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Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development

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NOTE

PROMISES UNFULFILLED: HOW INVESTMENT ARBITRATION TRIBUNALS MISHANDLE CORRUPTION CLAIMS AND UNDERMINE INTERNATIONAL DEVELOPMENT

*Andrew T. Bulovsky**

In recent years, the investment-arbitration and anti-corruption regimes have been in tension. Investment tribunals have jurisdiction to arbitrate disputes between investors and host states under international treaties that provide substantive protections for private investments. But these tribunals will typically decline to exercise jurisdiction over a dispute if the host state asserts that corruption tainted the investment. When tribunals close their doors to aggrieved investors, tribunals increase the risks for investors and thus raise the cost of international investment. At the same time, the decision to decline jurisdiction creates a perverse incentive for host states to turn a blind eye to corruption. Together, these distorted incentives hinder developmental goals and undermine the fight against corruption. To correct these problems, this Note proposes a framework to guide arbitral tribunals when faced with a corruption-tainted dispute. Specifically, this Note argues that when both parties participate in corruption, arbitral tribunals should invoke equitable estoppel to accept jurisdiction over the dispute. When considering the corruption claims, investment tribunals should use a contributory-fault approach that evaluates each party's role in the corrupt act to determine the final award. This framework not only helps align the investment-arbitration and anti-corruption regimes but also advances developmental objectives.

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INTRODUCTION

On February 24, 1998, the Kenyan government seized control of World Duty Free's stores inside the Nairobi and Mombasa International Airports.[1] The government had one goal: destroy evidence that World Duty Free obtained the contract for their duty-free stores through a bribe of approximately $2 million to Kenyan President Daniel arap Moi's reelection campaign.[2] After the Kenyan government seized the stores, World Duty Free, an Isle of Man corporation, initiated investor-state arbitration[3] under the bilateral investment treaty between the Isle of Man and Kenya.[4] Although the arbitral tribunal acknowledged that President Moi solicited the bribe,[5] the tribunal declined to exercise jurisdiction over the dispute because the initial deal was tainted by corruption.[6] As a result, World Duty Free lost its investment and

1. *See* World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 70–71 (Oct. 4, 2006), 17 ICSID Rep. 212 (2016).

2. *See id.* at ¶¶ 70, 105.

3. Investor-state arbitration is a form of international dispute resolution whereby an aggrieved investor brings a claim against the state in which the investment is made. It dates back to a dispute between Egypt and the Suez Canal Company in 1864, but its usage has increased significantly in the past decades. *See* Jason Webb Yackee, *The First Investor-State Arbitration:* The Suez Canal Company v Egypt *(1864)*, 17 J. WORLD INV. & TRADE 401, 401–02 (2016).

4. *World Duty Free*, ICSID Case No. ARB/00/7, at ¶ 4.

5. *Id.* at ¶ 180.

6. *Id.* at ¶ 188.

President Moi retained the $2 million.[7] The tribunal's refusal to exercise jurisdiction over World Duty Free's case illustrates an evolving dilemma in investment arbitration. How should tribunals handle disputes tainted by corruption allegations?

Investment tribunals are empowered to arbitrate disputes between host states and investors under international legal frameworks that provide substantive and procedural protections for private investments.[8] Numerous host states, however, have argued that investments tainted by corruption or similar illegality do not qualify for protection and thus that tribunals lack subject-matter jurisdiction[9] over these disputes.[10] Arbitral tribunals have been responsive to these host states' arguments and have declined to exercise jurisdiction over disputes tainted by corruption.[11] When investment tribunals decline to exercise jurisdiction over these disputes, however, tribunals undermine their intended purpose to incentivize investment[12] and promote development.[13] To remedy this predicament, this Note proposes a framework for the adjudication of corruption claims in investment arbitration. It argues that tribunals should invoke equitable estoppel to accept jurisdiction over the dispute and use a contributory-fault approach to determine liability.[14] This framework would bolster the investment-arbitration and anticorruption regimes, thereby incentivizing investment and promoting development.

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7. Although Kenyan law makes soliciting bribes illegal, the tribunal lamented the fact that "no attempt has been made by Kenya to prosecute [the president] for corruption or to recover the bribe in civil proceedings." *Id.* at ¶ 180.

8. *See infra* Section I.B.

9. For a discussion of the role of subject-matter jurisdiction in international investment arbitration, see Alejandro A. Escobar, U.N. Conference on Trade and Dev., *Requirements Ratione Materiae* (2003), https://unctad.org/en/Docs/edmmisc232add4_en.pdf [https://perma.cc/YL4U-PEZV].

10. *See, e.g.*, Metal-Tech Ltd. v. Republic of Uzb. ICSID Case No. ARB/10/3, Award, ¶ 125 (Oct. 4, 2013) ("[The parties] diverge on whether the definition of the term 'investment' contained in Article 25(1) includes a requirement of legality."); Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶ 47 (Aug. 2, 2006), 17 ICSID Rep. 105 (2016) ("El Salvador indicates . . . that the necessary condition for an investment to benefit from the Treaty is to be made in accordance with the domestic legislation of each of the Contracting Parties . . . ."); *see also* ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION § 5.18 (2014).

11. *See, e.g.*, *Metal-Tech Ltd.*, ICSID Case No. ARB/10/3, at ¶ 389.

12. Without a guaranteed forum to arbitrate disputes, investors face a riskier investment climate and are less likely to invest in developing markets. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 106–07 (2005).

13. Investment provides developing countries with the capital and infrastructure necessary for an emerging economy. *See* David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 502 (2009).

14. *See infra* Section III.A.

Part I traces the history of international investment treaties and discusses their intended role in promoting economic development. Part II argues that investment tribunals' mismanagement of corruption claims undermines the purpose of these treaties. It also explains how this phenomenon subverts the global fight against corruption. Part III advocates that arbitral tribunals should accept jurisdiction over disputes tainted by corruption and evaluate each party's role in the corrupt act. Ultimately, this Note presents an actionable solution to an increasingly salient issue in investment arbitration and international development.

I. THE RISE OF THE MODERN INVESTMENT TREATY

Since World War II, international investment has been recognized as a valuable tool for achieving economic-integration and developmental goals.[15] Achieving these goals, however, required adequate incentives and protections for investors. Bilateral investment treaties and their dispute resolution systems, commonly known as investment arbitration, provided those incentives. Section I.A highlights the history of international investment treaties and describes the developmental goals articulated at the Bretton Woods Conference in 1944. Section I.B explains the nature of bilateral investment treaties and investment arbitration. Section I.C describes the overlap between the investment-arbitration and anti-corruption regimes.

A. *The Purpose of International Investment Treaties*

International investment treaties date back to the late eighteenth century, when countries began forming treaties of friendship, commerce, and navigation to promote commercial relations between signatories.[16] The first agreement of this type was the Treaty of Amity and Commerce,[17] signed by the United States and France in 1782.[18] Although their provisions were broader than those in modern investment treaties, the early treaties had the similar goal of protecting the interests of nationals whose states were parties to the treaties.[19] For instance, these treaties sought to protect nationals' property abroad and guaranteed them favorable trading terms in exchange for conducting business in the foreign country.[20] Over the next 150 years,

15. *See* John W. Pehle, *The Bretton Woods Institutions*, 55 YALE L.J. 1127, 1133 (1946); Krista Nadakavukaren Schefer, *The Law of Investment Protection and Poverty Reduction*, *in* INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP 369, 369 (Stephen W. Schill et al. eds., 2015).

16. *See* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 158 (2005).

17. *Id.* at 158 n.7.

18. Treaty of Amity and Commerce, U.S.-Fr., July 16, 1782, 8 Stat. 12.

19. *See* Vandevelde, *supra* note 16, at 158–59.

20. *Id.* at 159.

countries steadily formed treaties and global investment increased.[21] But after the Great Depression and two world wars, the global economy collapsed.[22]

Western world leaders who grew weary of the bloodshed saw economic integration as the key to secure and maintain world peace.[23] In 1941, President Franklin D. Roosevelt and Prime Minister Winston Churchill laid the groundwork for this peace in the Atlantic Charter.[24] In the Charter, they articulated an international interest in reducing trade restrictions and promoting economic integration.[25] They strove to "bring about the fullest collaboration between all nations in the economic field with the object of securing, for all . . . economic advancement."[26] The Atlantic Charter was premised on the theory that with a sufficient level of economic integration, the conditions that led to war in the first place might be ameliorated. This philosophy also inspired the Bretton Woods Conference of 1944.[27]

At the Bretton Woods Conference, world leaders created the International Bank for Reconstruction and Development (which would eventually become the World Bank) and the International Monetary Fund (IMF) to help manage the global monetary system.[28] The International Bank and the IMF helped liberalize trade, which bolstered global economic growth and promoted international investment.[29] Although foreign investment cannot cure all of a society's ills, "it can provide a way to jump-start economies, a short cut to higher wages, an improved infrastructure, better schools and hospitals, and more efficient and cost effective public services."[30] Numerous provisions in the Bretton Woods Agreement specifically sought to achieve

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21. *See* BAJAR SCHARAW, THE PROTECTION OF FOREIGN INVESTMENTS IN MONGOLIA: TREATIES, DOMESTIC LAW, AND CONTRACTS ON INVESTMENTS IN INTERNATIONAL COMPARISON AND ARBITRAL PRACTICE 17 (2018).

22. *See id.*

23. For a discussion of the relationship between economic growth, the rule of law, and democratic legal institutions, see Okezie Chukwumerije, *Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development*, 23 EMORY INT'L L. REV. 383, 383–85 (2009).

24. *See The Atlantic Conference & Charter, 1941*, U.S. DEP'T STATE: OFF. HISTORIAN, https://history.state.gov/milestones/1937-1945/atlantic-conf [https://perma.cc/SU9Z-CSGV].

25. *See* Declaration of Principles, Known as the Atlantic Charter, by the President of the United States of America and the Prime Minister of the United Kingdom, U.K.-U.S., Aug. 14, 1941, 55 Stat. 1603 (pledging "to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity").

26. *Id.*

27. *See* G. John Ikenberry, *The Political Origins of Bretton Woods*, *in* A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM 155, 170 (Michael D. Bordo & Barry Eichengreen eds., 1993).

28. Pehle, *supra* note 15, at 1127–28.

29. *See id.*

30. R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY § 1.03 (2014).

these developmental goals[31] as a means to secure peace.[32] But as the world grew more economically integrated and concerns about uncompensated expropriation increased, the international investment community demanded stronger protections for investors.[33]

B. *Bilateral Investment Treaties and Investment Arbitration*

Bretton Woods laid the foundations for the post-WWII economic order. But at the same time, some developing countries—particularly those pursuing import-substitution policies[34]—closed their doors to investment.[35] Even in countries that allowed investment, there were numerous cases of expropriation where the host government seized private property for state control.[36] The old treaties relied on norms of customary international law, which sought to generalize the legal practices of states.[37] But customary international law was too weak to protect investors because of its inconsistent enforcement and limited protections.[38] To achieve the economic-integration and developmental goals envisioned in the Atlantic Charter and enshrined at Bretton Woods, the international community needed to incentivize investment in an uncertain environment. This meant finding a tool to "provide

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31. ERIC HELLEINER, FORGOTTEN FOUNDATIONS OF BRETTON WOODS: INTERNATIONAL DEVELOPMENT AND THE MAKING OF THE POSTWAR ORDER 109–12 (2014) (noting that the Bretton Woods agreement included multiple provisions aimed at helping developing countries: (1) the World Bank was charged with "mobilizing international development finance," (2) countries could receive short-term loans, (3) capital flight from developing countries was minimized, and (4) countries could restructure their debts).

32. *See* Ikenberry, *supra* note 27, at 170 (stating that participants at Bretton Woods saw an open international trading system as "fundamental to the maintenance of peace"); Pehle, *supra* note 15, at 1139 (claiming that "the success of the Fund and the Bank will be a mighty force in facilitating the far more difficult task of securing complete and wholehearted cooperation for the maintenance of peace through the United Nations").

33. *See* Vandevelde, *supra* note 16, at 167–69.

34. Import-substitution policies aim to produce goods and supply services locally rather than import them from more developed countries. *See* JOHN RAPLEY, UNDERSTANDING DEVELOPMENT: THEORY AND PRACTICE IN THE THIRD WORLD 30–31 (3d ed. 2007).

35. *See* Vandevelde, *supra* note 16, at 166–67 (claiming that some developing countries were suspicious of international investment and would often focus on import-substitution policies, thereby obfuscating their need for international investment).

36. Don C. Piper, *New Directions in the Protection of American-Owned Property Abroad*, 4 INT'L TRADE L.J. 315, 330 (1979). In fact, the United Nations identified 875 expropriations across sixty-two countries between 1960 and 1974. *Id.*

37. *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 23–24 (8th ed. 2012) (describing the sources of customary international law, including, inter alia, legal opinions, judicial decisions, legislation, international resolutions, and an analysis of treaty rights).

38. Customary international law was enforced through a form of dispute resolution known as espousal, which proved "unsatisfactory" because it relied on a state to enforce an investor's claim. This presented diplomatic difficulties and provided an insufficient guarantee of protection for investors. *See* Vandevelde, *supra* note 16, at 159–61.

clear rules and effective enforcement mechanisms" for investors[39] and thus reduce risks.[40]

Bilateral investment treaties (BITs) were that tool.[41] BITs create a "legal framework to facilitate and protect those investments"[42] by imposing obligations on host states regarding the basic substantive and procedural protections states must afford to outside investors.[43] They also help mitigate some international investment risks. Before making an investment, investors assess the risks associated with that investment[44]—a task complicated by the "inherent unpredictability of human and government conduct."[45] Faced with these risks, investors might decide to forgo an investment altogether.[46] To mitigate investors' concerns, states form BITs, which establish the conditions for private investment by citizens of companies of one state in the other.[47]

Substantively, BITs provide a variety of protections for investors. For instance, they usually include provisions ensuring fair and equitable treatment, which protect investments against discriminatory interference or adverse governmental action.[48] In addition, BITs typically offer national or most-favored-nation status to investors, meaning that the host state will not treat the investor less favorably than it treats its own national or other interna-

39. Salacuse & Sullivan, *supra* note 12, at 76.

40. *See* John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 308 (2013).

41. *See* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 659 (1990).

42. *Id.*

43. *Id.* at 659–60.

44. There are numerous types of risk associated with international investment. For instance, there are business or economic risks whereby investors might face an unfavorable or difficult business environment. There are also political risks, such as expropriation risks or other adverse treatment by the host state. *See* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 477 (2009).

45. JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT 25 (2013) ("An investor may promise to build a factory in a country but never build it. A host government may enact a low corporate tax rate in one year with a promise never to raise it, yet pass legislation to increase taxes drastically the day after an investor makes an investment.").

46. Many investment arbitrations arise from international-finance projects that involve more than one jurisdiction, subjecting them to multiple investment treaties and making predictability even more important. *See* JOHN M. NIEHUSS, INTERNATIONAL PROJECT FINANCE IN A NUTSHELL 344–45 (2d ed. 2015).

47. *See* Vandevelde, *supra* note 16, at 170–71. Note that BITs are only one type of investment treaty. Another common example is multilateral investment treaties, which afford similar substantive and procedural protections. *See, e.g.*, North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605.

48. Todd J Grierson-Weiler & Ian A Laird, *Standards of Treatment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 259, 284 (Peter Muchlinksi et al. eds., 2008).

tional investors.[49] Finally, BITs include expropriation protection, limiting the host state's ability to seize an investment.[50]

Procedurally, BITs typically contain a dispute-resolution clause that allows investors to rely on international investment arbitration to address alleged violations of the treaty.[51] Arbitral proceedings typically operate according to the procedural rules of the International Centre for Settlement of Investment Disputes (ICSID), an arm of the World Bank, but are occasionally run under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or on an ad hoc basis.[52] These frameworks are incorporated into the investment treaty itself.[53] Once included in the treaty, investment arbitration functions more like a contract than a treaty: it is essentially an open offer by the state to arbitrate, which may then be accepted by aggrieved investors.[54] By including a dispute-resolution mechanism, a state commits to provide investors with an arbitral forum.[55] In theory, this commitment creates a more stable investment environment.[56] It decreases costs for investors and host states alike because investors can avoid internalizing—and passing on to the state—the risk of losing their investment altogether.[57] Thus, access to arbitration reduces business costs and encourages investment.[58]

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49. Salacuse, *supra* note 41, at 668.

50. *Id.* at 670 (noting that a "state may not expropriate property of an alien except: (1) for a public purpose; (2) in a nondiscriminatory manner; (3) upon payment of compensation; and, in most instances, (4) with provision for some form of judicial review").

51. Ucheora Onwuamaegbu, *International Investment Dispute Settlement Mechanisms*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 58 § 3.00, 59 § 3.05 (Katia Yannaca-Small ed., 2d ed. 2018).

52. Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 440–41 (2013). These institutions provide a framework for settling investment disputes, such as a process for appointing arbitrators to hear the dispute. Disputes are typically heard by a three-member tribunal composed of one arbitrator selected by each party and a presiding arbitrator who is either mutually acceptable to the host state and investor or is chosen by a neutral third party. *Id.* at 436. To date, there are 855 known investment arbitration cases, of which approximately 80 percent have been adjudicated under ICSID. U.N. CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2018, at 19, U.N. Sales No. E.18.II.D.4.

53. Michael A. Losco, Note, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L.J. 1201, 1207–08 (2014).

54. *See* Brower & Schill, *supra* note 44, at 477; Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 356 (2015).

55. *See* Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, 73, 78 (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 546 (2003).

56. Salacuse & Sullivan, *supra* note 12, at 95.

57. Brower & Schill, *supra* note 44, at 477.

58. *See* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 438 (2009); John Gerring et al., *Democracy and Economic Growth: A*

In the years since the Cold War, states have signed BITs at a record pace.[59] But the investment treaty regime has its critics,[60] and commentators have recently debated whether investment arbitration should be included in the Trans-Pacific Partnership[61]—an attempted agreement that would have expanded international trade and investment.[62] Despite concerns over investment arbitration, however, states continue to sign investment treaties.[63] To date, states across the globe have ratified more than 2,946 BITs and 376 treaties with investment provisions, making these treaties a cornerstone of the modern international economy.[64]

C. *The Interplay Between Investment Arbitration and Anti-Corruption*

Tools that promote economic integration and development, such as investment treaties and arbitration, do not operate in a vacuum. Instead, they overlap with other legal regimes—such as the global fight against corruption.[65] In tandem with BITs' prevalence, enforcement of the global anti-corruption regime has significantly increased.[66]

Historical Perspective, 57 WORLD POL. 323, 332 (2005) (noting that stable "institutions foster economic growth via their positive impact on certainty").

59. This period bore witness to a strengthened interest in cross-border trade and investment, as demonstrated by the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT) and the signing of the North American Free Trade Agreement (NAFTA). *See* LLAMZON, *supra* note 10, § 5.03; Vandevelde, *supra* note 16, at 157–58 (noting that "the number of agreements has accelerated remarkably in recent years").

60. *See, e.g.*, Kevin P. Gallagher & Elen Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal*, 12 J. WORLD INV. & TRADE 919, 925 (2011).

61. *Compare The Trans-Pacific Partnership: Upgrading & Improving Investor-State Dispute Settlement*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf [https://perma.cc/6MY3-TRFB], *with* Todd Tucker, *The TPP Has a Provision Many Will Love to Hate: ISDS. What Is It, and Why Does It Matter?*, WASH. POST: MONKEY CAGE (Oct. 6, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/06/the-tpp-has-a-provision-many-will-love-to-hate-isds-what-is-it-and-why-does-it-matter [https://perma.cc/7PG4-84DF].

62. James McBride & Andrew Chatzky, *What Is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN REL. (Jan. 4, 2019), https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp [https://perma.cc/2ZLB-K7NW].

63. *See* Vandevelde, *supra* note 16, at 157–58. For instance, the United States signed its most recent investment agreement in 2018 with Canada and Mexico. *United States of America: Treaties with Investment Provisions (TIPs)*, INV. POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/223#iiaInnerMenu [https://perma.cc/GW2P-J7G5].

64. The bulk of investment treaties were concluded in the late 1990s and early 2000s, but the vast majority are still in force and states continue to sign new ones every year. U.N. CONFERENCE ON TRADE & DEV., *supra* note 52, at 17–18.

65. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 482–83 (2001).

66. *E.g.*, FRESHFIELDS BRUCKHAUS DERINGER, THE GLOBAL ANTI-BRIBERY LANDSCAPE 3 (2018), http://knowledge.freshfields.com/m/Global/r/3776 [https://perma.cc/CJF3-Y2RS].

The modern anti-corruption regime began in 1974 after the Watergate Committee uncovered illegal campaign contributions, international money laundering, and more than $300 million in foreign bribes.[67] When the investigations incriminated public officials from an array of countries, including Venezuela, Italy, Japan, Ghana, Mexico, Iran, and the Philippines, it became clear that corruption was a global problem.[68] In response, Congress passed the Foreign Corrupt Practices Act (FCPA), which prohibits bribery of foreign officials, in 1977.[69] But the world community was slow to follow the United States' example. Until recently, many foreign investors and governments saw bribery as part of the cost of doing business abroad.[70] The expectation of bribery was so ingrained that it made its way into states' laws: until the 1990s, Germany and France considered bribes paid by their companies to foreign officials a tax-deductible business expense.[71]

Beginning in late 1997, however, the international community joined the American anti-corruption effort and passed global anti-corruption conventions. First, the Organisation for Economic Co-operation and Development (OECD) passed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention).[72] Second, in the wake of the Enron scandal,[73] the United Nations passed the Convention Against Corruption (UNCAC) in 2003,[74] and several countries, such as Japan[75] and the United Kingdom,[76] followed up with their own anti-

67. *See* Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. (SUPPLEMENT) 593, 595–97 (2002).

68. *Id.* at 595–96.

69. Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494.

70. *See, e.g.*, Nora M. Rubin, Note, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 AM. U. INT'L L. REV. 257, 291 (1998) (stating that the German Income Tax Act allows deductions for bribes paid abroad as "useful expenditures").

71. Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 376 (2000); Carter Dougherty, *Germany Takes Aim at Corporate Corruption*, N.Y. TIMES (Feb. 14, 2007), https://www.nytimes.com/2007/02/14/business/worldbusiness/14iht-scandal.4596099.html [https://perma.cc/3F4J-5CAZ].

72. Org. for Econ. Co-operation & Dev. [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 21, 1997) [hereinafter OECD Convention].

73. Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA (Sept. 20, 2018), https://www.investopedia.com/updates/enron-scandal-summary [https://perma.cc/XBR8-63PJ].

74. G.A. Res. 58/4, annex, Convention Against Corruption (Oct. 31, 2003) [hereinafter UNCAC].

75. Daiske Yoshida & Junyeon Park, *Japan*, *in* BRIBERY & CORRUPTION 2019 (Jonathan Pickworth & Jo Dimmock eds., 6th ed. 2018), https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/japan [https://perma.cc/N93R-8UXG].

76. Julia Lippman, Note, *Business Without Bribery: Analyzing the Future of Enforcement for the UK Bribery Act*, 42 PUB. CONT. L.J. 649, 650 (2013).

bribery legislation. The OECD Convention, which currently has forty-four signatories accounting for nearly two-thirds of the world's exports,[77] and UNCAC, which subjects 186 countries to its provisions,[78] implore their signatories to enact domestic legislation to combat bribery.[79] Together, these conventions and legislative efforts demonstrate a global interest in fighting corruption.

The rise of anti-corruption enforcement has important implications for investment arbitration, which in turn affects international development. Yet anti-corruption enforcement has been hindered by investment tribunals' lack of engagement with corruption claims. Since *World Duty Free* in 2006,[80] investment tribunals have declined to exercise jurisdiction when a host state raises corruption allegations.[81] When investment tribunals decline to exercise jurisdiction, they vitiate the protections afforded to investments and distort the incentive structure for international investment.[82] This distortion impedes development.

II. INVESTMENT TRIBUNALS AND THE MISHANDLING OF CORRUPTION CLAIMS

Investment arbitration was designed to facilitate investment as a means to promote development and achieve peace.[83] But international investment tribunals fail to fulfill their purpose when they decline to exercise jurisdiction over disputes tainted by corruption. Section II.A discusses how arbitral tribunals have declined to exercise jurisdiction over disputes after a host state raises corruption allegations as an affirmative defense. Section II.B argues that arbitral tribunals undermine the international anti-corruption regime because they ignore the host state's role in the corruption. Finally, Section II.C contends that tribunals' mistreatment of corruption claims in-

77. GILLIAN DELL & ANDREW MCDEVITT, TRANSPARENCY INT'L, EXPORTING CORRUPTION – PROGRESS REPORT 2018: ASSESSING ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 6 (2018), https://www.transparency.org/whatwedo/publication/exporting_corruption_2018 [https://perma.cc/7TH6-ANVU].

78. *Signature and Ratification Status*, UNDOC, https://www.unodc.org/unodc/en/corruption/ratification-status.html [https://perma.cc/Z9UH-BQ7C].

79. OECD Convention, *supra* note 72, art. 3(3) (imploring states to "take such measures as may be necessary to provide that the bribe and the proceeds of the bribery . . . or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable"); UNCAC, *supra* note 74, art. 31, § 1 (requiring states to "the greatest extent possible . . . to enable confiscation of . . . [p]roceeds of crime" and "[p]roperty, equipment or other instrumentalities used in or destined for use in offences").

80. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), 17 ICSID Rep. 212 (2016).

81. *See, e.g.*, Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award (Oct. 4, 2013).

82. *See* Franck, *supra* note 58, at 438.

83. *See supra* Section I.A.

appropriately deprives investors of arbitral recourse and consequently impairs international investment. In so doing, existing investment arbitration practices hinder economic development.

A. *The Current Mishandling of Corruption Claims*

Investment tribunals' refusal to exercise jurisdiction over corruption-tainted disputes[84] constitutes a mishandling of corruption claims.[85] This mishandling is understandable because investment treaties themselves typically provide little guidance on how tribunals should handle corruption allegations: of the over 3,000 investment treaties completed since 1959, almost none address corruption.[86] Moreover, corruption manifests in multifarious ways[87] and is difficult to define,[88] which makes it even more challenging for tribunals to evaluate how it affected an underlying contract. In the absence of a clear directive indicating how corruption should affect investment arbitration, some host states have raised corruption allegations as an affirmative defense to deprive investment tribunals of jurisdiction over disputes.[89]

There are two primary adjudicatory phases to an investment arbitration proceeding: a jurisdictional phase and a merits phase.[90] At the jurisdictional phase, the investment tribunal determines whether it has authority to hear a given dispute and whether the claims are admissible.[91] The jurisdictional

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84. *See, e.g.*, *Metal-Tech Ltd.*, ICSID Case No. ARB/10/3, at ¶¶ 378–80 (rejecting jurisdiction because corruption is illegal under Uzbek law, meaning that the investment did not qualify for protection under the bilateral investment treaty).

85. *See* Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. LEGIS. 303, 304 (2012) (arguing that a comprehensive anti-corruption effort requires holding both the supply side and demand side of a given bribe to account); R. Zachary Torres-Fowler, Note, *Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration*, 52 VA. J. INT'L L. 995, 1000 (2012) (claiming that tribunals' failure to adjudicate corruption claims allows corruption to continue within the host state).

86. LLAMZON, *supra* note 10, § 4.66.

87. *See* W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 69–88 (1979) (discussing the characteristics of "transaction bribes," "variance bribes," and "outright purchase"); Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647, 682 (2015); Losco, *supra* note 53, at 1218–22 (describing "[u]nilateral or [m]ultilateral," "[h]ard or [s]oft," and "[o]bject or [p]rocurement" bribes).

88. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description . . . . But I know it when I see it . . . .").

89. Sergey Alekhin & Leonid Shmatenko, *Corruption in Investor-State Arbitration – It Takes Two to Tango*, *in* 4 NEW HORIZONS OF INTERNATIONAL ARBITRATION 150, 165–67 (A.V. Asoskov et al. eds., 2018).

90. *See* Andrew Newcombe, *Investor Misconduct: Jurisdiction, Admissibility or Merits?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 187, 191 (Chester Brown & Kate Miles eds., 2011).

91. *See* Jan Paulsson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR

phase is important because it establishes whether an investor will have access to the investment tribunal itself.[92] If the tribunal decides that it lacks jurisdiction or that the claims are inadmissible, the investor's case will not proceed to the merits phase.[93]

ICSID Article 25(1) gives arbitral tribunals jurisdiction to resolve a "legal dispute arising directly out of an investment."[94] But when the investment at issue is fouled by corruption, tribunals typically determine that it does not qualify as an "investment" under the ICSID Convention and, consequently, that the tribunal lacks subject-matter jurisdiction to resolve the dispute.[95] Several host states have succeeded in raising corruption as a defense because the ICSID Convention fails to clearly define investment.[96] This definitional shortcoming is compounded by tribunals' increasing tendency to take a "restrictive approach" to exercising jurisdiction over investment disputes.[97] A restrictive approach to jurisdiction defeats tribunals' role in affording access to arbitral recourse for aggrieved investors and, if it continues, will "do real damage to the international investment regime."[98]

In the corruption context, investment tribunals offer two primary reasons for declining jurisdiction: international public policy[99] and the requirement that investments comply with host state laws.[100] Under the

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OF ROBERT BRINER 601, 605 (Gerald Aksen et al. eds., 2005); Veijo Heiskanen, Note, Ménage à Trois*? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*, 29 ICSID REV. 231, 237–38 (2014).

92. CRAWFORD, *supra* note 37, at 693 (noting that a successful objection to jurisdiction would "stop all proceedings in the case, since they deprive the tribunal of the authority to give rulings as to the admissibility or substance of the claim").

93. Newcombe, *supra* note 90, at 192.

94. Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *ICSID Convention, Regulations and Rules*, at 18, ICSID Doc. ICSID/15 (Apr. 2006).

95. *See* Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REV. 155, 173 (2014).

96. *See* Julian Davis Mortenson, *The Meaning of "Investment": ICSID's* Travaux *and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 309–10 (2010) ("To say that the definition of 'investment' has been contentious is an understatement . . . ."); Jeremy Marc Exelbert, Note, *Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End*, 85 FORDHAM L. REV. 1243, 1267 (2016).

97. *See* Mortenson, *supra* note 96, at 271–72.

98. *Id.* at 259.

99. The international public policy justification is grounded in a 1728 legal treatise, which has been paraphrased as "[h]e that hath committed iniquity shall not have equity." *See* Zechariah Chafee, Jr., *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 877, 880 (1949). For an example of its modern application, see World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006), 17 ICSID Rep. 212 (2016) (invoking international public policy to decline jurisdiction).

100. *E.g.*, Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶¶ 372–73 (Oct. 4, 2013) (finding that the tribunal lacked jurisdiction because the investment in question was not made "in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made") (quoting Agreement Between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Protection and

international public policy justification, tribunals prevent an offending party from obtaining relief because combating corruption is a global value[101] and it would be unjust to assist a party that is "guilty of illegal (or immoral) conduct."[102] In 1963, this justification made its way into international arbitration in the oft-cited ICC Case No. 1110.[103] There, Judge Lagergren declined to exercise jurisdiction over the dispute because the underlying contract was procured with a bribe, and bribery is contrary to "international public policy common to the community of nations."[104] This same principle may be used to refuse the enforcement of arbitral awards under the New York Convention,[105] which governs proceedings conducted pursuant to the UNCITRAL procedural rules[106] and is similar to the American "unclean hands" doctrine.[107] Modern investment tribunals have reaffirmed the principle that corruption, at least corruption affecting the procurement of the contract, violates international public policy and justifies a jurisdictional declination.[108]

Reciprocal Protection of Investments, Isr.-Uzb., July 4, 1994, https://wipolex.wipo.int/en/text/309386 [https://perma.cc/NBV7-UCWR]).

101. *See* María Blanca Noodt Taquela & Ana María Daza-Clark, *The Role of Global Values in the Evaluation of Public Policy in International Investment and Commercial Arbitration*, *in* LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW 121, 137 (Verónica Ruiz Abou-Nigm et al. eds., 2018).

102. *World Duty Free Co.*, ICSID Case No. ARB/00/7 at ¶ 161.

103. *See* Torres-Fowler, *supra* note 85, at 1010–12.

104. J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10 ARB. INT'L 277, 294 (1994) (noting that the briber "forfeited any right to ask for assistance of the machinery of justice . . . in settling their disputes").

105. U.N. Conference on International Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/CONF.26/8Rev.1, art. V, § 2(b) (June 10, 1958) (stating that an award may be refused if "recognition or enforcement of the award would be contrary to the public policy of that country").

106. *See* LLAMZON, *supra* note 10, § 5.33 & n.64 (noting that the public policy exception in the New York Convention only governs UNCITRAL arbitrations, and no such exception is found in the Washington Convention that governs ICSID arbitrations).

107. Adler v. Federal Republic of Nigeria, 219 F.3d 869, 876–77 (9th Cir. 2000) ("The unclean hands doctrine 'closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.' " (quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945))); Jason Webb Yackee, Essay, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52 VA. J. INT'L L. 723, 729 (2012).

108. *Compare* World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006), 17 ICSID Rep. 212 (2016) (stating that "contracts obtained by corruption cannot be upheld by this Arbitral Tribunal"), *with* Niko Res. (Bangl.) Ltd. v. People's Republic of Bangl., ICSID Case No. ARB/10/18, Decision on Jurisdiction, ¶ 454 (Aug. 19, 2013) (finding that because "the [joint venture agreement] had been concluded long before the acts of corruption," the tribunal retained jurisdiction). The international public policy justification is broadly similar to what some tribunals refer to as a "good faith" requirement in the procurement of a contract. Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473, 1485 (2011). For

Other investment tribunals have declined to exercise jurisdiction because the disputed investment did not comply with the host state's laws.[109] Most BITs contain a provision that requires that investments be made "in accordance with host state laws."[110] Because most states are subject to UNCAC and are expected to pass domestic anti-corruption legislation,[111] host states generally criminalize corruption.[112] Therefore, when a host state raises a corruption allegation, it is able to rely on the "in accordance with host state laws" provision to argue that the corrupt act deprives the investor of protections and that the tribunal thus lacks jurisdiction.[113] Investment tribunals have been responsive to these arguments.[114] In 2013, the investment tribunal in *Metal-Tech Ltd. v. Republic of Uzbekistan* found that Metal-Tech, an Israeli company, had paid consultants more than $4 million to illicitly procure a contract from the Uzbek government to operate a manufacturing plant.[115] The underlying Israel-Uzbekistan BIT required investments to comply with local law, and because Uzbek law prohibits bribery, the investment tribunal declined to exercise jurisdiction over the company's claim that Uzbekistan had improperly terminated a contract.[116] Regardless of their specific justification, arbitral tribunals that decline to exercise jurisdiction over disputes tainted by corruption deprive investors of access to an arbitral forum for their claims.

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instance, even without explicit corruption, a contract procured through fraud or misrepresentation has resulted in a tribunal's decision to decline a claimant's request for protections under the applicable treaty. *See* Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award, ¶¶ 144–46 (Aug. 27, 2008), 17 ICSID Rep. 664 (2016).

109. ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 333 (James Crawford & John S. Bell eds., 2012); Losco, *supra* note 53, at 1224.

110. *International Investment Agreements Navigator*, INV. POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA/mappedContent [https://perma.cc/M7FK-JJLS] (select "Scope and Definitions"; then "Definition of investment"; then "Limitations to the definition of investment"; then "Contains 'in accordance with host State laws' requirement"; and then check "Yes").

111. *See* UNCAC, *supra* note 74; *Signature and Ratification Status*, *supra* note 78.

112. *E.g.*, Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 290 (Oct. 4, 2013) ("[The tribunal] notes that the condemnation of corruption under Uzbek law is in conformity with international law and the laws of the vast majority of States.").

113. *Id.* at ¶ 127 ("In the Tribunal's view, the Contracting Parties to an investment treaty may limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State.").

114. *See id.* at ¶¶ 372–73.

115. *Id.* at ¶¶ 1, 197–203.

116. *See id.* at ¶ 422 ("[T]he rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear—and rightly so—that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability.").

B. *Mishandling Corruption Claims Undermines Anti-Corruption Efforts*

Allowing a host state to invoke its own malfeasance to avoid liability disproportionately punishes investors and unfairly advantages corrupt states.[117] Corruption is not a unilateral act—a host state has either requested or accepted a bribe paid by an investor.[118] In *World Duty Free Co. v. Republic of Kenya*, the tribunal recognized that the $2 million bribe was "solicited by the Kenyan President and not wholly initiated by the [investor]."[119] The investor was merely one party to the corruption—"it takes two to tango."[120] A tribunal that declines to exercise jurisdiction over a dispute after the host state raises the corruption defense fails to hold the host state accountable for its role in the bribe. This creates a perverse incentive for states to solicit, or at least turn a blind eye to, bribery and corruption.[121]

Tribunals that recognize the corruption defense not only fail to hold corrupt host states accountable; they also fail to meet international anti-corruption standards. UNCAC is the most comprehensive global anti-corruption convention in the world.[122] Its key feature, building on the FCPA and the OECD Convention, is that it fights both supply-side *and* demand-side corruption.[123] Addressing both sides of a bribe is crucial because a corrupt bargain implicates parties on both sides.[124] Therefore, it is appropriate to punish the "foreign investors who supply the cash component of a bribe"[125] and the host state that solicited or demanded the bribe.[126] Ultimate-

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117. *See id.* at ¶ 389 ("While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts.").

118. LLAMZON, *supra* note 10, § 11.21 (critiquing the corruption defense as scrutinizing the "conduct of only one of the two principal actors that participated in the corrupt act").

119. ICSID Case No. ARB/00/7, Award, ¶ 180 (Oct. 4, 2006), 17 ICSID Rep. 212 (2016).

120. Alekhin & Shmatenko, *supra* note 89, at 176 (quoting 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*, IA REP. (June 22, 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/ (on file with the *Michigan Law Review*)).

121. Torres-Fowler, *supra* note 85, at 1000.

122. *See supra* note 78 and accompanying text.

123. *See* Steven R. Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, 54 AM. BUS. L.J. 641, 669–71 (2017); Meg Beasley, Note, *Dysfunctional Equivalence: Why the OECD Anti-Bribery Convention Provides Insufficient Guidance in the Era of Multinational Corporations*, 47 GEO. WASH. INT'L L. REV. 191, 216 (2015).

124. LLAMZON, *supra* note 10, § 1.14 (noting that while it is tempting to "view transnational corruption as a Manichean fable where the world is divided between villainous foreign investors and the largely good but easily tempted public officials of poor countries," this view "ignore[s] a far more complicated reality").

125. *Id.* § 11.20.

126. Klaw, *supra* note 85, at 371.

ly, UNCAC reflects a recognition by the international community "that addressing the demand side of bribery is as important as—or even more important than—addressing the supply side."[127] As it stands, many countries underenforce their own anti-corruption laws, due in large part to a lack of resources and political will.[128] Investment tribunals could fill the gaps by serving as a venue for the private enforcement of anti-corruption efforts.[129] This potential remains unfulfilled because investment tribunals have continued to shut their doors to investors who were but one party to a bribe.[130]

There is also a more pernicious externality to ignoring the demand side of bribery: corruption is a serious obstacle to a state's long-term development.[131] While corruption exacerbates inequality, impairs GDP growth, and undermines the rule of law,[132] it is primarily the poor who must live with its deleterious effects.[133] Additionally, corruption fosters "social disharmony . . . as government officials lose the trust of people and foster active resistance to taxation by the corrupt government, thereby ensuring a permanently dysfunctional and unresponsive government."[134] When that happens, "all eventually suffer."[135]

C. *Mishandling Corruption Claims Undermines International Development*

Tribunals' refusal to hear corruption claims undermines the incentive structure for international investment. The economic order articulated at Bretton Woods sought to facilitate economic growth and development

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127. Salbu, *supra* note 123, at 671. *See generally* Lucinda A. Low et al., *The "Demand Side" of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563 (2015) (offering a helpful overview of the history and development of both demand-side and supply-side anti-corruption efforts).

128. *See* Andrew Brady Spalding, *Deconstructing* Duty Free*: Investor-State Arbitration as Private Anti-Bribery Enforcement*, 49 U.C. DAVIS L. REV. 443, 472 (2015).

129. *See* Paul D. Carrington, Essay, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 160–64 (2010); Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 258 (1988).

130. *See, e.g.*, Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award (Oct. 4, 2013).

131. *See* Susan Rose-Ackerman, *Introduction and Overview*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION xiv, xxxi–xxxii (Susan Rose-Ackerman ed., 2006).

132. Johann Graf Lambsdorff, *Causes and Consequences of Corruption: What Do We Know from a Cross-Section of Countries?*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, *supra* note 131, at 3, 23–25.

133. *Combating Corruption*, WORLD BANK, (Oct. 4, 2018), https://www.worldbank.org/en/topic/governance/brief/anti-corruption [http://perma.cc/PL65-DZE8] ("Empirical studies have shown that the poor pay the highest percentage of their income in bribes.").

134. LLAMZON, *supra* note 10, § 3.18.

135. *Id.*; *see also* Tamar Meshel, *The Use and Misuse of the Corruption Defence in International Investment Arbitration*, 30 J. INT'L ARB. 267, 272–74 (2013).

through foreign direct investment.[136] The need for growth and development rested on a paradox, however, because developing states that needed investment the most lacked a strong "rule of law" and were thus the riskiest for investors.[137] BITs proved a mutually beneficial answer for developing and developed states[138]: investors received investment protection,[139] and states that committed to a stable legal framework would be more likely to receive the benefit of foreign investment.[140]

BITs have been remarkably successful in facilitating investment and economic growth. For example, numerous studies have found a positive correlation between investment treaties and subsequent foreign direct investment.[141] And in terms of direct economic impact, one study found that the typical BIT with the United States as a party correlated to approximately $1 billion in increased foreign direct investment per year for the signing state.[142] Despite concerns that investors are the primary beneficiaries,[143] host states' continued negotiation and usage of BITs underscores the fact that they perceive a benefit from the system.[144] Indeed, while American investors bene-

136. *See supra* Section I.A.

137. LLAMZON, *supra* note 10, § 1.11 ("Sensible investors seek the stability that comes with the 'rule of law,' it is said, and those parts of the world embroiled in autocracy and repression—often also the poorest of nations—should by any coldly rational calculation be bypassed by foreign investors.").

138. *See* Salacuse & Sullivan, *supra* note 12, at 77 ("Thus, a BIT between a developed and a developing country is founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future.").

139. Mortenson, *supra* note 96, at 267 ("Capital-importing countries [can] promote economic development by offering substantive guarantees of protection to foreign investors; capital-exporting countries [can] achieve some modicum of security for their citizens investing overseas."); *see also* Helen V. Milner, *The Global Economy, FDI, and the Regime for Investment*, 66 WORLD POL. 1, 4 (2014) (arguing that capital-poor nations can facilitate foreign direct investment by reassuring investors that their capital investments will not be expropriated by the host state).

140. *See* Salacuse & Sullivan, *supra* note 12, at 109.

141. Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401, 429 (2011); Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMP. ECON. 788, 788 (2004); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567, 1582–83 (2005) (finding that the relationship between the number of BITs in a country and that country's foreign direct investment was positively correlated and statistically significant); Salacuse & Sullivan, *supra* note 12, at 109. *But see* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 434 (2011) (advocating for modesty in evaluating the utility of BITs for promoting foreign direct investment).

142. Salacuse & Sullivan, *supra* note 12, at 109.

143. *See* Gallagher & Shrestha, *supra* note 60, at 925.

144. Kaj Hobér, *Does Investment Arbitration Have a Future?*, *in* INTERNATIONAL INVESTMENT LAW 1873, 1874 (Marc Bungenberg et al. eds., 2015).

fit,[145] the states receiving the investment are expected to benefit as well due to the increase of business and capital.[146] But when tribunals decline to exercise jurisdiction, they undercut investors' protections; this undermines the relationship between investment and economic growth.[147]

In sum, an investment tribunal that declines to exercise jurisdiction undermines the developmental goals of the investment treaty framework.[148] Tribunals are obliged to consider these goals in interpreting the applicable investment treaty.[149] And investment tribunals have noted that economic development was the "purpose which Bilateral Investment Treaties and the World Bank itself were created to serve."[150] When international investment tribunals mistreat corruption claims by declining to exercise jurisdiction, they reduce investor confidence in the international investment regime as a whole.[151] This reduced confidence in turn reduces foreign direct investment and hinders economic development, making it more difficult to reduce poverty and raise living standards.[152] This trend of jurisdictional deprivation justifies a reassessment of how investment arbitration tribunals handle corruption claims.

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145. Jeffrey Lang, *Keynote Address*, 31 CORNELL INT'L L.J. 455, 457 (1998) ("The BIT Program supports the key U.S. government economic policy objectives of promoting U.S. exports and enhancing the international competitiveness of U.S. companies.").

146. *See* S. EXEC. REP. NO. 109-17 at 11 (2006) (statement of Sen. Richard G. Lugar, Chairman, S. Comm. on Foreign Rel.) (arguing that BITs "would reinforce the significant economic reforms" that developing countries had taken, which would in turn contribute to economic integration); Presidential Statement on Bilateral Investment Treaties with Albania and Latvia, 1 PUB. PAPERS 46 (Jan. 13, 1995) ("These bilateral investment treaties put in place a strong foundation for expanded U.S. trade and investment with the reforming democracies of Central and Eastern Europe. . . . Americans and Central Europeans alike will benefit through the increased business.").

147. *See* LLAMZON, *supra* note 10, § 3.23 ("[F]oreign investor[s] want[] consistency and predictability of the environment in which [their] investment operates, especially since large-scale investment typically involves a commitment of many years within the territory of the host State . . . .").

148. Mortenson, *supra* note 96, at 311.

149. *See* Vienna Convention on the Law of Treaties art. 31, § 1, Jan. 27, 1980, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

150. F-W Oil Interests, Inc. v. Republic of Trin. & Tobago, ICSID Case No. ARB/01/14, Award, ¶ 212 (Mar. 3, 2006), 16 ICSID Rep. 398 (2012).

151. See Franck, *supra* note 58, at 438 ("Likewise, investors may lose faith in the arbitration process and the commercial value of predictable dispute resolution, which may in turn affect decisions to invest or increase the cost of investment.").

152. LLAMZON, *supra* note 10, § 11.24; Jonathan Bonnitcha, *Foreign Investment, Development and Governance: What International Investment Law Can Learn from the Empirical Literature on Investment*, 7 J. INT'L DISP. SETTLEMENT 31, 33 (2016) (noting that numerous studies have found that investment "inflows to a country are positively correlated with economic growth").

III. THE POTENTIAL ADJUDICATION OF CORRUPTION CLAIMS

Arbitral tribunals must provide a stable and predictable forum for dispute resolution to incentivize investment and promote development.[153] An investment tribunal that declines to exercise jurisdiction over a dispute fouled by corruption fails the international community. It fails the host states who are incentivized to ignore corrupt practices within their borders,[154] the people in developing countries who are denied developmental gains,[155] and the investors who rely on arbitration to protect their investments.[156] This Part proposes a path forward. Section III.A presents a framework for the adjudication of corruption claims. Section III.B explains how this framework helps achieve the goals of both the investment-arbitration and anti-corruption regimes. Section III.C describes how this framework advances developmental objectives.

A. *The Proposed Framework*

This Note proposes a framework that arbitral tribunals should adopt when handling disputes tainted by corruption. Tribunals should use equitable estoppel to defeat a host state's corruption defense and allow the case to proceed to the merits phase. When considering the corruption claim in the merits phase of the arbitration, the tribunal should then use a contributory-fault approach to determine liability. Together, this solution would help incentivize investment, combat corruption, and promote development.

Arbitral tribunals should use equitable estoppel to bar a host state's invocation of the corruption defense. After defeating a host state's corruption defense, tribunals should accept jurisdiction and evaluate each party's role in the corruption.[157] Currently, arbitral tribunals justify depriving investors of arbitral recourse because corruption violates international public policy and because corruption violates a host state's laws.[158] These justifications reflect a "traditional approach" to handling corruption in international disputes, whereby both parties assume the risk of contract invalidation.[159] The tradi-

153. *See* Salacuse & Sullivan, *supra* note 12, at 107–11.

154. Torres-Fowler, *supra* note 85, at 1000.

155. LLAMZON, *supra* note 10, § 11.24.

156. This deprivation also results in a host state's unjust enrichment because it may seize an investment's infrastructure and assets without providing compensation. *See, e.g.*, World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 70 (Oct. 4, 2006), 17 ICSID Rep. 212 (2016).

157. In a "bifurcated" proceeding, where the proceedings are separated into distinct phases (i.e. jurisdictional and merits), the proposed framework would advance the dispute into the latter phase. In a nonbifurcated proceeding, the proposed framework would allow the tribunal to consider the corruption claim directly. *See* Massimo V. Benedettelli, *To Bifurcate or Not to Bifurcate? That Is the (Ambiguous) Question*, 29 ARB. INT'L 493, 493 (2013).

158. *See supra* Section II.A.

159. Giacomo Rojas Elgueta, *The Legal Consequences of Corruption in International Arbitration: Towards a More Flexible Approach?*, KLUWER ARB. BLOG (Jan. 20, 2016),

tional approach works when either party could serve as respondent or claimant, meaning that neither party can "opportunistically anticipate whether they will be in the position of . . . walking away from the contract" by invoking the corruption defense.[160] But this logic falls apart in investment arbitration because the host state is almost always the respondent, which means that the investor (as the claimant) bears the risk of arbitral deprivation.[161]

A bribe between an investor and a host state implicates both parties, but the unique structure of investment arbitration produces a liability asymmetry between the investor and the host state.[162] Arbitrators themselves have noted that the investment arbitration structure disproportionately places blame on the investor.[163] To rebalance the liability asymmetry, arbitral tribunals should "consider the equities emerging from an analysis of both parties' conduct."[164] Equitable estoppel is a natural response: corrupt host states should not benefit from their part in corruption.[165]

Equitable estoppel is an accepted doctrine of international law that would bar the host state from invoking its own illicit conduct to deprive the tribunal of jurisdiction.[166] The doctrine requires a state to act consistently with respect to the enactment and subsequent enforcement of its own laws.[167] In other words, if a state makes bribery illegal only to then participate in a bribe, equitable estoppel would preclude the host state from invoking the law to escape its own liability. Equitable estoppel thus works to mitigate "the obnoxiousness of self-contradictory behaviour"[168] and is "root-

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http://arbitrationblog.kluwerarbitration.com/2016/01/20/the-legal-consequences-of-corruption-in-international-arbitration-towards-a-more-flexible-approach [https://perma.cc/N5AF-QQDA].

160. *Id.*

161. *Id.* (noting that the traditional approach "results in unsatisfactory and inefficient outcomes in *asymmetrical scenarios*, where the 'illegality defense' may represent for the host State an incentive to favor a corruption scheme").

162. RICHARD KREINDLER, COMPETENCE-COMPETENCE IN THE FACE OF ILLEGALITY IN CONTRACTS AND ARBITRATION AGREEMENTS 433 (2013).

163. *See* Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion, ¶ 63 (May 8, 2000), 5 ICSID Rep. 462 (2002) (arguing that investment tribunals that decline to exercise jurisdiction over a dispute tainted by corruption have "heaved the baby, enthusiastically, out with the bath-water" by failing to evaluate both sides' behavior).

164. Douglas, *supra* note 95, at 183.

165. *See* Siag v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶ 483 (June 1, 2009) ("As a creation of equity, estoppel is grounded in the notion that a person ought not to benefit from his or her wrongs."); Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 564 (Oct. 5, 2012) (noting that "a State cannot be allowed to take advantage of its own wrongful act").

166. *See* I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 468 (1958).

167. *Id.*

168. *Id.* at 470 (quoting Georg Schwarzenberger, *The Fundamental Principles of International Law*, *in* 87 RECUEIL DES COURS 191, 312 (1955)).

ed in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct."[169]

Not only is equitable estoppel supported by "[a] considerable weight of authority,"[170] it is regularly applied in international legal disputes.[171] For instance, the International Court of Justice (ICJ) has invoked the doctrine to compel jurisdiction when a state's actions caused another party to detrimentally rely on the state's conduct.[172] Equitable estoppel has also been used in investment arbitration.[173] One tribunal suggested that equitable estoppel could justify rejecting a state's argument that the tribunal lacks jurisdiction if the state participated in breaking its own laws or "knowingly overlooked" their violation.[174] The tribunal explained that, in such a case, fairness would "require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense."[175] Likewise, another tribunal defeated a host state's objection to the tribunal's jurisdiction after the tribunal determined that the host state was aware that the investment violated its laws but took no action to enforce them.[176] These cases demonstrate the potential application of equitable estoppel to the corruption context. If bribery violates a state's laws and the state participates in a bribe, it not only knowingly overlooks the violation of its own laws—it effectively sanctions their violation. Therefore, a tribunal is empowered to estop the host state from invoking the corruption defense to deprive the tribunal of jurisdiction.

To hold both parties responsible, an arbitral tribunal should next take the parties' role in the alleged corruption into account when determining the final award. It would be inappropriate for an arbitral tribunal to impose a "one-size-fits-all solution" to assess liability, because not all corrupt acts are the same.[177] Instead, the adjudication of corruption claims requires "a more

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169. *Id.* at 468–69.

170. CRAWFORD, *supra* note 37, at 420–21; *see also* Andreas Kulick, *About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, 27 EUR. J. INT'L L. 107, 107 (2016) (arguing that investment-arbitration tribunals are familiar with the doctrine of equitable estoppel).

171. *See* Christopher Brown, Comment, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369, 386–90 (1996) (noting that estoppel has been used by the Permanent Court of International Justice, the International Court of Justice, and in numerous arbitrations).

172. *See* Megan L. Wagner, Comment, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CALIF. L. REV. 1777, 1802–03 (1986) (examining ICJ jurisprudence and its invocation of equitable estoppel).

173. *See, e.g.*, Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 346 (Aug. 16, 2007).

174. *Id.*

175. *Id.*

176. Kardassopoulos v. Republic of Geor., ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶¶ 182, 190, 248 (Jul. 6, 2007).

177. Doak Bishop, *Toward a More Flexible Approach to the International Legal Consequences of Corruption*, 25 ICSID REV. 63, 63 (2010).

nuanced approach"[178] that assigns responsibility in proportion to fault.[179] This approach is analogous to the use of comparative negligence in tort law.[180] Although investment arbitration proceedings have invoked the contributory-fault approach,[181] they do not seem to have done so in disputes tainted by corruption claims. But a contributory-fault analysis would be efficacious in this context because it would acknowledge that neither party is fully innocent—a corrupt bargain requires actions from both the investor and the host state.[182] Simply, it would allow a tribunal to hold both the host state and investor accountable and reduce the award accordingly.

The contributory-fault approach is beneficial because it affords arbitral tribunals the discretion to hold both parties accountable.[183] Under the contributory-fault approach, an arbitral tribunal could assess whether certain mitigating factors require a reduction of a potential award. This assessment would require "a fact-based inquiry" that would allow the tribunal to determine the relevance of various factors, such as the size, timing, and duration of the bribery scheme.[184] The tribunal could also take into account which party initiated the illicit payment.[185] The contributory-fault approach allows tribunals to evaluate the significance and weight of these factors, providing tribunals with a better opportunity to evaluate both parties' conduct.[186]

In addition, the contributory-fault approach helps overcome some of the difficulties of "proving" corruption in arbitral proceedings.[187] In investment arbitration, tribunals are empowered to *request* documents and witnesses,

178. *Id.*

179. *See id.* at 66.

180. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 698 n.6 (1978) (examining the underpinnings of the comparative negligence approach).

181. *See* Judith Gill & Rishab Gupta, *The Principle of Contributory Fault After* Yukos, 9 DISP. RESOL. INT'L 93, 95–96 (2015).

182. *See* Alekhin & Shmatenko, *supra* note 89, at 176.

183. Torres-Fowler, *supra* note 85, at 1031 (arguing that the contributory-fault approach "would hold both the investor and the host state accountable for the complicit acts of bribery without enabling the host state to unjustly enrich itself through an act such as expropriation at the expense of the investor").

184. *Id.*; *see also* Bishop, *supra* note 177, at 66 ("You must ascertain the precise facts involved . . . [and] look at the precise effects of that corrupt act on the parties and on the contract.").

185. For example, if the tribunal found that the host state extorted the investor and solicited the bribe, that would result in a higher degree of culpability for the host state. Conversely, if the investor initiated the bribe and the host state's role in the act was limited, that would result in a lower degree of culpability for the host state.

186. *Cf.* LLAMZON, *supra* note 10, § 1.02 ("These arbitrators are routinely required by the law to decide in binary fashion, thereby taking overt or implied sides in favour of one party in cases where most, if not all, actors are tainted by corruption.").

187. *Cf., e.g.*, EDF (Servs.) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009) (noting that corruption "is notoriously difficult to prove since . . . there is little or no physical evidence").

but a tribunal lacks investigatory powers and is limited in its ability to subpoena testimony.[188] The contributory-fault approach helps account for these shortcomings because it incentivizes host states and investors to come forward with evidence related to the corrupt act in question for fear of having adverse inferences drawn against them. Specifically, it would leverage the prevailing procedural framework, which assigns each party "the burden of proving the facts on which it relies."[189] This means that the burden would fall on a host state claiming that an investor acted corruptly or on an investor wanting to prove that the host state requested a corrupt solicitation.[190] Thus, the contributory-fault approach incentivizes each party to produce evidence and testimony that either lessens its own liability or enhances the other party's liability.[191] For instance, if the investor can demonstrate that it made efforts at remediation and cooperated with authorities after uncovering that one of its employees participated in a bribe, a tribunal could consider that fact to reduce the investor's liability.[192] This would encourage parties to be forthright about their role in the corruption and would incentivize self-policing and reporting of uncovered violations.[193]

The contributory-fault approach is theoretically appealing because it mirrors intuitions about justice: allowing a corrupt party to avoid liability altogether feels unfair.[194] Courts do not always explicitly invoke equity in contract evaluation, but equity has nonetheless long played a role in the interpretation of contract terms.[195] Arbitral tribunals have been responsive to the notion of fairness. For example, in the *Metal-Tech* case, the tribunal dismissed the dispute for a lack of jurisdiction, but noted that the host state had

188. Cecily Rose, *Questioning the Role of International Arbitration in the Fight Against Corruption*, 31 J. INT'L ARB. 183, 195 (2014); Matthias Scherer, *Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals*, 5 INT'L ARB. L. REV. 29, 29 (2002).

189. *See* LLAMZON, *supra* note 10, § 9.08 (citing DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 127 (rev. ed. 1975)).

190. *Id.* This approach is supported by the UNCITRAL procedural rules, which assert that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." G.A. Res. 31/98, UNCITRAL Arbitration Rules, art. 24 § 1 (Dec. 15, 1976).

191. ICSID and UNCITRAL provide arbitral tribunals with discretion over the appropriate standard of proof required to satisfy a party's burden. *See* Rose, *supra* note 188, at 194. While an examination of the advantages and disadvantages of the optimal standard of proof is outside the scope of this Note, arbitral tribunals should coordinate with national and international authorities to ensure that the tribunal's findings do not have a res judicata effect on either party and work in tandem with anti-corruption enforcement efforts.

192. Kevin E. Davis, *Contracts Procured Through Bribery of Public Officials: Zero Tolerance Versus Proportional Liability*, N.Y.U. J. INT'L L. & POL. 1261, 1305–06 (2018).

193. *Id.* at 1309.

194. Schwartz, *supra* note 180, at 722.

195. *See, e.g.*, Franklin Tel. Co. v. Harrison, 145 U.S. 459, 471–73 (1892) (noting the Court's willingness to consider the fairness of a contract when evaluating its terms); *see also* Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 382 (1995).

participated in the corruption.[196] Based on the host state's participation, the tribunal reasoned, "it appears fair that the Parties share in the costs" of the arbitration.[197] And even when Judge Lagergren declined to exercise jurisdiction over a dispute involving corruption in ICC Case No. 1110, he expressed concern that "care must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct."[198] Ultimately, the contributory-fault approach is more equitable than declining to exercise jurisdiction because it holds both parties accountable and empowers the arbitral tribunal to consider the unique facts of the dispute in its decision. When combined with the doctrine of equitable estoppel, the contributory-fault approach would help reduce the liability asymmetry in investment arbitration.[199]

B. *Aligning Investment Arbitration and Anti-Corruption*

The proposed framework would also benefit the international-investment and anti-corruption regimes. The framework would benefit international investment because it empowers arbitral tribunals to exercise jurisdiction over disputes involving corruption, thereby helping ensure access to a tribunal for aggrieved investors. And greater certainty about access to a tribunal would reduce the risk of investment, thereby facilitating investment.[200] While the proposed framework benefits the international investment regime, it also complements international anti-corruption enforcement because it holds more parties responsible for their roles in corrupt acts.

Some commentators, however, have challenged the investment arbitration regime directly.[201] For instance, these critics are concerned that investment arbitration disproportionately benefits investors from developed countries at the expense of developing countries.[202] To them, the investment treaty regime itself was created for investors, and claims about developmental benefits are merely incidental to the primary goal of investor-wealth max-

196. Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 422 (Oct. 4, 2013) ("That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims.").

197. *Id.*

198. Wetter, *supra* note 104, at 294.

199. *See* Elgueta, *supra* note 159 (arguing that the corruption defense "results in unsatisfactory and inefficient outcomes" in investment arbitration because the investor is almost always the claimant and bears the risk of arbitral deprivation).

200. *See* Franck, *supra* note 58, at 438; *cf.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972) (noting that the selection of a dispute resolution forum "bring[s] vital certainty to . . . international transaction[s]").

201. Anthea Roberts, Essay, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410, 410 (2018) (claiming that "paradigm shifters" dismiss the entire investment-arbitration system and want to see its replacement, rather than incremental change).

202. *See* Gallagher & Shrestha, *supra* note 60, at 923-26; Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 134–35 (2005).

imization.[203] These critics would likely be skeptical of the proposed framework because it facilitates investors' access to arbitral tribunals, thereby increasing host states' potential legal liability.[204]

But while the proposed framework promotes investors' access to tribunals, it also benefits host states and their citizens because it assists anti-corruption efforts. Arbitral tribunals that decline to exercise jurisdiction over a corruption-tainted dispute fail to address the demand side of corruption. This failure allows the host state to escape liability for its role in the corrupt act and thus helps the state avoid internalizing the costs of its own conduct.[205] Moreover, this failure is at odds with UNCAC, which discourages both the supply side and the demand side of corruption.[206] The proposed framework provides an incentive for host states to minimize corruption and would work in tandem with UNCAC by holding both investors and host states responsible for their illicit conduct. Therefore, the proposed framework benefits host states as well as investors.

Since the 1990s, there has been an international recognition that corruption is detrimental to economic growth, but anti-corruption enforcement has been inconsistent.[207] A major reason for this enforcement difficulty is the inability of international anti-corruption conventions, such as UNCAC, to account for states' idiosyncratic enforcement preferences and understandings of corruption.[208] So while occasional enforcement actions are symbolically valuable,[209] UNCAC largely remains an "aspirational framework,"[210] a *lex simulata*.[211] In light of these shortcomings, commentators have noted the

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203. *See* Biplove Choudhary & Parashar Kulkarni, *Re-crafting Bilateral Investment Treaties in a Development Framework: A Comparative Regional Perspective*, *in* CAPITAL WITHOUT BORDERS: CHALLENGES TO DEVELOPMENT 209, 213–14 (Ashwini Deshpande ed., 2010).

204. *See* Roberts, *supra* note 201, at 422 ("The biggest quandary for paradigmatic reform champions concerns whether to support reforms that are more moderate than their ideal preference.").

205. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 530 n.56 (1986) (noting that cost internalization can be "achieved upon a . . . finding of liability"); Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 280 (2011).

206. *See* Salbu, *supra* note 123, at 669; *see also Foreign Bribery Rages Unchecked in Over Half of Global Trade*, TRANSPARENCY INT'L (Sept. 12, 2018), https://www.transparency.org/news/feature/exporting-corruption-2018 [https://perma.cc/4E3Y-VN25].

207. *See* Carrington, *supra* note 129, at 139.

208. Ophelie Brunelle-Quraishi, *Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis*, 2 NOTRE DAME J. INT'L & COMP. L. 101, 130, 133 (2011).

209. *See* REISMAN, *supra* note 87, at 105.

210. Beasley, *supra* note 123, at 215.

211. REISMAN, *supra* note 87, at 171 (lamenting the tendency to enact laws that are little more than "airy affirmations of purpose" and that are "not acted upon").

potential for the private enforcement of anti-corruption laws.[212] Investment arbitration is one such solution.[213]

The proposed framework need not supplant national anti-corruption enforcement efforts.[214] Rather, under this framework, an arbitral tribunal's authority would be limited to the commercial consequences of the contract. It would still be up to the national criminal justice system to pursue a criminal offense. When combined with sufficient coordination and communication between national authorities and arbitral institutions,[215] investment arbitration could complement public enforcement of anti-corruption laws. Ultimately, the proposed framework does more than "improve coherence between [investment treaties] and other bodies of international law and policy."[216] The framework addresses the supply and demand sides of corruption by evaluating each party's role in a given corrupt act. This not only furthers anti-corruption goals but also strengthens the legitimacy of investment arbitration as a dispute resolution forum that is capable of "produc[ing] just results."[217]

Investment arbitration may take broader public concerns into account because the dispute necessarily involves a sovereign state as a party. Thus, investment arbitration may be considered a "public law discipline."[218] In a dispute between two private parties, arbitrators are obligated to apply private law principles and consider only the four corners of the contract.[219] In the context of investment arbitration, however, corruption and other public policy considerations—such as environmental, human rights, and social poli-

212. *E.g.,* Spalding, *supra* note 128, at 472; *see also* Rashna Bhojwani, Note, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 108–09 (2012).

213. This Note recognizes that investment arbitration, although frequently implicating private parties, often relies on public international-law principles. For a discussion of how investment arbitration straddles both public and private international law, see Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 372 (2014).

214. Leo O'Toole, *Investment Arbitration: A Poor Forum for the International Fight Against Corruption*, YALE J. INT'L L. (Dec. 1, 2016), http://www.yjil.yale.edu/investment-arbitration-a-poor-forum-for-the-international-fight-against-corruption [https://perma.cc/2R7M-K7LL]. Thank you to Professor Katherine Simpson for alerting me to this important caveat.

215. *See* Losco, *supra* note 53, at 1241–42 (proposing a cooperative framework for enforcing anti-corruption laws between public and private parties).

216. U.N. CONFERENCE ON TRADE AND DEV., *supra* note 52, at 21.

217. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 229-30 (2007) (asserting that new strategies in transnational investment dispute resolution techniques can improve efficiency and promote justice).

218. *See* Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 85 (2011); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L COMP. L.Q. 573, 582–84 (2011).

219. LLAMZON, *supra* note 10, § 5.31.

cies—are "within the ambit of an investment arbitrator's decision-making."[220] Moreover, because most arbitrations are not subject to review by courts,[221] arbitral tribunals are the only bodies positioned to effectively consider corruption claims under investment treaties.[222] If arbitral tribunals do not consider these corruption claims, and a host state underenforces its own anti-corruption laws, corruption will continue. Therefore, an arbitral tribunal that explicitly considers corruption in its assessment of an investment dispute's merits would assist the anti-corruption regime. Additionally, it would further an intimately related and normatively valuable goal: economic development.

C. *A Path Forward for International Development*

The proposed framework would promote development by incentivizing investment and combating corruption. These goals are valuable in and of themselves, but they are also responsive to current trends in international investment law. In its most recent annual investment report, the United Nations Conference on Trade and Development (UNCTAD) found that states across the globe are reforming their investment treaties.[223] These reforms include writing new treaties to take into account public policy considerations and updating old treaties to do the same.[224] The reforms are principally focused on promoting development, which is "the underlying purpose" of investment treaties.[225] Crucially, while these reforms reflect a heightened interest in public policy considerations, they do not represent a lack of interest in foreign investment.

On the contrary, many countries have made substantial domestic efforts to facilitate investment. In 2017, sixty-five countries adopted policies that sought to liberalize and promote investment.[226] These policies include the establishment of new special economic zones, simplified administrative procedures, and eased foreign entry into the transport, energy, and manufacturing industries.[227] Some critics, however, would prefer a more fundamental change to international investment law; they have proposed replacing in-

220. *Id.*

221. *See* U.N. CONFERENCE ON TRADE AND DEV., *supra* note 52, at 19.

222. LLAMZON, *supra* note 10, § 5.34 ("Thus, if ICSID tribunals do not examine public policy issues, then nobody else will, as no other body is empowered to do so by the system.") (citing Bernardo M. Cremades, *Corruption and Investment Arbitration*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, *supra* note 91, at 203, 213).

223. U.N. CONFERENCE ON TRADE AND DEV., *supra* note 52, at xi.

224. *Id.* at xii–xiv.

225. Anne van Aaken & Tobias A. Lehmann, *Sustainable Development and International Investment Law: A Harmonious View from Economics*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 317, 329 (Roberto Echandi & Pierre Sauvé eds., 2013).

226. U.N. CONFERENCE ON TRADE AND DEV., *supra* note 52, at 16.

227. *Id.*

vestment arbitration tribunals with an international investment court housed in the European Union[228] or the World Trade Organization.[229] Investment-court proponents argue that investment arbitration suffers from a fragmentation problem: numerous tribunals and a lack of precedent[230] make for inconsistent decisions.[231] They reason that tenured judges and an appellate mechanism would create precedent and promote consistency in arbitral decisionmaking,[232] which would enhance the overall legitimacy of investment arbitration.[233] Although an investment court might increase consistency, its flaws outweigh its theoretical benefits.

The most significant issue with an investment court is that it would undermine state sovereignty. Critics of investment arbitration already argue that it intrudes upon a state's sovereignty because it allows an investor to bring suit if a regulation or other state action arguably violates an investment treaty.[234] But at least under investment tribunals, this limitation on state sovereignty is "modest . . . and is essential to creating a basis for effective and efficient foreign-investment activities."[235] An investment court, however, would subject a state to supranational legal obligations[236] that would erode the state's legislative power.[237] Despite assertions that state sovereignty is "a quaint and outdated idea,"[238] the past few years have revealed that skepticism toward international institutions and concerns over state sovereignty are alive and well.[239] In the current political climate, an investment court would

228. *See, e.g.*, Freya Baetens, *The EU's Proposed Investment Court System (ICS): Addressing Criticisms of Investor-State Arbitration While Raising New Challenges*, 43 LEGAL ISSUES ECON. INTEGRATION 367, 369 (2016).

229. *See, e.g.*, David M. Howard, *Creating Consistency Through a World Investment Court*, 41 FORDHAM INT'L L.J. 1, 44–48 (2017).

230. Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418, 422 (2013) (noting that one tribunal's decision is not binding on other tribunals). *But see* Frédéric G. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection as Common Law*, 34 NW. J. INT'L L. & BUS. 181, 243 (2014) (arguing that one tribunal's decision may have a persuasive effect in other disputes).

231. Howard, *supra* note 229, at 20.

232. *Id.* at 35.

233. *See* Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 51 (2003).

234. Brower & Schill, *supra* note 44, at 474.

235. *Id.* at 482.

236. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287 (1997) (noting that "supranational" refers to "a particular type of international organization that is empowered to exercise directly some of the functions otherwise reserved to states").

237. *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 4 (2005).

238. John Linarelli, *How Trade Law Changed: Why It Should Change Again*, 65 MERCER L. REV. 621, 622 (2014).

239. *See, e.g.*, *Brexit Brief: Dreaming of Sovereignty*, ECONOMIST (Mar. 19, 2016), https://www.economist.com/britain/2016/03/19/dreaming-of-sovereignty [https://perma.cc/

likely struggle to receive sufficient buy-in from investors, thereby undermining the legitimacy of the court itself.[240] An added concern with an investment court is that it would both be costly and face significant bureaucratic hurdles to implementation.[241] There are also questions whether awards rendered by the investment court would even be enforceable under the ICSID Convention.[242]

Regardless of one's perspectives on the potential benefits of an investment court (or on the merits of BITs generally), the proposed framework remains useful. For investment-court opponents, the proposed framework represents a solution to handle corruption allegations in investment arbitration. For investment-court proponents, the proposed framework is a useful interim solution. Either way, investment tribunals are one of the only institutions "in the international legal order where the infrastructure is already in place to regulate foreign investment, including those tainted with corruption, in an authoritative and controlling manner."[243] Therefore, the proposed framework is a practical, promising means to incentivize investment, combat corruption, and ultimately promote development.

The proposed framework would prove particularly effective if made in concert with other proposals to reform investment arbitration. There are legitimate concerns with the current embodiment of investment arbitration, such as the lack of transparency,[244] potential bias from arbitrators,[245] and limits on states' ability to enact legislation.[246] While reforms aimed at any of these issues would likely help increase the legitimacy of investment arbitration, reforms to increase transparency in particular would augment the proposed framework by helping hold parties accountable. Specifically, the International Bar Association has suggested that arbitral tribunals could

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SLM3-WK5V]; Charles A. Kupchan, *Trump's Nineteenth-Century Grand Strategy*, FOREIGN AFF. (Sept. 26, 2018), https://www.foreignaffairs.com/articles/2018-09-26/trumps-nineteenth-century-grand-strategy [https://perma.cc/8JHX-54WN].

240. *See* Charles H. Brower II, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement*, 49 LOY. U. CHI. L.J. 271, 297–300 (2017).

241. Howard, *supra* note 229, at 49; Schill, *supra* note 218, at 69 ("Thus, irrespective of the benefits of such alternative arrangements for the consistency, predictability, and legitimacy of investor-state dispute settlement, fundamental institutional reforms are unlikely to take place in the foreseeable future.").

242. *See* August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L. 761, 761–62 (2016).

243. LLAMZON, *supra* note 10, § 1.05.

244. Emilie M. Hafner-Burton et al., *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 YALE J. INT'L L. 279, 281–82 (2017).

245. Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 302–04 (2017).

246. *See* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1 (2019); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, *supra* note 90, at 606, 606.

provide public access to hearings, publish materials used in the proceedings, and disclose third-party funders.[247] If arbitral tribunals embraced the proposed framework and adjudicated corruption claims, these transparency reforms would provide an additional incentive for investors and host states to avoid corruption: they would have to answer for their crimes in the court of public opinion and internalize the resulting reputational damage.[248]

Even without other reforms, the proposed framework is one significant step toward holding both parties responsible for their role in corruption. Ultimately, rather than conducting a zero-sum economic analysis of corruption, this framework recognizes the potential for international investment arbitration to complement the anti-corruption regime and achieve developmental goals.[249]

CONCLUSION

In the face of isolationist and protectionist trends,[250] it is unsurprising that international institutions such as investment arbitration are facing a legitimacy crisis.[251] But the global economy remains interconnected,[252] providing a window of opportunity for reforms to investment arbitration that enhance its viability. The ability of investment arbitration to work "in tandem with . . . the political and economic context in which [investment treaties] operate, will determine the shape of the next era."[253] Thus, the proposed framework—which applies equitable estoppel and a contributory-fault analysis to corruption-tainted disputes—helps address the contemporary challenges in investment arbitration because it balances the interests of investors and host states. As such, this framework represents one means to enhance the legitimacy of investment arbitration itself.

247. *See* IBA ARBITRATION SUBCOMM. ON INV. TREATY ARBITRATION, INT'L BAR ASS'N, CONSISTENCY, EFFICIENCY AND TRANSPARENCY IN INVESTMENT TREATY ARBITRATION 53 (2018).

248. *See* Kaplow, *supra* note 205, at 530.

249. *See* Barnali Choudhury, *International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481, 483 (2013) (discussing the relationship between wealth maximization and the promotion of the public good).

250. *See, e.g.*, STEPHEN D. KING, GRAVE NEW WORLD: THE END OF GLOBALIZATION, THE RETURN OF HISTORY 215–16 (2017); *supra* note 239 and accompanying text.

251. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005).

252. *See* Christine Lagarde, *The Interconnected Global Economy: Challenges and Opportunities for the United States—and the World*, INT'L MONETARY FUND (Sept. 19, 2013), https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp091913 [https://perma.cc/B6MS-E78P].

253. Vandevelde, *supra* note 16, at 194.