CORRUPTION AND FTAS: DOES AN IMPLICIT CAUSE OF ACTION EXIST FOR CORRUPTION CLAIMS IN ISDS?

COLLIER BOWLING*

I. INTRODUCTION

"Corruption undermines democratic institutions, slows economic development and contributes to governmental instability. It is a key obstacle to progress and prosperity, hurting poor people disproportionately."[1] Corruption occurs when one entrusted with power abuses that power for any sort of personal gain.[2] Some may think of corruption solely as brib-

* New York University School of Law, J.D. 2019. I would like to thank Professor Alvarez for his immensely valuable feedback that was essential for this Note. Additionally, I would like to thank the staff of *the NYU Journal of International Law and Politics* for the extensive help and patience in helping me finalize this Note.

1. Press Release, United Nations Office on Drugs & Crime, Eliminating Corruption is Crucial to Sustainable Development (Nov. 1, 2015), https://www.unodc.org/unodc/en/press/releases/2015/November/eliminating-corruption-is-crucial-to-sustainable-development.html.

2. *What is Corruption?*, TRANSPARENCY INT'L, https://www.transparency.org/what-is-corruption (last visited Apr. 7, 2019) (explaining what corruption consists of).

ery, but bribery forms only part of the issue of corruption.[3] Acts of bribery fall under the classic case of corruption where an investor, either having solicited or been asked for a bribe, pays a government official for some form of an affirmative favor or a lack of regulatory action.[4] For example, assume an investor wants to invest in Country X, but a government official tells the investor that a gift of $500 must be given to the government official first. If the investor complies with the request, then an instance of corruption has occurred.[5]

However, acts of bribery do not encompass the whole definition of corruption, and this paper additionally focuses on acts of corruption beyond bribery. Incorporating additional acts of corruption as recognized by arbitral tribunals, this note defines public corruption as a situation where a public official misuses his or her position of power to pursue monetary, political, or personal gains.[6] This definition includes not only the prior example of a classic act of bribery, but also situations where a government official takes morally dubious actions that are not necessarily in pursuit of the public good for some gain. Possible scenarios could include a government official using his position of authority to pursue investigations against a political competitor solely for harassment purposes or a government official using the public order apparatus of a state to de-

---

3. *Compare Corruption Information: What is Corruption*, GLOBAL INFRASTRUCTURE ANTI-CORRUPTION CTR. (Nov. 6, 2014), http://www.giaccentre.org/what_is_corruption.php (listing various forms of corruption including: "bribery, extortion, fraud, cartels, abuse of power, embezzlement, and money laundering.") *with Corruption and the Paradox of Transparency*, 9 (Stanford Law School Rule of Law Program, Working Paper No. 03-2018) (defining corruption as bribery—when someone pays an agent to influence the agent's actions).

4. *Corruption*, BLACK'S LAW DICTIONARY (10th ed. 2014). This definition only covers public bribery, as there is a separate type of bribery called "commercial." Commercial bribery is "[t]he knowing solicitation or acceptance of a benefit in exchange for violating an oath of fidelity, such as that owed by an employee, partner, trustee, or attorney." *Commercial Bribery*, BLACK'S LAW DICTIONARY (10th ed. 2014). For this note, public bribery is the relevant bribery definition.

5. This situation of bribery assumes that there is no legitimate purpose under law for the $500 gift to the public official. A case discussed later in this note portrays a similar situation on a much larger scale. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

6. *What is Corruption?*, *supra* note 2.

lay a competitor's business plans.[7] Ostensibly, the official will act under a proper purpose, such as ensuring the political competitor is not breaking any laws. However, in reality, the official has no legitimate intentions under their delegated powers.

Beyond the issue of defining corruption, it is important to discuss the assertion that corruption negatively affects investors and citizens.[8] The effects of corruption are numerous. Some reoccurring examples of its effects include investors facing higher costs, possible competitive disadvantages for investors who do not participate in corruption, and poor governance.[9] For all countries, and developing countries in particular, corruption poses huge challenges to human development, economic, and governance goals if unaddressed. Indeed, recognizing the harms of unaddressed corruption, countries have implemented and continue to implement measures to combat corruption.[10] Arguably inspired by the passage of the United States' Foreign Corrupt Practices Act (FCPA) in 1977, the international community implemented domestic laws and created multilateral regimes to address the transnational scope of corruption.[11]

---

7. Under these examples, the said government official does have the official authority to pursue these actions. The official is not pursuing these actions in order to uphold the sanctity of the law or pursue his or her official duties. Rather, the official is pursuing these actions out of personal motive. The case discussed later in this note, *Yukos v. Russian Federation* discusses accusations from the Claimant against Russian government officials that align with these examples. Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 27, Final Award (Perm. Ct. Arb. 2014).

8. *See* Stefan Mbiyavanga, *Improving Domestic Governance Through International Investment Law: Should Bilateral Investment Treaties Learn from International Anti-Corruption Conventions?*, 2017 OECD GLOBAL ANTI-CORRUPTION & INTEGRITY F. 2 (2017) (arguing that corruption hurts both investors and affected citizens alike).

9. *Id.*

10. FRITZ HEIMANN & GILLIAN DELL, EXPORTING CORRUPTION? COUNTRY ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION: PROGRESS REPORT 2012, at 6 (2012) (detailing the level of anti-corruption enforcement among signatories to the OECD Convention).

11. Mbiyavanga, *supra* note 8, at 3. *See also* Andrew Kaizer & Kate Learoyd, *The Global Impact of the U.S. Foreign Corrupt Practices Act*, MCDERMOTT WILL & EMERY: INT'L NEWS, 2007, at 6, 6 (explaining that the FCPA substantially influenced the OECD Convention on Combating Bribery of Overseas Public Officials in International Business Transactions).

This paper focuses on Free Trade Agreements (FTAs), specifically those agreements concluded with the United States.[12] FTAs are a type of Bilateral Investment Treaty (BIT), and this paper uses these terms interchangeably.[13] Recently, FTAs increasingly focus on corruption. Given their purpose of encouraging trade, this growing focus on corruption—which is detrimental to economies—is not surprising.[14] Since 2000, more than 40% of concluded FTAs have anti-corruption commitments.[15] These FTA anti-corruption commitments include pledges to criminalize corruption, protections for whistleblowers, and monetary sanctions for corrupt activities.[16] Significantly, FTAs allow for investor-state dispute settlement (ISDS).[17] ISDS is a remedy that exists for investors for breaches of investment treaties, which could arguably include violations of anti-corruption commitments.[18] This remedy exists as long as the disputed investment is among the covered investments of the FTA and if, under the FTA, an incidence of corruption is a cause of action under ISDS.[19]

FTA dispute settlement schemes are usually limited to certain types of investments and open to only certain types of claims. The qualifications for covered investments and causes

---

12. Free trade agreements (FTAs) are treaties "between two or more countries to facilitate trade and eliminate trade barriers." *Free Trade Agreement (FTA)*, BUS. DEV. BANK CAN., https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/pages/free-trade-agreement-fta.aspx (last visited Apr. 7, 2019).

13. BITs establish "terms and conditions for private investments made by individuals and business entities from one sovereign state in another sovereign state." *Bilateral Investment Treaties (BITs)*, GEO. L. LIBR., http://guides.ll.georgetown.edu/c.php?g=371540&p=4187393 (last updated Mar. 4, 2019).

14. *Free Trade Agreement*, *supra* note 12. *See also* Press Release, United Nations Office on Drugs & Crime, *supra* note 1 (discussing the negative effects of corruption).

15. MATTHEW JENKINS, TRANSPARENCY INT'L HELPDESK, ANTI-CORRUPTION AND TRANSPARENCY PROVISION IN TRADE AGREEMENTS 2 (2017) (discussing regional trade agreements, which as a type of agreement includes free trade agreements).

16. Iza Lejárraga, *Deep Provisions in Regional Trade Agreements: How Multilateral-Friendly?* 26 (OECD Trade Policy Papers No. 168, 2014).

17. JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 41-43 (2011).

18. *Id.*

19. Michael Polkinghorne & Sven-Michael Volkmer, *The Legality Requirement in Investment Arbitration*, 34 J. INT'L ARB. 149, 151 (2017).

of action are therefore important to the availability of remedies. The possible causes of action appear in an FTA's *Investment* chapter. If the investment that forms the basis of a dispute is not among the list of covered investments, then there is no access to an arbitral tribunal over disputes arising out of that investment.[20] Additionally, even if the investment is a covered investment, if the cause of action is not included under the FTA, then an arbitral tribunal does not have jurisdiction to hear the case.[21] A classic example of a dispute before an arbitral tribunal is when a country directly expropriates, or takes control of, an investment.[22] As long as the investment is among the covered investments listed under the respective FTA, and expropriation is listed as a cause of action, which it almost always is, then the investor has access to an arbitral tribunal to resolve the investment dispute.[23] Based on the arbitral tribunal's legal evaluation of the dispute's merits, the tribunal could then issue a binding decision on the parties either providing a remedy for the investor or barring the investor from any remedy.[24]

Given the importance of the text of FTAs in determining whether access to arbitral tribunals exists, analyzing the specific wording of FTA provisions is essential. Upon review of the United States' FTAs, however, corruption provisions do not appear in any of the Investment chapters.[25] In other words,

---

20. *See,* Polkinghorne & Volkmer, *supra,* note 19, at 150-51 (discussing how BITs can limit their applicability to cover only certain time of investments).

21. Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1 J. Int'l Dispute Settlement 111-12 (2010) (discussing the need for an investment treaty to have a valid cause of action for an investor to utilize an arbitral tribunal afforded by the treaty).

22. *See* ALVAREZ, *supra* note 17, at 52 (quoting Article III(1) of the U.S. Model BIT of 1987 which provides that "[i]nvestments shall not be *expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization* ('expropriation') except for a public purpose . . . .").

23. Carlos M. Correa, *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, 26 MICH. J. INT'L L. 331, 336 (2004).

24. *See* ALVAREZ, *supra* note 17, at 58-59.

25. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993); United States-Israel Free Trade Agreement, Isr.-U.S., Apr. 22, 1985, 24 I.L.M. 657; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a

under each U.S. FTAs' Investment chapter, there is no cause of action explicitly allowing claims for instances of corruption, including bribery. A plain-language reading of the FTAs suggests an investor does not have access to an arbitral tribunal under a U.S. FTA for an investment dispute arising out of a corruption incident. If some basis other than an allegation of corruption exists, such as the involvement of expropriation in the investment dispute, then the investor would have access to an arbitral tribunal.[26] Thus, unless the investor finds another cause of action that *is* covered under the respective FTA, the investor cannot access an arbitral tribunal.

This denial of access to an arbitral tribunal is an obstacle to combatting corruption—a goal which academics and practitioners in the field of international law assert is important for international public policy.[27] Further, investors here arguably

---

Free Trade Area, Jordan-U.S., Oct. 24, 2000, 41 I.L.M. 63; United States-Singapore Free Trade Agreement, Sing.-U.S., May 6, 2003 [hereinafter U.S.-Singapore FTA], https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf; United States-Morocco Free Trade Agreement, Morocco-U.S., June 15, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text; United States–Bahrain Free Trade Agreement, Bahr.-U.S., Sept. 14, 2004, 44 I.L.M 544; United States-Oman Free Trade Agreement, Oman-U.S., Jan. 19, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text; Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, 43 I.L.M. 514 [hereinafter CAFTA-DR]; United States-Chile Free Trade Agreement, Chile-U.S., June 6, 2003, 42 I.L.M. 1026; Australia-United States Free Trade Agreement, Austl.-U.S., May 18, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text; United States-Peru Trade Promotion Agreement, Peru-U.S., April 12, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; United States-Panama Trade Promotion Agreement, Pan.-U.S., June 28, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text; United States-Colombia Trade Promotion Agreement, Colom.- U.S., Nov. 22, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text; Free Trade Agreement Between the United States of America and the Republic of Korea, S. Kor.-U.S., June 30, 2007 [hereinafter KORUS FTA].

26. *See, e.g.*, CAFTA-DR *supra* note 25, art. 10.7(1) (discussing how acts of expropriation violate the protections afforded to investment under the agreement).

27. For example, some academics say that denying investors access to arbitral tribunals based on a corruption cause of action could provide "countries with perverse incentives that might encourage corruption." This is because if a country's officials know that an investor's only legal recourse for a cause of action based off corruption is that country's domestic courts, the

have a moral basis for access to arbitral tribunals for instances of corruption. Taken together, it serves the public policy goals of all interested parties if FTAs provide a cause of action for corruption. This note argues that instances of corruption can be remedied through ISDS via other causes of action listed in the FTAs. Part I analyzes existing anticorruption principles and how parties to a tribunal can use acts of corruption to rid a tribunal of jurisdiction over a claim. Part II evaluates the extent to which an investor can make a claim against a state for state acts of corruption. Finally, Part III explores the difficulties a claimant faces in attempting to seek remedies from a state through a tribunal for corrupt state acts.

II. IF AND HOW INSTANCES OF CORRUPTION ARE RELEVANT IN ISDS

A. *Legality Requirement—The Necessary Component for Investments*

A review of the literature and ISDS case law shows that instances of corruption are important considerations in ISDS.[28] Many FTAs do not give an investor protection afforded by ISDS if its investment is not *in agreement with* the laws of the Host State.[29] Even if this legality requirement is not present, arbitral tribunals may still punish investors who participate in corruption. Despite the lack of a stare decisis principle in ISDS, scholars and adjudicators note the development of a

officials may feel more comfortable pursuing corrupt official actions. Travis Edwards, *Corruption as a Jurisdictional Barrier in Investment Arbitration: Consequences and Solutions*, GLOBAL ANTICORRUPTION BLOG (July 17, 2017), https://globalanticorruptionblog.com/2017/07/17/corruption-as-a-jurisdictional-barrier-in-investment-arbitration-consequences-and-solutions/.

28. *See, e.g.*, World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 149 (Oct. 4, 2006) (discussing the importance of corruption in arbitral tribunal's award); EDF (Services) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, ¶¶ 140–41 (Oct. 8, 2009) (noting that corruption is a violation of international public policy); Danielle Young, *Is Corruption an Emerging Cause of Action in Investor-State Arbitration?*, GLOBAL ANTICORRUPTION BLOG (Jan. 22, 2016), https://globalanticorruptionblog.com/2016/01/22/is-corruption-an-emerging-cause-of-action-in-investor-state-arbitration-2/ (discussing how international investment law has helped promote anticorruption norms).

29. *See, e.g.*, Polkinghorne & Volkmer, *supra,* note 19, at 149 (sharing an example a BIT between Spain and El Salvador indirectly requires "that investments be made 'in accordance with the laws of the host State'.").

"common law of anticorruption principles."[30] As a result, "arbitral panels have sometimes used anticorruption norms to interpret treaties and contracts that made no mention of anticorruption."[31] Additionally, even when treaties make no explicit requirement in the Investment section for the investment to meet the Host State's legal requirements, arbitral tribunals occasionally recognize an implicit *legality requirement* and deny asserting jurisdiction over disputes.[32] Perhaps at the root of this rise in arbitral panel attention to the issue of corruption is the lack of a global consensus about increasing or addressing anticorruption enforcement in numerous countries.[33] Governments that are weak on anticorruption enforcement cause numerous investors to face unjust outcomes as a result of corruption.[34] For example, domestic courts of a country unwilling to remedy an investor for a country's administrative corruption will not fairly adjudicate claims. Without access to courts, the foreign investor is likely without remedy for the injustice suffered. With this void in international anticorruption norms, international investment law and arbitral tribunals play important roles in promoting anticorruption principles.[35]

There is a rising trend among arbitral tribunals to bridge this gap and address issues of corruption.[36] Arbitral tribunals should feel comfortable addressing corruption in disputes due to provisions in the New York Convention that strongly encourage anticorruption. While the New York Convention dis-

30. Young, *supra* note 28.

31. *Id.*

32. *See, e.g.*, Polkinghorne & Volkmer, *supra,* note 19, at 155 (quoting Gustav. F.W. Hamester GmbH & Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶¶ 123–24 (June 18, 2010)) 123-24 "[An investment] will . . . not be protected if it is made in violation of the host State's law . . . . These are general principles that exist *independently of specific language to this effect in the Treaty.*").

33. Juanita Olaya, *Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption* 7-8 (Soc'y of Int'l Econ. Law, Online Proceedings Working Paper No. 2010/43, 2010) (discussing how there in no "global order per se" to combat the negative effects of globalization, including newly created opportunities for corruption).

34. *See generally* JENKINS, *supra* note 15, at 4 (discussing how corruption creates "hidden tariff[s]" that stifle investment and results in unjust information asymmetries).

35. *See generally* Young, *supra* note 28 (explaining how international investment law has helped promote anticorruption norms).

36. *Id.*

cusses the abrogation of arbitral awards in situations where the award would violate public policy, this logic can be extrapolated to support an argument for a cause of action stemming from corruption. The New York Convention states that "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country."[37] Given that corruption is against global public policy, and harms investors and citizens,[38] the arbitrator is arguably duty bound to uphold public policy and punish acts of corruption.[39] Since the New York Convention "has been described as the most important and successful United Nations treaty in the area of international trade [and arbitration] law," and considering its adoption by more than 150 countries, the Convention continues to be an important resource for arbitral tribunals when making their decisions.[40]

Reviewing recent arbitral awards, it is clear that at least some arbitral tribunals promote anticorruption principles. In *World Duty Free Co. Ltd. v. Republic of Kenya* the arbitral tribunal recognized that anticorruption principles are a strong part of international law in its decision to punish corrupt acts by the investor.[41] Additionally, in *EDF v. Romania*, the arbitral tribunal recognized corruption as a violation of international public policy.[42] If tribunals continue producing awards like these that uphold anticorruption principles, the next logical assumption is that corruption will decrease in business transactions. Assuming the concerned investment is governed by an

37. Convention on the Recognition of and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 330 U.N.T.S. 3.

38. Mbiyavanga, *supra* note 8, at 2.

39. CLEMENT J. MASHAMBA, ALTERNATIVE DISPUTE RESOLUTION IN TANZANIA: LAW AND PRACTICE 95 (2014). It is possible that a single country has a public policy that is not against corruption, but the global trend is otherwise.

40. Amanda Davidson et al., *The New York Convention 1958 Half a Century On: Is It Still Effective?*, LEXOLOGY (Dec. 16, 2014), https://www.lexology.com/library/detail.aspx?g=df7ac1d2-fa0e-48df-a3f6-8455465b73af.

41. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 142-43 (Oct. 4, 2006).

42. EDF (Services) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009).

FTA, an aggrieved party could potentially pursue remedies based on acts of corruption through an arbitral tribunal.

Arbitral tribunal decisions that find an implicit legality requirement provide reassurance for many. However, arbitral awards do not indicate a consensus that there is an implicit legality requirement—as some arbitral tribunals expressly refute this concept.[43] The legality requirement provides one of the most consequential ways that anticorruption principles arise in ISDS. In order for an arbitral tribunal to rule on a matter, the claimant must first "convince the arbitral panel that the panel has 'jurisdiction' over the dispute."[44] Whether an arbitral tribunal has jurisdiction over the dispute depends on whether the investment in question is a type of investment protected in the relevant treaty.[45] Not only are there just certain types of investments covered by the Investment section of a treaty, there also is often a requirement that foreign investments are "made or owned 'in accordance with' or 'in conformity with' the laws of the host State."[46] An economic transaction that may seem like an investment to a layman may not be considered an investment under the treaty if it does not meet the legal requirements of the Host State.[47] If an economic transaction does not meet the legal requirements of the Host State then it is not an investment under the relevant treaty, and the arbitral tribunal does not have jurisdiction over the dispute concerning the investment.

The main way of determining if an investment meets the legal requirements of the Host State is by looking to local law

---

43. Polkinghorne & Volkmer, *supra* note 19, at 158. *See also* Saba Fakes v. Republic of Turk., ICSID Case No. ARB/07/20, Award, ¶ 112 (July 14, 2010) (holding that the arbitral tribunal will not incorporate a legality requirement into the definition of "investment" under the applicable FTA); Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 127 (Oct. 4, 2013) ("The Tribunal does not share the view . . . [that] compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25(1) of the ICSID Convention.").

44. Edwards, *supra* note 27.

45. Polkinghorne & Volkmer, *supra* note 19, at 151.

46. *Id.* at 149.

47. *Id.* at 151–52. *See also* Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶¶ 306, 340 (Aug. 16, 2007) (discussing how the term investment in many BITs implies an economic transaction that complies with the Host State's laws).

and transnational public policy. For example, in a leading ruling on the legality requirement, an arbitral tribunal determined that a German investment in the Philippines did not qualify as an investment under the Germany-Philippines BIT. They based their decision on the fact that the investment violated foreign ownership laws in the Philippines and offended transnational public policy due to bad faith on the part of the investors.[48] Through finding language elsewhere in the BIT that addresses corruption, the arbitral tribunal felt comfortable upholding an anticorruption norm preventing unjust outcomes.

Regardless of the underlying rationale, when an arbitral tribunal finds that an investment violates the legality requirement, the application of the legality requirement is the same. If an investment violates the legality requirement of the relevant BIT, then the arbitral tribunal will dismiss the case citing a need for the investment to not breach local laws.[49] Academic literature exists on the relevance of timing with regards to the legality requirement.[50] However, this note focuses on issues associated with the legality requirement and with the merits of arbitration. Accordingly, such jurisdictional issues are outside its scope. In other words, rather than determining if an arbitral tribunal *can* hear a claim, this paper will focus on *whether a claim for an investor exists* and whether investors can bring a cause of action rooted in instances of corruption.

B. *Corruption Defense*

While this note does not dwell on the legality requirement, an important related concept may affect the merits of arbitration. The worst potential impact of the legality requirement for investors is when a Host State uses an investor's involvement in corruption as a counterclaim or "as a shield."[51] This is an important concept for investors to understand. A

48. *Fraport A.G. Airport Services Worldwide*, ICSID Case No. ARB/03/25, ¶¶ 396–404.

49. *See, e.g.*, Polkinghorne & Volkmer, *supra* note 19, at 152 ("[T]he tribunal dismissed the case because the investor had made an investment in breach of the host State's laws; and the requirement that all investments be made in compliance with the host State's law had as its source the applicable BIT.").

50. *Id.* at 150.

51. Young, *supra* note 28.

Host State can use corruption to protect itself by arguing that the arbitral tribunal does not have jurisdiction over the issue due to the legality requirement based on the fact that corruption occurred and therefore the investment has no legal status under the Host State's laws.[52] This is known as the *corruption defense* and this concept is supported by a "broad consensus"[53] of arbitral tribunals.[54] The corruption defense is based on the reasoning that arbitral tribunals should not assist parties that engage in corrupt acts.[55] Along this same line of reasoning exists the similar concept of the clean hands doctrine. This doctrine states that a claimant who participated in illegal conduct does not have standing to complain of related illegal actions by the State.[56]

Therefore, an investor complicit in an act of corruption involving a disputed investment should consider whether bringing a claim to an arbitral tribunal is worthwhile. However, perhaps a relief to many investors, there are practical limitations to the application of the corruption defense. A recent academic review of investment law jurisprudence surmises that arbitral tribunals only rarely accept corruption defense arguments.[57] "Corruption defences are only approved in approximately 1 out of 10 cases, and even where they are approved it is mostly only pursuant to outright admissions by the investors."[58] Accordingly, despite wide support for the concept of the corruption defense, arbitral tribunals rarely find appropriate circumstances for its application. This provides assurance for the majority of investors seeking the involvement of arbitral tribunals. Investors should nevertheless be aware of the potential successful invocation of this defense by a Host State.

---

52. *Id.*

53. Mbiyavanga, *supra* note 8, at 4.

54. *Id.*; *see also* Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶ 203 (Aug. 2, 2006) (declaring that investments not made in accordance with the laws of El Salvador are not covered by the FTA); Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶¶ 397–98 (Aug. 16, 2007) (discussing how investments need to be lawful to be afforded FTA protection).

55. Mbiyavanga, *supra* note 8, at 4.

56. Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 27, Final Award, ¶ 1315 (Perm. Ct. Arb. 2014).

57. Mbiyavanga, *supra* note 8, at 5.

58. *Id.*

The concept of the corruption defense makes sense as a matter of public policy. Corruption leads to many societal issues.[59] However, public corruption, by definition, cannot involve just one party.[60] For the occurrence of an act of corruption in the obtaining or retaining of an investment, there must be a willing official who either solicited or accepted a bribe from an investor, or engaged in another form of corruption. Therefore, it seems incongruous that a Host State, whose public official participated in corruption related to the investor's investment, could dispute an ISDS claim where its own public official's corrupt acts conveyed a benefit to the state.

Some recognition of this unfairness appears in the literature, with tribunals and scholars questioning the widespread acceptance of the corruption defense as an unassailable choice for states. In *Yukos Universal Limited (Isle of Man) v. Russian Federation*, the arbitral tribunal examined the extent to which the corruption defense should apply.[61] The tribunal "expressly rejected the argument than an 'unclean hands' doctrine constituted a 'general principle of law recognized by civilized nations' that could bar access to remedies in arbitration."[62] The arbitral tribunal noted that it did not explicitly find the existence of corrupt acts in the disputed investment.[63]

Despite the fact that the *Yukos* tribunal did not find evidence of corrupt acts, if other arbitral tribunals follow the *Yukos* tribunal in denying that the unclean hands doctrine is a general principle of international law, moral issues with the corruption defense may be partially resolved. In that case, arbi-

---

59. *Id.* at 2.

60. *See* Joshua M. Robbins, *Investment Treaties: An Overlooked Anti-Corruption Tool*, INSIDE COUNS. (June 15, 2016), https://www.bakerlaw.com/webfiles/Litigation/2016/Articles/07-05-2016-Robbins-Inside-Counsel.pdf (discussing how corruption involves both "supply side" and "demand side" parties).

61. Young, *supra* note 28. The "unclean hands" doctrine is referred to in *Yukos. See Yukos Universal Ltd.*, PCA Case No. AA 27, ¶ 17–18, 24, 80. Essentially the "unclean hands" doctrine and the corruption defense stand for the same idea: that "the lawfulness of the investor's conduct is a pre-condition for the bestowal of jurisdiction upon the arbitral tribunal." Mariano de Alba, *Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration*, 12 REVISTA DE DIREITO INTERNACIONAL 321, 321 (2015).

62. Young, *supra* note 28; *Yukos Universal Ltd.*, PCA Case No. AA 27, ¶1358.

63. Young, *supra* note 28.

tral tribunals will not automatically accept a State's corruption defense just because it finds acts of corruption occurred. Instead, arbitral tribunals will likely examine the appropriateness of the corruption defense based on the conduct of both the claimant *and* the respondent State. Based on this analysis, arbitral tribunals will then determine whether denying jurisdiction to a claimant as a result of the corruption defense is fair.

While there are cases questioning the validity of the corruption defense, there are other arbitral decisions fully upholding the corrupt defense doctrine that dismiss disputes on the basis of a lack of jurisdiction. Some of these dismissals occur even after Host States admit that their officials engaged in corruption related to the investment in dispute.[64]

One of the most egregious cases exemplifying this issue, and arguably a textbook example of public corruption, is *World Duty Free Co. Ltd. v. Republic of Kenya*.[65] The case provides an excellent example of both public corruption and the corruption defense. *World Duty Free* concerned a contract between World Duty Free (WDF) and Kenya, governed by ICSID, for "the construction, maintenance and operation of duty-free complexes at Nairobi and Mombassa International Airports."[66] A close associate of then-Kenyan President Moi heavily advised the claimant's representative to give a 2 million USD bribe to President Moi to obtain the contract.[67] The claimant agreed to this advice and brought a briefcase filled with the advised amount of money to his meeting with Moi at Moi's residence.[68] Kenya concluded the desired contract with World Duty Free.[69]

Later, after a series of actions that the claimant describes as an expropriation of World Duty Free's Kenyan investment intended to cover up the Kenyan government's corruption, the claimant sought recourse under ISDS.[70] The arbitral tribunal ruled that the contract in dispute was void and unenforceable on the basis of what the claimant described as a personal

64. JENKINS, *supra* note 15, at 15.

65. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, (Oct. 4, 2006).

66. *Id.* ¶ 62.

67. *Id.* ¶ 130.

68. *Id.*

69. *Id.* ¶ 126.

70. *Id.* ¶ 68–72.

donation to the Kenyan government—which the tribunal deemed an act of corruption triggering the corruption defense.[71] The Kenyan government never conceded the that the claimant's allegations of corruption were truthful. Instead, the Kenyan government stated that since the claimant's alleged bribery occurred while obtaining the underlying investment, the arbitral tribunal must dismiss the case due to a lack of an underlying lawful contract.[72] This outcome seems illogical and potentially unfair. In its ruling, the arbitral panel notes it as a "highly disturbing feature in this case" that bribery allows for a "complete defence to the Claimant's claims."[73]

The only solace arbitral tribunal gives those that would pity the claimant is that if Kenya brought the proceeding, WDF could have likewise invoked the corruption defense to make the contract voided and unenforceable.[74] Potentially, making the contract void and unenforceable is a desirable strategy for an investor if the contract tainted with corruption is financially unfavorable in the long-run. If there is an issue of underlying corruption, an investor can take advantage of the corruption defense as Kenya did in *World Duty Free*. By using the corruption defense, the investor potentially relieves himself of his contractual responsibilities. However, this strategy may result in outcomes as undesirable as the decision in *World Duty Free*.

In analyzing possible solutions for situations similar to the one in *World Duty Free*, at least one legal academic notes that there should perhaps be a comparative fault system in instances of corruption.[75] Under a comparative fault scheme, an arbitral tribunal matches potential compensation for instances of corruption with the party's degree of involvement in that corruption. Following this logic, the *World Duty Free* arbitral tribunal could have presumably awarded some compensation to the investor, even though the investor was involved in the acts of corruption underlying the investment dispute. The compar-

71. *Id.* ¶¶ 130, 136, 138, 142, 158, 188.

72. *Id.* ¶ 105.

73. *Id.* ¶ 180.

74. *Id.* ¶¶ 128, 181.

75. R. Zachary Torres-Fowler, Note, Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration, 52 VA. J. INT'L L. 995, 1029-30 (2012).

ative fault system at least offers a potentially fairer outcome than the actual result in *World Duty Free*.

The tribunal decided *World Duty Free* on the merits, despite the usual invocation of the legality requirement as a preliminary jurisdictional issue. However, the implication for investors does not change as a result of the timing or framing of the tribunal's decision. As a result of the investor bribing the Kenyan President for a contract, the arbitral tribunal ruled that the investor did not have any valid claim under ISDS whether or not the Kenyan government violated the contract in dispute. The Kenyan government submitted a valid counterclaim that the contract in dispute was unenforceable as a result of the claimant's illegal actions conducted with its own President. The fact that "[c]orruption defences are only approved in approximately 1 out of 10 cases" is stronger reassurance than the weak *World Duty Free* arbitral tribunal statement that Kenya would have faced the same outcome had it been the Claimant.[76] The application of the corruption defense in cases such as *World Duty Free* may scare investors, but there is a divergence of opinion among arbitral tribunals as to whether respondents should be able to assert corruption defense.

C. *Potential Cause of Action Through Fair and Equitable Treatment*

As described above, the application of the corruption defense may leave investors without recourse or remedy. Investors could, however, attempt to bring a cause of action under fair and equitable treatment (FET), a provision in most investment treaties.[77] "Tribunals interpret 'fair and equitable treatment' to require protection of legitimate investor expectations, compliance with contractual obligations, due process, good faith, and freedom from coercion and harassment."[78] "The investor's legitimate expectations are based on the host state's legal framework and on any undertakings and represen-

---

76. Mbiyavanga, *supra* note 8, at 5; *World Duty Free Co.*, ICSID Case No. ARB/00/7, ¶ 181.

77. RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 130 (2d ed. 2012).

78. Young, *supra* 28. Note that immediately afterwards the article says, "Corruption would fit easily into several of these categories." *Id.*

tations made explicitly or implicitly by the host state."[79] FET provides a cause of action based on instances of corruption as: (1) the FET's purpose is filling gaps, and (2) FET requires government action.[80]

FET's coverage may include corruption situations falling under Transparency International's definition of corruption, such as where a government official misuses his public position to either solicit an instance of corruption or to harass an investor.[81] The tribunal may find the official interfered with the investor's freedom from coercion and harassment, or perhaps eroded the legitimate investor expectations of not having to pay a bribe for investment authorization.[82] The *Frontier Petroleum v. Czech Republic* arbitral tribunal apparently agrees with this definition. The tribunal asserts that a State violates FET standards by using the law for purposes other than those for which it was created.[83] Such unjust purposes include the State conspiring to use the law to inflict damage on an investment.[84] Additionally, recent FTAs define FET as supporting the inclusion of claims based on instances of corruption.[85] The Comprehensive Economic and Trade Agreement (CETA), for example, defines FET as including "abusive treatment of investors, such as coercion, duress and harassment" and a "denial of justice in criminal, civil or administrative proceedings."[86] This coverage strongly implies that the CETA drafters intended to

79. DOLZER & SCHREUER, *supra* note 77, at 145.

80. *Id.* at 132, 153.

81. *What is Corruption?*, *supra* note 2.

82. *See* Mbiyavanga, *supra* note 8, at 5 (discussion on FET standards). Perhaps the claimant in *World Duty Free* could have argued for a ruling in its favor based off such a theory. The claimant could have perhaps said that it was coerced into bribing Kenyan President Moi to obtain the desired contract. Given that there was no pre-existing business or WDF infrastructure in the Kenyan airport, it seems that it would be hard to assert that any economic coercion occurred. Rather, it seems likely that the claimant simply agreed to bribery in order to obtain business. Thus, the theory of FET allowing for claims based off coercion seems unlikely to have succeeded in *World Duty Free.*

83. Frontier Petroleum v. Czech Republic, Final Award, U.N. Comm'n on Int'l Trade Law, ¶¶ 300–01 (Nov. 12, 2010).

84. *Id.* at ¶ 300.

85. *See* Comprehensive Economic and Trade Agreement art. 8.10(2)(a), (e), Can.-E.U., Sep. 26, 2014, 60 O.J. L11 (discussing how FET includes abusive treatment of investors).

86. *Id.* art. 8.10(2)(a), (e), Can.-E.U., Sep. 26, 2014, 60 O.J. L11.

include at least certain instances of corruption under FET coverage.

Beyond this preliminary point, there are other reasons as to why FET is an appropriate cause of action for instances of corruption. As a general principle, FET provides investors with a relatively broad number of bases for establishing a valid cause of action. "[T]he purpose of the clause as used in BIT practice is to *fill gaps* which may be left by the more specific standards."[87] This increases the likelihood of success in using an FET clause as a cause of action for an act of corruption. While some FTA drafters may consciously choose to exclude instances of corruption as a cause of action, there is a strong counterargument that FET creates the potential for causes of action based off of instances of corruption. Arbitral tribunals should at least consider the possibility.

Given the clause's gap-filling role, investors arguably may use an FET clause to pursue a cause of action based on corruption. The commentators and arbitral tribunals increasingly recognize that investors might use corruption "as a sword"[88] in ISDS.[89] Instead of instances of corruption solely being used as a valid counterclaim by a Host State, the international community is increasingly accepting the idea that an investor can actually base claims of FET off instances of corruption.[90]

As a basic premise, a breach of FET "requires conduct in the exercise of sovereign powers."[91] This requirement provides

87. DOLZER & SCHREUER, *supra* note 77, at 132 (emphasis added).

88. Young, *supra* note 28.

89. *See id.* (hypothesizing that under FET the claimants in *Yukos* could have used "corruption as a sword" through having a cause of action based off instances of corruption in the Russian government). For additional cases that support the notion that corruption can be used "as a sword" in investment disputes, see EDF (Services) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009) (asserting acts of corruption violate FET obligations in the BIT); Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Counter Memorial, ¶ 516 (Apr. 8, 2016) (recognizing that acts of corruption can create a cause of action); Liman Caspian Oil BV v. Republic of Kaz., ICSID Case No. ARB/07/14, Award, ¶ 422 (June 22, 2010) (discussing that acts of corruption violate FET obligations in the applicable treaty).

90. Young, *supra* note 28.

91. DOLZER & SCHREUER, *supra* note 77, at 153 ("[FET] responsibility under the treaty would only be caused by a misuse of public power."). *See also* Impregilo v. Islamic Republic of Pak., ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶¶ 266–70 (April 22, 2005) (discussing requirements for a breach of FET under the BIT).

the starting argument for an investor using an FET clause to pursue a cause of action based off corruption. Since instances of corruption involve a government official misusing the exercise of sovereign powers, instances of corruption arguably always meet this basic requirement of FET breach.[92] For example, had the claimant raised FET as a cause of action in *World Duty Free,* it could have easily argued that conduct in the exercise of sovereign powers occurred in the investment dispute. The claimant received information that a bribe "was payment for doing business with the Government of Kenya."[93] This clearly implies that paying the bribe would result in some governmental exercise of power on behalf of the claimant, whether through permit approval, contract awarding, or some other governmentally-sponsored measure. Although *proving* an instance of corruption would be another challenge, establishing *conduct in the exercise of sovereign powers* in *World Duty Free* may have been a straightforward task. Given the role and requirements of FET clauses, these provisions are good potential causes of action for investors seeking remedy for corruption.

D. *In the Context of Fair and Equitable Treatment and FTAs, What is Important?*

There are a few important points to consider when determining whether there has been a violation of an FET clause. The importance of an investor's *legitimate expectations* regarding his investment is discussed above.[94] However, beyond legitimate expectations, one should analyze the FTA's preamble and the concept of *bad faith*, which are additional factors critical to determining whether there is a violation of the FET standard.

Preambles in FTAs carry significance in arbitral tribunal decisions. Arbitral tribunals determine what they consider to

92. It is important to realize that a "simple breach of contract is insufficient to amount to a breach of the FET standard." DOLZER & SCHREUER, *supra* note 77, at 154. However, "[t]he distinction between sovereign and commercial acts . . . is of unclear validity in the area of state responsibility. Also, even if the underlying relationship and the breach are clearly commercial, the motives of a government for a certain act may still be governmental." *Id.*

93. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 130 (Oct. 4, 2006).

94. *See supra* Section II.C.

be the parties' intended FTA standard by looking at the preamble of the FTA. For example, in *MTD v. Chile*, the arbitral tribunal stated that the preamble "emphasized a duty to adopt proactive behaviour in favour of the investor."[95] Looking at the framing of the language in the preamble, the arbitral tribunal asserted that "[i]ts terms are framed as a pro-active statement—'to promote', 'to create', 'to stimulate'—rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors."[96] If arbitral tribunals adopt a reading of an FTA's preamble similar to the *MTD* arbitral tribunal, then a Host State will be responsible for proactive language it uses in the FTA's preamble. Therefore, when parties to an FTA use proactive language in a FTA's preamble mandating that the parties take a stance against corruption, an arbitral tribunal will likely hold the parties accountable to that language and factor it into whether a party violated the FET standard.

For example, an arbitral tribunal interpreting the U.S.-Singapore FTA or Dominican Republic-Central America FTA (CAFTA-DR) would likely give at least moderate consideration to the FTA's language expressing the parties' desire to eliminate corruption in business transactions.[97] The Singapore FTA's preamble states that the United States and Singapore desire "to eliminate bribery and corruption in business transactions." Even though neither the Singapore FTA or CAFTA-DR explicitly give an investor a cause of action based off corrupt actions by the Host State, the language in the preambles gives the investor a stronger argument for asserting a claim based off of a violation of the FET standard. An investor is more likely to succeed in asserting a cause of action based on corruption as a violation of an FET clause when the FTA's preamble commits the parties to taking an affirmative stance against corruption.

The Vienna Convention on the Law of Treaties (VCLT) bolsters the argument for raising claims based on FET. Many

---

95. DOLZER & SCHREUER, *supra* note 77, at 143. *See also* MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004) (recording the tribunal's consideration of the preamble of the BIT to determine its object and purpose).

96. *MTD Equity Sdn. Bhd.*, ICSID Case No. ARB/01/7, ¶ 113.

97. U.S.-Singapore FTA, *supra* note 20, pmbl.; CAFTA-DR, *supra* note 20, pmbl.

scholars accept that "[e]very type of clause has to be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT)."[98] The VCLT mandates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[99] Furthermore, "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . ."[100] Taken together, the VCLT overwhelmingly supports the argument that part of an FET standard's meaning in an FTA is established by its preamble. Since a preamble comes before the articles of a treaty, the preamble should naturally receive significant consideration when determining the "object and purpose"[101] of the treaty's articles. Additionally, particularly with CAFTA-DR and other similarly worded U.S. FTAs, the FTAs' mandates criminalizing corruption under local laws provide significant context for determining that the FTAs have a strong object or purpose of discouraging corruption. Therefore, with treaties like CAFTA-DR that include a mandate to criminalize corruption, the FTA preamble's anti-corruption goal truly has a proactive meaning.

One counterargument to this is that an FTA preamble's anti-corruption language merely describes the parties' goals or intentions and is not binding in any way.[102] Critics making this argument could point to the VCLT's language about how a preamble provides context for a treaty and assert that context is the entire purpose of a preamble. However, a stronger argument is that these anti-corruption norms are a meaningful component of FTAs.

---

98. DOLZER & SCHREUER, *supra* note 77, at 132.

99. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

100. *Id.* art. 31(2).

101. *Id.* art. 31(1).

102. Tanja Turgot, Sustainable Development in the Major International Trade Agreements as Applied to Cross-Border Crude Oil Trade 50 (2007) (unpublished Master's Thesis, University of Lund), http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1562679&fileOId=1566039 (discussing how environmental agreements in a preamble are not binding, but only suggestive).

In determining whether there is a violation of the FET standard, it is also important to consider if there is any "[b]ad faith."[103] "Arbitral tribunals have confirmed that good faith is inherent in FET."[104] Therefore, an analysis of whether there is a violation of the FET standard is incomplete without considering whether the accused party acted in "good faith."[105] This is not to say that a violation of good faith must occur to find a violation of the FET standard.[106] However, at a minimum, determining that bad faith occurred would assuredly enhance a cause of action based off a violation of the FET standard.

In determining whether a Host State's actions are done in good faith, the arbitral tribunal in *Frontier Petroleum v. Czech Republic* stated that it must consider whether the Host State used "legal instruments for purposes other than the one put forth by the government" or if there was a "termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment."[107] According to that tribunal, bad faith depends on misuse of public power.[108] In the context of corruption, a tribunal would likely find bad faith if, for example, a public official revoked or refused to offer a permit because an investor refused to pay a bribe solic-

---

103. *See* Frontier Petroleum v. Czech Republic, Final Award, U.N. Comm'n on Int'l Trade Law, ¶ 300 (Nov. 12, 2010) (describing a bad faith action by a host state as one that "includes the use of legal instruments for purposes other than those for which they were created.").

104. DOLZER & SCHREUER, *supra* note 77, at 156.

105. *See id.* at 156 (noting that good faith is "'the common guiding beacon' to the obligation under BITs.").

106. *Frontier Petroleum*, U.N. Comm'n on Int'l Trade Law, ¶ 301 ("[N]ot every violation of the standard of fair and equitable treatment requires bad faith. The fair and equitable treatment standard may be violated, even if no *mala fides* is involved."). It is possible to imagine an arbitral tribunal deeming there to have been an instance of corruption in an investment dispute, even if neither party admits or wants to acknowledge this, or if the underlying acts are not deemed corrupt locally, but are considered so internationally. This could happen if an arbitral tribunal deems anticorruption principles to be essential for international public policy, and so the arbitral tribunal finds a violation of FET based off an instance of corruption even when no bad faith arguably occurred. *See* World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 140–41 (Oct. 4, 2006) (discussing how arbitral tribunals must give strong weight to international public policy in rendering their awards, despite—or maybe contrary to—local public policy values).

107. *Frontier Petroleum*, U.N. Comm'n on Int'l Trade Law, ¶ 301.

108. *Id.* ¶ 300.

ited by the official. Instances of bad faith are not limited to these examples and, in fact, it may be impossible to say a corrupt act was not done in bad faith.[109]

Looking at the U.S.'s FTAs, it would be difficult to say that any of the included FET standards would *prohibit* a cause of action based on a Host State's bad faith, especially with regards to corruption. Analyzing the provisions contained in many of the FTAs, which assert that Host States adopt local laws to outlaw corruption, and the anti-corruption provisions of the agreements themselves, it appears that a Host State acting in bad faith through corrupt acts violates the FET standard. For example, there is no any language definitively contradicting this view in the U.S.-South Korea FTA. Article 11.5, which contains the FTA's language on FET, says that the FET standard should be determined in "accordance with customary international law . . . [for the] minimum standard of treatment of aliens" and that FET "[does] not require treatment in addition to or beyond that which is required by that standard, and [does] not create additional substantive rights."[110]

In that agreement, those against allowing a cause of action based off corruption may point to how the language does not create additional substantive rights beyond those provided by FET. However, this argument misses the point of FET. As discussed above, corrupt acts inherently involve bad faith, which contradicts the good faith requirement of FET.[111] Additionally, an investor invoking FET to establish a cause of action for corrupt acts by a Host States meets the requirement of betrayed legitimate expectations and the exercise of power by a sovereign.[112] Therefore, there is a strong argument that no additional substantive rights are given to an investor by a tribunal allowing a cause of action in FET for corrupt acts. Rather, an investor's legal authority to seek a remedy for a government's corrupt acts is fully recognized by the tribunal.

---

109. This would appear to be the case if tribunals use Transparency International's definition of corruption. *What is Corruption?*, *supra* note 2 ("Corruption is the abuse of entrusted power for private gain.").

110. KORUS FTA, *supra* note 22, art. 11.5(1)–(2).

111. DOLZER & SCHREUER, *supra* note 77, at 156.

112. *Id.* at 146, 153 (discussing the need for a sovereign exercising power for a FET violation and that legitimate expectations are "inherent" in FET).

E. *A Textbook Example for Applying FET for Acts of Corruption*

Yukos v. Russian Federation provides a conclusive example of an opportunity to invoke FET in seeking a remedy from an arbitral tribunal.[113] The dispute in *Yukos* involved multiple actions by Russian authorities against Yukos.[114] These included "criminal prosecutions, harassment of Yukos, its employees and related persons and entities; massive tax reassessments . . . fines, asset freezes and other measures."[115] These actions culminated in the bankruptcy and dissolution of Yukos. In response, the claimants pursued ISDS under FET and expropriation causes of action in violation of the Energy Charter Treaty.[116] According to the claimants, Russian authorities took the described measures above due to the perceived "political threat" Yukos possessed; the authorities, therefore, purposely tried to destroy the company.[117] Ultimately, the arbitral tribunal sided with the claimants and stated that Russia "[launched] a full assault on Yukos and its beneficial owners in order to bankrupt Yukos and appropriate its assets."[118] As a result, the arbitral tribunal ruled that Russia expropriated Yukos in violation of the Energy Charter Treaty.[119]

There are many useful insights in *Yukos*. While the arbitral tribunal ruled in favor of the claimants on the basis of expropriation, the arbitral tribunal suggested that it could have ruled in favor of the claimants on the basis of FET as well. Specifically, the arbitral tribunal stated that the measures the claimants faced in the process of expropriation "[did] not comport with the due process of law."[120] In addition to this, the arbitral tribunal asserted that the Russian authorities' actions "[bend] to the will of Russian executive authorities to bankrupt Yukos . . . and incarcerate a man who gave signs of

113. Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 27, Final Award (Perm. Ct. Arb. 2014).

114. *Id.* ¶ 63.

115. *Id.*

116. *Id.*

117. *Id.* ¶ 73.

118. *Id.* ¶ 1404.

119. *Id.* ¶¶ 1583–85.

120. *Id.* ¶ 1583.

becoming a political competitor."[121] Under the definition of corruption provided by Transparency International, this description of the Russian authorities' actions by the arbitral tribunal perfectly fits the definition of corruption.[122] The Russian authorities explicitly used their political powers to pursue private, political gains.

Finally, the arbitral tribunal stated, "having found Respondent liable under international law for breach of Article 13 of the ECT, the Tribunal does not need to consider whether Respondent's actions are also in breach of Article 10 [the Article relating to FET] of the Treaty."[123] This is particularly interesting, since the tribunal mentioned earlier in the award that "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos."[124]

Taken together, the tribunal suggests that while it ruled in favor of the claimants on the basis of expropriation, the arbitral tribunal could have ruled in favor of the claimants on the basis of FET due to the Russian authorities' corruption as well. This takeaway has significant implications for investors, as it sets potential precedent for incidents of corruption as causes of action under ISDS. Admittedly, as discussed above, this is not the core holding of the tribunal in *Yukos*. However, scholars consider the takeaway an implied ruling.[125] When examined, *Yukos* meets all potential prongs for a violation of the FET standard. Government officials misused their positions of power to pursue personal gain by eliminating Yukos as a political competitor to the government. Their acts were facilitated through the exercise of sovereign power and they betrayed the

121. *Id.* The "man" incarcerated is Mr. Mikhail Khodorkovsky, who was the "principal shareholder and Chief Executive Officer of Yukos." *Yukos Universal Ltd.*, PCA Case No. AA 27, ¶ 5.

122. *What is Corruption?*, *supra* note 2 (defining corruption "as the *abuse of entrusted power* for private gain. It can be classified as grand, petty and *political*.") (emphasis added).

123. *Yukos Universal Ltd.*, PCA Case No. AA 27, ¶ 1585.

124. *Id.* ¶ 756.

125. Young, *supra* note 28. Young asserts that FET is the appropriate cause of action for instances of corruption under ISDS and that the implied ruling in *Yukos* was that the Russian authorities' actions amounted to corruption.

legitimate expectations of Yukos concerning its ability to operate in Russia without receiving government harassment.[126]

Additionally, the arbitral tribunal's interpretation of the Russian government's actions presents a textbook example of bad faith. As a result of perceiving Yukos as a political threat, the Russian government misused various legal powers with the purpose of bankrupting Yukos and eliminating a political threat.[127] The legal powers misused, such as Russia's tax mechanisms, were presumably not created to eliminate political threats. Rather, they served as a means for the Russian government to collect revenue. Therefore, the Russian government acted in bad faith, since it did not use Russia's laws for their intended purpose.

III. Difficulties and Conclusion

A. *Likely Difficulties and Why They Exist*

An analysis of the use of the FET standard to advance ISDS claims based on instances of corruption remains incomplete without a discussion of the likely challenges an investor would face. The case *EDF v. Romania* highlights these challenges.[128] *EDF* illustrates the difficulty for investors when proving a government acted corruptly. The claimant contended the government engaged in actions that resulted in the claimant's loss of holdings in Romania due to their refusal to pay bribes to an official.[129] In its ruling, the arbitral tribunal adopted the claimant's position "that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy."[130]

---

126. Recall that FET requires "conduct in the exercise of sovereign powers" and a betrayal of an investor's legitimate expectations. Dolzer & Schreuer, *supra* note 77, at 153.

127. Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 27, Final Award, ¶ 1404 (Perm. Ct. Arb. 2014).

128. EDF (Services) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award (Oct. 8, 2009).

129. *Id.* ¶¶ 69, 71, 73.

130. *Id.* ¶ 221. This standard has been referred to in other cases. Tribunals say that state bribery can be "a state's violation of one of its international law obligations." Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Counter Memorial, ¶ 516 (Apr. 8, 2016). Similarly, tribunals assert that

Furthermore, the arbitral tribunal stated that "exercising a State's discretion on the basis of corruption is a . . . fundamental breach of transparency and legitimate expectations."[131] The arbitral tribunal ultimately held, however, that there was not "clear and convincing evidence" to support the claimant's bribery accusations.[132] The tribunal further added that "corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence."[133] Practically speaking, absent a Host State asserting a corruption defense, this ruling seemingly makes it extremely difficult for an investor to invoke the FET obligation as the basis of a cause of action based on a Host State's corrupt acts. Without concrete evidence, such as a state official's written request for bribery, an investor would face major evidentiary concerns when trying to assert a Host State official solicited corruption. However, this is not to say that an investor could not successfully prove the existence of the Host State's corrupt acts and successfully create a cause of action based on FET.

Perhaps the biggest lesson is that it is relatively easy to successfully assert a claim in a *Yukos*-like fact pattern, while in an *EDF*-like fact pattern—where the circumstances are more subtle—it is more difficult. The tribunal in *EDF*, as opposed to the tribunal in *Yukos*, did not find that the Romanian state worked with fervent determination to use its political powers to imprison potential political rivals.[134] Nor did the *EDF* tribunal hold that the Romanian state used its political powers to bankrupt a corporation it deemed a threat.[135] While *EDF* claimant's

---

bribery is "a breach of international public policy." Liman Caspian Oil BV v. Republic of Kaz., ICSID Case No. ARB/07/14, Award, ¶ 194 (June 22, 2010).

131. *EDF (Services) Ltd.*, ICSID Case No. ARB/05/13, ¶ 221.

132. *Id.* Interestingly, the arbitral tribunal asserts this standard of proof since the corruption accusations involve "officials at the highest level of the Romanian government." *Id.* Scholars note that this is not the only standard of proof in arbitrations involving claims of corruption, but it is utilized in a "number of cases." Vladimir Khvalei, *Standards of Proof for Allegations of Corruption in International Arbitration*, *in* ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION 60 (Domitille Baizeau & Richard Kreindler eds., 2015).

133. *EDF (Services) Ltd.*, ICSID Case No. ARB/05/13, ¶ 221.

134. Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 27, Final Award, ¶ 1583 (Perm. Ct. Arb. 2014) (discussing the extensive efforts Russian authorities pursued to imprison political rivals).

135. *Id.*

core complaint was that Romanian authorities corruptly retaliated for claimant's refusal to participate in requests for a bribe, the only cited consequence was the dissolution of claimant's joint venture with entities connected to the Romanian government.[136] Although the alleged actions in *EDF* harmed claimant's business operations in Romania, because it was not clearly as reprehensible as the bankruptcy and imprisonment of rivals in *Yukos*, the claimant faced more difficulties when convincing the tribunal that the Romanian government violated FET. This does not definitively mean that the circumstances must be as dire as those the claimant faced at the government's hand in *Yukos*. However, a claimant may need more evidence of corruption than dissolution of a joint venture with government related entities to prevail on its FET claim.

Arguably all acts of corruption, regardless of the degree of severity, should be punished.[137] However, tribunals may be reluctant to use FET to rule in favor of a claimant for a state act of corruption because FTAs and BITs do not have any explicit causes of action for corruption and FET clauses are gap-fillers.[138] Per definition, gap-fillers provide guidance for the space left by the more specific standards in a FTA.[139] Given the lack of explicit causes of action for corruption in FTAs, some may consider using the gap-filler role of FET clauses to incorporate a cause of action for corruption appropriate. Nevertheless, tribunals may falter when making such decisions. Even when States engage in particularly morally egregious corrupt acts, such as the Russian state in *Yukos*, tribunals do not explicitly rule in favor of claimants on the basis of a corruption violation under FET.[140] In situations where the acts of corruption are relatively less shocking, it is unsurprising when tribunals decline invoking FET to punish states. Although there is no

136. *EDF (Services) Ltd.*, ICSID Case No. ARB/05/13, ¶¶ 74–75.

137. *How to Stop Corruption: 5 Key Ingredients*, TRANSPARENCY INT'L (Mar. 10, 2016), https://www.transparency.org/news/feature/how_to_stop_corruption_5_key_ingredients (discussing that it is essential to ensure the corrupt are punished).

138. DOLZER & SCHREUER, *supra* note 77, at 132.

139. *Id.*

140. *See, e.g.*, Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 27, Final Award, ¶ 1585 (Perm. Ct. Arb. 2014) (finding the Russian government liable under international law for breaches of a BIT that did not include charges of corruption).

stare decisis principle in ISDS, given that tribunals consider common law principles, there could be a cascading effect on subsequent tribunal awards if tribunals begin using FET clauses to punish States for corruption.[141]

Unfortunately for investors, *EDF*'s evidentiary requirements are not unique to its deciding tribunal. Other tribunals require the same evidentiary standard for claims that a Host State committed a corrupt act. In *Aven v. Costa Rica*, the arbitral tribunal not only reasserted the notion that corruption must be proven,[142] but it also stated that the burden of proof for allegations of corruption lies with the claimant.[143] The *Liman Caspian Oil BV v. Kazakhstan* tribunal also echoed this standard. It acknowledged that "secrecy is inherent in such [corruption] cases," and that corruption is rarely provable.[144] The arbitral tribunal then asserted that "this cannot be a reason to depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption."[145] The arbitral tribunal clarified that "[t]he issue is not one of inference," and that the claimant must fulfill its burden.[146]

Depending on the arbitral tribunal, however, some investors may have more opportunity to prove a claim of corruption. For example, the *Yukos* arbitral tribunal implicitly ruled that it could have decided in the investor's favor based off Russia's corrupt acts, and it did so without any admission of corruption by the Russian government.[147] Therefore, it is fair to say that arbitral tribunals do not necessarily require an explicit

---

141. Young, *supra* note 28.

142. Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Counter Memorial, ¶ 593 (Apr. 8, 2016) ("There is general consensus among international tribunals and commentators regarding the need for a higher standard of proof of corruption.").

143. *Id.* ¶ 596 ("Claimants had completely failed to meet the burden of proof on their allegation of corruption.").

144. Liman Caspian Oil BV v. Republic of Kaz., ICSID Case No. ARB/07/14, Award, ¶ 423 (June 22, 2010) ("Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability.").

145. *Id.*

146. *Id.* at ¶ 424.

147. *See* Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 27, Final Award, ¶ 1404 (Perm. Ct. Arb. 2014) (discussing how Russian authorities misused their entrusted powers—beyond the appropriate "*bona*

admission of corruption by a Host State or the existence of a government official's document soliciting corruption. Instead, tribunals may require strong evidence of corruption on the part of the government. Admittedly, this is high standard and in *Yukos* the Russian government committed particularly heinous acts.[148] However, arbitral rulings similar to *Yukos* should give hope to investors that they can potentially mount a successful FET claim on the basis of a Host State's corrupt acts.

B. *Conclusion*

A review of the issue of corruption based on the arbitral awards of *Yukos*, *EDF*, *World Duty Free*, *Frontier Petroleum*, *Aven*, and *Liman Caspian Oil* shows that many arbitral tribunals take a strong position against corruption.[149] Corruption is fundamentally offensive to the legality requirement embodied in many FTAs and goes against the anti-corruption principles of international public policy.[150] Additionally, corruption has many negative effects including investors facing higher costs, possible competitive disadvantages for investors who do not participate in corruption, and poor governance.[151] Even when arbitral tribunals do not rule in favor of investors claiming corrupt action by Host States, tribunals consistently express severe disdain for corruption.[152] While some tribunals exhibit reluc-

---

fide taxation measures"—to eliminate a political rival). Likely it did not rule this way since corruption was not asserted.

148. The Tribunal considered as a "particularly relevant" factor the "egregious nature of many measures of Respondent [Russia]." *Id.* ¶ 1886.

149. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 136, 138, 142, 158, 188 (Oct. 4, 2006); EDF (Services) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009); *Yukos Universal Ltd.*, PCA Case No. AA 27, ¶ 1583 (giving what this author believes to be an implicit condonation of corruption).; Frontier Petroleum v. Czech Republic, Final Award, U.N. Comm'n on Int'l Trade Law, ¶ 300 (Nov. 12, 2010) (condoning "a conspiracy by state organs to inflict damage upon or to defeat the investment," which this author considers to be an act of corruption); Aven v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Counter Memorial, ¶ 593 (Apr. 8, 2016) (implying in its ruling FET is violated if there is enough evidence to prove an incidence of corruption); *Liman Caspian Oil BV*, ICSID Case No. ARB/07/14, ¶ 423 (June 22, 2010) (discussing how corruption is a "grave violation" of FET).

150. Polkinghorne & Volkmer, *supra* note 19, at 154–155.

151. Mbiyavanga, *supra* note 8, at 2.

152. *See, e.g.*, *EDF (Services) Ltd.*, ICSID Case No. ARB/05/13, ¶ 221 (describing how corruption violates international public policy).

tance to rule in favor of claimants explicitly on the basis of state corruption, tribunals are apparently more comfortable ruling against corrupt instances under other provisions. In *Yukos*, the tribunal gives an almost textbook description of an act of corruption, describing how Russian authorities acted on behalf of their superiors to incarcerate "a political competitor.[153] Rather than categorize this as a blatant act of corruption violating the FET standard, the tribunal incorporates this under the expropriation violation. Given the difficulty in proving acts of corruption, tribunals apparently prefer ruling in favor of claimants on other bases.[154] The downside of this approach, however, is that the tribunal would need to find another basis. This may not always be an option and is highly dependent on the facts in a given dispute.

In conclusion, this note argues that arbitrators should feel more confident about their authority to rule against acts of corruption by states given the strong public policy argument about the negative effects of corruption on society.[155] The purpose of FET is to *fill gaps* left by more specific clauses in BITs broadly and FTAs more specifically. Arbitrators should feel empowered to rule against acts of corruption by States when there is sufficient evidence about the occurrence of these acts.[156] This may be difficult since government officials likely take great care to hide their corrupt acts and destroy any evidence. However, when faced with fact patterns such as the one in *Yukos*, tribunals may provide both claimants and the citizens of the offending states deserved justice by explicitly labeling the acts as corruption.

There is no universal agreement on how to deal with corruption in an investment context. Case law indicates potential for investors to pursue remedies for corrupt acts through FET clauses. However, tribunals do not always explicitly endorse

153. *Yukos Universal Ltd.*, PCA Case No. AA 27, ¶ 1583.

154. *See, e.g.*, *Liman Caspian Oil BV*, ICSID Case No. ARB/07/14, ¶ 423 (noting that "[c]orruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability.").

155. *See* MASHAMBA, *supra* note 39, at 95 (arguing that arbitrators have a duty to uphold international public policy to prohibit corruption in international investment transactions and that "[c]orruption has been made one of the conducts that are contrary to public policy worldwide.").

156. DOLZER & SCHREUER, *supra* note 77, at 132.

this view, and it presents evidentiary difficulties. Despite these potential challenges, investors seeking to pursue a FET claim in ISDS may succeed. In future arbitrations, tribunals should be more confident about their ability to rule against state corruption under FET. Tribunals should make a clear statement that acts of corruption will not be condoned under international law.