



British Institute of
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Corruption and Investor-State Disputes – UNCAC Perspective



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Why Should the States Care?

- The system of investor-State enables private business to assert **direct claims** against governments in international arbitration
- Tribunals consisting of **private arbitrators** appointed for each case decide whether the host state breached its obligations.
- Awards of such tribunals are **final and mandatory** and may reach **hundreds of millions or even tens of billions of dollars**
- Awards touch upon **sensitive areas** such as protection of environment, regulation of major financial institutions or expropriation for public purpose.

Effect of corruption

- Allegations of corruption can lead to tribunals saying they have **no jurisdiction** or that the claim is **inadmissible**, or can lead to decisions that **States failed to provide fair and equitable treatment** of investors or breached other rules of international law.
- **Remedies** in the form of **damages** to the investor, **share in costs** of proceedings or even a “recommendation” to make a payment to a UN anti-corruption agency

Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, 8 March 2017



- “(a) did Claimants make an overpayment as a part of the purchase price; and (b) was that overpayment made to Ms Karimova? ... (c) was Ms Karimova an ‘official’ of the Government and (d) was the overpayment intended ‘for performance or non-performance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe’?”
- Tribunal does conclude that President’s daughter was recipient of any alleged overpayment
- Although Ms Karimova was intended target of the alleged overpayment, corruption under Uzbek law not proven as she had no official role at the time

World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, 4 October 2006



- Claimant alleged Kenya violated various contractual obligations and international law by illegally taking and destroying Claimant's property
- The Claimant filed a document in the arbitral proceedings that revealed the Claimant previously had made a covert payment to the former President of Kenya, Daniel arap Moi, in order to conclude the 1989 Agreement.
- Tribunal: the Claimant had no right to pursue or recover under any of its pleaded claims, all of which arose from that 1989 Agreement (para. 179).

Economic Crimes in Investor-State Disputes

- The State is a **party to arbitration**, but also **regulates, enforces laws, adjudicates** and **investigates** crimes on its territory.
- In addition, State representatives may also be **involved in committing economic crimes** relevant to the disputes.
- Allegations of economic crimes raise complex questions on the border of **public and private law**, including whether investor-state tribunals have jurisdiction if the underlying investment was **acquired by illegal means**.
- How far the tribunals should go in examining allegations of economic crimes and whether the limits lie to their **deference** to actions of domestic courts?

International Consensus without details

- Despite the apparent **consensus** on international level that crimes such as corruption, bribery, money laundering, international regulations often lack either the **necessary detail** or the **binding force**.
- This means that international tribunals often rely on **national law** and their **own understanding** of the effect of economic crimes on investor-state disputes.
- **UNCAC** should play a greater role because of its detailed provisions and universal coverage

Key Problems

- **Inconsistent approaches** - some tribunals want to blame the states, other tribunals want to blame the investor, other tribunals want to blame both
- **Two parallel universes:** international investment law and anti-corruption efforts
- **Treaties are normally silent** on corruption and bribery
- Some recent treaties do make **direct references to the UNCAC** (2013 Austria–Nigeria BIT; 2010 Austria–Tajikistan BIT; 2010 Austria–Kazakhstan BIT; 2015 Burkina Faso–Canada BIT; 2013 Guatemala–Trinidad and Tobago BIT)

What needs to be done

- Clarify **position of States** of the applicability of the UNCAC
- **Analyze** the existing treaties and decisions of investor-state tribunals with the view of compliance of their approaches with the UNCAC
- **Reform** international investment agreements with clear stipulations of the UNCAC
- Develop **recommendations** how to approach the issues of corruption consistently with the UNCAC and the ILC Articles on State Responsibility
- **Convey** the findings to States, arbitrators and other stakeholders

Read more and contact

- ‘Economic Crimes in International Investment Law’,
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