account in providing the appropriate relief. Since the relaxation of this rule is a fact-based inquiry, the following factors have been suggested.

(i) 'The nature of the investment agreement'

The questions included in this inquiry include the duration of the investment agreement, its significance to the host State in terms of the services or goods to be rendered by the investor,

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[902] *Fraport v Philippines* ICSID Case No. ARB/11/12 para 346.
[903] Llamzon (n 6 above) 275.
[904] This maxim is a Latin phrase which is literally translated as 'from a dishonourable cause an action does not arise'. It is a legal doctrine which states that a person cannot pursue legal remedies if the cause of action arises from illegality or transgression of a positive law. M Fordham 'The role of *ex turpi causa* in tort law' (1998) *Singapore Journal of Legal Studies* 238-259. See also the English case of *Patel v Mirza* [2016] UKSC 42.
[905] *World Duty Free* case para 181.
[906] *Jaybhay v Cassim* 1939 AD 537, 543. See also the South Africa cases of: *Limbada v Dwarka* 1957 3 All SA 258 (N); *Msibi v Sadheo* 1946 NPD 787. For a discussion of the application of the *pari delicto* rule in UK, see *Patel v Mirza* [2014] EWCA Civ 1047, citing cases such as *Smith v Bromley* (1760) 2 Doug KB 696n; *Walker v Chapman* (1773) Lofft 342, 98 ER 684.

and the complexity of the project and expected outcomes. In terms of duration, a short-term investment means that the relationship of the Parties will extinguish sooner compared to a long-term investment. A long-term investment might also signal the value of the investment project, its complexity and expected outcomes. Therefore, to enforce a long-term investment may be torturous to the host State, since they will be stuck with a corrupt partner over a long period of time. Due to the complexity of the project, the likelihood of committing other corrupt acts is high. However, this factor would have to be read in line with the second factor, which deals with the extent of performance.

(ii) 'The extent to which the agreement has been executed'

The status of the contractual relationship at the time of instigating the arbitration is critical. If performance has not yet commenced, it would be fair to set aside the investment agreement. However, if the investor has substantially performed its obligations, it would be unjust to void the agreement and not compensate the investor. According to Raeschke-Kessler, 'corruption is no justification to expropriate the investor without any fair and reasonable compensation by declaring the contract to be null and void at such late and advanced stage of the relationship between the Parties'.[907] Suppose, in an electricity-generating project worth US$5 billion, the investor paid a bribe of US$1 million, and at the time of discovering the corruption, the project was almost complete. Employing the current jurisprudence, the investment would lose protection since the agreement would be considered null and void. Since the investment was in the State's territory, the latter would acquire the project or investment and no compensation would be paid to the investor. The investor could not recoup its investment and take it elsewhere. This criterion also implores the tribunal to consider the value of bribery in relation to the investment made. It suggests that if the value of the bribe is less in value compared to the ultimate investment, the severity of the sanctions must be less.[908] However, so far, in the cases that have been arbitrated on involving corruption, the value of bribes paid has been

[907] H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in foreign investment-contracts and dispute settlement between investors, states, and agents' (2008) 9 *Journal of World Investment & Trade* 19.

[908] In the *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6 para 556, the Tribunal indicated that they 'may exist a set of circumstances that does not trigger the illegality requirement: for example, the provision of an item with trivial value that a… court might find deserving of only a minimal fine'. Also in the case of *Tanzania Electric Supply Company v Independent Power Tanzania Limited* ICSID Case No. ARB/98/8 Award of July 2001, the only sum that was admitted to have been paid to a public official was the equivalent of less than US$20 'holiday gift package' given to a state corporation, and the Tribunal indicated that the amount of money was insufficient to support the argument that the agreement had to be declared void.

significant.[909] The value of the bribes were congruent with the value of the investment or returns on the investment.[910]

(iii) 'The costs involved in upholding or terminating the agreement'

This is a financial consideration for both the host State and the investor. The greater the loss, the less punitive the tribunal should be. Suppose the project is for construction of a hospital in a remote area. Under these circumstances, if the investment were cancelled, the citizens of that area would unduly suffer, compared to upholding the agreement and seeking damages from the investor or a reduction of the value payable by the host State. Undue hardships were considered as a ground of refusal to terminate an invalid contract in the South Africa cases of *AllPay Consolidated Investment Holdings (Pty) Ltd.* [911] Even though the tender was declared invalid, the declaration of invalidity was suspended for a year until 31 March 2017 to enable SASSA to award a new tender.[912] An extension was further granted as the Court considered that in the circumstances, it would be 'just and equitable to grant a further extension of the suspension of the invalidity order so as to avoid the serious prejudice which millions of poor people could have suffered'.[913]

The possibility of claiming damages from the investor would act as deterrent factor to the investor. In terms of Article 35 of the UNCAC, Member States have a right to initiate legal proceedings against those responsible for damage due to corruption, in order to obtain compensation.[914] As to the conditions to be satisfied for one to claim damages, the guidelines of the Civil Law Convention on Corruption are useful.[915] The conditions are as follows: proof that the defendant has committed or authorised the act of corruption, or failed to take reasonable

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[909] In the *Vladislav Kim et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6, the bribe was of US$33.98 million to Ambassador Gulnara Karimova, in exchange for a relationship of trust and her influence on her father, the then-President of Uzbekistan. In the *World Duty Free Co. Ltd. v Republic of Kenya* ICSID Case No. ARB/00/7 a US$2 million bribe was paid to the President of Kenya.

[910] For instance, in the *Metal-Tech Ltd. v Republic of Uzbekistan* ICSID Case No. ARB/10/3, the value of the investment project was USD 19,398,000 and over USD3.5 million was paid to consultants and individuals.

[911] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 1 SA 604 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC).

[912] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC).

[913] *South Africa Social Security Agency and another v Minister of Social Development and others* 2018 ZACC 26 para 35

[914] See the example of BAE Systems/Tanzania Radar Defence System case. http://star.worldbank.org/corruption-cases/node/18470 (accessed 01 February 2018) and the 2014 Costa Rica's civil action against Alcatel CIT discussed in Chapter 3.

[915] Civil Law Convention on Corruption Strasbourg, 4.XI.1999.

steps to prevent the act of corruption; proof that the plaintiff has suffered damage; and proof that there is a causal link between the act of corruption and the damage.[916] These prerequisites require the claimant of damages to demonstrate culpable behaviour of the defendant and exhibit losses suffered as a result of the defendant's acts of corruption. The claim of damage should be substantiated and, most importantly, directly linked to the act of corruption complained of. Hence, unsubstantiated claims of loss do not give a right to compensation. In other words, the damage suffered must be ordinary, such as loss of profit, and not an extraordinary consequence of corruption.

(iv) *'The extent to which the Host State and the Investor took measures to prevent the occurrence of and/or remedy the act of corruption complained of.'*

The current arbitral trend of determining liability is one-sided. At no point is the conduct of the host State examined. It has been noted that tribunals shy away from applying the principles of State Responsibility as far as holding the State accountable for corruption. For instance, in the *World Duty Free* case, the tribunal indicated that the corrupt acts of a sitting Head of State would not be attributable to the State as this posed adverse effects on innocent Kenyan citizens by holding them accountable for the acts of its corrupt political figures.[917] However, cognisance has to be given to the fact that most of the cases before the tribunals did not seek to hold public officials accountable. Tribunals cannot directly make public officials accountable, for they lack such jurisdiction. Only the State can be held accountable for the acts of its public officials, as discussed elsewhere above. Only in the *EDF* case did the investor seek to hold the State accountable by arguing that acts of certain government-controlled Romanian agencies 'were part of an orchestrated action to take the investor's investment in retaliation for his refusal to pay bribes. Arbitral practice and international law confirm that acts of a commercial nature may be attributed to the State as long as such acts emanate from a government agency'.[918] The Tribunal consented that a request for a bribe by a State agency was a violation of the fair and equitable treatment obligation owed to the investor pursuant to the BIT, as well as a violation of international public policy.[919] Lamentably, there is no clarity on the accountability of the State when the bribe is freely paid.

[916] Art 4 of the Civil Law Convention on Corruption.
[917] *World Duty Free* supra, para 181.
[918] *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13 para 102.
[919] n 918 above, para 221.

Therefore, this criterion presents an opportunity to examine the conduct of the State. Not all States may be willing to accept this clause; however, the clause is a necessity meant to regulate the bilateral nature of corruption. It is instrumental in balancing and apportioning the economic and moral costs of corruption, achieved by enjoining the tribunals to determine whether those who sought to invoke corruption as a defence tried to prevent the occurrence of such in the first place. Second, the tribunal must scrutinise the steps Parties to the dispute took upon getting notice of the act of corruption complained of. These inquiries are discussed below.

(a) 'Inquiry on preventive measures'

All international instruments regulating corruption require Members to take steps to prevent the occurrence of corruption. Preventive measures include the development and maintenance of coordinated anti-corruption policies,[920] recruiting public officials on merit,[921] developing codes of conduct for both public and private sector, and preventing conflict of interests.[922] When inquiring about the presence of preventive measures, the tribunal would have to determine if the Parties have anti-corruption measures in place. The tribunal may also inquire if the preventive measures in place are effective to meet the desired objective of preventing corruption. This inquiry is not out of order, since international anti-corruption instruments in place, so far, require States to 'establish and promote effective practices aimed at the prevention of corruption'[923] and to periodically review them.[924] This inquiry into the presence of preventive measures can reflect the will of the Parties to regulate corruption in their spheres of influence, and in cases of lack thereof, adverse inferences have to be drawn. However, presence alone is inadequate. As indicated in the case of South Africa, the country has ample anti-corruption legislation in place as well as anti-corruption bodies in line with international standards, but such laws and bodies are ineffective to regulate corruption of foreign investors.

(b) 'Inquiry on remedying the act of corruption'

The second leg of the inquiry interrogates the measures that Parties took upon being aware of the alleged act of corruption. The inquiry has an effect of either reducing or disallowing the remedy claimed by the complainant. For example, if the State or investor discovers that its employees received or solicited a bribe but took no steps to avoid a repetition of the event or

[920] Art 5 of UNCAC. See also Art III of the IACC.
[921] Art 7 (1) of UNCAC.
[922] Art 12 of the UNCAC.
[923] Art 5 (2) of the UNCAC. See also Preamble to the African Union Convention on Preventing and Combating Corruption (2003); Art III (2) of the Inter-American Convention Against Corruption (1996).
[924] Art 5 (3) of the UNCAC.

even to punish the employee, a claim for compensation might be reduced or even rejected owing to the State's or investor's contribution to the aggravation of the financial damage suffered.[925] There is evidence to the fact that tribunals have refused to entertain or give effect to corruption allegations where the State had failed to prosecute or punish the public officials under its domestic laws. For instance, in the *Southern Pacific Properties* case[926] the Tribunal highlighted that Egypt's failure to implicate the particular officials in the alleged acts of corruption was a reason for not entertaining its repeated allusions to corruption, since it effectively showed that it condoned such actions. Similarly, in the *Wena Hotels* case, where Egypt failed to prosecute alleged corrupt officials, the Tribunal was 'reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with [investor] was illegal under Egyptian law'. [927]

The conduct of the Parties to the dispute can reflect acquiescence, in the sense that either the investor or host State, by failing to take steps to remedy the alleged wrong, acquiesced to the act of corruption. Therefore, either Party cannot seek to disengage from the investment agreement or refuse to grant the investment treaty protection. Acquiescence describes the inaction of an entity which is faced with a situation constituting a threat to or infringement of its rights. [928] Its primary purpose is 'evidential…its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical'.[929] It is generally recognised that the legal effects of the doctrine of acquiescence only attach in circumstances that require a Party to act but where it fails to do so. Both domestic laws and international anti-corruption laws[930] call upon States to take preventive measures to criminalise and prosecute offenders. An omission on the part of the State to prosecute offenders should be a violation of the State's obligation under international law as well as a form of acquiescence under the law of State Responsibility.[931]

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[925] See for instance Art 6 of the Civil Law Convention on Corruption which provide that Members should put in place rules which allow compensation to be reduced or disallowed having regard to all the circumstances, if the plaintiff has by his or her own fault contributed to the damage or to its aggravation.
[926] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ICSID Case No. ARB/84/3.
[927] *Wena Hotels v Egypt* 2002 41 ILM 896 para 116.
[928] I C MacGibbon 'The Scope of acquiescence in international law' (1954) 31 *British Yearbook of International Law* 143.
[929] MacGibbon (n 928 above) 145.
[930] UN Convention against Corruption; Inter-American Convention against Corruption; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; AU Convention on Corruption and SADC Protocol on Corruption.
[931] Llamzon (n 6 above) 275.

Some tribunals appear to recognise the participation of the State for the purposes of allocating costs of arbitration, as reflected in the *Metal-Tech* case, wherein the Tribunal indicated that '[t]he law is clear - rightly so - that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs'.[932] This should also be extended to the assessment of the appropriate award.

Although there are several challenges in combatting corruption, including lack of uniformity at the domestic level on acts regarded as corrupt, complacent or discriminatory enforcement of anti-corruption laws by States, unsettled arbitral jurisprudence and underdeveloped IIA anti-corruption provisions, international investment law can assist in combatting corruption. The recommendations proposed above would go a long way in combatting corruption, where the conduct of both the host State and the investor is scrutinised and there is accountability. The prospects for combatting corruption in international investment transactions are realistic.

The proposed model is not a waterproof solution against corruption, but it is part of the solution to combat corruption in the investment regime by shaping the relevant actors within the system. States have unsuccessfully tried to establish a code of conduct for transnational corporations. This model presence an opportunity for States to influence the conduct of foreign investors. There is a possibility that States will be cynical about the proposed model. Possible criticisms relate to fear of loss of sovereignty. The loss of sovereignty relates to which matters to adjudicate within its territory. The model places an obligation on States to adjudicate matters of corruption, and failure to do so means adverse inferences will be drawn against it. However, sovereignty is not an absolute concept. Notions of the rule of law have been employed as a limitation on State sovereignty by investment tribunals.[933]

[932] *Metal-Tech Ltd. v The Republic of Uzbekistan* ICSID Case No. ARB/10/3 para 422.

[933] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11 paras 529-530; *Quiborax S.A. and Non Metallic Minerals S.A. v Plurinational State of Bolivia* ICSID Case No ARB/06/2 para 89. See also, E Guntrip 'Self-determination and foreign direct investment: reimagining sovereignty in international investment law' (2016) 65 *International & Comparative Law Quarterly* 829-857.

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