

Anti-corruption aspects of International Investment Law

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IIL and anti-corruption objectives: patterns of interaction

- International Investment Law as a tool for anti-corruption policies
 - How can IIL and investment policy contribute to anti-corruption objectives?
- Anti-corruption policy as objective of International Investment Law
 - Is anti-corruption an objective of IIL?
 - How is this goal best served?



Overview

- Anti-corruption as an objective of International Investment Law
- Anti-corruption in investment arbitration
- The way forward? investors' obligations and the new Indian model BIT

Anti-corruption policy objectives in International Investment Law

- The linkages between FDI and corruption
- The objectives of international investment law
 - Historical perspective
 - Recent Bilateral Investment Treaties
- Should anti-corruption objectives be part of IIL/ BITs?

FDI and incentives to (not) bribe

- Bribery resulting in a sub-optimal economic efficiency equilibrium and distorting competition
- Bribery as an element of competition in certain markets (industries/ countries)
- Transparency/ CSR/ voluntary measures



FDI and the nature of bribe

- MNCs as multi-jurisdictional entities
- Bribe activities can be complex and may involve more than one (physical/ legal) persons as bribers
- Bribes and transfer of capital

Enforcement of anti-corruption laws

- Domestic enforcement
 - Complexities of effective regulatory control (monitoring)
 - Lack of effective regulatory responses in investment recipient, developing countries
 - Jurisdictional limits of home country control and extraterritoriality
- The development of international institutions
 - The OECD Anti-bribery Convention

The objectives of IIL: A historical perspective

- Protection of aliens' property
 - Customary international law
 - Diplomatic protection
 - International minimum standard and protection against expropriation
 - Threats to the scope/ existence of customary law
 - Treatification of investment protection
 - Network of more than 3,000 BITs

The objectives of IIL: The modern BIT

- FDI theory and investment determinants
- BITs as incentives to attract FDI
 - Rules regarding entry and access to the market
 - Rules enhancing institutions and the rule of law (FET)
 - Rules offering effective protection (ISDS)

The objectives of IIL: The modern BIT (II)

- BITs as ensuring benefits for development of investment-recipients
- Investment and the right to regulate
- Investment and promotion of sustainable development
- Investors' responsibility and obligations

Does anti-corruption fit under the modern BIT?



Dealing with corruption in IIL

- Corruption and legality of an investment
- Legality as an question of national/ international law
- Effects of illegality of an investment
- Existing criticism

Legality of investments

- Legality of investment activity as such
 - *Tokios Tokeles v Ukraine*
 - *Inmaris v Ukraine*
 - *Fraport v Philippines*
- Legality of method for acquisition of investment
 - *Inceysa v El Salvador* (fraud)
 - *World Duty Free v Kenya* (corruption)
 - *Metal-Tech v Uzbekistan* (corruption)

Legality as a question of national law

- Legality assessment based on BIT provisions requiring that a protected investment is made “in accordance with local laws”
- *Salini v Morocco*

“this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal. (para. 46)
- *Quiborax v Bolivia*

“The Tribunal considers that the BIT's legality requirement has both subject-matter and temporal limitations. The subject-matter scope of the legality requirement is limited to (i) non-trivial violations of the host State's legal order (*Tokios Tokelés*, *LESI* and *Desert Line*), (ii) violations of the host State's foreign investment regime (*Saba Fakes*), and (iii) fraud – for instance, to secure the investment (*Inceysa*, *Plama*, *Hamester*) or profits (*Fraport*). Additionally, under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments “made” in accordance with the laws and regulations of the host

Legality as a question of national law

Under BITs without a provision “in accordance with local laws”, legality under national law matters

- *Hamester v Ghana*

“An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; ...These are general principles that exist independently of specific language to this effect in the Treaty”

Legality as a question of national law

International Public Policy

World Duty Free v Kenya

“In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”

Relevant timing of illegality and causality

- “In accordance with local law” requires legality at the stage of entry (*Metal-Tech v Uzbekistan*)
- Illegality concerning the performance of an investment affects the discussion of the merits (*Hamester v Ghana*)
- Illegality concerns the consent to ICSID Arbitration (*Phoenix v Czech Republic*)

Effects of corruption

- Legality linked to the definition of investment
 - In accordance with local laws
 - Illegality at the time of entry

Affects jurisdiction *ratione materiae*

- Legality affects the merits
 - *World Duty Free v Kenya*
 - Separability of arbitration clause
 - Invalidity of substantive terms of the contract

Illegality of the State

- BIT protection cannot be excluded for State violations of domestic law (*Kardasopoulos v Georgia*)
- Acts of officials are attributed to respondent state
- Estoppel: States cannot rely on investors' violation of domestic law if they knew the illegality and deliberately accepted it
 - *Inmaris v Ukraine*
 - *Alpha v Ukraine*

Illegality of the state (II)

Metal Tech v Uzbekistan

“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. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.”



Criticism

- Illegality at different stages of investment
- Reliance on national law definitions
- Adjudication by ISDS
 - Legitimacy
 - Expertise
 - Accountability



Criticism

- Lack of estoppel and investors' rights
- Incentives to invest
- Incentives to introduce higher standards
- Equality of competitive conditions



A new approach: The Indian new model BIT

- The proposal
 - Subjecting IIAs benefits to compliance with anti-corruption obligations
 - Corruption definition based in IIA
 - Covering both initial and later stages of an investment
 - Allowing for counter-claims in front of tribunals



Indian model BIT

Article 8.3

“The Parties further agree that compliance with Articles 9, 10, 11 and 12 of this Chapter is compulsory and is fundamental to the operation of this Treaty. Investors and their Investments must comply with the obligations in Articles 9, 10, 11, and 12 to benefit from the provisions of this Treaty.”

Article 9: Obligation against Corruption

9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.

9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.

9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State’s Law.

9.4 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

Indial Model BIT

14.11 Counterclaims by Parties

(i) A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.

(ii) In assessing the monetary compensation to be paid to a Party under this Article, the tribunal can take into consideration the following: a. whether the breach justifies an award of damages; and
b. whether that Party has taken steps to mitigate its losses.

(iii) The Parties agree that a counterclaim made in accordance with this Article 14.11 shall not preclude or operate as a *res judicata* against applicable legal, enforcement or regulatory action in accordance with the Law of the Host State or in any other proceedings before judicial bodies or institutions of the Host State.

Anti-corruption as an objective of IIL

- Incentive to attract FDI
 - Incentives for MNEs to adopt and self-monitor anti-corruption standards
 - Attract development-friendly investments
 - Facilitate the establishment of competitive conditions in local market

But

- Lack of estoppel and abuse by host state
- Investors obligations and ISDS as appropriate dispute settlement

- Benefit investment recipient country
 - Legal certainty
 - Avoiding the (weak) institutional framework of investment recipient countries

But

- ISDS and legitimacy/ accountability/ expertise
- Able to influence domestic institutions?



Thank you for your attention