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# Chapter 1

## Bribery and Other Serious Investor Misconduct in Asian International Arbitration



Nobumichi Teramura, Luke Nottage, and Bruno Jetin

**Abstract** Bribery and other serious illegal behaviour by foreign investors face wide condemnation in any society. Yet there remains a lack of consensus on the consequences of corruption and illegality affecting international investment, and especially in investment arbitration—a transnational procedure to resolve disputes between a foreign investor and a host state. A core issue is whether a foreign investor violating a host state’s law should be awarded protection of its investment, as per its contract with the host state and/or the applicable investment or trade agreement between the home state and the host state. Some suggest such protection would be unnecessary, as the investor committed a crime in the host state, while others attempt to establish an equilibrium between the investor and the host state. Some others claim to protect investment, invoking the sanctity of promises made. This book explores Asian approaches towards the issue, setting it in the wider political economy and domestic law contexts. It also considers the extent to which significant states in Asia are or could become ‘rule makers’ rather than ‘rule takers’ regarding corruption and serious illegality in investor–state arbitration.

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## 1.1 Introduction

Almost everyone regards corruption and bribery as an international evil, and encourages global society to eradicate such illegal activities.<sup>1</sup> Various international initiatives against corruption have gained international support. Very important is the United Nations Convention against Corruption (UNCAC) (open for signature in 2003), which has 189 member states and is the only universal legally binding anti-corruption instrument, covering the making and soliciting of bribery of local and foreign officials.<sup>2</sup> Another influential international legal instrument is the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). This was ‘the first and only international anti-corruption instrument focused on the “supply side” of the bribery transaction – the person or entity offering, promising or giving a bribe’,<sup>3</sup> requiring member states to criminalise such activity, even abroad, under their own domestic laws. It was inspired by the Foreign Corrupt Practices Act 1977 in the US, which then pushed for an international treaty to level the playing field so that not only US businesspeople abroad but also those from other states would be prevented from bribing public officials in their dealings abroad. (The US legislation, as subsequently amended, and the Bribery Act 2010 in the United Kingdom, remain very important domestic laws given the centrality still of both countries for investment and financial intermediation.<sup>4</sup>) The 1997 OECD Convention has been adopted by 44 signatories—all 37 OECD developed economies, plus Argentina, Brazil, Bulgaria, Costa Rica, Peru, Russia and South Africa.<sup>5</sup> Both treaties reflect the normative global consensus against corruption and bribery,<sup>6</sup> and Asian states certainly form part of the consensus.<sup>7</sup>

Nevertheless, despite both treaties having mechanisms for peer review by member states,<sup>8</sup> enforcement of these treaties and related national laws remains problematic.<sup>9</sup> The treaties only set a baseline, and some key concepts are not clear or spelled out.<sup>10</sup> International investment agreements are starting to add provisions urging enactment and enforcement of anti-corruption laws, including in the intra-Asian context, though these do not add detail and remain few.<sup>11</sup>

Corruption and poor governance remain serious problems worldwide, including in many Asian jurisdictions.<sup>12</sup> For example, the majority of East (North and South East) and South Asian states and jurisdictions performed poorly in Transparency International’s 2021 Corruption Perceptions Index, which scored and ranked 180 countries and territories based on their perceived levels of public sector corruption according to responses from experts and businesspeople. Scores were little changed in the 2022 Index report.<sup>13</sup> As demonstrated in Table 1.1, Singapore, Hong Kong, Japan, Bhutan and Taiwan are ranked in the top 30 least corrupt countries and territories, but 12 among 23 East and South Asian jurisdictions sank below the top 90.

Moreover, the World Justice Project (WJP) Rule of Law Index 2021 measured ‘the rule of law in 139 countries and jurisdictions by providing scores and rankings based on eight factors: Constraints on Government Powers, *Absence of Corruption*, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice’.<sup>14</sup> Again, little improvement is evident from the

**Table 1.1** 2021 (and 2022) Corruption Perception Index (CPI) Rankings for East and South Asia (Best to Worst)

Country/ Territory	Singapore	Hong Kong	Japan	Bhutan	Taiwan	South Korea	Malaysia	China	India
Global Rank	4 (5)/180	12 (12)/180	18 (18)/180	25 (25)/180	25 (25)/180	32 (31)/180	62 (61)/180	66 (65)/180	85 (85)/180/ 180
Country/ Territory	Maldives	Vietnam	Indonesia	Sri Lanka	Mongolia	Thailand	Philippines	Nepal	Papua New Guinea
Global Rank	85 (85)/180	87 (77)/180	96 (110)/180	102 (101)/ 180	110 (116)/ 180	110 (101)/ 180	117 (116)/180	117 (110)/ 180	124 (130)/180
Country/ Territory	Laos	Myanmar	Bangladesh	Cambodia	North Korea				
Global Rank	128 (126)/ 180	140 (157)/ 180	147 (147)/180	157 (150)/ 180	174 (171)/ 180				

2022 Index. Assessments of 17 East, South East and South Asian countries and territories are not outstanding. None of them were in the top 10 countries with strong rule of law, and 10 out of the 17 jurisdictions ranked in the bottom half, as shown in Table 1.2. The COVID-19 pandemic reportedly exacerbated corruption in Asia because the Asian governments rolled out huge economic recovery plans, without providing adequate checks and balances.<sup>15</sup>

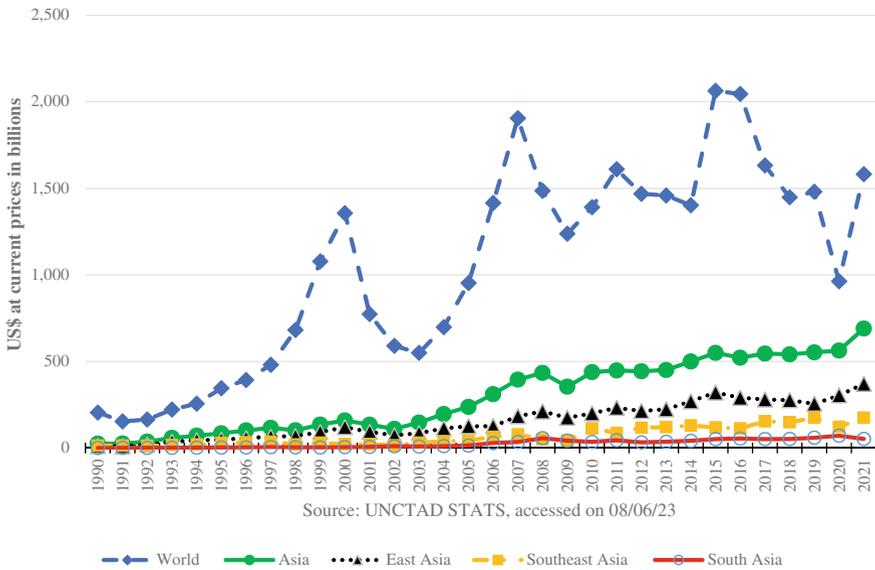
This reality in many parts of Asia as well as worldwide encourages some foreign investors, even from OECD Convention member states, to pay bribes or engage in other illegal behaviour—often with the explicit or implicit encouragement or support of host state officials and/or local investment partners.<sup>17</sup> This issue is particularly important as the flows and stocks of foreign investment have increased significantly in and out of the Asian region, particularly since the 1980s and including recently to a growing extent among Asian economies,<sup>18</sup> as shown in Fig. 1.1.

FDI started to surge in the 1990s when the deregulation of world markets and the decline of protectionism initiated hyper-globalisation.<sup>20</sup> Figure 1.1 shows that, at the world level, FDI has embraced the global economy, accelerating sharply during the periods of growth and collapse after the dotcom crisis of 2001 and the financial crisis of 2008–2009. A peak was reached at USD2 trillion in 2016, fuelled by a flurry of megadeals in cross-border mergers and acquisitions in high-income countries.<sup>21</sup> The decline in the subsequent years (2017–2019) was driven by a decrease in the average profit rate on foreign investment, escalation and broadening of trade conflicts, a fall in greenfield investments and large-scale repatriation of accumulated foreign earnings following tax reforms in the US.<sup>22</sup> Excluding one-off factors, FDI growth averaged 1% per year after the global financial crisis (2009–2018) compared with 8% over the period 2000–2007.<sup>23</sup> This evolution has fuelled the debate concerning the entry into a period of deglobalisation.<sup>24</sup> In this gloomy context for foreign investment, the shock of the COVID-19 pandemic occurred. The fall in 2020 brought global FDI back to USD1 trillion, an amount equivalent to the sum in 2005 and around 20% lower than the trough following the global financial crisis of 2009. However, the end of the pandemic brought about a sharp increase in FDI in 2021, recovering to the 2005–2021 average of USD1.5 trillion.

In comparison, FDI inflows into Asia have grown steadily since the 1990s, registering only a modest drop in 2009. They maintained their growth after 2016 and even during the COVID-19 pandemic in 2020 when FDI was plummeting globally. This is mainly explained by the resilience of East Asian economies. South East Asia recovered later and was strongly hit by the paralysis of international trade as it relies more on FDI related to global value chains, while in the Chinese case, FDI is more attracted by the vast potentialities of its internal market.<sup>25</sup> Consequently, FDI in South East Asia was down 43% in 2020 compared to 2019. FDI in South Asia remains around two times and four times less than in South East and East Asia, respectively. This is because India's economy is around five times smaller than China's and because South Asia remains fragmented by geopolitical conflicts that hinder deeper regional integration. As a result, India does not attract as much FDI as China and is not the hub of regional value chains that assemble intermediate products imported from neighbouring countries. However, FDI in South Asia proved resilient during the pandemic

**Table 1.2** 2021 (and 2022) WJP Rule of Law Index Rankings for East and South Asia, Best to Worst<sup>16</sup>

Country/ Territory	Japan	Singapore	Hong Kong	South Korea	Malaysia	Mongolia	Indonesia	Nepal	Sri Lanka
Global Rank	15 (16)/139 (140)	17 (17)/139 (140)	19 (22)/139 (140)	20 (19)/139 (140)	54 (55)/139 (140)	61 (62)/139 (140)	66 (64)/139 (140)	70 (69)/139 (140)	76 (74)/139 (140)
Country/ Territory	India	Thailand	Vietnam	China	Philippines	Bangladesh	Myanmar	Cambodia	
Global Rank	79 (77)/139 (140)	80 (80)/139 (140)	88 (84)/139 (140)	98 (95)/139 (140)	102 (97)/139 (140)	124 (127)/139 (140)	128 (132)/139 (140)	138 (139)/139 (140)	



**Fig. 1.1** Inflows of Foreign Direct Investment in Asia, 1990–2021<sup>19</sup>

and grew by 17% in 2020 compared to 2019. Nonetheless, in 2021, South Asia experienced a decline in FDI, while the rest of Asia returned to its pre-pandemic growth pattern. Overall, FDI in Asia increased firmly despite the global economic decline, reaching 44% of the world total in 2021, up from 37% in 2019. In 2021, East Asia attracted 23%, South East Asia 11% and South Asia 3.3% of global FDI inflows. This is a new indication of the shift towards Asia in the accumulation of world capital.

Nonetheless, discussion has been limited and fragmented about the many legal issues arising from the interface between foreign investment and corruption, particularly in and across the diverse and vibrant Asian region. One situation is where a local competitor bribes host state officials, disadvantaging foreign investors.<sup>26</sup> Another growing issue and the main focus on this book is where foreign investors bring other claims against host states, which then raise as a defence some significant bribery made in connection with the initial investment. Such disputes nowadays are typically resolved by international arbitration, under two main routes. The first involves individually negotiated investment contracts between a foreign investment and a host state entity (and sometimes a local investment partner). These contracts typically include an arbitration clause, requiring disputes to be resolved by an expert international tribunal of chosen arbitrators, at a chosen neutral seat.<sup>27</sup> Also, the parties usually expressly agree on applicable rules to be followed with the tribunal, such as the ad hoc United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, or institutional arbitration rules such as those of the International Chamber of Commerce (ICC). The underlying investment contracts are typically expressed to be governed by an agreed national contract law, or sometimes the *lex*

*mercatoria*’ or ‘general principles of law’ (such as the UNDRIT Principles of International Commercial Contracts).<sup>28</sup> The resultant awards are enforceable typically through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) now ratified by around 172 states,<sup>29</sup> in the manner of most purely commercial arbitral awards rendered by a foreign-seated tribunal today, or through seat courts applying increasingly (especially across Asia) arbitration legislation based on the template of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).<sup>30</sup> Both the Model Law and the NYC permit only limited grounds to refuse enforcement of awards; but one is ‘public policy’ of the state enforcing the award, which—even if interpreted in an internationalist spirit—can make it difficult to enforce an award against a government entity.<sup>31</sup>

A variant, that may provide better scope to enforce awards, is for the parties to the investment contract to consent to resolve disputes through arbitration administered by the International Centre for the Settlement of Investment Disputes (ICSID, headquartered in Washington DC and affiliated with the World Bank). If the host state is further party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), with 156 member states,<sup>32</sup> it can consent to arbitration under ICSID Arbitration Rules. If the home state of the foreign investor is also party to the ICSID Convention, resultant awards can then only be challenged by an ad hoc annulment committee of separate arbitrators, as there is no ‘seat’ and related court, and the grounds for setting aside the awards (to prevent enforcement) are even narrower by not including the ‘public policy’ of any state.<sup>33</sup> Further, such ICSID Convention awards can be enforced against assets of the losing host state in any Convention member state, as if they were the final judgment of that state’s court system,<sup>34</sup> thus preventing any further review there for ‘public policy’ or other NYC-like grounds for refusing enforcement.<sup>35</sup>

The second main route for foreign investors to resolve international investment disputes with governments is through consent to arbitration through a standalone investment treaty, or (more common recently) an investment chapter within a free trade agreement (FTA). As these have proliferated and become more widely known, most investment disputes involve such treaty-based arbitration, and cases under this route (and related treaty provisions) are also the main—though not exclusive—focus of this book. Through such treaties, the host state promises to the home state that it will provide agreed substantive protections to the home state’s investor, to encourage and protect foreign investment. The host state also makes these commitments more credible by agreeing to have an international arbitral tribunal hear and give awards regarding alleged violations, if and when the foreign investor commences such investment treaty arbitration. The consent provided in the treaty generally allows for ad hoc UNCITRAL arbitration (which have been applied therefore in about a third of all known claims) or institutional arbitration through ICSID (about two-thirds of claims), with very few treaties and therefore claims being filed under other international arbitration centre rules (such as ICC Rules).<sup>36</sup>

Such investment treaty arbitration is typically referred to as an investor–state dispute settlement (ISDS), especially in the media, which has become increasingly concerned about this dispute resolution process and outcomes, including recently

in parts of Asia.<sup>37</sup> However, ISDS can also be broadly interpreted as encompassing dispute resolution under investment contracts including arbitration clauses (especially where the host state is party to the ICSID Convention and consents to its type of administered arbitration),<sup>38</sup> as well as investor–state conciliation or mediation rather than arbitration (so far rare, but of growing interest including via investment treaty provisions).<sup>39</sup> In this chapter and volume, we refer to this route of consent to arbitration through investment treaties as ‘treaty-based ISDS’ or more generally ‘ISDS arbitration’. Known cases have become increasingly common worldwide (reaching over 1,303 filings as of 31 July 2023).<sup>40</sup> This is because foreign investment flows have burgeoned—especially for foreign direct investment (FDI) involving investors taking larger and more controlling stakes—in conjunction with more investment treaties (over 3,200 signed<sup>41</sup>) that increasingly provide for ISDS as well as interstate arbitration processes, especially since the 1990s. The proportions of East and South Asian cases were quite low until around 2010, compared to other regions and the stocks of FDI, arguably perhaps due to various ‘institutional barriers’ to commencing or defending claims (such as a relatively paucity of arbitrators and counsel in the region).<sup>42</sup> However, the proportions and absolute numbers related to Asia have been increasing significantly over the last decade.<sup>43</sup>

Such treaty-based ISDS arbitration cases tend to attract more attention because they have wider implications than disputes involving contract-based consents to arbitration from government entities, as the latter typically only have implications for the relevant individual investor(s) and can depend on the wording of the investment contract terms. By contrast, tribunals in treaty-based ISDS arbitrations must interpret and apply still often more broadly drafted substantive protections offered by host states to all foreign investors of the home state under public international law. An award favouring one investor under such a treaty-based ISDS claim, because of a host state measure found by the investor to violate its substantive treaty commitments, could lead to similar claims by other investors from the same host state also adversely affected by this violation—or even by similarly affected investors from other states under different treaties but with similarly worded protections against such measures.<sup>44</sup>

## 1.2 Investor–State Arbitration Disputes Implicating Corruption

The core problem of interest in this volume, arising under both main routes for resolving investor–state disputes through arbitration, can be explained as follows. A foreign investor, even if having had staff found actually or possibly to have engaged in some bribery, may well expect complete or at least some protection for its investment, pursuant to its contract with a host state and/or applicable investment treaties such as an FTA or Bilateral Investment Treaty (BIT). At least, it will attempt to make such a claim against the host country before an independent tribunal established by

an investment treaty or, less frequently nowadays, through an arbitration agreement included in any investment contract with the host state.<sup>45</sup> The investor will not favour litigation in the host state, as it perceives the domestic legal system to be biased and partial,<sup>46</sup> and it feels that the host state should respect what it has agreed to provide in investment treaties and/or contracts. Indeed, typical investment treaties afford foreign investors protection from expropriation, fair and equitable treatment,<sup>47</sup> national treatment, most-favoured-nation treatment, full protection and security, and dispute resolution by a neutral third party (especially arbitration).<sup>48</sup> Accordingly, the investor might well feel entitled to assert those rights in front of an independent tribunal.

The host state will react negatively, however, usually relying on illegality provisions expressly or impliedly included in investment agreements. Many BITs and FTAs require foreign investments to be made in accordance with or in conformity with domestic laws of the host state,<sup>49</sup> which normally criminalise corrupt practices such as bribery.<sup>50</sup> The host state may find this legality requirement useful to assert the non-availability of investment protection for the corrupting investor, invoking the violation of the treaty provision from the investor's side. In other words, the state may reject affording protection to investment tainted by corruption or other such seriously illegal conduct. Indeed, the corruption defence has often led arbitral tribunals to dismiss investors' claims for investment protection because tribunals tend not to provide foreign investors with such rights if they find that the investment has been made through illegal conduct.<sup>51</sup>

The dilemma then is that the investor may feel that this defence is too favourable towards the host state. For example, even if the host state clearly misbehaves, say by expropriating the investment without compensation or by breaching other substantive commitments promised under the investment treaty, the investor loses access to an independent dispute resolution forum. The host state might go even further, giving the investor the impression that it is common to give the public official an informal payment in the form of donations or consulting agreements, or even essentially coercing the foreign investor into paying the bribe in order to start operations.<sup>52</sup> As soon as the payment is made or alleged, the investor loses protection over the investment. In other words, it is not impossible for the state to abuse the corruption defence, for it obtains both the investment and the bribe, while the investor loses the investment and a neutral forum to recover its loss. It may even lead to perverse incentives: a host state may ensure a bribe is taken and evidenced, but never prosecuted, to raise (sometimes decades later) if and when a foreign investor commences an ISDS arbitration.

The problem is particularly acute in developing economies because ISDS-backed protections are arguably useful to encourage foreign investment into jurisdictions with weak rule of law, governance and political systems.<sup>53</sup> The very type of jurisdictions likely still to be struggling with problems of corruption and lack of transparency in public affairs, therefore, are nonetheless likely to be hit by ISDS claims at least in the shorter term.<sup>54</sup> Over the longer term, appropriately commenced and resolved ISDS arbitration claims might also lead to improvements in transparency, good governance and the rule of law particularly in developing economies.<sup>55</sup>

Accordingly, the tribunal needs to consider how to strike a balance between the investor and the host state in handling corruption allegations. However, ISDS tribunals have not yet settled this issue. The lack of their discussion and consensus on the issue was recently criticised by the Expert Group Meeting on Corruption and International Investments, co-organised by the United Nations Office on Drugs and Crime (UNODC) and the United Nations Conference on Trade and Development (UNCTAD) in 2021, as follows:

Despite a growing number of investor–state disputes involving corruption allegations, arbitral tribunals often do not address the issue and the limited number of awards that did deal with corruption allegations lack consistency. Arbitrators generally appear hesitant to address corruption allegations, and when they do their approaches seem ambiguous and inconsistent. Coherent standards must be in place to ensure that corruption allegations based on credible sources are appropriately addressed based on international public policy.<sup>56</sup>

This critique appears to be fair: arbitral tribunals' approaches towards corruption and illegality are indeed fragmented, despite quite a few arbitral awards addressing the issues, as demonstrated in the following section.

### **1.3 Arbitral Tribunals' Approaches to Dealing with Corruption**

Arbitral tribunals have dealt with the issue of corruption in various ways. Several academic commentators have identified three broad approaches: (1) the 'zero tolerance' approach; (2) the 'closer look' approach; and (3) the 'it depends' approach.<sup>57</sup> Those approaches have evolved by absorbing debates also about other serious illegal behaviour by foreign investors such as forgery and fraud, occasionally but insufficiently in the context of Asia.

#### ***1.3.1 The 'Zero Tolerance' Approach***

The 'zero tolerance' approach does not admit the tribunal's jurisdiction if it finds evidence of any (non-trivial) corruption. It suggests either dismissing any claims arising out of contracts procured through corruption or concluded for paying bribes, or conferring no protection to investments made through corruption.<sup>58</sup> The origin of the former justification can be found in the award of Judge Lagergren in ICC Case No. 1110 (1963), which concerned a commission/consultancy agreement to bribe Argentinian government officials.<sup>59</sup> Judge Lagergren highlighted the existence of an international public policy against corruption and held that: 'in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature ... Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to

ask for assistance of ... arbitral tribunals ... in settling their disputes'.<sup>60</sup> Several investment arbitral tribunals have followed suit, holding that such intermediary contracts contemplating bribery are void(able) and therefore should not give rise to valid claims.<sup>61</sup>

Some other tribunals have rejected hearing arguments on investments 'tainted by corruption', refusing to protect investments that violate an investment treaty clause that the foreign investment shall be 'in accordance with the domestic law of the host state'. This type of clause has also been applied to decline jurisdiction for other serious investor misconduct. In an early Asia-related claim under a BIT with Germany, the tribunal in *Fraport AG Frankfurt Airport Services Worldwide v. the Republic of the Philippines (I)* [2007]<sup>62</sup> (*Fraport (I)* case) adopted this option. Disputes arose from the claimant's investment into a Filipino company joining a concession contract for the construction and operation of Ninoy Aquino International Airport Passenger Terminal III. After the Philippine Supreme Court ruled that the concession contract was null and void, the claimant commenced a BIT claim against the Philippines under ICSID Convention Arbitration Rules. However, the tribunal considered that the claimant 'was consistently aware that the way it was structuring its investment in the Philippines was in violation of the [Anti-Dummy Law] and accordingly sought to keep those arrangements secret ... [and that] it proceeded with the investment by secretly [and knowingly] violating Philippine law through the secret shareholder agreements'.<sup>63</sup> The tribunal concluded that it lacked jurisdiction over the case as the claimant did not make an investment 'in accordance with law' under the applicable BIT.<sup>64</sup> Thus, the tribunal used the legality clause to exclude unlawfully established investments from the scope of the BIT protection and to deny its jurisdiction *ratione materiae*.<sup>65</sup>

Some arbitral tribunals have gone even further, holding that no explicit legality clause is required for them to dismiss claims for the protection of illegal investments because investment treaties in general and the ICSID Convention implicitly require the compliance of investments with the host states' laws.<sup>66</sup> However, this view is quite controversial because its legal basis is unclear, and arbitral tribunals adopted different rationales without uniformity.<sup>67</sup> Several commentators and arbitrators further criticise the view, suggesting that contracting parties (i.e., states) do not consent to limit the jurisdiction of a tribunal without an express agreement.<sup>68</sup> They claim that denouncing its jurisdiction based on an allegedly implied legality clause would risk the tribunal exceeding its jurisdiction and would thereby cause the resulting award to be challenged under Article 52 of the ICSID Convention.<sup>69</sup> Accordingly, the lack of legality clause or the lack of explicit jurisdictional hurdle 'cannot be overcome by resorting to general principles of law or considerations of object and purpose'.<sup>70</sup> Therefore, the 'zero-tolerance' approach would only become reasonable where a tribunal relied on an explicit legality clause in an investment treaty or agreement. Further issues then include the wording needed to constitute such a clause, depriving the investor of jurisdiction and treaty protection if the tribunal is convinced that serious illegality or corruption occurred. In particular, ISDS tribunal awards have split in interpreting treaty provisions along the lines that the host state shall admit such investments in accordance with its laws and investment policies.

One view is that such wording has the same effect (limiting treaty protection) as a provision defining covered investments as those made in accordance with host state law. Another view is that this merely conditions the obligation otherwise on the host state to admit or let in foreign investment.<sup>71</sup>

The ‘zero-tolerance’ approach may somewhat rebalance the interests between the investor and host state in the current framework of ISDS, which is (arguably) disproportionately pro-investor.<sup>72</sup> Since that view was expressed, however, UNCITRAL and ICSID have engaged in widespread consultation to identify whether and more specifically how treaty-based ISDS could be too pro-investor, and therefore what more targeted mechanisms might be promoted to address any such imbalances.<sup>73</sup> A recent detailed study by Ishikawa also argues that many existing investment treaties already contain considerable scope for host states to bring counter-claims against foreign investors, focusing on their hard and soft law obligations to ensure environmental sustainability<sup>74</sup> but with potential extension to avoiding bribery. Other commentators claim that this strict approach may advance anti-corruption objectives.<sup>75</sup> In short, the zero-tolerance approach is the most rigorous among the three approaches against corruption in investor–state arbitration.

### 1.3.2 *The ‘Closer Look’ Approach*

The ‘closer look’ approach finds that the tribunal has jurisdiction but can reject some claims on the grounds of corruption. This approach is different from the zero-tolerance approach in that its focus is directed at the claim itself and its admissibility rather than the basis of a tribunal’s jurisdiction.<sup>76</sup> In *Plama Consortium Limited v. Republic of Bulgaria* (2008),<sup>77</sup> the tribunal found claims for investment protection to be inadmissible if the investment has violated the domestic law of the host state and principles of international law. Moreover, in *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia* (2016) (*Churchill Mining case*),<sup>78</sup> the tribunal decided that all the claims by the British company and its Australian subsidiary were inadmissible because these were effectively ‘based on documents forged to implement a fraud aimed at obtaining mining rights’, with the foreign investor found to be wilfully blind to the local investment partner’s forgery of the coal mining exploration licences.<sup>79</sup> If issues of corruption or serious irregularity instead go to admissibility of certain claims, rather than jurisdiction, not only can the ISDS tribunal hear evidence to decide the matter,<sup>80</sup> but there may be some other claims from investors that could still be admissible.<sup>81</sup> The tribunal’s decision will also not trigger any provisions in applicable treaties or arbitration law (say at the seat), for court review of arbitrator decisions on jurisdictional matters.<sup>82</sup> This approach may be therefore somewhat less favourable for the host state, compared to the zero-tolerance approach where a tribunal upholding jurisdiction (after dismissing the corruption defence) can have that decision challenged in another forum by the host state.

The dissenting opinion by Cremades in the *Fraport (I)* case was somewhat in line with this approach. It pointed out that the zero-tolerance approach may leave an

investor without a remedy, and a host state secure and immune in a gross violation of an investment or trade agreement thanks to its corrupt government official.<sup>83</sup> His point is that the tribunal needs to examine corruption allegations carefully to avoid the unfair consequence, and the jurisdictional phase is not appropriate for the tribunal to undertake such careful examination.<sup>84</sup> Newcombe is also in favour of the closer look approach, claiming it is useful to avoid procedural complications at later stages such as a challenge to the arbitral award for the tribunal's failure to exercise jurisdiction.<sup>85</sup>

### 1.3.3 *The 'It Depends' Approach*

The 'it depends' approach argues that the tribunal should carefully hear the substance or merits of the case, depending on the nature of the relevant corruption allegations.<sup>86</sup> This can impact on liability, remedies awarded (typically damages)<sup>87</sup> and cost orders by ISDS tribunals.<sup>88</sup> Factors taken into consideration by the tribunal include whether the allegedly corrupt country government officials are still in power, and whether there is a commercial custom of back payments in the host state. The approach encourages tribunals to look at the substance of investment claims, in relation also to the cause of action (e.g., violation of fair and equitable treatment commitments), referring to the diversity of corrupt practices and the bilateral nature of corruption.<sup>89</sup> The tribunal may opt for this approach, for instance, where there is misconduct by the investor and the host state, or where entry into the domestic market by foreign investors is practically impossible in the host state without some sort of 'commission payment'. Several arbitral tribunals have considered corruption allegations in examining the merits of the dispute,<sup>90</sup> especially where they came across issues pertaining to post-investment corruption.<sup>91</sup> For instance, the tribunal in the *Fraport (I)* case held that '[i]f, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defence to claimed substantive violations of the BIT'.<sup>92</sup>

The ISDS tribunals are further divided on more specific issues, which can arise under all or some of the three approaches outlined above.<sup>93</sup> Controversial topics include standards of proof for allegations of corruption,<sup>94</sup> the evaluation of risk factors that may imply the existence of corruption (i.e., the treatment of circumstantial evidence or 'red flags' of corruption),<sup>95</sup> the arbitrator's investigative and reporting rights and duties on corruption (including obligations to report corruption to the responsible authority),<sup>96</sup> the burden of proof for allegations of corruption,<sup>97</sup> the impact of criminal investigations over arbitral proceedings,<sup>98</sup> the attribution to the host state of the corrupt behaviour on the part of a state official (and then appropriateness for the state to raise corruption as a defence),<sup>99</sup> the availability of remedies for findings of illegality (such as restitution of benefits under contracts tainted by corruption),<sup>100</sup> the possibility for an investor to raise the demand for a bribe from a state agency as the infringement of its rights such as legal expropriation and fair and equitable treatment,<sup>101</sup> the plausibility of raising the general corruption situation in a

host state as part of claims of denial of justice (arguing the state's failure to accord fair and equitable investor treatment),<sup>102</sup> and the prospects of host-state counter-claims where the state is not liable for corruption.<sup>103</sup>

#### 1.4 Limited Research on 'Asian' Views on Corruption and Investment Arbitration

Despite by now there being quite a few Asian ISDS arbitration cases, including awards discussing corruption and other serious misconduct by investors,<sup>104</sup> the literature on Asian perspectives and approaches in this field is rather scarce. This is surprising given the growing interest in Asian investment treaty and arbitration practice, including questions as to whether this is or may become distinctive by global standards.<sup>105</sup> Thus, for example, Llamzon's *Corruption in International Investment Arbitration* (published by Oxford University Press in 2014) is the first (and probably only) comprehensive research monograph that addresses transnational corruption in investment arbitration, aiming in the words of another commentator 'to develop a framework for arbitral decision-making when issues of corruption arise in investment arbitration proceedings'.<sup>106</sup> The 358-page volume offers deep insights into the relationship between investment arbitration and corruption based on the author's careful and rigorous legal research.<sup>107</sup> However, the book only occasionally discusses the perspectives of Asian countries because its focus is not on Asian approaches, although it does indeed examine several Asia-related ISDS decisions discussing corruption.<sup>108</sup>

In addition, Greenwald and Ivers contributed in 2018 a 93-page report on *Addressing Corruption Allegations in International Arbitration*.<sup>109</sup> This material also provides a comprehensive overview of the key issues that arise in international investment arbitrations involving corruption allegations, without analysing Asian insights on the issues. Further, the ICC issued in 2015 a dossier in the ICC Institute of World Business Law Series: *Addressing Issues of Corruption in Commercial and Investment Arbitration*.<sup>110</sup> This dossier compiles various reports analysing topical issues of corruption and arbitration, and the authors of the reports include individuals having a connection with Asia. However, none of the reports offers a close examination of Asian approaches towards corruption in ISDS. In more recent years, the ICC has constituted a 'Task Force Addressing Issues of Corruption in International Arbitration' (co-chaired by prominent Hong Kong-based arbitrator Chiann Bao), cooperating with the ICC Corporate Responsibility and Anti-Corruption Commission and the International Bar Association. It aims to explore existing approaches to allegations or signs of corruption in disputes and articulate guidance for arbitral tribunals on how to deal with such occurrences, but it is unclear whether it incorporates any regional perspectives or when reports will be made public.<sup>111</sup>

Such limited coverage of Asia is also salient in research articles addressing specific topics of corruption and other illegal conduct. On the fundamental issue of whether international arbitration is an appropriate forum to decide corruption claims, Rose's

article suggests that arbitral tribunals are ill-suited to the adjudication of corruption allegations due to the relatively closed and non-transparent character of international arbitration, which is at odds with the public interest involved in such allegations.<sup>112</sup> However, this generalised statement sits awkwardly with the legal environment of Asia where quite a few jurisdictions have been consistently evaluated by international organisations as having judicial institutions that offer limited legal certainty and a weak rule of law, as mentioned above.<sup>113</sup> Polkinghorne and Volkmer discuss three important investment arbitration issues, namely the source of legality requirement in investment arbitration, its scope and whether legality is a jurisdictional issue or a merit issue, but they pay little attention to BITs concluded between Asian states or arbitration cases involving Asian parties.<sup>114</sup> Wilske and Obel classify arbitral tribunals' handling of corruption allegations into three categories, but their focus is also not on Asia.<sup>115</sup>

In addition, several commentators consider state responsibility for corruption in investment arbitration, discussing when states should be held liable for conduct by their bribed officials. Wood claims that the conduct of a corrupt official should seldom be attributable to his or her state because 'a foreign investor cannot reasonably assume an official (no matter how high-ranking) to be authorised to engage in and act upon corruption'.<sup>116</sup> The proponents of the zero-tolerance approach are likely to find Wood's thesis useful as it suggests making states immune from the conduct of their allegedly corrupted civil servants. In contrast, Devendra states that 'when the international law of [s]tate responsibility is applied, there are circumstances in which a host [s]tate may be held internationally responsible for the corrupt conduct of its public officials'.<sup>117</sup> Devendra claims the occurrence of such circumstances depends on several factors, including the public official's conduct, the host state's conduct, the investor's conduct and the surrounding circumstances. He also comments that the critical factor is whether the government officer ostensibly exercised official capacity when she or he engaged in the corrupt conduct. Requiring careful examination by tribunals of corruption and illegality allegations, Devendra's thesis is compatible with the 'closer look approach' and the 'it depends approach'. Unfortunately, however, the discussion of state responsibility for corruption in investment arbitration is limited as Wood's thesis does not examine corruption cases in Asia in detail, while Devendra's argument is largely based on general international law, which has been criticised by some commentators for its Eurocentrism and/or Western centrism.<sup>118</sup>

Overall, these useful and significant contributions by leading experts of investment arbitration analyse core issues around corruption and investment arbitration without paying great attention to Asian contexts. This is also true of a more recent treatise entitled *Corruption and Fraud in Investment Arbitration: Procedural and Substantive Challenges* (published by Springer in 2022).<sup>119</sup>

Several works certainly discuss 'corruption in Asia' or 'investment treaties and arbitration in Asia', but they typically treat such subjects as distinct and separated matters. They tend not to deeply delve into the intersection between 'corruption in Asia' and 'Asian ISDS'. For instance, the *Routledge Handbook of Corruption in Asia* consists of 20 chapters addressing diverse Asian experiences in corruption and anti-corruption reforms.<sup>120</sup> The edited handbook provides a critical review of the major

issues, trends and challenges of (anti-)corruption reform in Asia, basically without touching upon matters related to ISDS. Moreover, the *Handbook on the Geographies of Corruption* contains national case studies examining specific countries that struggle with corruption, including some Asian states such as Pakistan, Bangladesh, China, the Philippines, Indonesia and the countries of post-Soviet Central Asia.<sup>121</sup> However, this 392-page *Handbook* published by Edward Elgar Publishing does not refer to ISDS or investment treaties either. *Investment Protection in Southeast Asia: A Country-by-Country Guide on Arbitration Laws and Bilateral Investment Treaties* (published by Brill in 2017) is a handy reference tool especially for practitioners to study investment protection in the region.<sup>122</sup> This 462-page collection contains country reports for all ASEAN member states and Timor-Leste, and each report covers a few key areas, such as arbitral legislation and institutions in the country, domestic laws related to FDI, an analysis of the BITs entered into by the state and cases involving the state or its investors. However, the country reports rarely refer to how the country regulates investment-related corruption or how it has dealt with corruption-related ISDS cases. Moreover, Chaisse and Nottage's *International Investment Treaties and Arbitration Across Asia* (published by Brill in 2018) introduces FDI trends and regulations, investment treaties and arbitration across Asia.<sup>123</sup> The reach of this 700-page voluminous edited book is more comprehensive in that it offers studies for the ten member states of ASEAN and other major players in Asia, including Japan, India, China and Korea. However, relatively few pages of the volume discuss ISDS matters involving corruption and other serious illegal misconduct. There is also limited attention given to corruption in ISDS in *The Asian Turn in Foreign Investment* (published by Cambridge University Press in 2021)<sup>124</sup> and *ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options* (published by Edward Elgar Publishing in 2022).<sup>125</sup> In sum, there has hitherto been no comprehensive study comparing Asian laws and practices addressing corruption and other serious investor illegality in the context of investor-state arbitration.

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

This book aims to examine Asian approaches and case studies about corruption and serious investor misconduct in international investment arbitration. It focuses on corruption-related disputes between private parties and public sector entities operating in East (North and Southeast) and South Asia.<sup>126</sup> It also covers other serious illegal conduct in the region that foreign investors have or may become engaged in, which are related to or broadly equivalent to corruption and bribery.

Since Asia entered the age of mega-regional free trade agreements, investigating Asian views on corruption and illegality in investment arbitration has become ever more important. The Comprehensive and Progressive Agreement for Trans-Pacific

Partnership (CPTPP) and the Regional Comprehensive Economic Partnership Agreement (RCEP Agreement) came into force in 2018 and 2022, respectively, mandating member states to combat corruption and other illegal conduct.<sup>127</sup> Accordingly, the member states of those arrangements—mostly Asian countries—are now facing elevated and collective pressure to fight against corruption.<sup>128</sup> Nevertheless, both trade agreements remain silent on how specifically to deal with disputes arising from corruption and illegality at the inter-state level. They set out provisions allowing the member states to settle differences through arbitration, but matters arising from the obligation to address corruption are excluded from such dispute settlement provisions, which reduces their impact.<sup>129</sup> Obligations to encourage ‘corporate social responsibility’ among investors under these mega-regional FTAs, which could reinforce their anti-bribery obligations, are loosely worded and so not easily amenable to ISDS dispute resolution processes.<sup>130</sup> Nonetheless, this type of anti-bribery provision contained in several recent BITs concluded by Japan, for example, ‘although framed as the host state’s obligation, might be taken into account by [an ISDS arbitration] tribunal in determining whether, or to what extent, the investor may invoke [the treaty’s] protection’.<sup>131</sup> Hence, amidst the fresh region-wide condemnation of corrupt acts, investment arbitration remains a potentially influential platform impacting on corruption-related ISDS cases in Asia.

Nevertheless, the current efforts for fighting corrupt practices in investor–state arbitration are often fragmented, as discussed elsewhere in this chapter. In view of the situation, we should certainly praise the calls by UNODC and UNCTAD for further action to establish coherent standards for investment tribunals to tackle corruption,<sup>132</sup> provided that the standards reflect also a voice from Asia. Unfortunately, the voice has unlikely reached the ears of international policymakers yet. For instance, UNODC and UNCTAD revealed a lack of Asian representation in their Expert Group Meeting on Corruption and International Investments, which aimed to ‘provide a platform for anti-corruption and foreign investment specialists to exchange ideas, discuss common challenges and identify ways forward with respect to minimising the risk of and opportunities for corruption in foreign direct investments’.<sup>133</sup> The Meeting reportedly gathered over 140 experts from 60 countries,<sup>134</sup> but the number of presenters in the event was 18,<sup>135</sup> and only 2 speakers were from Asian countries (Mongolia and China).<sup>136</sup> Moreover, as demonstrated above, there is a paucity of research appraising Asian perspectives on corruption in investment arbitration. Thus, Asian views on corruption and other issues have not gained international attention, despite the comments of many trade and investment law experts now suggesting treaty reforms to upgrade the framework of investor–state arbitration at a global level.<sup>137</sup> Someone needs to challenge the status quo, otherwise Asian states will miss golden opportunities to influence the ongoing international policy-making process for investment arbitration.

Against this backdrop, this edited volume aims to accumulate and present Asian perspectives, so that Asia may build a foundation so as to lead the next rounds of treaty reforms in the field of corruption and ISDS. In particular, it intends to address the following questions.

1. What are the real impacts of corruption, potentially of very different types, particularly on FDI and local economies in Asian jurisdictions?
2. Has Asia in general been, and will it remain, ‘ambivalent’ about international law prohibiting corruption and illegality? How have Asian countries been combatting corruption and other illegal activities particularly regarding foreign investment?
3. Have Asian countries dealt with corruption and illegality in relation to foreign investment projects? And if so, how? What laws and rules exist, and how do they operate in the respective jurisdictions? What are the recent developments? If Asian countries have faced any international investment claims involving corruption and illegality, whether treaty-based ISDS cases or those based on investment contracts providing consent to arbitration, what are the outcomes and consequences?
4. Have Asian countries been, or are they more likely to become, ‘rule makers’ (creating rules on their own initiative) rather than ‘rule takers’ (following primarily Western normative templates) in international investment law, specifically regarding corruption and illegality?<sup>138</sup>

These questions will support us to achieve the central objective: to examine Asian approaches toward corruption and illegality in international investment arbitration.

This book further takes into account not only legal perspectives but also non-legal ones such as angles from international economics. These perspectives reinforce that corruption is not monolithic, and indeed may have a significant correlation (if not necessarily also a causal impact) on foreign investment and/or economic growth trajectories. For example, a political economist’s recent study of China’s own ‘gilded age’ highlights how corruption can be similar to theft (usually illegal and bad for growth) or instead exchange-based (not necessarily illegal or bad for growth).<sup>139</sup> Jurists negotiating, drafting and applying investment treaties need to appreciate such nuances and perspectives when considering corruption both in theory and practice. Jurists also need to be humble as to the capacity of legal norms to address pervasive problems like corruption, compared to technological or other non-legal initiatives.<sup>140</sup>

## 1.6 Structure of the Book

Following this introductory chapter, the edited volume proceeds as follows. Part I considers wider economic issues relating to corruption and investment in the Asian region. In Chap. 2 Ahmed Masood Khalid surveys diverse discussions on investment-related corruption and its impact on local economies. His analysis focuses on how certain corrupt business practices have deterred (or possibly enhanced) economic growth in Asian countries and beyond.<sup>141</sup> In Chap. 3 Bruno Jetin, Jamel Saadaoui and Haingo Ratiarison turn to how the level of corruption in host states likely affects the amount of foreign investment into Asian nations. Their statistical analysis explores a correlation (if any) between the seriousness of corruption in Asian countries and the decrease and/or increase of FDI flows into the host states.

Part II discusses general legal issues related to corruption and investment arbitration in Asia. In Chap. 4 Anselmo Reyes and Till Haechler consider corruption regulations in Asia generating cross-border economic and geopolitical tensions. Their chapter discusses how Asian states may invoke their municipal laws to destabilise the world's largest companies and evade the arbitral tribunal's jurisdiction, for the benefit of their national industries and interests. In Chap. 5 Yueming Yan and Tianyu Liu examine international and regional frameworks against corruption in Asia, as well as anti-corruption provisions in investment treaties concluded by Asian states. In Chap. 6 Michael Hwang and Aloysius Chang offer an anatomy of corruption in ISDS arbitrations, focusing on definitions, evidentiary problems, attribution of responsibility and legal consequences. Next, Martin Jarrett in Chap. 7 more closely explores how an investor's misconduct should influence the examination of a host state's liability for an internationally wrongful act under an investment treaty. As critics have pointed out the imbalances between states and investors pertaining to corruption, Jarrett discusses the way to rebalance the asymmetries and fragmentation regarding (non-)Asian ISDS.

Part III collects the reports of corruption in key jurisdictions across Asia, mostly net FDI importing states and large net FDI exporters: China (including Hong Kong), India, Indonesia, Japan, the Lao Republic, the Philippines, South Korea and Thailand. Topics covered in each country report include general governance and corruption, investment treaty trajectories in the context of corruption, and relevant ISDS cases involving alleged bribery and serious investor misconduct based on an investment treaty or (less frequently) a one-off contract.

Beginning with the largest economies in Asia, for instance, the Chinese Communist Party launched a far-reaching anti-corruption campaign following the conclusion of the 18th National Congress in 2012. Accordingly, in Chap. 8 Vivienne Bath and Tianqi Gu discuss the impact of the nationwide campaign against corruption on the Chinese and Hong Kong environments for FDI and ISDS, taking into account other Party initiatives such as the Belt and Road Initiative and the China International Commercial Court.

Next, Prabhash Ranjan in Chap. 9 examines India's approach to corruption and illegality in investor-state arbitration. Ranjan surveys India's BIT programme and then sheds light on the country's new investment treaty practice, referring to the Final 2016 Indian Model BIT and the Joint Interpretative Statement on the India-Mauritius BIT. He further discusses the Devas Saga in which two corruption-related BIT claims were brought against India by the foreign investors of Devas, an Indian multimedia company.<sup>142</sup>

In Chap. 10 Simon Butt, Antony Crockett and Tim Lindsey provide a thorough overview of Indonesia's quite pervasive corruption (including notably among the judiciary), and its domestic laws and institutions aiming to combat it (including some backlash against the anti-corruption agency). They discuss Indonesia's evolving investment treaty regime, highlighting the government's interest in offering better protection and fair treatment to foreign investments. They further examine Indonesia's experience in responding to corruption or illegality claims in ISDS, such as in the *Churchill Mining* case and the *Al Warraq* case.

In Chap. 11 on Japan, a large net capital exporter rather than a major destination for FDI, Luke Nottage and Nobumichi Teramura show how Japan's limited tolerance for corruption domestically is matched by the growing inclusion of provisions in its investment treaties from around 2007 that urge host states to implement anti-corruption measures. They remark that this favours Japan's many outbound investors, but so does the more erratic treaty practice that still exists around the incorporation of clear legality clauses.

Turning then to smaller and/or more developing economies in Asia, Chap. 12 by Romesh Weeramantry and Uma Sharma succinctly explores corruption law and practice in the Lao Republic, highlighting ISDS experience in the cases of *Sanum Investments (I)* and *Lao Holdings (I)*. For the Philippines, Thomas Elliot Mondez and Jocelyn Cruz in Chap. 13 discuss the pitfalls of local corruption related to FDI, referring to the landmark *Fraport (I)* case and its aftermath.

Joongi Kim in Chap. 14 on South Korea follows a similar format and approach to that of Nottage and Teramura's chapter on Japan, but revealing more corruption domestically (especially around 2006–2007, perhaps linked to the then Korean President and associates being arrested for corruption). Korea also has significantly more inbound ISDS arbitration claims, arguably linked to its larger network of treaties. These claims may explain why its recent treaties seem to have more consistent express legality provisions than Japan's treaties, as they offer more scope for host state defences. Kim also outlines a major ISDS dispute, involving US investors (Mason and Elliott) complaining that Korean government corruption violated their right to fair and equitable treatment, which was still pending when this book went to press.<sup>143</sup> This case study is a reminder that ISDS arbitration can play a significant role in incentivising host states to eschew corruption, in addition to the multilateral anti-corruption treaties and other initiatives outlined in our introduction.

Lastly, in Chap. 15 Sirilaksana Khoman, Luke Nottage and Sakda Thanitcul address Thailand, a country characterised by high inbound FDI and economic growth since the 1980s, yet multiple military coups and political upheaval as well as domestic laws and institutions aiming to address corrupt practices. They summarise the distinctive phases and features of Thailand's investment treaty practices, and key arbitration cases involving the government under treaties or investment contracts (including one brought recently by an Australian company) where occasionally corruption or serious investor illegality have been raised before tribunals and/or seat courts.

Based on the foregoing general and country-specific reports that examine Asian approaches toward corruption and illegality in international investment arbitration, the concluding chapter by Teramura, Nottage and Jetin elaborate on whether Asia has been or could likely become a 'rule maker' rather than 'rule taker' in ISDS regarding corruption and illegality. More normatively, the chapter considers what the Asian states and territories should do to better contribute to or even lead further investment treaty reforms pertaining to corruption in investor–state arbitration, and thereby better address corrupt practices and related poor governance more generally.<sup>144</sup>

## Notes

1. Kofi Annan, past Secretary General of the United Nations, described corruption as an insidious plague that ‘undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish’ (Annan 2004). See also Pavić 2012, p. 663; Wetter 1994, p. 294; *Glencore International AG v. Republic of Colombia*, Award, ICSID Case No ARB/16/6, 27 August 2019 [663] (*Glencore case*).
2. UNODC n.d.-c.
3. OECD n.d.-c.
4. Beasley 2015, p. 196.
5. OECD n.d.-c.
6. Gaillard 2019, p. 14. These conventions offer various definitions on corruption because there is no universal definition (Baizeau 2015, p. 9). However, corruption normally refers to ‘the deliberate abuse of authority or trust to benefit a private interest’ including “‘bribery” (giving or offering something to someone as a reward for doing something), “embezzlement” (improperly taking control of assets to which one has access) and “fraud” (false representations by statements or conduct to gain a material advantage) (Banifatemi 2015, p. 16).
7. The only Asian state that has not signed or ratified the UNCAC is the Democratic People’s Republic of Korea (North Korea): UNODC n.d.-b. In contrast, only Japan and South Korea have adopted the OECD Convention in Asia (in its narrower sense, described below). In addition, there are regional conventions fighting against corruption—albeit not in Asia—such as the 1996 Inter-American Convention Against Corruption, the 1999 Council of Europe Criminal Law Convention on Corruption and the 1999 Council of Europe Civil Law Convention on Corruption. See also Chap. 5 in this volume.
8. See OECD n.d.-a and UNODC n.d.-a. Further accountability and incentives to implement the OECD Convention come from the regular reports entitled *Exporting Corruption* from Transparency International, an influential international non-governmental organisation: see e.g., <https://www.transparency.org/en/publications/exporting-corruption-2022>. The United Nations has also extended this idea of peer review in its revised (2015) Guidelines on Consumer Protection: see UNCTAD n.d.-e.
9. See e.g., Arnone and Borlini 2014; Beasley 2015; Davids and Schubert 2011; Joutsen 2011; OECD n.d.-b; Pieth 2020. However, enforcement of these treaties targeting corruption can sometimes be strong, e.g., even just for temporary domestic electoral advantage: see e.g., Cohen and Li 2021. The treaties also create a ‘harder law’ regime compared to say more recent initiatives in many parts of the world to address modern slavery in corporate supply chains: see e.g., Harris and Nolan 2021.
10. See Chap. 4 in this volume.
11. See Chap. 5 in this volume.
12. The geographic focus of this volume is Asia, comprising primarily East, South East and South Asia, because of their strong geographical and socio-economic relations, apart from Chaps. 2 and 5, following the United Nations definition of Asia that extends to Central and Western Asia.
13. See Transparency International 2022a, 2023.
14. WJP 2021, p. 9 (emphasis added).
15. Transparency International 2022b.
16. WJP 2021, 2022.
17. Brouwer 2023.
18. UNCTAD 2021. The major outbound investors in the region are Japan, China and South Korea, but this book mostly focuses on inbound FDI flows into East, South East and South Asia as this closely links to the domestic issues of corruption and illegality in the host states.
19. Source: Jetin’s computation with UNCTAD data.

20. Carroll et al. 2020; Subramanian and Kessler 2013.
21. UNCTAD 2018.
22. UNCTAD 2019.
23. UNCTAD 2019.
24. Antràs 2020.
25. UNCTAD 2022.
26. See the Mason and Elliott claims pending against Korea (outlined in Chap. 14 in this volume).
27. However, undermining neutrality somewhat, some government entities (e.g., in Thailand) have laws or policies requiring them for at least some types of public contracts to insist on arbitration seated in and therefore subject to supervision by the courts in their own jurisdiction: see e.g., Nottage and Thanitcul 2017.
28. For a recent example of where an arbitral tribunal applied these Principles (even though not originally expressly chosen to apply to a lease agreement) to award nearly USD15 billion to eight Filipino individuals (heirs to the last Sultan of Sulu) against Malaysia (successor to the British North Borneo Company), see Charlotin 2022.
29. UNCITRAL n.d.-a.
30. UNCITRAL n.d.-b; and generally e.g., Bell 2018.
31. Article V of the NYC and Article 36 of the Model Law. The state may also have taken the NYC reservation, or adapted the Model Law template, to allow only enforcement of ‘commercial’ awards and then explicitly or implicitly excluded awards from arbitration agreements involving government entities. See generally e.g., Bermann 2017.
32. ICSID 2024b.
33. Article 52 of the ICSID Convention.
34. Article 54 of the ICSID Convention.
35. If the host state but not the home state has not ratified the ICSID Convention, it can still consent to allowing the foreign investor to commence arbitration administered by ICSID, but those will proceed under different ICSID Rules, and resultant awards will be enforced typically via the NYC rather than the ICSID Convention enforcement regime.
36. UNCTAD n.d.-b. Out of 1,303 treaty-based ISDS claims recorded as of 31 July 2023, e.g., 68 were ad hoc arbitrations under the UNCITRAL Rules. The reason for many treaty claims being referred to ad hoc arbitration might be that the leaders of arbitration centres were involved in corruption allegations in the past, as discussed in Sim 2019 on the Asian International Arbitration Centre.
37. See e.g., Nottage 2021a, 2023a.
38. There have been 146 cases filed with ICSID under consents to arbitration in individual contracts, according to ICSID 2024a. Of these, 145 involved ICSID Convention Arbitration Rules.
39. Claxton 2020; Ubilava 2022.
40. There had been 1,303 known filings, according to UNCTAD n.d.-c.
41. There had been 2,833 BITs signed (2221 in force) and 453 signings of other investment agreements such as FTAs (375 in force), according to UNCTAD n.d.-a.
42. Kim 2012; Nottage and Weeramantry 2012, 2011.
43. See e.g., Chaisse and Nottage 2018.
44. This explains, for example, large numbers of claims brought by investors from various home states under quite similarly worded BITs concerning quite similar measures introduced by Argentina to address an economic crisis in the 1990s, or under treaties and the Energy Charter Treaty against Spain after it significantly changed its renewable energy legislation, or against India over various measures after an adverse 2011 award. See Singh 2021; Alvarez and Topalian 2012; Park and Samples 2017 (focusing on the subset of bond claims after the crisis); on Spain/renewable energy policy change ISDS claims see García-Castrillón 2016, 2017; Schmidl 2021; Ballantyne 2021 (introducing a Japanese investor’s successful ICSID claims against the Spanish government over solar reforms).
45. Walter 2015, pp. 85, 90ff.
46. Besch 2015, pp. 140–141.

47. Of 2,538 BITs signed between 1959 and 2016, 2,418 (95%) have a fair and equitable treatment clause: UNCTAD n.d.-d.
48. Hobe 2015, p. 13; Meshel 2013, pp. 270–271.
49. For example, of 2,538 BITs signed between 1959 and 2016, 66% contain an ‘in accordance with host State law’ clause: UNCTAD n.d.-d.
50. Obersteiner 2014, p. 276; Tamada 2015, p. 107.
51. See generally Banifatemi 2015.
52. See the argument that systemic corruption could amount to duress under international law, undermining the host state’s defence, in Chap. 7 in this volume.
53. Discussing the empirical evidence on the impact of ISDS-backed provisions on FDI flows, see e.g., Armstrong 2018; Armstrong and Nottage 2022; Nottage 2021b; Singh 2021.
54. Dupont et al. 2022, p. 367 (suggesting that ‘poor governance, understood as corruption and lack of rule of law, has a statistically significant relation with investment arbitration claims’).
55. However, significant net positive effects on local legal and political institutions from ISDS claims may need to be accompanied by specific law reforms, such as enactment of broader arbitration legislation following global standards, as suggested recently, e.g., by Rogers and Drahozal 2022.
56. UNODC 2021, p. 6.
57. Wilske and Obel 2013, pp. 181–186; Tamada 2015, pp. 115ff; Raouf 2009 (introducing the ‘zero tolerance’ approach and the ‘eyes shut’ approach in which arbitrators rely on weak procedural grounds to avoid inquiry into matters strongly indicating the existence of corruption); Schefer 2021, pp. 892–902 (introducing the three types of the illegality defence regarding corruption along the lines of the three approaches).
58. Greenwald and Ivers 2018, pp. 56–72.
59. Wetter 1994.
60. Wetter 1994, p. 294.
61. Greenwald and Ivers 2018, pp. 56ff; Llamzon 2015, pp. 32–33. For example, in *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated 4 October 2006 (*World Duty Free* case), the tribunal concluded that ‘bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy, [and therefore] claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal’ (para. 157). Also, see *Niko Resources (Bangladesh) Ltd. v. People’s Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, and Bangladesh Oil Gas and Mineral Corporation*, ICSID Cases Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction dated 19 August 2013 (*Niko* case).
62. ICSID Case No. ARB/03/25, Award dated 16 August 2007. For more on this ISDS dispute, and related court litigation in the Philippines, see Chap. 13 in this volume.
63. *Fraport (I)* case, pp. 159 and 170.
64. *Ibid.*, p. 194.
65. See also *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013 (*Metal-Tech* case) (discussed further in Chap. 4 in this volume).
66. Greenwald and Ivers 2018, pp. 67ff; Polkinghorne and Volkmer 2017, pp. 155–158; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009; *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated 6 June 2012 (translation); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction dated 25 July 2012 (*Khan Resources* case); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award dated 10 December 2014; *Cortec Mining Kenya Limited et al. v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award dated 22 October 2018.
67. Reichenbach 2022, paras. 21.31–21.33 (noting that some tribunals failed to explain why the ICSID Convention only protects lawful investments, and that other tribunals justified the implicit legality requirements based on various grounds, including the principle of good

- faith, *nemo auditur*, unclean hands and international public policy). See further generally Chap. 6 in this volume.
68. Reichenbach 2022, para. 21.34; Moloo and Khachaturian 2011, p. 1489; *Bear Creek Mining Corp v. Republic of Peru*, Award, ICSID Case No ARB/14/21, 30 November 2017 [320] (noting that ‘under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties’).
  69. Moloo and Khachaturian 2011, p. 1490; Reichenbach 2022, para. 21.34.
  70. Drude 2018, p. 704.
  71. The latter view is ultimately preferred by Reinisch 2018, p. 82. However, the former view may gain favour among tribunals as worldwide concerns about corruption continue to grow.
  72. Tamada 2015, p. 117.
  73. See e.g., UNCITRAL 2024 (with helpful summaries of deliberations via McInerney-Lankford and Vasquez 2020; Roberts and John 2019). In Working Group III (Investor-State Dispute Settlement Reform) at UNCITRAL, the South African delegate proposed to limit the protection of investment and the jurisdiction of ISDS tribunals to ‘claims by responsible investors who have not violated any law, rules, regulations and internationally recognised values, or participated in corrupt activities’: UNCITRAL 2019, pp. 6 and 9. See also ICSID 2021 (with new ICSID Rules brought into effect from 1 July 2022); and CIDS n.d. (with Concept Papers to support the work of delegates to the UNCITRAL reform deliberations, elaborated into a special issue: Langford et al. 2020).
  74. Ishikawa 2022, reviewed by Nottage 2023b.
  75. Meshel 2013.
  76. Banifatemi 2015, p. 19 (noting that the short-term result of jurisdiction and admissibility may be the same—the dismissal of arbitral proceedings at the preliminary stage, although a tribunal may not raise admissibility on its own motion, unlike the case of jurisdiction).
  77. ICSID Case No. ARB/03/24, Award, 27 August 2008.
  78. ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40, Award, 6 December 2016 (discussed further in Chap. 10 in this volume).
  79. The *Churchill Mining* case, p. 191. See further in Chap. 10 in this volume.
  80. See generally Banifatemi 2015.
  81. See further Reichenbach 2022 (and Chap. 4 in this volume).
  82. Banifatemi 2015; Weeramantry and Packer 2023.
  83. The *Fraport (I)* case, p. 23/24.
  84. Wilske and Obel 2013, p. 184.
  85. Newcombe 2011, p. 199, referring to *Malaysian Historical Salvors SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10, Decision on Annulment of 16 April 2009, para. 80) where the ICSID ad hoc Committee held that the tribunal exceeded its authority by failing to exercise jurisdiction. More broadly on that case, see also Coppens 2011.
  86. Tamada 2015, p. 116; Wilske and Obel 2013, pp. 184–186.
  87. See, e.g., *Hesham T. M. Al Warraq v. Republic of Indonesia (Al Warraq case)*, UNCITRAL, Final Award dated on 15 December 2014 (discussed by Chap. 10 in this volume); Burgstaller and Risso 2021, p. 703. See also the *Sanum v. Laos* cases (discussed in Chap. 12 in this volume).
  88. Weeramantry and Packer 2023, p. 455, noting that in *Metal-Tech v. Uzbekistan* although the tribunal found corruption and so withdrew jurisdiction, it required the host state to bear its own costs and equally share in the costs of the tribunal and ICSID; and in *Spentex v. Uzbekistan* the majority unusually urged the host state to donate USD8 million to a United Nations anti-corruption project (which it apparently did), failing which it would be ordered to pay the entire costs of the proceedings, including 75% of the claimant’s costs (approximately USD12 million).
  89. Wilske and Obel 2013, p. 185.
  90. Schefer 2021, pp. 901–902; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 December 2000; *Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award dated 26 January 2006.

91. Greenwald and Ivers 2018, pp. 72–74; the Khan Resources case, p. 83; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227 (Yukos case), Final Award dated 18 July 2014, p. 430.
92. The *Fraport (I)* case, pp. 164–165 (emphasis added). See also the dissent of the *Fraport (I)* case, noting that ‘[a]s a matter of principle, therefore, the legality of the investor’s conduct is a merits issue’ (p. 22).
93. See Chap. 6 in this volume.
94. Caprasse and Tecqmenne 2022; Greenwald and Ivers 2018, pp. 38–49; Hoepfner 2017, pp. 216ff; Khvalei 2015; Menaker 2015; Sayed 2017; Valle and Carvalho 2022.
95. Haugeneder 2021, pp. 433–435 (noting that arbitrators are increasingly adopting *ICC Guidelines on Agents, Intermediaries and Other Third Parties 2010*, which is the ICC’s publication on ‘red flags’ indicating a risk of corruption). See also Gaillard 2019, pp. 3–9; Low 2019; Pieth and Betz 2019; Levine 2021; Pieth and Betz 2019.
96. Baizeau and Hayes 2017; Marcenaro 2015; Rose 2014; Sprange 2015; Ziadé 2015.
97. Menaker 2015, 79–82; Tezuka 2015, 58–59.
98. Besson 2015; Wallgren-Lindholm 2015, pp. 185–186.
99. Devendra 2019; Llamzon 2014, pp. 238–281, 2015; Nappert 2015; Wood 2018.
100. Fernández-Armesto 2015, pp. 169ff; Gaillard 2019, pp. 10–12; Partasides 2017.
101. Llamzon 2014, pp. 119–200; Schefer 2021, pp. 35–36; Vijayvergia and Belmannu 2020, Sect. 2.4; Ziadé 2015, pp. 746–747.
102. Chan 2022.
103. Vijayvergia and Belmannu 2020.
104. The *Fraport (I)* case; the *Metal-Tech* case; the *Niko* case; the *Churchill Mining* case; *Amco Asia et al. v. Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984; *Westinghouse et al. v. National Power Company*, ICC Case No. 6401, 19 September 1991; *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000; *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL Arbitration, Final Award, 15 December 2014; *Lighthouse Corporation Pty Ltd. and Anor v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award, 22 December 2017; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award dated 12 July 2019 (see also Bohmer 2019); *Sanum Investments Limited v. Lao People’s Democratic Republic*, UNCITRAL, PCA Case No. 2013–13 (the *Sanum Investments (I)* case), Award dated 6 August 2019, *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (the *Lao Holdings (I)* case), Award dated 6 August 2019. On the development of the two Lao-related cases, see Hepburn and Peterson 2012; Charlotin 2021. On a recent corruption-related ISDS case involving the government of Mongolia, see Djanic 2022.
105. See e.g., Chaisse and Nottage 2018; Nottage et al. 2021a, b; Mohan and Brown 2021.
106. Mistelis 2014.
107. Donoghue 2015.
108. *Himpurna California Energy Ltd. (Bermuda) v. P.T. (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award dated 4 May 1999; *SGS v. Philippines*, Case No. ARB/02/6, Decision on Jurisdiction dated 29 January 2004; *Malaysian Historical Salvors v. Malaysia Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment dated 16 April 2009; *Niko Resources (Bangladesh) Ltd. v. People’s Republic of Bangladesh, BAPEX, and PETROBANGLA*, ICSID Case Nos. ARB/10/11 and ARB 10/18, Decision on Jurisdiction dated 19 August 2013.
109. Greenwald and Ivers 2018.
110. Baizeau and Kreindler 2015. The ICC Commission on Arbitration and ADR also has a Task Force on ‘Addressing Issues of Corruption in International Arbitration’ that is currently compiling national reports, with results expected to be forthcoming in 2024 via ICC n.d. but it is unclear how many Asian jurisdictions will be covered.
111. ICC n.d.
112. Rose 2014.
113. For example, Vietnam, Cambodia and Laos: Teramura 2021b, p. 27; Teramura 2021a.

114. Polkinghorne and Volkmer 2017.
115. Wilske and Obel 2013. Other articles on the three categories do not focus on Asia either. See Tamada 2015; Raouf 2009; Schefer 2021.
116. Wood 2018, p. 117.
117. Devendra 2019.
118. Caserta 2021, p. 321.
119. Tussupov 2022. See also Caprasse and Tecqmenne 2022 and Valle and Carvalho 2022 (discussing evidential issues related to corruption in investment arbitration with limited consideration of Asian contexts) and Reisman 2021 (considering the apportionment of fault for performance corruption in investment arbitration generally).
120. Gong and Scott 2016.
121. Warf 2018.
122. Malintoppi and Tan 2017.
123. Chaisse and Nottage 2018.
124. Mohan and Brown 2021.
125. Calamita and Giannakopoulos 2022.
126. As mentioned earlier, with limited exceptions, this volume does not focus on the more geographically remote and socio-economically quite distinctive Central Asian region. However, several important cases against states in that region that have raised corruption concerns are discussed by individual authors. See generally Weeramantry et al. 2023 and also (for *Tethyan v. Pakistan*) Boehmer 2019.
127. See Chapter 26 (Transparency and Anticorruption) of the Consolidated TPP Text; and Article 17.9 of the RCEP Agreement. See further Chaps. 4 and 5 in this volume.
128. Chaisse et al. 2022, suggesting the RCEP agreement ‘represents [a region-wide] effort to reconcile overlapping agreements around a more common template’.
129. Article 26.12.3 of the TPP Text and Article 17.9.2 of the RCEP Agreement.
130. For example, TPP Article 9.17 states: ‘The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party’. Investor accountability and due diligence, however, have been gaining increasing traction in international investment law: Burgstaller and Risso 2021; Ishikawa 2022; Jarrett et al. 2021; Llamzon and Chrostin 2021.
131. Ishikawa 2018, pp. 537–538.
132. UNODC 2021, p. 6.
133. UNODC 2021, p. 3.
134. Kryvoi 2021.
135. UNODC 2021, p. 2.
136. The Mongolian speaker was a UNODC officer based in Vienna, Austria.
137. Nottage et al. 2018; Trakman 2018.
138. Compare generally Chesterman 2017; Chaisse and Nottage 2018; Nottage et al. 2021a, b; Hsieh 2021 (arguing that a looser, more consensus based ‘new Asian regionalism’ is shaping the new regional economic order and international trade norms).
139. Ang 2020, pp. 8–14.
140. Compare e.g., Lomborg 2023 (summarising recent research suggesting huge cost–benefit advantages by introducing e-procurement regimes, particularly in developing economies).
141. For example, see Ang 2020.
142. *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No 2013–09, Award on Jurisdiction and Merits, 25 July 2016; *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014–10, Interim Award, 13 December 2017.
143. For further updates, as these disputes remain ongoing, see Kim 2023.
144. Cf. Kawharu and Nottage 2017.

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