THE INCLUSION OF ANTI-CORRUPTION CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENTS AND ITS POSSIBLE SYSTEMIC IMPLICATIONS

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ABSTRACT

Empirical studies have demonstrated a recent trend of incorporating anti-corruption provisions into international investment and trade agreements. Some treaties, i.e. the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, include both substantive and procedural obligations such as establishing corruption as criminal offenses, promoting integrity among public officials, and raising public awareness of the threat of corruption. Others like Japan prefer to insert rather general and abstract provisions in its bilateral investment treaties, stating that they agree to take efforts to prevent and combat corruption without indicating specific measures. This article attempts to take a closer look at these anti-corruption provisions by examining their driving forces and main objectives. This article argues that the inclusion of anti-corruption provisions in investment treaties offers practical tools for investment arbitration tribunals in dealing with allegations of corruption frequently raised by the parties, enhances sustainable development of international investment policy, strikes a symmetric balance of interests between investors and host States, and attracts foreign investment flows.

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I. INTRODUCTION

Corruption and bribery have been widespread phenomena in international investment activities and have had a severe impact on the maintenance of order of international investment and trade. Investor-State arbitration (hereinafter "ISA") tribunals are confronting an increasing number of corruption allegations,[1] and the United Nations Conference on Trade and Development (hereinafter "UNCTAD") International Investment Agreements (hereinafter "IIAs") Navigator also indicates the growth of anti-corruption provisions in the bilateral investment treaties (hereinafter "BITs") and free trade agreements (FTAs).[2] While topics surrounding the jurisprudence of allegations of corruption in investment arbitration have been widely discussed in academic scholarship,[3] studies are limited on rising practices of anti-corruption provisions. In particular, there is a lack of framework for comprehensively examining the driving forces and expectations of anti-corruption provisions in the existing IIA stock.[4] This article provides such a framework.

Traditionally, investment policymakers primarily look into economic issues and rarely consider external matters such as labor, environment, public health, and anti-corruption in the IIA-making and negotiation processes. Given the fact that many investments are established at the costs of environment and other social values and that States' regulatory measures for the purposes of protecting public interests have been adjudicated as violating treaty obligations, the need and appeal for reforming the existing IIA system

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[1] *See, e.g.*, Littop Enterprises Ltd. v. Ukr., Case No. V 2015/092, Final Award, ¶ 363 (Stockholm Chamber Com. 2021). *See generally* Niko Res. (Bangl.) Ltd. v. Bangl. Petroleum Expl. & Prod. Co. Ltd. ("Bapex"), ICSID Case No. ARB/10/11 & No. ARB/10/18, Decision on the Corruption Claim (Feb. 25, 2019) [hereinafter *Niko Resources v. Bangladesh*]; Spentex Neth., B.V. v. Republic of Uzb., ICSID Case No. ARB/13/26, Award (Dec. 27, 2016) [hereinafter *Spentex Netherlands v. Uzbekistan*]. *See also* Glencore Int'l A.G. v. Republic of Colom., ICSID Case No. ARB/16/6, Award, ¶ 593 (Aug. 27, 2019).

[2] *Mapping of IIA Content*, INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (last visited Mar. 7, 2022).

[3] *See, e.g.*, Lucinda A. Low, *Dealing with Allegations of Corruption in International Arbitration*, 113 AJIL UNBOUND 341, 341-45 (2019); John R. Crook, *Remedies for Corruption*, 9(3) WORLD ARB. & MEDIATION REV. 303, 303-16 (2015); Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67(3) INT'L & COMPAR. L.Q. 577, 580-84 (2018).

[4] For studies on anti-corruption provisions, see generally Yueming Yan, *Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance*, 23(4) J. INT'L ECON. L. 989 (2020). *See generally* Yueming Yan, *References to International Anti-Corruption Conventions in International Investment Arbitration and International Investment Agreements*, *in* THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW 447 (Régis Bismuth et al. eds., 2021); Charles N. Brower & Jawad Ahmad, *The State's Corruption Defence, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 455 (Katia Yannaca-Small ed., 2d ed. 2018); Kathryn Gordon, *International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 135 (OECD ed., 2008).

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are getting stronger.[5] Inserting anti-corruption measures then becomes a significant part of IIA reform, considering the severe consequences corrupt acts can have on transnational investments and trade activities, such as undermining the integrity of the public and private sectors.

The paradigm is shifting, and one can observe rules on anti-corruption at different levels in treaties concluded by the European Union (EU), the United States (hereinafter "US"), Canada, Brazil, and Japan. More importantly, a comprehensive chapter on anti-corruption is included in many recently concluded trade agreements, for instance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP"). This chapter includes both substantive and procedural commitments such as establishing corruption as criminal offenses, promoting integrity among public officials, and raising public awareness of the threat of corruption.[6] Meanwhile, we can observe some provisions that are rather general and abstract. A notable example should be the Japanese BITs where the State parties simply agree that they should undertake measures to prevent and combat corruption without illustrating concrete and specific measures.[7]

This article does not intend to present a specialized and in-depth analysis of every single type of anti-corruption provisions, but it aims to consider these different measures as a whole and examine the factors that drive the emergence of the anti-corruption provisions. After an Introduction, this article demonstrates that the inclusion of anti-corruption provisions in IIAs can provide practical tools for investment arbitration, as ISA tribunals are facing considerable difficulties in addressing allegations of corruption (Part II). It then illustrates the relationship between sustainable development, host States' right to regulate, and IIA reform, by investigating two important roles of anti-corruption provisions in the IIA reform: enhancing sustainable development of international investment policy (Part III) and striking a

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[5] SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE (3d ed. 2016).

[6] *Consolidated TPP Text – Chapter 26 – Transparency and Anticorruption*, GOV'T CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/26.aspx?lang=eng (last visited Mar. 13, 2022) (arts. 26.7-.8, 26.10).

[7] *See, e.g.*, Agreement Between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment art. 7, Japan-Morocco, Aug. 1, 2020, https://edit.wti.org/wti-filesystem/20200908/4efd43be-b67a-43cc-87f6-44e87e15be65/Japan%20-%20Morocco%20BIT.pdf; *Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment*, EDIT, https://edit.wti.org/document/show/97ef583a-d24c-4474-a9bf-aec76d0864d8 (last visited Mar. 13, 2022) (art. 9); *Agreement Between Japan and the United Arab Emirates for the Promotion and Protection of Investment*, JUS MUNDI, https://jusmundi.com/en/document/pdf/treaty/en-agreement-between-japan-and-the-united-arab-emirates-for-the-promotion-and-protection-of-investment-japan-uae-bit-2018-monday-30th-april-2018 (last visited Mar. 13, 2022) (art. 10); Agreement Between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment art. 10, Arm.-Japan, Feb. 14, 2018, https://edit.wti.org/wti-filesystem/20210222/f1418512-7545-48ec-84e7-196f031138fc/Armenia%20-%20Japan%20BIT%20(2018).pdf.

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symmetric balance of interests between investors and host States (Part IV). Finally, this article probes how anti-corruption provisions interact with the overall purposes and goals of international investment and international investment law. To be specific, it conveys an argument that States are likely to be more attractive to foreign direct investment (hereinafter "FDI") because highest quality investors would prefer a more reliable investment environment where there is an increased level of transparency with abundant anti-corruption measures (Part V). This article concludes in Part VI.

II. TO OFFER PRACTICAL TOOLS FOR INVESTMENT ARBITRATION

Investment treaties are, without a doubt, the primary sources and legal authorities that investor-State arbitrators are expected to rely on in dealing with investment disputes. Moreover, whether or not to apply BIT clauses is not a decision that can be made at the tribunal's discretion; instead, paragraph 1 of Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter "ICSID Convention") requires tribunals to "decide a dispute in accordance with such rules of law as may be agreed by the parties."[8] The current caselaw addressing issues of corruption in ISA suggests that none of the tribunals had referred to anti-corruption provisions because these applicable investment treaties do not contain any clear or specific anti-corruption clauses.[9] By contrast, there are indeed few provisions addressing anti-corruption issues in the old-generation of BITs. This absence, on the one hand, provides little to no substantive framework for investment tribunals to use in determining how to handle submissions or concerns of corrupt acts which occurred in the course of establishing and operating foreign investments;[10] on the other hand, the absence likely serves the intentional goal of encouraging "sovereign states to insert clauses addressing corruption and anti-corruption in their future treaty-making practice aimed at providing vital guidance on prospective allegations of corruption."[11]

[8] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [ICSID Convention] art. 42(1), Mar. 18, 1965, 575 U.N.T.S 159 (entered in to force Oct. 14, 1966).
[9] Yueming Yan, *A Comprehensive Chapter on Anti-Corruption in the China-EU CAI: A Progressive or an Unnecessary Step?*, *in* CHINA, THE EU AND INTERNATIONAL INVESTMENT LAW: REFORMING INVESTOR-STATE DISPUTE SETTLEMENT ch. 17, 231 (Yuwen Li et al. eds., 2019).
[10] ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION 62 (2014); Gordon, *supra* note 4, at 135; Despina Christofi, *The Relationship Between Allegations of Economic Crimes in Foreign Investments and the Adjudicative Power of Investor–State Tribunals*, 36(1) ICSID REV. 129, 147 (2021).
[11] Yan, *supra* note 9.

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A. A Different Voice

There are, however, dissenting voices expressing the view that anti-corruption provisions are not necessarily required. In particular, these voices argue that it brings no added value to incorporate provisions that make an explicit reference to international anti-corruption instruments like the United Nations Convention against Corruption (hereinafter "UNCAC") and the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter "OECD Anti-Bribery Convention").[12] Advocates of this viewpoint explain that these regional and international anti-corruption conventions contain extensive anti-corruption norms binding on a large number of States. As required by the interpretation rules enshrined in the Vienna Convention on the Law of Treaties (VCLT), arbitrators have referred to these anti-corruption instruments from time to time in the absence of anti-corruption provisions in the applicable investment treaty.[13]

These viewpoints seem reasonable when considering the second sentence of Article 42(1) of the ICSID Convention, in which alternative applicable rules in the absence of such an agreement are unequivocally pointed out: "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[14] However, relying on "rules of international law as may be applicable" alone in addressing the typical allegations of corruption is untenable, practically speaking. There are numerous legal instruments concerning anti-corruption that were concluded by various States. A broad reference to these legal norms, such as in *World Duty Free*, may still warrant criticism due to the limited guiding function they can offer to investment arbitrators as well as the intrinsic differences between these legal norms. More specific reasoning is provided in the next section.

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[12] Brower & Ahmad, *supra* note 4, at 480-81.
[13] *Id.*
[14] Article 42 (1) of the ICSID Convention provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

ICSID Convention, *supra* note 8, art. 42(1). This rule is said to have features of flexibility in conjunction with certainty. The first sentence stands for party autonomy in choosing rules while the second sentence is a reflection of certainty purposes aiming at "ensuring that the tribunal will find appropriate rules even in the absence of such a choice." *See* CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 550 (2d ed. 2009).

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B. Limitations of International Anti-Corruption Conventions

First of all, in the absence of an anti-corruption provision in the applicable BIT, many ISA tribunals have indeed referred to regional and international anti-corruption conventions, but the results accordingly rendered have been unsatisfactory. This dissatisfaction stems from a wide range of controversies: the undefined corrupt acts, the obscure standard of proof applicable to corruption and the current asymmetric responsibilities on the two sides of corruption.[15] There are some other heated debates on how to treat a "red flag"[16] and how ISA tribunals should respond to suspicions of corrupt measures in the absence of an explicit allegation of corruption raised by the parties.[17] Indeed, the norms in some international conventions, such as Article 15 and Article 16 of the UNCAC, are of particular importance as they play a key role in assisting tribunals to define corruption and to determine whether the concerned conduct falls within the scope of a corrupt act.[18] Other classical challenges ISA tribunals are facing are, however, scarcely addressed in international anti-corruption conventions.

Secondly, most clauses contained in regional and international anti-corruption treaties are intended to be enforced through domestic institutions or courts rather than through international investment arbitration. The primary purpose of these instruments is to promote worldwide corruption prevention and elimination by setting substantive issues, such as concluding widely agreed coverage of corrupt acts, facilitating and supporting international cooperation, and establishing particular institutions to promote domestic anti-corruption movement more effectively and efficiently.[19] Some treaties may expressly require the contracting States to impose sanctions on public officials who are involved in a corrupt act, while others

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[15] Yan, *supra* note 9, at 230.

[16] Low, *supra* note 3, at 343-44; Utku Coşar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions*, *in* LEGITIMACY: MYTHS, REALITIES, CHALLENGES 531, 541 (Albert Jan van den Berg ed., 2015).

[17] Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, *in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 225, 234-37, 258 (Andrea Menaker ed., 2017); Thomas Kendra & Matt Coleman, *How Far Do Tribunals Have a Duty to Investigate Corruption? The Kenyan High Court Has Its Word*, KLUWER ARB. BLOG (Dec. 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/12/04/how-far-do-tribunals-have-a-duty-to-investigate-corruption-the-kenyan-high-court-has-its-word/; L. Yves Fortier, *Arbitrators, Corruption, and the Poetic Experience: 'When Power Corrupts, Poetry Cleanse'*, 31(3) ARB. INT'L 367, 367-80 (2015).

[18] The United Nations Convention Against Corruption is one of the most frequently mentioned anti-corruption norms in Investor-State arbitration (ISA) that deals with allegations of corruption. Article 15 and Article 16 are contained in Chapter III (Criminalization and law enforcement) and aim to conceptualize bribery of national public officials as well as bribery of foreign public officials and officials of public international organizations, respectively. *See* G.A. Res. 58/4, arts. 15-16 (Nov. 21, 2003) [hereinafter UNCAC].

[19] *Id.* art. 1.

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do not.[20] In brief, the current international conventions on anti-corruption are largely directed at domestic legislation and assume enforcement by national authorities, as opposed to guiding investment arbitration.

Thirdly, intrinsic differences do exist between "the law of the Contracting State party to the dispute" and "such rules of international law as may be applicable," as well as between one international anti-corruption norm and another. A State may simply sign and ratify two or more anti-corruption treaties which, however, have different and even contradictory regulations on the scope of a corrupt act. A realistic example is the regulations on the demand side of a bribe—the solicitation or acceptance of a bribe. The UNCAC explicitly addresses the demand side of corruption, but the OECD Anti-Bribery Convention contains no rules on the legal consequence of accepting and soliciting bribes.[21]

Last but not least, even though *ad hoc* tribunals have simultaneously and consistently referred to a broad number of international and regional norms on anti-corruption developed by the United Nations (hereinafter "UN"), the OECD, the Council of Europe (CoE), the Organization of American States (OAS), and the African Union, various evidentiary standards of proving corruption as well as distinct types of evidence have been relied upon by arbitral tribunals in the fact-finding process. Tribunals have distinct and variable holdings on the standard of proof and the evidence applicable in proving corruption. To put it simply, some tribunals (like in *Metal-Tech v. Uzbekistan*[22] and in *Vladislav Kim v. Uzbekistan*[23]) have recognized the use of circumstantial evidence and "red flags"; "irrefutable evidence" was required by others (such as in *African Holding v. Democratic Republic of the Congo*).[24] Some insisted on higher standard of proof given the seriousness of charges of corruption (in *Karkey v. Pakistan*[25] and in *Lao Holdings v. Laos*[26]), while others disagreed with this point and ended up using relatively lower standard (in *Unión Fesona Gas v. Egypt*[27] and in *Getma International*

[20] The Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) does not explicitly regulate the liability of public officials who conduct corrupt acts with foreign investors.

[21] *See* UNCAC, *supra* note 18.

[22] Metal-Tech Ltd. v. The Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 243 (Oct. 4, 2013).

[23] Vladislav Kim v. Republic of Uzb., ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 548 (Mar. 8, 2017).

[24] African Holding Co. of America, Inc. v. La République démocratique du Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶ 52 (July 29, 2008).

[25] Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/13/1, Award, ¶ 492 (Aug. 22, 2017).

[26] Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6, Award, ¶ 109 (Aug. 6, 2019).

[27] Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, ¶ 7.52 (Aug. 31, 2018).

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and others v. Guinea (2)[28]). So far, it is difficult to identify a legitimate unified standard applicable widely in ISA—and referring to international anti-corruption norms does not remedy this issue.

On the whole, the foregoing suggests that it would be insufficient to deal with corruption issues by relying exclusively on international anti-corruption conventions. On the contrary, the irreconcilable divergence among these anti-corruption norms not only prevents the arbitration system from acting as a proper channel in combating corruption in international investment, but it also renders ISA subject to an unwavering crisis of legitimacy due to the inconsistency of decisions. In this sense, standardization by incorporating agreements on anti-corruption into investment treaties that provide substantive guidance and tools for investment arbitrators plays a significant role in alleviating the above plight.

III. TO ENHANCE SUSTAINABLE DEVELOPMENT OF INTERNATIONAL INVESTMENT POLICY

Sustainable development is one of the most popular topics among scholars and non-governmental organizations and is now considered an important dimension for improving international investment treaties at both the policy-making plane and practice levels. Although the content and meaning of this concept is still "uncertain and heavily disputed,"[29] anti-corruption provisions have been consistently acknowledged as one element instrumental to fulfill the purposes of sustainable development in the new generation of IIAs, as indicated in a range of reports issued by the UNCTAD.[30]

However, these reports simply mentioned "anti-corruption" as part of sustainable development requirements, but they failed to introduce and explain how and why anti-corruption provisions play an impactful role in enhancing sustainable development. In fact, the relationship between anti-corruption provisions and sustainable development has received far less scrutiny in the academic community than the relationships between sustainable development and provisions addressing other areas such as

[28] Getma Int'l v. Republic of Guinea, ICSID Case No. ARB/11/29, Award, ¶ 183 (Aug. 16, 2016).

[29] Steffen Hindelang & Markus Krajewski, *Towards a More Comprehensive Approach in International Investment Law*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 1, 7 (Steffen Hindelang & Markus Krajewski eds., 2016).

[30] *See, e.g.*, U.N. CONF. ON TRADE & DEV. [hereinafter UNCTAD], UNCTAD'S REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME (2018), https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf [hereinafter *UNCTAD Reform Package* (*2018*)]; UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2015), https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf [hereinafter *UNCTAD IPFSD* (*2015*)]; UNCTAD, WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, U.N. Sales No. E.12.II.D.3 (2012).

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environmental protection, human rights, labor rights, and public health. To delve into the constructive, deliberated, and nuanced connection between *anti-corruption provisions* and sustainable development, it is necessary to briefly examine the original linkage between *corruption* and sustainable development and to delineate the ways in which sustainable development interacts with international investment law in the first place.

A. The Concept of Sustainable Development and (Anti-)Corruption

The concept of sustainable development did not enter into the international agenda until 1987 when the Brundtland Report *Our Common Future* defined and—for the first time—set sustainable development as a significant goal for the international community.[31] Five years later, the UN Conference on Environment and Development adopted the *Rio Declaration on Environment and Development*, affirming the pivotal commitment of poverty eradication and environmental protection, which are essential tasks of sustainable development.[32] Later, in 2002, the *Johannesburg Declaration on Sustainable Development* extended the framework of sustainable development to embrace multiple pillars at all levels, providing: "[a]ccordingly, we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels."[33]

Corruption was at that time recognized by this Declaration as posing a serious threat to people's qualify of life as well as to worldwide sustainable development, and the fight against corruption was declared one of States' particular focuses and priorities.[34] This important work on anti-corruption was then commonly recognized by a sequence of international and regional anti-corruption norms, such as the UNCAC.[35] In particular, the UNCAC has constantly emphasized the undesired effects of corruption on sustainable development, articulating "the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law."[36]

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[31] U.N. Secretary-General, *Report of the World Commission on Environment and Development: Our Common Future*, ¶¶ 27-30, U.N. Doc. A/42/427 (Aug. 4, 1987).
[32] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26(Vol. I), annex 1 (Aug. 12, 1992).
[33] Report of the World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, ¶ 5, U.N. Doc. A/CONF.199/20 (Aug. 26-Sept. 4, 2002).
[34] *Id.* ¶ 34.
[35] UNCAC, *supra* note 18.
[36] *Id.* at 2.

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At the same time, the UN launched the Plan of Implementation of the World Summit on Sustainable Development where good governance and anti-corruption at different levels are unequivocally reassured as key factor to safeguard sustainable development:

> Good governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development.[37]
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> . . . .
>
> Engage actively and constructively in ensuring the timely completion of the negotiations on a comprehensive United Nations convention against corruption, including the question of repatriation of funds illicitly acquired to countries of origin;[38]
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> . . . .
>
> States should also fulfil their commitment to negotiate and finalize as soon as possible a United Nations convention against corruption in all its aspects, including the question of repatriation of funds illicitly acquired to countries of origin and also to promoting stronger cooperation to eliminate money laundering.[39]

The principle of good governance and the necessity of taking effective measures to combat corruption was also emphasized in the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development.[40] Moreover, the International Conference on Financing for

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[37] Report of the World Summit on Sustainable Development, *supra* note 33, *Plan of Implementation of the World Summit on Sustainable Development*, ¶ 4.

[38] *Id.* ¶ 140(e).

[39] *Id.* ¶ 142.

[40] The International Law Association's (ILA) 2002 New Delhi Declaration developed seven principles of international law instrumental to achieve sustainable development objectives. The sixth principle is the principle of governance, where it puts forth that:

> 6.1. The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development. It commits States and international organizations: (a) to adopt democratic and transparent decision-making procedures and financial accountability; (b) to take effective measures to combat official or other corruption; (c) to respect the principle of due process in their procedures and to observe the rule of law and human rights; and (d) to implement a public procurement approach according to the WTO Code on Public Procurement.

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Development adopted the *Monterrey Consensus* in 2002; this deliberately shed light on the negative impacts of corrupt activities on economic and sustainable development by pointing out that "[c]orruption is a serious barrier to effective resource mobilization and allocation, and diverts resources away from activities that are vital for poverty eradication and economic and sustainable development," as well as expressly naming the fight against corruption as a priority at all levels.[41]

B. Sustainable Development and IIA Reform

As for investment law and sustainable development, a global consensus that FDI flows play an indispensable role in promoting sustainable development has been achieved.[42] On the other hand, increasing FDI flows, *per se*, is an integral part of the very essence of sustainable development.[43] As a reflection of globalization, FDI is now critical of the ability of developing countries to stimulate and achieve economic growth necessary to improve the welfare of their populations and to meet their basic needs in a sustainable manner. Therefore, given increasing cross-border investment and economic transactions, international investment law that governs both FDI and investment relationships between States and foreign investors is a vital avenue through which sustainable development can be enhanced.

However, investment treaties, the main component of the modern international investment law regime, have been critiqued as insufficiently

> 6.2. Civil society and non-governmental organizations have a right to good governance by States and international organizations. Non-state actors should be subject to internal democratic governance and to effective accountability.
>
> 6.3. Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development as well as the full participation of women in all levels of decision-making. Good governance also calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market aimed at a fair distribution of wealth among and within communities.

See World Summit on Sustainable Dev., Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations, annex (ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development), ¶¶ 6.1-.3, U.N. Doc. A/CONF.199/8 (Aug. 9, 2002).

[41] U.N., MONTERREY CONSENSUS OF THE INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT ¶ 13 (2003), https://www.un.org/en/development/desa/population/migration/generalssembly/docs/globalcompact/A_CONF.198_11.pdf.

[42] Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8(3) J. WORLD INV. & TRADE 357, 357 (2007); Marie-Claire Cordonier Segger & Andrew Newcombe, *An Integrated Agenda for Sustainable Development in International Investment Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 99, 102 (Marie-Claire Cordonier Segger et al. eds., 2011).

[43] Newcombe, *supra* note 42, at 358.

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compatible with sustainable development[44] due to the "inadequacy of the norm supply by IIAs," "democratic deficit of IIA-making" and "fragmentation of international law."[45] This is understandable if one notices that the notion of sustainable development is in fact not one of the overarching objectives that IIAs are pursuing until recent years, given that sustainable development is not considered one of the starting purposes in the earlier negotiation of investment treaties. A number of high-profile arbitration cases also suggest IIAs' incompatibility with sustainable development, such as *Methanex v. US*[46] and *Philip Morris v. Australia*.[47]

Now that States intend to enforce the sustainable development dimension of international investment activities, there is demand for a structural reform of IIAs by including social and environmental concerns but ensuring the policy of investment protection at the same time. This reform, which is also called sustainable development oriented IIA reform, aims at ensuring responsible investment by containing provisions addressing three pillars of sustainable development: economic, social and environmental. These investment-plus concerns are collectively referred to as sustainable development provisions and are fragmented in the current more than 3,000 IIAs with varying content and degrees.

Mainstreaming sustainable development into IIAs can be achieved through various modes: in the preamble, adding exception clauses, making clarification on substantive provisions, inserting corporate social responsibility (hereinafter "CSR") clauses, referring to other sustainable development treaties and modifying procedural requirements.[48] This reform focuses on environmental issues at the outset, but then extends to other social

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[44] MANJIAO CHI, INTEGRATING SUSTAINABLE DEVELOPMENT IN INTERNATIONAL INVESTMENT LAW: NORMATIVE INCOMPATIBILITY, SYSTEM INTEGRATION AND GOVERNANCE IMPLICATIONS (2018).

[45] *Id.* at 2.

[46] Methanex Corp. v. U.S., Final Award of the Tribunal on Jurisdiction and Merits (*ad hoc* Trib. 2005).

[47] Philip Morris Asia Ltd. v. The Commonwealth of Austl., Case No. 2012-12, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2015) [hereinafter *Philip Morris v. Australia*]. For more discussions on sustainable development-related investment disputes, see, e.g., Chester Brown & Domenico Cucinotta, *Treatment Standards in Environment-Related Investor-State Disputes*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 175, 175 (Kate Miles ed., 2019).

[48] Newcombe, *supra* note 42, at 397, 407; Markus W. Gehring & Avidan Kent, *Sustainable Development and IIAs: From Objective to Practice*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 284, 284 (Armand De Mestral & Céline Lévesque eds., 2012). It is also proposed that investment agreements can "contribute only a limit amount to the furtherance of sustainable development goals" and that States must ensure the existence of "robust domestic law that impose obligations on investors and on states to ensure environmental safety and accountability." *See* Andrea K. Bjorklund, *Sustainable Development and International Investment Law*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW, *supra* note 47, at 38, 68.

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pillars. So far, provisions of environmental protection,[49] labor rights,[50] and human rights[51] have been central considerations associated with sustainable development.

C. Sustainable Development and Anti-Corruption Provisions

Nonetheless, anti-corruption provisions do not belong to the first tier of sustainable development provisions developed in investment treaties,[52] although good governance and anti-corruption has, from the very beginning, been explicitly confirmed as an integral dimension of sustainable development in the above-mentioned international documents. At present, the inclusion of anti-corruption measures would not only benefit economic interests, but it would also promote social values, two of which are normally considered "conflicting" interests.

Driven by the need to promote sustainable development objectives, a provision on anti-corruption could be formulated in multiple forms, at varying levels, and from distinct dimensions. At the domestic level, an anti-corruption provision could obligate States to enact a package of anti-corruption laws through national legislation, including criminalizing corruption as an offense; establishing civil, criminal, and administrative sanctions on both individuals and legal entities who commit corrupt acts; protecting witnesses and whistleblowers; etc. At the regional level, States may commit to working jointly in combating transnational corruption and corruption of foreign public officials. At the international level, they may raise anti-corruption standards by transplanting those internationally recognized higher standards and obligations into investment treaties.[53]

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[49] *See generally* Gordon, *supra* note 4; Manjiao Chi, *The* '*Greenization' of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and Its Implications for China*'*s Future Bit-Making*, 18(3) J. INT'L ECON. L. 511, 511-42 (2015).

[50] Edward Guntrip, *Labour Standards, the Environment and US Model BIT Practice: Where to Next?*, 12(1) J. WORLD INV. & TRADE 101, 101-26 (2011); Ulrich Mückenberger, *Can International Investment Agreements Support Labour Standards?*, *in* LONG-TERM INVESTMENT AND THE SUSTAINABLE COMPANY: A STAKEHOLDER PERSPECTIVE VOL. III 177, 177 (Sigurt Vitols ed., 2015); Vid Prislan & Ruben Zandvliet, *Mainstreaming Sustainable Development into International Investment Agreements: What Role for Labor Provisions?*, *in* INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP 390, 390 (Stephan W. Schill et al. eds., 2015).

[51] *See generally* Abdullah Al Faruque, *Mapping the Relationship Between Investment Protection and Human Rights*, 11(4) J. WORLD INV. & TRADE 539 (2010); Karsten Nowrot, *How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?*, 15(3-4) J. WORLD INV. & TRADE 612 (2014). *See also* Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39(3) DENVER J. INT'L L. & POL'Y 483, 483 (2011).

[52] Arguably, this is because the focus was given to other international-level measures like concluding multilateral anti-corruption conventions. *See* Newcombe, *supra* note 42, at 396.

[53] UNCTAD, WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES, at 100-01, U.N. Sales No. E.18.II.D.4 (2018); UNCTAD, WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY, at 140, U.N. Sales No. E.17.II.D.3 (2017).

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Moreover, anti-corruption provisions may not solely require States to endeavor to combat corruption, but also to impose anti-corruption obligations on foreign investors. Given that anti-corruption is a crucial aspect of corporate governance, anti-corruption considerations could also come in the form of CSR clauses by introducing certain standards into domestic laws.[54] Home countries might equally contribute to CSR promotion as well through anti-corruption provisions.[55]

Overall, anti-corruption and good governance comprise one significant component of sustainable development. Inserting anti-corruption provisions into investment treaties would foster, facilitate, and enhance the sustainable development dimension of international investment law. Indeed, anti-corruption provisions are becoming increasingly embedded into investment treaties, which would drive reform of international treaties, strengthen sustainable development dimension of investment policies, and advance growth of FDI inflows and outflows and other private capital flows.

IV. TO STRIKE A SYMMETRIC BALANCE OF INTERESTS BETWEEN INVESTORS AND HOST STATES

Another expectation of anti-corruption provisions is to strike a balance of interests between foreign investors on the one hand and host States on the other. This balancing objective is one central aspect of the current IIA reform. This section will briefly discuss how this intended purpose could be accomplished through anti-corruption considerations in IIAs. To this end, an introduction of the reasons why a symmetric balance of BIT rights and obligations is vital for sustainable development and IIA reform will firstly be presented in a nutshell.

A. The Need for Balancing, IIA Reform, and Anti-Corruption

Investment treaties were initially established to restrict the host State's regulatory measures relating to foreign investment; to this end, host States are commonly obliged to accord a number of rights to foreign investors, including offering a series of favorable treatments like the fair and equitable treatment (hereinafter "FET"), the national treatment, the most-favored-nation treatment (MFN) and the non-discrimination treatment, giving the right to access international dispute settlement, and providing compensation for illegal expropriation, etc.[56] Under these clauses, foreign investors will

[54] *UNCTAD Reform Package* (*2018*), *supra* note 30, at 66.
[55] *Id*. at 67.
[56] *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN

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accordingly obtain compensation or other remedies in cases of a State's violation of these investment disciplines and BIT rights. The remedies are normally granted by ISA tribunals or other judicial or quasi-judicial proceedings and institutions.[57]

At that time, a great restriction on regulatory autonomy was imposed upon host States and few obligations were imposed on investors; later, a range of measures stemming from host States' regulatory powers were condemned as departures from the international obligations enshrined in these older generation of investment treaties, even though these measures were normally out of concern for safeguarding the environment and public health,[58] human rights,[59] and achieving other legitimate public policy objectives.[60] This scenario reflects a systemic problem of the international investment law regime: "a structural inability to adequately or consistently address both the investment risks and the social risks involved in foreign investment."[61] This fact would lead to two entirely different motivations by States: on one end of the spectrum, casting a regulatory chill due to a threat of ISA,[62] and on the other end of the spectrum, calling for a symmetric balance between investment protection and the State's regulatory powers in

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INVESTMENT (4th ed. 2017). *See also* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 147-231 (2009).

[57] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. INT'L ECON. L. 1037, 1037-38 (2010).

[58] *See generally, e.g.*, William Ralph Clayton v. Gov't of Can., Case No 2009-04, Award on Jurisdiction and Liability (Perm. Ct. Arb. 2015) [*Clayton/Bilcon v. Canada, Award of Jurisdiction and Liability (2015)*]; Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016) [*Crystallex International v. Bolivarian Republic of Venezuela*]; *Philip Morris v. Australia*, *supra* note 47.

[59] *See generally, e.g.*, Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017) [*Bear Creek Mining v. Peru (2017)*]; Urbaser S.A. v. The Argentine Republic, ICSID Case No ARB/07/26, Award (Dec. 8, 2016) [*Urbaser v. Argentina, Award (2016)*]; Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award (Apr. 9, 2015) [*Suez v. Argentina, Award (2015)*].

[60] For more case resources, see generally INT'L INST. OF SUSTAINABLE DEV., INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM 2000-2010 (Nathalie Bernasconi-Osterwalder & Lise Johnson eds., 2011), https://www.iisd.org/system/files/publications/int_investment_law_and_sd_key_cases_2010.pdf; STEFANIE SCHACHERER, INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM THE 2010S (Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch eds., 2018), https://www.iisd.org/system/files/publications/investment-law-sustainable-development-ten-cases-2010s.pdf.

[61] Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18(4) J. INT'L ECON. L. 861, 869 (2015).

[62] Vid Prislan & Ruben Zandvliet, *Labor Provisions in International Investment Agreements: Prospects for Sustainable Development*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2012-2013, 357, 369-70 (Andrea Bjorklund ed., 2014); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606, 607-08 (Chester Brown & Kate Miles eds., 2011); Spears, *supra* note 57, at 1039.

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the IIA-making practice.[63] While regulatory chill effects are conceived as a risk to sustainable development (although vulnerable to developing countries),[64] a reform of IIA's goal of attaining symmetry would cater to and better balance considerations of both economic pursuit and environmental and social values. By doing so, the long-lasting and ongoing legitimacy crisis may also be alleviated.

Furthermore, to effectively accommodate the paradigm shift within the regime of investment treaties, the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) has proposed four principles to lead this IIA evolution:

1. Incorporating concrete commitments to promote and facilitate investment for sustainable development.
2. Balancing State commitments with investor obligations and promoting responsible investment.
3. Ensuring an appropriate balance between protection commitments and regulatory space for development.
4. Reforming the ISDS system.[65]

One can notice that striking a balance of conflicting interests between investors and host States is imperative and accounts for a large proportion of the whole sustainable-development-oriented IIA reform project.[66]

Anti-corruption has been considered as part of the effort to achieve such equilibrium. For instance, the World Investment Report 2019 has identified "parity" as one of the features of the new generation of IIAs. One of the manifestations of this feature in the treaties is "balance between investor protection and investor obligations through investor's duty to *abstain from*

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[63] This is not the first instance in which the imbalance of international investment law, in particular, of investment treaties, was brought to the table. Arguably, bilateral investment treaties [hereinafter BITs] were initially created in an asymmetric way between developed capital-exporting countries and developing capital-importing countries. This initial asymmetry, to some extent, results in the inequality of benefits between host States and investors, see Garcia et al., *supra* note 61, at 869-71. It is also argued that imbalance of BITs is found at different levels, see Huaqun Zeng, *Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice*, 17(2) J. INT'L ECON. L. 299, 323-25 (2014). For other aspects of balancing interests of BITs and through investor-state dispute settlement (ISDS), see, e.g., Piero Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests*, 32(1) ICSID REV. 38, 38-57 (2017); Alex Mills, *The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 437, 437 (Zachary Douglas et al. eds., 2014).

[64] Prislan & Zandvliet, *supra* note 62, at 362-63, 365.

[65] *UNCTAD IPFSD* (*2015*), *supra* note 30, at 77-79.

[66] It seems that "sustainable development" is more demanding for developing countries while a need for balancing and preserving public policy space in investment treaties is called by both developed and developing nations. *See* Segger & Newcombe, *supra* note 42, at 102; Graham Mayeda, *Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, *supra* note 42, at 539.

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corruption."[67] The World Investment Report 2016 also identified anti-corruption as one essential part of the debate on how to achieve the appropriate balance.[68]

B. Possible Ways for Balancing and Anti-Corruption Provisions

A desire for a symmetric balance in investment treaties has actually been promoted by States in multiple ways, such as providing interpretive statements that narrow interpretation of investment policies, inserting general exception clauses aimed at exempting States' responsibilities on measures for other non-investment policy objectives, adopting novel language in the preamble indicating States' intention of describing investment policy objectives as compatible with other social and environmental policy goals.[69] No matter how a State develops its BITs for this purpose, the changes could be categorized as deriving from two perspectives: (1) the investor's perspective, imposing obligations on investors to promote responsible investment, and (2) the host State's perspective, affording certain regulatory space with host States.[70] Theoretically, these are also two avenues through which States could draft anti-corruption provisions to contribute to promoting the balance of BITs.

First of all, an anti-corruption provision could be directed at imposing anti-corruption obligations on foreign investors. As early as 1990, the UN had proposed the need to have transnational corporations' behavior be in compliance with certain principles, including anti-corruption. The 2011 OECD Guidelines for Multinational Enterprises also places combating bribery, solicitation and extortion necessary elements to promote responsible business.[71] Prohibiting investors from committing corrupt acts with reference to these documents has been occasionally proposed by scholars.[72]

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[67] Emphasis added. *See* UNCTAD, WORLD INVESTMENT REPORT 2019: SPECIAL ECONOMIC ZONES, at 114, U.N. Sales No. E.19.II.D.12 (2019).

[68] The World Investment Report 2016 provides: "Egypt's updated model BIT is awaiting release after a comprehensive review that involved all concerned stakeholders. The update aims to balance investment protection and the state's right to regulate and includes provisions on combating corruption, SDG consideration, investors' responsibilities and a refined ISDS mechanism." *See* UNCTAD, WORLD INVESTMENT REPORT 2016: INVESTOR NATIONALITY: POLICY CHALLENGES, at 110, U.N. Sales No. E.16.II.D.4 (2016).

[69] *See generally* Spears, *supra* note 57.

[70] *See* Caroline Henckels, *Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2012-2013, at 305, 306 (Andrea Bjorklund ed., 2014). *See also UNCTAD IPFSD* (*2015*), *supra* note 30, at 77-79.

[71] OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES 47-50 (2011).

[72] Zeng, *supra* note 63, at 328; Congyan Cai, *China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12(2) J. INT'L ECON. L. 457, 503-04 (2009). (Cai argues that the conduct of investors should be regulated in the China–US BIT which could be designed in four ways: in declaratory way, in mandatory way, in

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In practice, provisions that foster responsible and corruption-free investments constitute a relatively large portion of the entirety of the anti-corruption provisions currently in existence.

Such provisions are presented either in the CSR-based form or through "carve-out" clauses.[73] As for the CSR-based anti-corruption provisions, States encourage foreign investors to voluntarily comply with CSR rules, principles and practices (including those of anti-corruption) through CSR clauses. In terms of the "carve-out" statements on anti-corruption, some States insert direct and explicit anti-corruption obligations on investors by stating that "investors and investment shall not . . . [conduct corrupt acts]." Some have drafted such provisions from the State's perspective, mentioning that States should not be obliged to protect investments contained through corruption. Additionally, there are provisions expressly denying investors' access to investor-state dispute settlement (ISDS) if the investment concerned is made by way of corruption. It is evident that the CSR-based anti-corruption provisions are less demanding than "carve-out" anti-corruption provisions.

Secondly, safeguarding the State's regulatory powers on anti-corruption is another available way for States to strike this balance. It enables States to take regulatory measures on foreign investments established in their jurisdiction for public interest purposes and within the principle of non-discrimination. It has been undisputed that the right to regulate originates from the principle of sovereignty.[74] However, the scope of the State's right to regulate out of environmental and social concern is far less clear, which leaves greater discretion to the contracting States.[75]

The regulatory flexibility in investment treaties manifests itself in various ways. The current practices show that two approaches are normally referred to by States: refining substantive provisions (such as those addressing FET) and adding general exception clauses.[76] In fact, the regulatory flexibility approach is much less frequently applied by States in dealing with anti-corruption issues. One example of refining substantive provisions in the anti-corruption context is the Slovakia-Islamic Republic of

prohibited way and in persuasive way. Cai also expressly proposes that anti-corruption matters could be incorporated into the China–US BIT in a prohibited way, entirely requiring investors not to engage in bribery and corruption.)

[73] Yan, *Anti-Corruption Provisions in International Investment Agreements*, *supra* note 4, at 994; JEAN-MICHEL MARCOUX, INTERNATIONAL INVESTMENT LAW AND GLOBALIZATION: FOREIGN INVESTMENT, RESPONSIBILITIES AND INTERGOVERNMENTAL ORGANIZATIONS 32-34 (2019).

[74] Spears, *supra* note 57, at 1038; Elizabeth Trujillo, *Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime*, 59(8) BOS. COLL. L. REV. 2735, 2737 (2018); Howard Mann, The Right of States to Regulate and International Investment Law 5 (Nov. 6-8, 2002), https://www.yumpu.com/en/document/view/22577605/the-right-of-states-to-regulate-and-international-investment-law.

[75] Trujillo, *supra* note 74, at 2738.

[76] Spears, *supra* note 57, at 1048.

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Iran BIT (2016), where States expressly agreed that "elimination of bribery and corruption" could be a "legitimate public purpose" to "justify" measures inconsistent with the national treatment and most-favored-nation treatment.[77] Some States like Brazil select the device of general exception clauses to address anti-corruption, stating, for example, that nothing in the agreement shall require States to protect those investments made illegally.[78] This type of statement can also be deemed as a way of "imposing investor's obligations."

V. TO ATTRACT FOREIGN INVESTMENT FLOWS

Anti-corruption provisions may also encourage more FDI flows by providing a "corruption intolerance" environment for foreign investors. Attracting foreign investment is one initial motivation for establishing the regime of investment treaties, which is an important component of contemporary economic development policy. For developing countries, FDI would be critical to improve the overall domestic living conditions and

[77] Article 4 of the Slovakia–Islamic Republic of Iran BIT (2016) provides:

> Article 4 National Treatment and Most Favored Nation Treatment
> 1. Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favorable than that it accords, in comparable situations, to its own investors and their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its territory.
> 2. Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favorable than that it accords, in comparable situations, to investors of any third State or to their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its territory.
> . . . .
> 4. A measure of the Contracting Party that treats investors of the other Contracting Party of their investments less favorably than:
> a) its own investors or their investments is not inconsistent with paragraph 1 of this Article; or
> b) investors of another State or their investments is not inconsistent with paragraph 2 of this Article;
> if it is adopted and applied by the Contracting Party in pursuit of a legitimate public purpose that is not based on the nationality of the investor or of nationality of the owner of an investment, either explicitly or factually, including the protection of health, safety, the environment, and internationally and domestically recognized labor rights, or the elimination of bribery and corruption, and it bears a reasonable connection to the stated purpose.

Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, Iran-Slovak., Jan. 19, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3601/download.

[78] *See Cooperation and Facilitation Investment Agreement* (*Brazil Model BIT)*, UNCTAD, art. 15, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download (last visited Mar. 7, 2015).

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welfare of the populations, as the UNCTAD World Investment Report 2001 noted: "[m]any countries, in particular the poorer and least industrialized ones, risk becoming even more marginal to the dynamics of international production because they cannot meet the new requirements for attracting high quality FDI. There is a need to develop attractive configurations of locational advantages."[79]

An increase in foreign investment flows will bring various benefits, including both direct gains and indirect benefits, such as increasing job opportunities, tax revenues, foreign exchange, technology transfer, etc. A framework of good practices has been identified as instrumental for investment promotion activities to attract FDI, including elements of organizational strategy, inquiry handling, investment facilitation, incentives, aftercare, and monitoring and evaluation activities.[80] Corrupt acts that are conducted between private sectors and public officials may occur in each stage of an investment promotion activity, such as affecting the good governance of the investment facilitation and monitoring and evaluation process. To see how anti-corruption provisions affect countries' FDI attractiveness, it is necessary and important to first look at the relationship between (anti-)corruption and FDI.

The relation between corruption and FDI attractiveness is not a simple one for an explanation. On one hand, studies discussing policies to attract FDI seldom embrace many discussions on corruption;[81] on the other hand, the empirical research on this issue presents contradictory results. This section is not aimed at conducting an empirical study of the relationship between corruption and FDI attractiveness of countries, but to assemble related empirical literature and provide a theoretical analysis of why anti-corruption provisions would benefit the policy of attracting FDI.

Although corruption has been widely recognized in international conventions as an evil to good governance, human rights and economy, there are ongoing arguments about whether corruption is harmful or beneficial to the international economy. There are viewpoints suggesting that "corruption in developing nations is not necessarily antipathetic to the development of modern economic and social systems; that corruption serves in part at least a beneficial function in developing societies."[82] More studies, however,

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[79] UNCTAD, WORLD INVESTMENT REPORT 2001: PROMOTING LINKAGES, at 122-23, U.N. Sales No. E.01.II.D. (2001).

[80] Henry Loewendahl, *Innovations in Foreign Direct Attraction*, INTER-AMERICAN DEV. BANK [hereinafter IDB], at 7-10, IDB Doc. IDB-TN-1572, https://publications.iadb.org/publications/english/document/Innovations-in-Foreign-Direct-Investment-Attraction.pdf.

[81] U.T. Isayev, *Foreign Investment During the Transition: How to Attract It, and How to Make the Best Use of It*, at 3 (May 27, 1998), https://www.imf.org/external/np/eu2/kyrgyz/pdf/isayev.pdf. In this paper, the author simply mentioned corruption as one of main problems hindering foreign direct investment [hereinafter FDI] without further and detailed discussions.

[82] David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19(4) W. POL. RSCH. Q. 719, 719 (1966).

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especially the recent ones, illustrate that corrupt acts discourage the development of the international economy [83] and, in particular, that corruption will be a detriment to FDI attractiveness.[84] A recent OECD report further shows that the contracting parties to the OECD Anti-Bribery Convention will see a certain degree of FDI fall at the time the acts of corruption rise.[85] Another recent study, which examined 142 countries from the period of 1994-2014, concluded that "a lack of corruption was found both to have a positive and statistically significant impact on the growth rate of real per capita GDP and to increase the investment ratio."[86] It is also argued that "generally corruption affects the investment attractiveness of the country, but it is not the major factor affecting the FDI inflow."[87] Moreover, there may be a "negative effect due to the *difference* in corruption levels between the home and host countries."[88] An anti-corruption provision is a consensus established by both parties. Such provisions not only mandate State parties to conduct anti-corruption practices in international investment, but also ensure that the standards applied at the domestic level are consistent between one State party and another.

Moreover, investment treaties are presumably concluded by sovereign States—especially by developing countries—in order to increase investment flow and "allow states that are hospitable to foreign capital to convince investors that they are genuine."[89] The theories of BITs have suggested that States need to demonstrate their will to "create and maintain a stable and favorable investment climate" and offer alternative dispute settlements to investors so as to attract more investment flow. [90] The integrity and

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[83] *See generally* Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?* (World Bank Pol'y Rsch. Working Paper Series, Working Paper No. 2048, 1999). Paolo Mauro, *Corruption and Growth*, 110(3) Q.J. ECON. 681, 681-712 (1995).

[84] *See generally* Jung-Yeop Woo, *The Impact of Corruption on A Country's FDI Attractiveness: A Panel Data Analysis, 1984-2004*, 17(2) J. INT'L & AREA STUD. 71 (2010). In this article, Woo analyzed the data of ninety countries for twenty-one years from 1984 to 2004. It also made a comparison between OECD countries and non-OECD countries. *See also* Mohsin Habib & Leon Zurawicki, *Corruption and Foreign Direct Investment*, 33(2) J. INT'L BUS. STUD. 291, 303 (2002).

[85] Adrian Blundell-Wignall & Caroline Roulet, *Foreign Direct Investment, Corruption and the OECD Anti-Bribery Convention* 21-22 (OECD Working Papers on Int'l Inv., Working Paper No. 2017/01, 2017).

[86] Andrzej Cieślik & Łukasz Goczek, *Control of Corruption, International Investment, and Economic Growth — Evidence from Panel Data*, 103 WORLD DEV. 323, 330 (2018).

[87] Ayshan Gasanova et al., *The Assessment of Corruption Impact on the Inflow of Foreign Direct Investment*, 1836(1) AIP CONF. PROC. 020011-1, 020011-4 (2017).

[88] Habib & Zurawicki, *supra* note 84, at 303.

[89] Yoram Z. Haftel, *Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries*, 17(2) REV. INT'L POL. ECON. 348, 349 (2010). It is worth noting that reducing protection for investors and enhancing the regulatory space of the host States would likely undermine FDI attractiveness.

[90] Rodrigo Polanco Lazo et al., *Missing Investment Treaties*, 21(3) J. INT'L ECON. L. 703, 703-04 (2018); Jason Webb Yackee, *Do Investment Promotion Agencies Promote Bilateral Investment Treaties, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2013-2014 529, 531-32 (Andrea K. Bjorklund ed., 2015).

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governance of the government is also an important factor that a reasonable investor will factor in. In this sense, incorporating anti-corruption provisions as a reflection of a State's commitments of taking anti-corruption measures to ensure a preferable investment environment will contribute to the FDI attractiveness of this State.

VI. CONCLUSION

Topics surrounding the allegations of corruption in international arbitration have attracted great attention among practitioners and academics. The development of anti-corruption provisions in international investment treaties has, however, been underexamined. This article then provides a unique and timely investigation of the existing anti-corruption provisions by looking into their driving forces and main objectives.

First of all, including provisions regulating corruption issues to some extent assists investor-State tribunals in adjudicating allegations of corruption. Until now, ISA tribunals have dealt with a great number of cases where allegations of corruption have been raised but the current case law in terms of the legal consequences of a positive corrupt act and the ultimately-used evidential standards have also raised mounting criticism. One of the reasons lies in the fact that none of them had referred to anti-corruption provisions because these applicable treaties do not contain any clear or specific anti-corruption clauses. In this sense, inserting anti-corruption provisions into IIAs can offer practical tools for international arbitration.

Second, anti-corruption provisions have been consistently acknowledged as one important component to fulfill the purposes of sustainable development in the new generations of IIAs. A provision on anti-corruption could direct at either investors or States, or both, requiring the relevant parties to prevent and combat corruption by deploying effective anti-corruption measures. Given that anti-corruption is a crucial aspect of corporate governance, anti-corruption considerations could also come in the form of CSR forms by introducing certain standards into domestic law.

Third, anti-corruption provisions can also contribute to balancing interests between foreign investors and host States. A balance expected under the IIA reform can be achieved through the investor's perspective, imposing obligations on investors to promote responsible investment. In practice, provisions that foster responsible and corruption-free investments constitute a relatively large portion of the entirety of the anti-corruption provisions currently in existence. On the other, safeguarding the State's regulatory powers on anti-corruption is another available way for States to strike this balance. We can observe certain treaties where States have established and preserved a regulatory space in matters relating to bribery and corruption.

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Last but not least, anti-corruption provisions may also encourage more FDI flows. States who are willing to promote a more transparent environment are likely to be more attractive to foreign investors. Incorporating anti-corruption provisions as a reflection of a State's commitments of taking anti-corruption measures to ensure a preferable investment environment will contribute to the FDI attractiveness of this State.

In light of the above, States are advised to insert anti-corruption considerations in the future IIA-making practices as a means to combat and eliminate corruption through international investment law. This is particularly important to Asian countries in the process of shaping a new Asian regionalism.[91] Purportedly, corruption in many countries in the region of Asia continues to be strong in spite of the slight improvements over the past years.[92] Asian companies and even governments were claimed, before international courts and tribunals, as having conducted corrupt acts in transnational business.[93] At the legislative level, unlike regions of Africa, Europe, and America, there is a lack of a *regional* convention on anti-corruption effective in the Asian context; while relying mainly on the UNCAC, Asian nations have encountered various challenges and difficulties to varying degrees in implementing this universal convention. That said, the international investment treaty regime has the potential to serve as an effective channel for Asian nations to reform its image, expand its presence in investment flows, contribute to the IIA reforms, and ultimately further the new Asian regionalism. Remarkably, Japan and Singapore, together with other Asian countries in the CPTPP, have made strong commitments on promoting anti-corruption standards in their investment and trade agreements. It is imperative for other Asian nations to take actions as well.

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[91] *See generally* PASHA L. HSIEH, NEW ASIAN REGIONALISM IN INTERNATIONAL ECONOMIC LAW (2021).

[92] *See Corruption Perceptions Index 2021*, TRANSPARENCY INT'L, https://www.transparency.org/en/cpi/2021 (last visited Mar. 11, 2022).

[93] *See, e.g.*, *Spentex Netherlands v. Uzbekistan*, *supra* note 1; *Niko Resources v. Bangladesh*, *supra* note 1.

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