



British Institute of  
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# Corruption and Investor-State Disputes – United Nations Convention Against Corruption Perspective

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# Why Should the States Care?

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- 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

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- 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

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- “(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

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- 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

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- 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

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- 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

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- **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

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- 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

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- Yarik Kryvoi, 'Economic Crimes in International Investment Law', *International and Comparative Law Quarterly*, Volume 67, Issue 3, pp. 577-605 (2018)
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