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Article

Returning the Home State to the Global Anti-Corruption Campaign

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ABSTRACT

International investment law is facing significant challenges in combating corruption in investment activities. The existing scholarly discussions are mostly centred upon the triangular relationship between the foreign investor, the host State and the investment arbitration tribunal. The role of another important body—the home State—has been under-examined, which seems to be better placed to implement measures to effectively govern investors' (mis)conduct and ensure responsible investments. After identifying the low rate of substantiated corrupt acts in investment arbitration and the lack of a robust corruption prevention system in investment treaties, this article argues that participation of home States in arbitration proceedings can help mitigate those arduous evidentiary challenges and facilitate the fact-finding process. Home States should also impose obligations of delivering periodic corruption risk assessments on investors through domestic legislation and investment treaties.

1. INTRODUCTION

There is little doubt that the investor–State arbitration (ISA) mechanism is experiencing an ongoing legitimacy crisis. A handful of flaws in the system have been exposed, among which a lack of consistency in arbitral decisions has been the most fiercely debated. Notwithstanding that, one can observe a 'consistency' in the decisions on the legal consequences of corrupt acts typically occurring between the representative(s) of the investor and the public official(s) of the host State in the procurement of foreign investments.[1] These awards additionally deviate from a frequently held belief that investment arbitration is a one-sided mechanism which usually advances foreign investors' interests at the cost of the host States' interests.[2]

[1] Yueming Yan, 'A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?' in Yuwen Li, Tong Qi and Cheng Bian (eds), *China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement* (Routledge 2019) 228–30.

[2] Paul Michael Blyschak, 'State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases' (2009) 9 Asper Review of International Business and Trade Law 99,

More specifically, in the high-profile cases where the alleged corrupt acts were proven—*World Duty Free v Kenya*,[3] *Metal-Tech v Uzbekistan*,[4] and *Spentex v Uzbekistan*[5]—ISA tribunals completely denied investors' claims in relation to issues of jurisdiction, admissibility and merits. The awards of these cases have been extensively examined and criticized by commentators, who argue that the approach used to address allegations of corruption in investment arbitration is unsatisfactory.[6] It has often been questioned whether or not a host State should be held responsible for the corrupt act of its public official(s) in advancing the investment.[7]

Apart from the legitimacy debate on the arbitral decisions based on a positive finding of corruption, international investment law has encountered many procedural challenges in its anti-corruption movement. Among others is 'proving' a corrupt act.[8] Despite the growing number of allegations of corruption submitted before ISA tribunals, a large portion of them have not prospered due to a lack of evidence.[9] The increasing corruption-related cases have also drawn our attention to the currently flawed corruption prevention system in international investment law, particularly in international investment agreements (IIAs).

While the existing literature has studied the above-noted controversies from distinct angles and has put forward many practical proposals to address those challenges,[10] these discussions are mostly centred upon the triangular relationship between the foreign investor, the host State and the investment arbitration tribunal. The role of another important body—the home State—has been under-examined, which seems to be better placed to enact rules and implement measures to effectively govern investors' (mis)conduct and promote corporate governance. For instance, in the implementation of the Belt & Road Initiative (BRI) where there is a lack of a multilateral investment treaty binding on all BRI countries, China, as the home State of a large number of investment projects, assumes more obligations and duties to

108; José E Alvarez, 'Investment Treaty Arbitration and Public Law. By Gus Van Harten. Oxford, New York: Oxford University Press, 2007. pp Xxxii, 214, 184. Index. 65, £24, Paper' (2008) 102 American Journal of International Law 909, 910. There exist simultaneously opposing propositions arguing that arbitrators' professional reputations incentivize them to 'remain impartial' and that arbitration outcomes were 'not associated with arbitrator or respondent development status'; see, respectively, Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 Cornell Law Review 47, 90; Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard International Law Journal 435, 487.

[3] *World Duty Free Company v Republic of Kenya*, ICSID Case No Arb/00/7, Award of 4 October 2006.

[4] *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award of 4 October 2013.

[5] *Spentex Netherlands, BV v Republic of Uzbekistan*, ICSID Case No ARB/13/26, Award of 27 December 2016.

[6] See eg Yarik Kryvoi, 'Economic Crimes in International Investment Law' (2018) 67 International and Comparative Law Quarterly 577; Lucinda A Low, 'Dealing with Allegations of Corruption in International Arbitration' (2019) 113 AJIL Unbound 341; Tamar Meshel, 'The Use and Misuse of the Corruption Defence in International Investment Arbitration' (2013) 30 Journal of International Arbitration 267.

[7] See generally Aloysius Llamzon, *Corruption in International Investment Arbitration* (OUP 2014); Isuru C Devendra, 'State Responsibility for Corruption in International Investment Arbitration' (2019) 10 Journal of International Dispute Settlement 248; Carolyn B Lamm and Andrea Menaker, 'The Consequences of Corruption in Investor-State Arbitration' in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015).

[8] Vladimir Kvhalei, 'Standards of Proof for Allegations of Corruption in International Arbitration' in Domitille Baizeau and Richard Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration* (International Chamber of Commerce 2015); Abdulhay Sayed, 'Duplicity in Corruption and Arbitration: Dealing with the Evidentiary Gap' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, vol 19 (Kluwer Law International; ICCA & Kluwer Law International 2017); Cecily Rose, 'Circumstantial Evidence, Adverse Influences, and Findings of Corruption: Metal-Tech Ltd. v. The Republic of Uzbekistan' (2014) 15 The Journal of World Investment & Trade 747.

[9] See eg *Glencore International AG and CI Prodeco SA v Republic of Colombia*, ICSID Case No ARB/16/6, Award of 27 August 2019; *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB (AF)/12/6, Award of 6 August 2019; *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No 2013-13, Award of 6 August 2019; *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Award of 12 July 2019; *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1, Award of 22 August 2017; *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction of 8 March 2017.

[10] Aloysius Llamzon, 'State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration' (2013) 10 Transnational Dispute Management (TDM) 81 <https://www.transnational-dispute-management.com/article.asp?key=1958> accessed 7 July 2023; Mohamed Abdel Raouf, 'How Should International Arbitrators Tackle Corruption Issues?' (2009) 24 ICSID Review - Foreign Investment Law Journal 116, 437; Ayodeji Akindeire, 'Corruption in Investor-State Arbitration: Balancing the Scale of Culpability' <https://papers.ssrn.com/abstract=3464618> accessed 7 July 2023; Michael A Losco, 'Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction' (2014) 63 Duke Law Journal 1201.

enhance corporate social responsibility (CSR) of its investors (in particular, those State-owned enterprises) and ensure responsible investments. In other words, China has the potential to play an essential role in curbing corruption that might occur in the BRI implementation, especially when a lot of Chinese outbound investments are implemented in low- and middle-income countries where corruption may be an issue.

In practice, it has also been continuously observed that home States are 'returning to' investor–State disputes by distinct ways and are exerting increasing impacts on the rule-making process of international investment law. It is thus necessary and timely to examine home States' roles in combating corruption in international investment law. This article attempts to explore whether and how the home State of the foreign investor can be part of international investment law's anti-corruption campaign. This article argues that the home State and its domestic institutions can play a significant role in meeting the challenges of corruption deterrence faced by international investment law. More specifically, it argues that home States can contribute to eliminating corruption by providing necessary information to ISA tribunals to facilitate the fact-finding process and other challenging evidentiary difficulties. Additionally, home States can contribute by establishing an effective corruption risk assessment mechanism. This can be achieved through domestic legislation and investment treaties. Such a mechanism would require investors to implement public, documented and periodic assessments in the establishment and performance of the investments.

In light of the above, this article is divided into four sections. The first section is an introduction. Section 2 explores certain challenges facing international investment law in combating corruption, as well as the underlying reasons for said challenges. Section 3 then illustrates the measures the home State may take to meet these challenges. Section 4 is a brief conclusion.

2. THE EXISTING CHALLENGES OF CORRUPTION DETERRENCE IN INTERNATIONAL INVESTMENT LAW

When looking at the challenges facing international investment law, in particular the ISA mechanism, the first impression that a person is likely to receive is that there exists a wide range of difficulties in proving corruption during arbitration proceedings. However, international investment law also encounters many other difficulties beyond the scope of such proceedings.

A. Low rate of substantiated corrupt acts in investment arbitration

In ISA, there is a growing number of corruption claims raised by host States; however, in most cases, the alleged corrupt acts have not been substantiated. In the book *Corruption in International Investment Arbitration* (Oxford University Press, 2014), Dr Aloysius Llamzon identifies 28 investment arbitration cases involving corruption,[11] but the alleged corrupt acts were proved only in *World Duty Free v Kenya (2006)* and *Metal-Tech v Uzbekistan (2013)*. ISA tribunals have also dealt with corruption issues in many post-2014 cases, such as *Glencore v Colombia (1) (2019)*, *Tethyan Copper Company v Islamic Republic of Pakistan (2019)*, *Lao Holdings v Lao People's Democratic Republic (1) (2019)*, *Unión Fenosa Gas v Arab Republic of Egypt (2018)*, *Vladislav Kim and others v Uzbekistan (2017)*, etc.[12] However, in a

[11] Llamzon (n 7) 305–19. See also Cecily E Rose, 'Questioning the Role of International Arbitration in the Fight against Corruption' (2014) 31 Journal of International Arbitration 183.

[12] Other post-2014 cases include *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (2)*, *Niko Resources v Bangladesh (2019)*, *Securiport v Benin (2019)*, *Pan African Minerals and others v Burkina Faso (2019)*, *Sanum Investments Limited v Lao People's Democratic Republic (1) (2019)*, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya (2018)*, *Krederi Ltd. v Ukraine (2018)*, *Georg Gavrilović and Gavrilović d.o.o, v*

very small fraction of the total cases, the alleged corrupt acts were substantiated, including *Spentex v Uzbekistan (2016)*, *Littop v Ukraine (2021)*, *Penwell v Kyrgyzstan (2021)*, and *BSG Resources v Guinea (I) (2022)*.

The reasons explaining this phenomenon are multi-fold and are, to a great extent, case-dependent. The foremost one should be the difficulties in obtaining evidence to prove corruption, due largely to the inherently hidden nature of corruption. This is especially true in *transnational* investment activities.

In ISA, a typically alleged corrupt relationship is between the representative(s) of the investor and the public official(s) of the host State for the purposes of obtaining the investment.[13] Often, the corrupt acts were allegedly conducted between the Chief Executive Officer (CEO) or Chairman of the investor and the President of the host State, such as *World Duty Free v Kenya (2006)*. In this proved case, it was the Claimant itself who provided a testimony statement describing when, how and why the CEO (Mr Nasir Ibrahim Ali) of World Duty Free made payments to President (Mr Daniel arap Moi) of Kenya,[14] although World Duty Free considered the payment as a 'Harambee' practice, a routine practice to make donations so as to conduct business in Kenya.[15] In contrast, Kenya submitted that such payment was made in a 'heavily concealed manner' and thus was not considered an accepted 'exchange of gift' in the 'Harambee' system.[16] Instead, Kenya considered it a bribe to obtain the investment opportunity.[17] The tribunal ultimately concluded the existence of a bribe between Mr Ali and Mr Moi based on the statements within the testimony.[18]

However, adjudicating allegations of corruption based on direct evidence, like the testimony in *World Duty Free v Kenya*, has been rare in investment arbitration. A rather common situation is that the party alleging corruption can hardly obtain direct evidence and that ISA tribunals make decisions solely in reliance on circumstantial evidence. That said, before relying on circumstantial evidence, the following three issues must first be addressed.

First, it must be asked whether or not ISA tribunals *should* use circumstantial evidence or 'red flags' to prove corruption. This question has been controversial since the emergence of allegations of corruption in investment arbitration. On the one hand, ISA tribunals have arguably refrained from examining 'red flags' when addressing allegations of corruption.[19] On the other hand, tribunals in *Glencore v Colombia (1)*,[20] *Tethyan v Pakistan*,[21] and *Unión Fenosa Gas v Egypt*[22] have, respectively, acknowledged the admissibility and applicability of circumstantial evidence.

Secondly, the question of what kind or to what extent circumstantial evidence can substantiate corruption must be asked. In *Metal-Tech v Uzbekistan*, corruption was allegedly conducted in an indirect manner: between the CEO of Metal-Tech and Uzbek government officials through intermediaries like 'consultants' or relatives of public officials.[23] The tribunal examined a series of circumstantial evidence, which included, *inter alia*, a suspiciously striking amount of consulting fees, the consultants' lack of qualifications, sham consulting contracts,

Republic of Croatia (2018), Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan (2017), Getma International and others v Guinea (2) (2016), Republic of Croatia v MOL Hungarian Oil and Gas (2016), Customs and Tax Consultancy v Democratic Republic of Congo (2015) and Getma International v Guinea (1) (2014).

[13] Yan (n 1) 229–230.

[14] *World Duty Free v Kenya, Award (2006)* (n 3) para 130.

[15] ibid 110.

[16] ibid 121.

[17] ibid 133.

[18] ibid 134–36.

[19] Rose (n 8) 754.

[20] *Glencore v Colombia (1), Award (2019)* (n 9) paras 723–31.

[21] *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, *Decision on Respondent's Application to Dismiss the Claims (With Reasons)* of 10 November 2017 para 307.

[22] *Unión Fenosa Gas, SA v Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award of 31 August 2018 para 7.52.

[23] *Metal-Tech v Uzbekistan, Award (2013)* (n 4) para 197.

lack of clarity and transparency of the payment and services, etc.[24] The tribunal believed that these indicators have satisfied the standard of '*reasonable certainty*'[25] to establish corruption.[26] Similar 'red flags' were evaluated in *Spentex v Uzbekistan* where the tribunal took a *holistic* view of the relevant evidence and circumstances—'*connecting the dots*' and concluded the existence of corruption.[27] However, the *Pan African Minerals* tribunal stressed that the '*indicia*' evidence must be 'sufficiently serious, precise and concordant'; in the end, the tribunal found the raised 'red flags' insufficient to prove the alleged corrupt acts.[28]

Thirdly, the question of how to procure 'circumstantial evidence' must be asked. Even though ISA tribunals have in practice admitted, recognized and applied circumstantial evidence to handle allegations of corruption, procuring these indicators may be equally arduous. Parties alleging the corruption claims may not stand in a proper position to secure evidence or may lack the ability to access vital evidence. The counterparty who may possess certain evidence is unlikely to cooperate with the alleging party or with the tribunal in facilitating this process.

It is worth noting another evidentiary difficulty facing ISA tribunals in handling allegations of corruption: the standard of proof that should be applied in attempting to prove corrupt acts. The party invoking the allegation of corruption commonly advocates for a lower standard such as 'balance of probabilities', while the other party generally argues for a higher one like 'clear and convincing' or 'reasonable certainty' or the 'irrefutable' standard. These distinct standards have all been relied upon by ISA tribunals. The tribunal in *Georg Gavrilovic* determined the case based on the 'balance of probabilities'[29] while the *Metal-Tech* tribunal and the *Fraport (2)* tribunal respectively applied 'reasonable certainty'[30] and 'clear and convincing'.[31] The proposition of 'the graver the charge, the more confidence there must be in the evidence relied on' has also been advanced by several tribunals.[32] There are also cases where arbitrators have been reluctant to point out which specific standard of proof should be used; instead, they assessed whether or not they were persuaded based on the evidence adduced.[33]

In fact, the standard of proof has been a tough issue not only faced in investment arbitration but also in commercial arbitration as well as international litigation. Arguably, there is no single theory, rule, or principle as to the standard of proof that applies to every case, neither is there a unitary approach to the fundamental purpose of evidence.[34] Against this background, it is unsurprising that investment arbitration tribunals have referred to distinct

[24] ibid 326–352.
[25] ibid 243.
[26] ibid 351–352.
[27] Vladislav Djanic, 'In Newly Unearthed Uzbekistan Ruling, Exorbitant Fees Promised to Consultants on Eve of Tender Process Are Viewed by Tribunal as Evidence of Corruption, Leading to Dismissal of All Claims under Dutch BIT' (*Investment Arbitration Reporter*, 22 June 2017) <https://www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/> accessed 7 July 2023.
[28] Damien Charlotin, 'Analysis: Aynes-Chaired ICC Tribunal Finds That State Validly Terminated Public-Private Partnership, and Rejects Corruption Allegations' (*Investment Arbitration Reporter*, 18 March 2020) <https://www.iareporter.com/articles/analysis-aynes-chaired-icc-tribunal-finds-that-state-validly-terminated-public-private-partnership-and-rejects-corruption-allegations/> accessed 7 July 2023.
[29] See *Georg Gavrilovic and Gavrilovic d.o.o v Republic of Croatia*, ICSID Case No ARB/12/39, Award of 25 July 2018 paras 350, 398. See also *Unión Fenosa Gas v Egypt*, Award (2018) (n 22) para 7.52.
[30] *Metal-Tech v Uzbekistan*, Award (2013) (n 4) para 243. See also *Getma International and others v Republic of Guinea (2)*, ICSID Case No ARB/11/29, Award (French) of 16 August 2016 para 184.
[31] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (2)*, ICSID Case No ARB/11/12, Award of 10 December 2014 para 479. See also *Karkey v Pakistan, Award (2017)* (n 9) para 492.
[32] *Sanum v Laos (1)*, Award (2019) (n 9) para 110; Djanic (n 27).
[33] *Tethyan Copper v Pakistan, Decision on Respondent's Application to Dismiss the Claims (2017)* (n 21) para 308; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ('Bapex') and Bangladesh Oil Gas and Mineral Corporation ('Petrobangla'), ICSID Case No ARB/10/11 and No ARB/10/18, Decision on the Corruption Claim of 25 February 2019* para 806.
[34] It is also advocated that rules regarding burden of proof, the admissibility of the evidence and the proper weight to be given and the effects of adverse inferences vary from one case to another, from jurisdiction to jurisdiction, from different legal

norms and applied different standards of proof in dealing with corruption cases. Having said that, inconsistency of the standards used in the same legal issue has received mounting critique, contributing to the questioning of the legitimacy of investment arbitration.[35]

B. Lack of a robust corruption prevention system in investment treaties

The growing number of allegations of corruption in ISA implies that corrupt practices are becoming rampant in this field. These acts can take many forms and occur at any stage of an international investment transaction. Therefore, combating corruption in international investment law should not be restricted to simply 'proving' corrupt acts in a particular arbitration proceeding. Instead, efforts should be made beyond arbitration proceedings, in a manner that aligns with the commitments and obligations that States have made in the broader anti-corruption regime.

A variety of anti-corruption treaties exists at international and regional levels, most notably the United Nations Convention against Corruption (UNCAC) and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Organization for Economic Cooperation and Development (OECD Anti-Bribery Convention). These treaties impose a range of obligations on contracting States to deter, prevent, and combat corruption and bribery. Some obligations relevant to international investment law have been mainstreamed into bilateral investment treaties (BITs) and IIAs, which have, in turn, 'evolved into an integral part of the global anti-corruption campaign'.[36] For instance, there is a growing trend towards incorporating legislative commitment, such as Articles 1–3 of the OECD Anti-Bribery Convention,[37] into IIAs. Despite these developments, the efforts to *prevent* corruption in international investment law remain inadequate.

To combat corruption, implementing a prevention mechanism that takes *proactive* measures to rule out corruption should be the first step. As the United Nations Office on Drugs and Crime (UNODC) recognizes, 'prevention is better than cure'.[38] For now, corruption prevention has become a crucial tool in the global anti-corruption campaign and is widely accepted as essential for raising public awareness of corruption and promoting the involvement of governmental and non-governmental bodies in this universal anti-corruption movement. Notably, UNCAC includes a whole chapter on preventive measures, encompassing a wide range of measures; in particular, it requires that each contracting State establish preventive anti-corruption bodies[39] that will develop, implement and maintain a variety of preventive anti-corruption policies and practices[40] directed at public sectors,[41] public officials,[42] public

traditions. See Richard Kreindler, *Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements* (Hague Academy of International Law 2013) 252–53.

[35] See eg Kvhalei (n 8); Utku Cosar, 'Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions' in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges*, vol 18 (Kluwer Law International 2015); Sophie Nappert, 'Public Interest in a Private Procedure - What Burden of Proof for Allegations of Corruption in International Arbitration?' (2013) 10 Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=1979> accessed 7 July 2023.

[36] Yueming Yan, 'References to International Anti-Corruption Conventions in International Investment Arbitration and International Investment Agreements' in Jan Dunin-Wasowicz, Régis Bismuth and Philip M Nichols (eds), *The Transnationalization of Anti-Corruption Law* (Routledge 2021) 449.

[37] These provisions regulate that States should, in its domestic legal system, establish bribery, either by an individual or a legal person, of a foreign public official as criminal offenses. Some IIAs reaffirmed this obligation, whereas some insert a higher standard, that is outlawing not only the supply side but also the demand side of corruption. See eg art 21.6, the US–Korea Free Trade Agreement (FTA) (2007).

[38] UNODC, 'Prevention Measures in the United Nations Convention against Corruption' <https://www.unodc.org/unodc/en/corruption/prevention.html> accessed 7 July 2023.

[39] art 6, UNCAC 2005.

[40] art 5, ibid.

[41] art 7, ibid.

[42] art 8, ibid.

procurement and management of public finances,[43] public reporting,[44] judiciary and prosecution services,[45] private sectors,[46] as well as the entire society.[47] These preventive measures work in conjunction with other anti-corruption norms, including international cooperation, criminalization and enforcement obligations, to collectively form a comprehensive anti-corruption regime. Existing scholarship has explored the interplay between international investment law and anti-corruption legislation and cooperation, highlighting their mutual contributions.[48] However, little has been done to tackle corruption prevention in international investment law, and more specifically, in investment treaties.

The United Nations Convention on Trade and Development (UNCTAD)'s IIAs Navigator shows that only a small number of IIAs include corruption clauses, standing for less than 3% of the existing IIAs stock.[49] As can be shown from Figure 1, the shortage of anti-corruption clauses in BITs is manifest, even though States are increasingly integrating anti-corruption measures into IIAs.[50]

Among the limited IIAs with anti-corruption provisions, less than half have inserted provisions articulating corruption prevention. In addition, only two IIAs incorporated *specific* measures aimed to prevent corruption. Others use abstract and obscure language in addressing this issue.

One type of anti-corruption provisions on preventive measures is regulated in a number of IIAs concluded by Japan.[51] For example, Japan has recently signed a BIT with Morocco—the Japan-Morocco BIT (2020)—where the two parties have committed to undertake measures to prevent corruption. This investment treaty provides that '[e]ach Contracting Party shall endeavour to ensure that measures and efforts are undertaken to *prevent* and combat corruption regarding matters covered by this Agreement in accordance with its applicable laws and regulations (*emphasis added*)'.[52] A similar provision can be found in several cooperation and facilitation investment agreements (CFIAs) concluded by Brazil, such as Article 10(1) of the Brazil–India CFIA (2020) providing that '[e]ach Party shall adopt measures and make efforts to *prevent* and fight corruption, money laundering and terrorism financing with regard to matters covered by this Treaty, in accordance with its laws and regulations (*emphasis added*)'.[53]

Both provisions do emphasize the importance of States ensuring the existence of measures and efforts to prevent corruption which may affect any transnational investment activities or investment relationships. That said, the potential effectiveness of these obligations is

[43] art 9, ibid.
[44] art 10, ibid.
[45] art 11, ibid.
[46] art 12, ibid.
[47] art 13, ibid.
[48] See eg Yueming Yan, 'Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance' (2020) 23 Journal of International Economic Law 989; Stefan Mbiyavanga, 'Improving Domestic Governance through International Investment Law: Should Bilateral Investment Treaties Learn from International Anti-Corruption Conventions?' [2017] 2017 OECD Global Anti-Corruption & Integrity Forum 17; Kathryn Gordon, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues', *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) <https://www.oecd-ilibrary.org/finance-and-investment/international-investment-law-understanding-concepts-and-tracking-innovations_9789264042032-en> accessed 7 July 2023.
[49] *UNCTAD, International Investment Agreements Navigator, Mapping of IIA Content.*
[50] For discussions on this recent development, see eg Yan 'Anti-Corruption Provisions in International Investment Agreements' (n 48); Charles N Brower and Jawad Ahmad, 'The State's Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018). See also Jean-Michel Marcoux, *International Investment Law and Globalization: Foreign Investment, Responsibilities and Intergovernmental Organizations* (Routledge 2019).
[51] Yan, 'Anti-Corruption Provisions in International Investment Agreements' (n 48) 992. See also Brower and Ahmad (n 50).
[52] art 7, Japan–Morocco BIT (2020).
[53] art 10(1), Brazil–India BIT (2020).

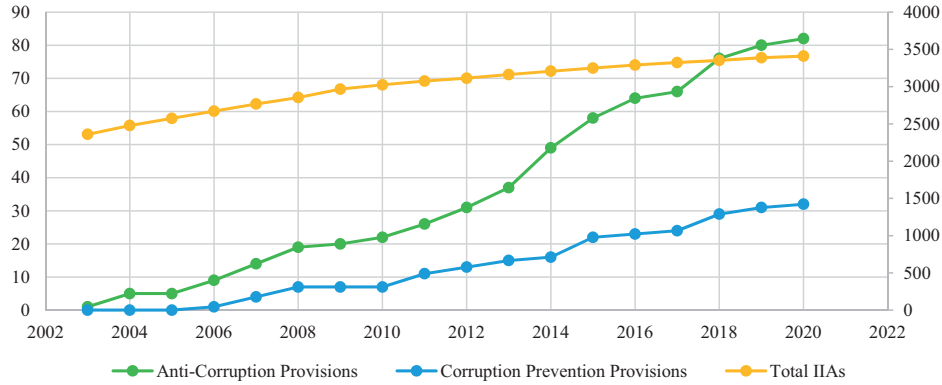

Figure 1. Number of IIAs (with Anti-Corruption Provisions)

doubtful. Primarily, while States are committed to taking certain measures, the treaties fail to elaborate upon specific actions that States can carry out. In addition, both provisions require States to implement measures merely in the framework of domestic legislation; bilateral or regional measures necessary for preventing transnational corruption have been ruled out. Moreover, Brazil has not included this provision as applicable to international investment dispute settlement, let alone established a system supervising the enforcement of this anti-corruption obligation. Japan nevertheless has allowed investors to launch investment arbitration proceedings against the host State whose preventive measures are unsatisfactory, but the party initiating the proceedings must demonstrate its loss or damages suffered due to the host State's non-compliance with this provision.

Some concrete measures tailored to prevent corruption can be found in two comprehensive trade agreements with investment chapters: the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[54] and the United States–Mexico–Canada Agreement (USMCA).[55] These two agreements have inserted relatively comprehensive and operational anti-corruption measures. The corruption prevention measures enshrined in the USMCA and the CPTPP are almost identical, which are in fact largely sourced from the UNCAC.[56] As mentioned earlier, the UNCAC includes comprehensive corruption prevention measures directed at both public and private entities. Integrating these provisions into investment treaties suggests an international-level standard employed by States, which, on the other hand, should be deemed as implementing UNCAC's international obligations.[57]

More specifically, both the CPTPP and the USMCA oblige the State parties to implement administrative and promotional measures to prevent corruption that may affect international trade and investment. Administrative measures are those concrete actions that State parties should undertake through 'executive-branch regulation or similar action, rather than new legislation', while promotional measures are 'less concrete and harder to quantify' but demand that States promote and encourage awareness.[58]

[54] See Chapter 26 (Transparency and Anticorruption) Section C (Anticorruption), CPTPP (2018).
[55] See Chapter 27 (Anticorruption), USMCA (2018).
[56] The contracting State parties to the CPTPP and to the USMCA are Member States of the UNCAC.
[57] Yan, 'References to International Anti-Corruption Conventions in International Investment Arbitration and International Investment Agreements' (n 36) 460.
[58] Collmann Bohn, Richard Mojica and Marc Alain Bohn, 'Takeaways from the Anti-Corruption Chapter of the USMCA' (*The FCPA Blog*, 9 January 2019) <https://fcpablog.com/2019/01/09/takeaways-from-the-anti-corruption-chapter-of-the-usmca/> accessed 7 July 2023.

We cannot deny that the preventive obligations in the CPTPP and the USMCA are not new and have been included in many international anti-corruption treaties that several States have ratified in the past. This is the same with some other anti-corruption norms such as obligations to criminalize corruption offences and to establish the liability of legal persons for corrupt acts (Articles 1 and 2 of the OECD Anti-Bribery Convention). That said, integrating anti-corruption objectives into IIAs has its practical value.[59] Anti-corruption provisions in investment treaties are customized obligations (compared to some general obligations in international treaties on anti-corruption), specifically tailored and reshaped for investment-related matters. Therefore, they enable a State to better address the challenges posed by corruption in investment transactions in a more effective way. More importantly, some corruption prevention provisions in IIAs are regulated, accompanied by corresponding dispute settlement mechanisms. The USMCA and the CPTPP have permitted State parties to initiate dispute settlement proceedings themselves 'if it considers that a measure of another Party is inconsistent with an obligation under this Chapter [Anticorruption], or that another Party has otherwise failed to carry out an obligation under this Chapter [Anticorruption], in a manner affecting trade or investment between Parties'.[60] The dispute may be dealt with through a range of dispute settlement mechanisms, including consultations, good offices, conciliation, mediation, or the establishment of a panel (which additionally demands that the panel have expertise in the area of anti-corruption under dispute).[61]

It is worth mentioning that a number of other States have also incorporated anti-corruption provisions where they commit to eliminating and fighting corruption, such as in many early US free trade agreements.[62] But they do not specify which measures they will take, and it is unknown whether any measures related to corruption prevention would be implemented. One may inquire why States seem to be reluctant to include corruption provisions, in particular specific prevention measures, in investment treaties. The following two-fold reasons provide one possible explanation for this phenomenon.

First, the development and corruption level of a specific State must be examined. In general, developed countries are more likely to introduce strong anti-corruption laws and policies, given their relatively clean records. On the contrary, developing countries or least developed countries where corruption is more rampant seem to lack a robust legal framework against corruption; as a result, such States are unlikely to make commitments or take practical action to curb corruption at international or transnational levels. Secondly, the overall development of sustainability issues in the IIA reform must be accounted for. Traditional BITs primarily address investors' rights and host States' obligations in promoting and facilitating transnational investment and rarely touch upon non-investment aspects such as environment, labour, human rights and anti-corruption. Given the growingly close relations between sustainable development and investment activities, the paradigm is now shifting; States are increasingly addressing investment-plus issues, including labour rights, CSR, public health and human rights, environmental protection and other externalities.[63] Be that as it may, anti-corruption still receives relatively little attention. Moreover, when States begin to insert stronger obligations on protecting environment and labour rights, anti-corruption

[59] See Yueming Yan, 'The Inclusion of Anti-Corruption Clauses in International Investment Agreements and Its Possible Systemic Implications' (2022) 17 Asian Journal of WTO & International Health Law and Policy 141.

[60] art 27.8(2), USMCA. See also art 26.12(2), CPTPP.

[61] art 27.8(4)–(6), USMCA.

[62] Such as the US–Singapore FTA (2003) and the US–Australia FTA (2004).

[63] See generally, Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35 ICSID Review - Foreign Investment Law Journal; Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14 Utrecht Law Review 40; Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge 2018).

provisions are rather weak in terms of enforcement. In some Canadian BITs concluded in recent years, States have equally addressed labour, environment and anti-corruption within the CSR clause;[64] however, in Canada's newest model, Foreign Investment Promotion and Protection Agreement (Canada 2021 Model FIPA), Canada has explicitly employed higher standards on labour and environment issues while regulations on anti-corruption remain a soft law feature.[65]

3. ROLES OF THE HOME STATE IN COMBATING CORRUPTION IN INTERNATIONAL INVESTMENT

Compared to pure domestic corruption, *transnational* corrupt acts seem even more difficult to deter. Challenges concern every phase of deterrence, encompassing prevention, investigation and prosecution. More specifically in international investment law, proving corruption has been one barrier, whereas the lack of a robust corruption prevention system is another. While various measures may be implemented to deal with these two specific problems, this article attempts to explore whether and how the home State of the foreign investor can be part of international investment law's anti-corruption campaign.

Corruption is inherently bilateral, involving the supply side (the investor) and the demand side (the public official of the host State). Host States have the responsibility to deter corruption by implementing measures that ensure the integrity of their public officials in performing official acts (especially in facilitating foreign investments). Conversely, the home State is more likely to be better placed to adopt actions directed at the other end of the corruption spectrum, which involves the foreign investor. The OECD Anti-Bribery Convention[66] and UNCAC[67] authorize a State to exercise jurisdiction over bribery and corruption offences committed outside its territory. Domestic anti-corruption acts, such as the United Kingdom (UK) Bribery Act 2010[68] and the US Foreign Corruption Practices Act (FCPA), also assert their extraterritorial jurisdiction over bribery of foreign public officials. Therefore, the home State plays a critical role in combating transnational corrupt acts in international investment activities by its investors.

This part demonstrates that home States can contribute to eliminating corruption in international investment activities by providing necessary information to ISA tribunals to facilitate the fact-finding process and other challenging evidentiary difficulties and by establishing an effective corruption risk assessment mechanism both through domestic legislation and investment treaties. An alternative typology of these measures could be as follows: home States can play an important role in combating corruption *during* and *beyond* ISA proceedings.

[64] art 16 of the Canada–Burkina Faso BIT (2015) provides that:

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

[65] art16(1) of the Canada 2021 Model FIPA provides that:

> The Parties reaffirm that investors and their investments shall comply with domestic laws and regulations of the host State, including laws and regulations on human rights, the rights of indigenous peoples, gender equality, environmental protection and labour.

[66] art 4, OECD Anti-Bribery Convention.
[67] art 42, UNCAC.
[68] s 12, UK Bribery Act 2010.

A. During ISA proceedings: access to 'evidence' and information

As introduced earlier, a low rate of substantiated corrupt acts, along with the evidentiary problems faced by investment arbitration, was identified. This section explores whether home States can play a role in coping with those procedural difficulties in ISA proceedings that involve allegations of corruption and in alleviating the legitimacy crisis currently facing the ISA regime. This article argues that greater participation of home States in ISA proceedings can, to some extent, help address these challenges.

The Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of the International Centre for the Settlement of Investment Disputes (ICSID)[69] and the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor–State Arbitration[70] have expressly granted investment arbitral tribunals the discretion to allow or invite submissions from a non-disputing party, including the home State of the investor. In practice, it has been continuously observed that home States are 'returning to' investor–State disputes by distinct ways, including, *inter alia*, intervening as non-disputing State parties and offering joint interpretations with host States.[71] Likewise, home States could use these methods to assist the arbitral tribunals in determining both legal and factual issues in relation to allegations of corruption.

1. Domestic legislation and practices on anti-corruption

To begin with, home States could intervene in proceedings by offering their 'internal' (criminal, administrative and civil) norms on anti-corruption, as well as their interpretations and applications, especially on the issue of the appropriate standard of proof. As previously mentioned, ISA tribunals have applied different standards of proof in dealing with corruption cases. A primary reason for this inconsistency is the silence of BITs on this problem and the lack of a uniform rule or principle on standard of proof applicable in arbitral proceedings, leaving the power to the tribunal to determine the appropriate standard on a case-by-case basis.[72] By submitting their anti-corruption domestic legislation and practices, home State can aid ISA tribunals in utilizing the proper standards.[73]

In theory, domestic law is one of the various sources that ISA tribunals may refer to. For example, Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[74] provides a mechanism that combines flexibility with certainty,[75] allowing the use of domestic laws either chosen by the parties or the tribunal. In considering applicable law in international investment arbitration, domestic law has received limited attention, which arguably is relevant in more ways than has been currently appreciated.[76] In certain circumstances, domestic laws are of particular importance, and addressing allegations of corruption is one of those instances.

[69] Rule 67 (Submission of Non-Disputing Parties), Rule 68 (Participation of Non-Disputing Treaty Party), ICSID Arbitration Rules (2022).

[70] art 5, UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration.

[71] See generally Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2019).

[72] *Niko Resources v Bangladesh, Decision on the Corruption Claim (2019)* (n 33) paras 805–06; Llamzon (n 7) 637. In *Glencore v Colombia (1)*, the tribunal also recognized the use of the standard of proof enshrined in the applicable BIT and the arbitration rules, if any. *Glencore v Colombia (1), Award (2019)* (n 9) para 669.

[73] The investment arbitration system may also establish a rule, probably indirectly through practices or amending investment arbitration procedural rules, suggesting where to figure out a proper standard or which rules to refer to (domestic or international law). A proposal as such, which warrants further discussion, is beyond the scope of this article.

[74] It provides that: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.' See art 42(1), ICSID Convention.

[75] Christoph Schreuer and others, *The ICSID Convention: A Commentary* (CUP 2009) 550.

[76] See generally, Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017).

Admittedly, we have a large number of international and regional conventions and documents relating to corruption for ISA tribunals to rely on. However, these instruments are drafted in an abstract and general manner and often lack specific details and high standards. Taking the OECD Anti-Bribery Convention as an example, this treaty primarily establishes bribery of foreign public officials as criminal offences, liability of (individual or legal) persons for the bribery acts, and States' (extraterritorial) jurisdiction over such offences[77]; numerous related aspects are not mentioned, such as small facilitation fees, demand-side ability (ie public officials), standard and burden of proof, etc. For these unsolved issues, national legislation and practices have the potential to help ISA tribunals identify and apply appropriate rules.

For instance, in *Vladislav Kim*, the tribunal recognized that the applicable standard of proof for investors' misconduct of corruption can be found in domestic laws.[78] In the official Guidance regarding the implementation of the UK Bribery Act 2010, the UK Ministry of Justice has explicitly confirmed that its case law establishes the 'balance of probabilities' as the proper standard of proof, if a commercial organization needs to prove that it has made due diligence efforts to prevent persons associated with it from bribing.[79] Even in understanding those international norms (as well as a general principle of the prohibition of corruption),[80] domestic laws and practices are important sources to refer to.[81] Additionally, in *World Duty Free*, the tribunal referred to domestic laws of the host State and that of the home State to gain a deeper understanding of the concept of international public policy against corruption.[82]

Therefore, national legislation is particularly important in corruption cases, as corrupt acts often involve domestic criminal offences, and the existing international and regional treaties on corruption do not cover all relevant issues. While the host State has better knowledge of its own domestic legislation and is the disputing party, the home State can intervene as a non-disputing party, offering its domestic anti-corruption laws on relevant issues (in particular, standard of proof and other evidentiary rules) and their implementation in practice.

2. Relevant 'evidence' on investors' misconduct of corruption

As for the factual issues, the home State can also play a role in various ways. Of the most important, the home State can potentially help to facilitate the fact-finding process by providing 'evidence' it may have available with regard to the corrupt acts allegedly conducted by its own nationals (ie the investor). Section 2 of this article has illustrated that proving a corrupt act is challenging, which is still true even when circumstantial evidence is admitted and attributed exceptional weight. The home State, as the national State of the foreign investor, seems to stand a good chance in accessing some materials (eg documents) that the investor itself is trying to hide or refuse to present in the arbitration proceedings where the tribunal so requested according to the arbitration rules, such as Rule 36(3) of the ICSID Arbitration Rules (2022)[83] and Article 27(3) of the UNCITRAL Arbitration Rules (2021).[84] A common category of such 'evidence' could be orders, administrative decisions, court judgments, or other documents produced in the home State's *domestic* proceedings with regard to the

[77] arts 1–4, OECD Anti-Bribery Convention.
[78] *Vladislav Kim v Uzbekistan, Decision on Jurisdiction (2017)* (n 9) para 545.
[79] The Bribery Act 2010—Guidance (about procudures which relevant commercial organisations can put into place to prevent persons associated with them from bribing) (s 9 of the Bribery Act 2010) 15.
[80] Schreuer and others (n 75) 608–10.
[81] ibid 618–20.
[82] *World Duty Free v Kenya, Award (2006)* (n 3) para 157.
[83] This rule provides that '[t]he Tribunal may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding'.
[84] This clause provides that '[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine'.

investigation or prosecution of the investor's misconduct of corruption. In *Glencore v Colombia (1)*, the tribunal expressly noted that 'the conclusions of the justice system at the municipal level, or absence thereof, which have a much higher capacity of investigation than this Arbitral Tribunal, is one of the various elements that *must* be considered when evaluating the available evidence (*emphasis added*)'.[85]

Despite the foregoing, home States face practical challenges in providing documents from domestic proceedings to ISA tribunals, as they are not compelled to cooperate. This is especially true when it comes to the non-disputing party submission mechanism, which is dependent upon the home State's own discretion. While an 'obligation of cooperation' might develop in the future as a subject of international administrative law, for now, it is largely up to home States to decide whether or not to assist ISA tribunals.

To confront these difficulties, one viable solution is legalization through investment treaties. States could consider inserting a clause of cooperation in IIAs, demanding that the home State provide available information to ISA tribunals. This information could be any documentation, domestic judgments, and pending proceedings in relation to the alleged corrupt acts by the investor. The International Institute for Sustainable Development (IISD) has offered a good example in this regard. In its Model International Agreement on Investment for Sustainable Development in 2005, Article 32(C) explicitly provides that:

> Home States shall, when possible, provide all available information that might assist a dispute settlement tribunal under this Agreement in determining whether a breach of an anti-corruption obligation has occurred.[86]

The treaty drafters consider this clause to be 'a logical extension of the seriousness with which this issue is treated in the text as a whole'.[87] However, the existence of such a provision does not necessarily guarantee an easier fact-finding process. It can be difficult to determine whether a home State has made a genuine effort to collect and provide all relevant information. Additionally, if a home State disagrees with the binary or all-or-nothing approach (as adopted in *World Duty Free* and *Metal-Tech*) in dealing with allegations of corruption,[88] it may refuse to provide vital information on the alleged corrupt acts to ISA tribunals to protect its own nationals (ie investors). Therefore, the effectiveness of an obligation of cooperation relies heavily on the willingness of home States to comply voluntarily.

One important point to note is that the objective of involving home States in anti-corruption efforts is not to politicize disputes, but rather to offer an opportunity to prevent corrupt acts and assist ISA tribunals in addressing corruption allegations more effectively. This suggestion arises from the perspective of anti-corruption law, which expects most, if not all, States to take necessary measures to combat corruption. However, it is undeniable that home States may make decisions from a political aspect on whether and to what extent to cooperate with tribunals if they are concerned about the dispute's outcome. Even if an obligation of cooperation is inserted in the applicable investment treaty, home States may claim to have fulfilled this cooperation obligation by providing immaterial evidence. Ultimately, home

[85] *Glencore v Colombia (1), Award (2019)* (n 9) paras 673–74.

[86] art 32(C), 'IISD Model International Agreement on Investment for Sustainable Development' (1 March 2005) <https://www.italaw.com/sites/default/files/archive/ita1027.pdf> accessed 7 July 2023.

[87] Howard Mann and others, *IISD Model International Agreement on Investment for Sustainable Development - Negotiators' Handbook* (2nd edn, International Institute for Sustainable Development 2006) 44.

[88] As briefly addressed earlier in this article, upon a positive finding of a corrupt act between the investor and the public official of the host State, ISA tribunals in *World Duty Free* and in *Metal-Tech* have dismissed the investors' claims entirely and left the host States freely leaving the proceedings. This way of addressing allegations of corruption has been characterized as a binary, all-or-nothing approach. See Low (n 6) 341–45; John R Crook, 'Remedies for Corruption' (2015) 9 World Arbitration & Mediation Review 303, 305.

States play a supplementary role in assisting ISA tribunals in determining corruption-related factual and legal issues.

B. Beyond ISA proceedings: establishing a corruption risk assessment regime

Besides assistance during ISA proceedings, home States can contribute to international investment law's efforts of corruption elimination in other phases, especially in preventing corrupt acts. Section 2 of this article has elaborated upon the significance of a robust and experienced corruption prevention system to prevent individuals or entities from conducting corruption, as well as a lack of such system in the existing IIAs stock. This section attempts to introduce what home States could take on to solve this plight. While there are numerous and diversified corruption prevention measures home States may undertake, this article suggests that it is imperative and vital for home States to establish a corruption risk assessment system operating at both national and international levels, which requires investors to produce thorough and periodical corruption risk assessment reports before the establishment and during the performance of the investment.

Corruption risk assessment is an important tool used by many States to deter and eliminate corruption.[89] Its aim is to identify risks that a business may face and to foster companies' compliance with domestic and transnational anti-corruption rules and regulations in maintaining businesses locally and abroad.[90] The importance of effective risk assessment has been repeatedly emphasized in various international anti-corruption conventions and instruments over the past decade.[91] According to the OECD's Good Practice Guidance on Internal Controls, Ethics and Compliance, a thorough risk assessment can facilitate the development of '[e]ffective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery'.[92]

The content of a proper anti-corruption risk assessment may vary from company to company, depending on 'the size, nature of operations and locations of [the] enterprise'.[93] Foreign investors, especially multinational enterprises may face a greater scale of bribery risks, given their significant global presence. It is commonly understood that the more comprehensive and detailed the assessment, the more effective the efforts of preventing corruption are likely to be.[94] Despite the fact that the procedures of a corruption risk assessment depend on the nature and size of a given enterprise, there are a few basic characteristics that are commonly observed in companies of all sizes, including oversight by top-level management, appropriate identification and analysis of internal and external risks, compliance with due diligence enquiries and proper and accurate documentation of the risk assessment.[95] To promote the corruption deterrence level in international investment, two avenues are available for home States to pursue: through domestic legislation and through investment treaties.

[89] UNODC (n 38).

[90] OECD, UNODC and The World Bank, 'Anti-Corruption Ethics and Compliance Handbook for Business' (2013) 10 <https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf> accessed 7 July 2023.

[91] arts 9–10, UNCAC; Annex II – Good Practice Guidance on Internal Controls, Ethics and Compliance, OECD's Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (adopted on 26 November 2009, amended on 26 November 2021).

[92] Annex II, OECD's Recommendation.

[93] United Nations Global Compact, 'A Guide for Anti-Corruption Risk Assessment' (2013) 8 <https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FAnti-Corruption%2FRiskAssessmentGuide.pdf> accessed 7 July 2023.

[94] Principle 3, Commentary 3.1, The Bribery Act 2010—Guidance.

[95] ibid. See also Cecily Rose, 'The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention' (2012) 61 International & Comparative Law Quarterly 485, 496.

1. Through domestic legislation

A home State should encourage or legislate that private entities carry out anti-corruption risk assessments periodically and properly. In the past decade, the UK has promulgated the Bribery Act 2010 and the accompanying guidance where commercial organizations are required to conduct periodic, informed and documented risk assessment which is to assess 'the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by person associated with it'.[96] The Bribery Act 2010—Guidance has identified five categories of external risk commonly encountered by enterprises: country risk, sectoral risk, transaction risk, business opportunity risk and business partnership risk.[97] These risks are the major bribery risk in international investment activities. Investment projects, most times, engage in high-value projects or projects involving many contractors or intermediaries (business opportunity risk) and involve in large-scale infrastructure sector (sectoral risk). Investors seeking administrative licenses and permits are more likely to be exposed to bribery environments (transaction risk), especially in developing and underdeveloped countries where the overall corruption combating level remains low and the efforts taken against corruption are still dissatisfying (country risk). Moreover, a relationship that uses intermediaries in transactions with foreign public officials may involve higher risk (business partnership risk), which is quite common in transnational investment activities.

In ISA cases where corruption was outcome-determinative, these 'risks' were especially evident faced by the foreign investors. In *World Duty Free*, the corrupt act was committed between the CEO of the investor and the then-President of the host State.[98] In *Metal-Tech*, bribery was conducted between the Chairman and CEO of Metal-Tech and Uzbek Government officials responsible for the approval, establishment and operation of Metal-Tech's investment, through unqualified intermediaries.[99] In other unproven cases, a corrupt relationship is also frequently alleged between representatives of the investor and *high-ranking* public officials of the host State with the involvement of 'unqualified' *intermediaries* who had a close relationship with said public officials. For instance, in *Vladislav Kim*, corruption was allegedly conducted between the investor and the daughter of the then President of Uzbekistan.[100] These cases commonly involve *large-scale* and *high-value* investment projects.

To ensure effective anti-corruption measures, it is important for home States to clarify the 'extraterritorial effect' of their domestic legislation on corruption risk assessment. One proposed approach is for home States to establish such a risk assessment mechanism that applies to their nationals' investment activities both within *and* outside their territory. The UK Bribery Act 2010—Guidance provides several useful case studies to assist local companies operating in high-risk foreign countries in developing their corruption risk assessments.[101] The 'extra-territorial reach' of such mechanisms is particularly critical in international investment as foreign direct investments are often conducted overseas and potential bribery acts are likely to occur outside the home country and involving individuals residing in the host State.

[96] Principle 3 (Risk Assessment), The Bribery Act 2010—Guidance.
[97] ibid.
[98] *World Duty Free v Kenya, Award (2006)* (n 3) para 130.
[99] *Metal-Tech v Uzbekistan, Award (2013)* (n 4) paras 225–26.
[100] *Vladislav Kim v Uzbekistan, Decision on Jurisdiction (2017)* (n 9) para 605.
[101] Case Study 6, Case Study 7, Case Study 8, Case Study 9, Case Study 10, Case Study 11, The Bribery Act 2010—Guidance.

2. Through investment treaties

Home States may also integrate corruption risk assessments into IIAs,[102] which can be achieved by inserting explicit obligations on foreign investors or establishing a joint anti-corruption body to monitor and supervise investment activities to ensure corruption-free investments. Among the existing anti-corruption provisions, none have regulated on joint anti-corruption body or risk assessment. Integrating provisions that require such assessments in the establishment and performance of an investment is critical and significant to enhance anti-corruption levels, especially the corruption prevention levels in investment activities, which will also promote the overall sustainable development dimensions of IIAs.

In particular, calls for integrating environmental impact assessment into international investment law are getting loud,[103] which has also been recognized in investment arbitration. In *Cortec Mining v Kenya*, the tribunal declined jurisdiction because the environmental impact assessment requirements were not met by the investor.[104] In the same vein, it is imperative for States to insert stronger, binding and enforceable obligations of anti-corruption, rather than exclusively relying on soft law clauses that highly rely on investors' voluntariness. A tentative anti-corruption provision, I provide here, could be:

Article X: Corruption Risk Assessment

1) Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, adopt, maintain and ensure the existence of an effective and efficient system of corruption risk assessment for investors to undertake for matters covered by this Agreement.
2) The investor shall, in keeping with good practice requirements relating to the size, nature and location of its investment, maintain a corruption risk assessment and reporting system, as required by the laws of the host State or the laws of the home State for such an investment, whichever is more rigorous. On all occasions, the investor shall comply with the internationally recognized minimum standards on corruption risk assessment. The investor shall assess the nature and extent of its exposure to potential external and internal risks of corruption, prior to the establishment, and periodically throughout the performance of its investment, and make the assessments public and accessible.

This Article X consists of twofold obligations imposed respectively on States and investors. According to the first paragraph, home States assume the obligation of establishing a robust legal framework of corruption risk assessment within their respective domestic legal systems. This national legal framework is expected to incur obligations on investors in

[102] IIAs are arguably a useful tool for States to promote anti-corruption policies from various aspects. For instance, many States have imposed strong obligations on foreign investors, requiring them to refrain from engaging in corrupt practices in order to obtain investment. Failure to comply with this requirement may result in any claims associated with the investment being denied for lack of jurisdiction by investor–State tribunals. See eg art 8.18 of the Canada–EU Comprehensive Economic Trade Agreement. Similarly, corruption risk assessment can be included in BITs as an important corruption prevention measure on foreign investors.

[103] See generally Graham Mayeda, 'Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation' (2017) 18 The Journal of World Investment & Trade 131; David Collins, 'Environmental Impact Statements and Public Participation in International Investment Law' (2010) 7 Manchester Journal of International Economic Law 4. Opposite opinions are proposed as well that the provisions of sustainability assessment 'may not be readily accepted by countries negotiating IIAs'. See Peter Muchlinski, 'Negotiating New Generation International Investment Agreements: New Sustainable Development Oriented Initiatives' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 60; J Anthony VanDuzer, Penelope Simons and Graham Mayeda, 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries' (Commonwealth Scretariat 2012) 262.

[104] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No ARB/15/29, Award of 22 October 2018.

evaluating potential risks and improving corporate governance when performing foreign investment transactions. Though the first paragraph is abstract in nature, this is done intentionally because this Article X is designed to be suitable for any State, regardless of its respective development level or corruption deterrence level. This norm and the logic beneath this are inspired by the regulation of the UNCAC where the provisions enshrined therewithin are abstract because this convention has general applicability and should theoretically be accepted by most, if not all, countries. In practice, the UNCAC is indeed one of the most successful anti-corruption conventions in existence, in that 189 countries (as of 18 November 2021) have become parties to it. Having said that, States should consider inserting more concrete and specific preventive measures in IIAs, like those in the CPTPP and the USMCA, if they truly care about the effectiveness and efficiency of the enforcement of their corruption risk assessment systems.

The second paragraph intends to insert a strong obligation on investors, requiring investors to conduct public, documented and periodic corruption risk assessments. This paragraph includes both flexibility and rigidity. On one hand, it allows the investors to issue assessment reports in a customized manner, depending on the size and nature of the investment and in accordance with the applicable domestic norms. On the other hand, it demands that the investors comply with the internationally recognized minimum standards and, at least, that the reports should be publicly accessible. This strong obligation on investors is compatible with the current sustainable development-oriented IIA reform where investors are given stronger obligations than ever to establish responsible investments.[105] However, it is improper to deprive the investor of access to ISA simply on the ground that non-compliance with Article X violates the treaty's legality requirement or the 'in accordance with host State laws' clause (if any). This is partly because the assessment requirement is not a substantive but a procedural obligation and partly because the temporal scope of the legality requirement relies on misconduct in the initiation of an investment and has little to do with those in the performance stage,[106] unless the parties expressly regulate otherwise. It is even argued that investors should be allowed to demonstrate their efforts in preventing corruption when faced with an allegation of corruption raised by the host State.[107] In other words, a proper and adequate corruption risk assessment may become an investor's defence against the host State's corruption claims.

[105] Empirical studies have provided a typology of anti-corruption clauses intended to eradicate corrupt acts by foreign investors. These provisions vary from less stringent commitments like CSR provisions to stronger obligations such as 'carve-out' anti-corruption provisions. See generally, Yan, 'Anti-Corruption Provisions in International Investment Agreements' (n 48); Mbiyavanga (n 48). For other types of anti-corruption clauses, see also Brower and Ahmad (n 50); Chijioke Chijioke-Oforji, 'Regulating Corruption Through Free Trade Agreements: An Analysis of the NAFTA 2.0 Anti-Corruption Provisions' (2020) 17 Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=2735> accessed 7 July 2023.

[106] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No ARB/03/25, Award of 16 August 2007* para 344; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award of 18 June 2010 para 127.

[107] David M Orta, Brian Rowe and Lucas Loviscek, 'Allegations of Corruption in Investment Treaty Arbitration: The Need for Reform', *Expert Guides*, 17 September 2019. In some jurisdictions, an adequate anti-corruption compliance operation is ruled as a defense of the given enterprise whose representatives have conducted briberies when doing businesses for the given enterprise. For instance, in the UK Bribery Act 2010, Section 7 (Failure of commercial organisations to prevent bribery) provides that:

> (1) A relevant commercial Organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending –
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advance in the conduct of business for C.
> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

4. CONCLUSION

Corruption prevention and deterrence have been widely recognized by States, as indicated by most, if not all, domestic legislation, the conclusion of the UNCAC and other international and regional anti-corruption treaties. It is worth noting that the United Nations has recently held a special session of the General Assembly against corruption, where the need to effectively address challenges and implement measures to prevent and combat corruption has been firmly re-stressed. International investment law can also make a significant contribution to this global anti-corruption campaign. However, the development of international investment law related to corruption is now at a crossroads. The existing ISA system and the investment policies in IIAs have demonstrated their limits in making a contribution to this universal movement.

First, given the hidden nature of corruption, it has been hard for parties to obtain key evidence and adduce them to ISA tribunals. The number of total corruption claims invoked in ISA proceedings grows, as does the number of unsuccessful claims. The increasing unsuccessful allegations of corruption have generated additional concerns regarding procedural and evidentiary issues, such as whether 'red flags' or other circumstantial evidence could be relied upon to assist in the fact-finding process of corruption and which standard of proof should apply. Secondly, corruption became more rampant in investment activities, but few actions were undertaken to deal with matters concerning corruption prevention in IIAs. Anti-corruption provisions exist in less than 3% of the existing IIA stock and the number of investment treaties that expressly articulate corruption prevention is even smaller.

To meet these main challenges, this article argues that the home State of the investor has an important role to play in improving international investment law's treatment of corruption or anti-corruption. More specifically, the challenges of proving corruption may be alleviated through the active participation of the home State which can provide necessary and key evidence in the form of information to arbitrators whenever they need to determine whether a corrupt act exists or not. The home State may also assist investment arbitration in dealing with the controversial standard of proof issue by submitting its domestic legislation and practices on the matter.

Assisting arbitrators in addressing allegations and suspicions of corruption is not the end. To find or prove an allegation of corruption is merely one aspect of the wide and determinative efforts against corruption. What international investment law is expected to contribute is rooting out corruption, rather than simply 'fixing' it after it occurs. Prevention is and should always be the first course of action, which means that States should take proactive measures against corruption before any establishment of transnational investment. In this sense, this article suggests that home States, through domestic laws and investment agreements, establish effective corruption prevention norms with a focus on the corruption risk assessment mechanism that applies to investment activities of its nationals conducted domestically and internationally. In particular, including a risk assessment in an investor's portfolio which allows the investor to foster compliance with international and national rules prohibiting corruption will improve the corruption deterrence level of international investment law.

Major capital-exporting countries and the largest outbound investment economies should consider implementing these actions as soon as possible, as they undertake more responsibility in promoting sustainable development in investment activities. China, for example, should take immediate actions in curbing and eliminating transnational corruption in the BRI implementation, considering that its BRI project has made up one-third of global trade and comprised over half of the global population and that the anti-corruption systems in BRI jurisdictions may not be robust. To the extent that home States get involved in corruption

prevention and deterrence, their practices will have a positive impact not only on international investment law's anti-corruption efforts but also on the universal anti-corruption movement.

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