Improving domestic governance through international investment law:

Should bilateral investment treaties learn from international anti-corruption conventions?

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This paper is the result of a comparative analysis of investment treaties, investment arbitration awards, subject literature and expert interviews. It investigates options for integrating the strong legal regime of investment arbitration - which brings together the principal actors in transnational corruption: foreign investors and host states - further into the fight against corruption.

Investment arbitration jurisprudence shows that host states have made allegations of bribery with an increasing frequency. However, the lack of unambiguous guidelines on how to treat such arguments has arguably contributed to a shortage of affirmative decisions, even where further evidence might have been available.

The inflow of illicit payments through investment projects can severely undermine domestic good governance efforts. As a measure to keep corruption-tainted investments from benefiting from investment treaty protections, states should press for explicit provisions in investment treaties excluding such assets from the treaty’s scope of application. This paper proposes making the investor’s access to arbitral procedures depend on its compliance with international bribery norms such as Article 1 of the OECD Convention. Building on the findings of the paper, a Model Clause has been drafted, which is intended as an innovative reference for drafters and negotiators of future investment treaties.

Keywords: International Investment Law, Investor-State Dispute Settlement, Corruption, Bribery

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1. Introduction

The framework of international trade relations is undergoing major changes. The notion of terms such as ‘free trade’ and ‘fair trade’ diverge widely (Pieth 2016, p.14) and the usefulness of investment protections as a whole is being questioned. However, on the issue of corruption, the objectives for achieving consensus amongst the stakeholders appear much better: Corruption hurts honest investors and affected citizens alike: The former through competitive disadvantages, e.g. in tendering procedures, and the latter through the frustration of good-governance efforts and higher prices. Accordingly, improvements in the fight against corruption benefit all and it is in this fight that investment law can play an especially significant role, as it “minimizes dependence on public officials who are subject to capture by wealthy outsiders” (Carrington, p.109).

However, most governments do not actively deploy investment law as a mechanism to achieve good governance and anti-corruption objectives (Gordon, p.138). This paper therefore investigates options for integrating the strong legal framework of investment law further into these efforts.

The text is segmented into three parts: In a first step, Sections II and III introduce the concepts of investment law and arbitration, as well as the occurrence of corruption therein. In a second step, an inquiry into available legal bases for the so called corruption defence is undertaken: While Section IV looks at legal concepts and doctrine upon which the defence has been based, Section V investigates examples of more recent treaty-based justifications. In a third and final step, the findings of the paper are reproduced in a Model Treaty clause (Section VI).

2. Investment law and corruption: An unforeseeable encounter?

Foreign investment is a critical component of the world’s economy: As many developing countries lack the technology, capital and other resources to develop their industries, foreign investment is seen as a crucial component to making their markets more competitive in a globalized economy (Moses, p.230). To make investors feel secure in investing in foreign (developing) countries, national governments have entered into international investment agreements (IIA) (Chaisse & Bellak, p.4).

Amongst IIAs, bilateral investment treaties (BITs) are in the foreground (Moses p.239; cf. Chaisse 2015, p.565). BITs - over 2300 of which are currently in force - typically offer investors protections against ‘arbitrary and discriminatory’ treatment by the host state, a guarantee of ‘fair and equitable treatment’ and protections against expropriation without adequate compensation (Llamzon, p.41). Furthermore, in most BITs states have consented for individual foreign investors to directly claim the protections offered in the investment treaty before an international tribunal against a state party - so called investment arbitration. Thereby, investors are enabled to bypass the host state’s domestic legal system (Losco, p.1205). The leading body for international investment arbitration is the International Centre for Settlement of Investment Disputes (ICSID), an arm of the World Bank.
This collective international effort to provide an investment friendly environment in high-risk countries is compromised by domestic struggles within the latter. Corruption in general and bribery in particular are primary concerns in this regard, as they have a particularly “corrosive effect” on the attractiveness of a domestic market to foreign investors (Foreword to UNCAC by former Sec. General Kofi Annan; cf. also ASEAN Business Outlook Survey 2017, 14.; For an in-depth discussion of the phenomenology of corruption, see Nadakavukaren 2013, p.397).

These realizations, inter alia, have led to the emergence of another branch of international law: international anti-corruption treaties and conventions by international policy makers. The major turning point in the regulation of bribery of foreign officials came in 1977, when the United States introduced the US Foreign Corrupt Practices Act (FCPA).

On this development, Pieth (2011, p.1379) points out that:

„Whereas the post-colonial world of the „Cold War“ made intensive use of bribery to foster and forge alliances and to continue to obtain access to natural resources in former colonies, with the opening of the East the rules of economic engagement changed and in particular G7 countries were no longer interested in a corruptive catch-as-catch-can.“

Since then a great deal of energy has been put into the creation of an international, multilateral regime largely building on the example of the FCPA (Davis, p.170). The core of this legal regime consists of two conventions: The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) of 1997, and the United Nations Convention against Corruption (UNCAC) of 2003.

**OECD Anti-Bribery Convention**

The OECD Convention - which to date has 41 signatories including all OECD Member States - was negotiated under strong pressure from the U.S. government, which in turn was intensely lobbied by U.S. firms wanting to eradicate perceived trade disadvantages created by the FCPA (Webb, p.195).

It was the first international anti-corruption instrument focused on the ‘supply side’, i.e. the influx of corrupt funds, an approach that can now be found in many national laws targeting transnational corruption (Cf. Lamzon, p.67). The idea behind this concept is that if all major commercial competitors withhold from paying bribes to corrupt officials, the latter would lose their ability to buy allegiances (OECD Commentary - Pieth, p.31). This does not only benefit the citizens administered by them, but also ‘levels the playing field’ for righteous competitors (OECD Commentary - Pieth, p.31). The system was supplemented with a Recommendation in 2009 addressing ancillary matters of non-criminal nature (Pieth 2010, p.9).

The Convention’s key provision is its Article 1:

“The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.

4. For the purpose of this Convention:
   a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
   b) “foreign country” includes all levels and subdivisions of government, from national to local;
   c) “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.”

Nowadays, these international bodies interact with investments and investment law in at least three ways (Gordon, p.139): First, they influence investment via their effects on domestic and international laws and practices. Second, they provide a source of concepts, definitions and principles that can directly be integrated into the texts of BITs (Sistem v. Kyrgyz Republic, para.41, where the Tribunal relied directly on Art. 1 of the OECD Convention as “a reasonable and useful definition” of bribery; Betz, 69 et seq.). Third, in rare cases they are used as guidance in decision making by investment arbitration panels.

3. The corruption defence in investment treaty arbitration

The usual setting within which investment arbitration is taking place is that of an investor bringing a claim against a host state, e.g. for compensation for loss of investment. By invoking the so called corruption defence, however, the table turns and it is the host state bringing a counterclaim against the investor by invoking acts of corruption, e.g. bribery, as a means to preclude any claims an investor might make and evade every liability. The raison d’être of the corruption defence is that while arbitral tribunals are not tasked with punishing acts of corruption, they clearly “cannot grant assistance to a party that has engaged in a corrupt act.” (See for example: Metal Tech v. Uzbekistan, para.165; Niko v. Bangladesh, Procedural Order No.15) This view is backed by broad consensus and has been confirmed in various ICSID Awards (Inceysa v. El Salvador, paras. 397 et seq.; Fraport v. Philippines I, paras.397 et seq.; Thunderbird v. Mexico, para.112). To provide an idea of a ‘successful’ corruption defence by a host state, the Metal Tech Award is illustrated below:

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<th>Metal Tech v. Uzbekistan</th>
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<td>In 2000 Metal-Tech, entered into a joint venture (Uzmetal) with two state-owned enterprises (SOE) of Uzbekistan to build and operate a modern plant in Uzbekistan (Award, para.1, 7, 13). In the following, Metal-Tech concluded three ‘consulting agreements’ worth</td>
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USD 4.4 mio with individuals closely connected to the Uzbek Government (para.29, 86; para.90, 226). One of the Consultants was the brother of the Prime Minister of Uzbekistan, (para. 90, 226).

In December 2006, both Uzbek SOEs filed domestic court proceedings which resulted in the liquidation and subsequent transfer of all of Uzmetal’s assets to the Uzbek SOEs (para.34 et seq.). In January 2010, Metal-Tech filed a request for ICSID arbitration, claiming expropriation (para. 55). Uzbekistan’s principal defence was that the Tribunal lacked jurisdiction because the Claimant’s investment was ‘made and operated’ corruptly and in violation of Uzbek law on bribery (para.110[i], 110[ii]). The Tribunal made findings of corrupt activities for two of the three consulting agreements: Amongst other “red flags”, the contracting partners had no relevant experience or other qualifications for the services for which they were allegedly hired for ( paras. 311 et seqq., paras. 337 et seq.).

Since the applicable BIT only protected investment ‘implemented in accordance with the laws and regulations’ of the host state, the claim raised by the investors was regarded as not having been covered by Uzbekistan’s consent to arbitration expressed in the BIT . Importantly - as in World Duty Free - the claimants had freely admitted to having made the bribe payments, wherefore the Respondent did not have to prove corruption and the Tribunal did not have to consider and weigh additional evidence. Thereby, the Tribunal’s decision making was substantially facilitated (para.240 et seq.; cf. Llamzon, p.198)

A look at investment law jurisprudence as a whole, however, reveals that affirmative decisions on corruption arguments are rarities. Corruption defences are only approved in approximately 1 out of 10 cases, and even where they are approved it is mostly only pursuant to outright admissions by the investors (cf. the last para in the Metal Tech v. Uzbekistan box above).

It is submitted here that apart from a lack of familiarity with the issue of corruption, it has arguably also been a lack of procedural and substantive guidance that has contributed to the reluctance of tribunals to render affirmative decisions on corruption defences (for further comments on this, see below Section 6.4). Some of the difficulties with regards to the legal principles that tribunals have generally applied to corruption defences and the respective provisions found in investment treaties will be discussed in the following two Sections.

4. Different means to the same end: Common legal concepts underpinning corruption defences

ICSIID jurisprudence shows that tribunals have generally addressed corruption arguments through one of the following three legal concepts: First, the investor’s obligation to invest ‘in accordance with host state law and regulations’; second, transnational public policy and third, the ‘Doctrine of clean hands’.

4.1. ‘In accordance with host state law’ clauses

Investment agreements oftentimes stipulate that only investments ‘in accordance with the Host State’s law and regulations’ are covered (the so called legality requirement).
By way of example, the India-Morocco BIT specifies:

**Art.1(1) India-Morocco BIT**

The term ‘investment’ shall mean any kind of asset invested by investors on one Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of the latter.

(Agreement between the Government of the Republic of India and the Government of the Kingdom of Morocco for the Promotion and Protection of Investments of 13 February 1999; See also Nadakavukaren 2016, 125)

Furthermore, there is wide consensus that the legality requirement - as an international legal principle - applies even where it is not explicitly mentioned in an investment treaty (Fraport v. Philippines II, para.332; see also Betz, p.12).

However, it is unclear which host state laws investors have to comply with in order to enjoy treaty protections. ICSID case law reveals that not all types of violations of domestic host states’ law have led to an investment losing its BIT-protections (Betz, p.12; Grubenmann, p.209 et seq.). In L.E.S.I-DIPENA v. Algeria (para.24 [iii]), the Tribunal held that the BIT’s mention of conformity with laws only 'seeks to exclude from protection all investments made in violation of the fundamental principles”. In the same vein, several authors have argued that only ‘grave violations’ such as conduct leading to civil judgments or criminal convictions should have said consequence (Betz, p.12 and Grubenmann, p.211).

Furthermore, reliance on national law to determine the BIT’s scope of application seems problematic as such. First, national criminal laws vary in quality. Conduct that is considered criminal in one country may well be allowed in another. Second, it is uncertain whether the legality principle imposes a continuous duty on the investor, or whether the provision extends only to the inception of the investment (Betz p.12, Losco, p.1226). In Fraport v. Philippines I (para.345), the tribunal suggested that the ‘in accordance with’ provision only applies to the initiation of the investment and that violations of host states law during the operation of an investment “might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.”

Lastly, determining the legality of an investment based on national laws arguably incentivizes the abuse of national lawmaking powers. In this context, the dissenting arbitrator in Fraport stated the danger of state parties using “their legislative, executive and judicial powers to escape their responsibilities, including their obligation to arbitrate.” (Dissenting opinion by Arbitrator Cremades, 19.7.2007, §29). Of course, such a line of action would be contrary to the substantive provision of BITs, e.g. the requirement of fair and equitable treatment. However, a finding of corruption - even if based on domestic law - could preclude the tribunal’s jurisdiction to hear the case, whereby it would never even get to decide on violations of substantive law (ibid).
4.2. Transnational public policy

There is broad consensus in ICSID jurisprudence and legal literature that corruption does run contrary to transnational public policy. The Tribunal in the often referenced World Duty Free v. Kenya Arbitration (para.157) 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” (see also: Betz p.23; Kreindler, p.309; Losco, p.1223).

The rational of transnational public policy can be expressed as “the general principles of morality accepted by civilized nations” (International Law Association, Report on the Sixty-Ninth Conference, London 2000, p.345; cf. Betz, p.22). However, “the exact definition of this concept, its legal functioning, its boundaries and even its existence are highly controversial” (Meyer, p.231, with reference to Lalive,). In the interest of predictability of legal procedures, applying precise rules with explicit objective provisions should be the main legal basis for any award and not the rather vague concepts of transnational public policy (cf. Betz, p.17 and 21; Llamzon, p.196).

4.3. The ‘Clean Hands Doctrine’

The ‘clean hands doctrine’ embodies the maxim that “he who seeks equity must do equity”, i.e. the applicant has to bring its claim with clean hands. It derives from the more general principle of good faith (cf. Niko v. Bangladesh, Award on Jurisdiction, para.476).

However, whether the doctrine really exists is controversial: In Guyana and Suriname (para.418), 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”. If it were a customary law or a general principle of law, Tribunals arguably would be able to apply the doctrine without a textual basis in the treaty (Burke-White, p.9). However, several awards have negated the doctrines existence. For example, the Tribunal in Yukos v. Russia (para.1358) stated that it was “not persuaded that the clean hands doctrine exists as a “general principle of law recognized by civilized nations” (cf. Betz, p.231).


5. Investment treaty drafting: Emergent trends

The current inclination of host states to raise corruption as a defence cannot gloss over the fact that investment treaties were originally not designed to deal with this kind of counterclaim: The vast majority of BITs of older age are silent on corruption, providing no substantive framework for arbitrators to resolve corruption defences (Llamzon, p.62; Gordon, p.135). However, there is growing acknowledgment that investment treaties need to be “part of the equation” when speaking of reducing illicit financial flows (Betz/Pieth, p.10).
In the following, examples of investment treaty language evidencing that corruption has become an international policy issue are displayed. Firstly, Article 18.5 US-Morocco Free Trade Agreement (FTA) states:

**ARTICLE 18.5: ANTI-CORRUPTION**
1. The Parties reaffirm their resolve to eliminate bribery and corruption in international trade and investment.
2. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment,

*United States-Morocco Free Trade Agreement, signed 2004.*

In a similar fashion, Article 8 of the Japan-Philippines BIT puts forth:

**Art.8 Measures against Corruption**
Each Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with laws and regulations.

*Agreement between Japan and the Republic of the Philippines for an Economic Partnership, signed 2006*

Such ‘programmatic’ provisions – further examples of which can be found in numerous other investment treaties - are primarily directed at national law makers only. Therefore, they are not directly of use to dispute settlement. Due to this, such provisions stop short of providing arbitrators with adequate guidance.

Several ‘model’ investment agreements, however, have gone a step further and provide so called *carve-out clauses* directly aimed at arbitration procedures. Generally speaking, carve-out clauses describe the treaties scope of application. The effect of a carve-out clause is to limit the treaty scope of application, e.g. in order not to infringe upon non-economic and public policy interests. In the context of corruption, carve-out clauses condition a tribunal’s jurisdiction or the investment treaties applicability upon the investor’s compliance with anti-corruption law (cf. UNCTAD, World Investment Report 2015, p.133).

An example of a corruption carve-out is provided in the Southern African Development Community’s (SADC) Model BIT, which creates a “common obligation on corruption for investors” by stipulating:

**Art. 10.1 Common Obligation against Corruption**
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.

2011 Southern African Development Community Model Bilateral Investment Treaty and
Commentary

Though not stated explicitly in the Model text itself, the attached commentary indicates that
investments violating the “corruption obligation” should be considered violations of the treaty and will
no longer be covered investments. Consequently, all dispute settlement rights of a bribing investor
could be challenged. Notably, Article 10.1 SADC Model Treaty - for the most part - is a verbatim
rendition of Article 1 OECD Convention.

India’s Model BIT of 2015 contains the furthest reaching carve-out provision discovered in the
preparation of this paper. It stipulates:

**Article 9: Obligation against Corruption**

9.1 Investors and their Investments in the Host State shall not, either prior to or after the
establishment of an Investment, offer, promise, or give any undue pecuniary advantage,
gratification or gift whatsoever, whether directly or indirectly, to a public servant or official
of the Host State as an inducement or reward for doing or forbearing to do any official act
or obtain or maintain other improper advantage.

9.2 Except as otherwise allowed under the Law of the Host State, Investors and their
Investments shall not engage any individual or firm to intercede, facilitate or in any way
recommend to any public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act
or obtain or maintain other improper advantage.

9.3 Investors and their Investments shall not make illegal contributions to candidates for
public office or to political parties or to other political organisations. Any political
contributions and disclosures of those contributions must fully comply with the Host State’s
Law.

9.4 Investors and their Investments shall not be complicit in any act described in this
Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

**Model Text for the Indian Bilateral Investment Treaty of 2015**

While the provision again makes extensive use of the language of Article 1 OECD Convention, it also
explicitly outlaws facilitation payments, illegal political contributions, as well as complicity in any of
the described acts. In Article 8(3), the Model BIT explicitly excludes any investor that does not
comply with Article 9 (Corruption), from benefitting from the provisions of the treaty.

5.1. **Advantages of providing a carve-out clause**

Such a carve-out clauses offer a number of benefits: First, they represent a step toward levelling the
playing field within the same market by ensuring that corrupt investors lose legal protection. This is
particularly significant in the context of host states with relatively weak judicial systems, where else
there might be little motivation for foreign investors to maintain rule of law compliance (Burke-White, p.9).

Second, with the reliance on provisions and definitions found in authoritative anti-corruption conventions such as the OECD Convention, the task of proving bribery can be facilitated: The Tribunal in *Thunderbird v. Mexico* (para.112) acknowledged that mainly due to the influence of the international anti-corruption conventions, tribunals and courts have been open to the use presumptions rather than full-fledged and hard to obtain full evidence.

Third, the mere incorporation of a corruption carve-out clause also represents a bold political statement by the parties to the investment treaty. It would emphasize that the investment law & arbitration do not represent a “one-way-street favoring foreign investors” (cf. Burke-White, p.9).

5.2. Likely challenges of carve-out clauses

The greatest challenges to providing more explicit anti-corruption clauses in investment treaties will likely be political ones. Remarkably, the ‘best-standard’ clauses of the SADC or India Model BIT cannot be found outside of mere Model Treaties. While there is a fair number of corruption carve outs in various model treaties, no investment agreement with legal force containing a corruption carve out could be identified. This raises the suspicion that - rather than showing anti-corruption commitment - model corruption clauses are being used for tactical purposes, e.g. as throw-away provisions during treaty negotiations.

The principal aim of investment treaties and their drafters is to attract foreign investment. However, where public policy concerns are impacted, tension is emerging (cf. Chaisse 2013, p.333). Taking into account the impact of corruption on the lives of citizens, there can be little doubt in whose favour the balance should tip.
6. Model Clause

Building on all the above findings, the following Model Clause has been drafted as an innovative reference for treaty drafters. If implemented, the Model Clause offers explicit guidance to arbitrators and counsel as to the objective requirements and the available remedy for a host state’s corruption defence.

Chapter X - Dispute Settlement

Article X.Y - Bribery of Officials

1. Investments by investors of one Party that have in whole or in part been procured, facilitated, established or operated in a manner violating Article 1 of the OECD Anti-Bribery Convention on Bribery, shall not be covered by the provisions of this Treaty.

2. A Party may raise this as an objection to jurisdiction in any dispute under this Treaty.

3. The Parties reaffirm their conviction and commitment to eliminate bribery and other forms of corruption in international trade and investment.

While no argument is made that the proposed Model Clause is an ideal solution, a few aspects will be discussed in the following

6.1. “as stipulated in Article 1 of the OECD Anti-Bribery Convention”

The Model Clause does not merely reiterate the content of Article 1 OECD Convention, but expressively links itself to the OECD Convention (Alternative clauses to consider include, for example: Article 16 UNCAC, Article 4 African Union Convention on Preventing and Combating Corruption, Article VI (b) Inter-American Convention against Corruption.).

Through the inclusion of Article 1 OECD Convention the tribunal is enabled - and at the same time obliged - to apply an internationally used, highly developed, expert-drafted provisions on bribery of foreign officials, along with exact definitions of relevant terms and the Convention’s own commentary. This is of particular importance in the context of potential weaknesses in the host state’s domestic bribery law.

Furthermore, with the reference to the OECD Convention, there is no danger of host states attempting to restrict an investment treaty’s scope of application through domestic law making, e.g. by declaring certain practices to be of illegal: The investor no longer needs to comply with the host state’s anti-bribery law, but directly with Article 1 OECD Convention.
6.2. “in whole or in part”

This formulation makes clear that the treaty’s protections would be inapplicable for the whole investment, not just - if such a distinction can be made - those parts tainted by bribery. For breaches of criminal law, such a consequence seems justified. (For breaches of administrative or civil law, other remedies should be chosen, however).

6.3. “procured, facilitated, established or operated”

The Model applies to investments “procured, facilitated, established or operated” by bribery. Accordingly, the Clause is triggered by a breach at any point of the lifetime of an investment, as long as a causal link between the investment and the violation of Article 1 OECD Convention is established.

6.4. “objection to jurisdiction”

Abs. 2 of the Model makes clear that a finding of bribery results in a lack of jurisdiction. A look at ICSID jurisprudence reveals, however, that most tribunals have treated corruption allegations at the merits stage of proceedings. (A survey conducted in the preparation of this paper showed that out of 18 awards featuring corruption defences by host states, in 15 awards tribunals looked into the allegation only at the merits stage. Whether the alleged corruption took place during the establishment or operation of an investment did not play a decisive role.

There are arguably two plausible explanations for this: Firstly, tribunals have generally preferred to avoid deciding a case on corruption arguments where other grounds for rejection of the investor’s claim were available. As many arbitrators have a background in commercial and not criminal law, they might have opted to side-step the issue in cases where the investor would not have succeed with its claims regardless of the corruption allegation. Second, a failure to make an affirmative finding of jurisdiction could be grounds for annulment of the award, pursuant to Article 52(1)(b) ICSID Convention (Nadakavukaren 2016, p.523). Without adequate reassuring guidance on how to reach a finding of corruption, arbitrators have justifiably been reluctant to risk rendering a dismissive decision on jurisdiction which later on might be open to annulment.

Notwithstanding, it is agreed here with those commentators who interpose that if corruption is seen a merits issue, tribunals are more likely to measure out the host state’s perceived blameworthiness versus the investor’s criminal conduct during the merits (see for example Yackee, p.18). As the Model Clause provides arbitrators with a comprehensive framework to decide on corruption, there is no longer any justification to withhold from making affirmative decisions where there is sufficient evidence.
7. Conclusion

Pushing for explicit treaty-based justifications for the operation of a distinct corruption defence in investment arbitration is an important step to safeguard the integrity of investment law. The need to emphasize the inclusion of corruption carve-out clauses is supported by two key observations: First, the legal principles that have been applied to corruption defences, i.e. the legality principle, transnational public policy and the ‘Doctrine of Clean Hands’, are inhibited by considerable uncertainties and shortcomings. In this regard, Corruption carve-outs could lend well-needed guidance to tribunals. Second, parties to investment treaties are yet to actually include the ‘best standard’ anti-corruption clauses found in various model treaties. With regards to this, carve-out clauses would signal that contracting parties are willed to call a spade a spade and to confront corruption in investment. The Model Clause presented in Chapter 6 showcases what a bribery provision in future investment treaties could look like.

Interesting points for further research include the extension of carve-out clauses to address money laundering as well as other forms of corruption, e.g. trading in influence.
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