

STREAMLINING THE CORRUPTION DEFENSE: A PROPOSED FRAMEWORK FOR FCPA-ICSID INTERACTION

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ABSTRACT

Over the past decade, the number of Foreign Corrupt Practices Act (FCPA) enforcement actions has soared, as has the number of cases before the International Centre for Settlement of Investment Disputes (ICSID). At the same time, events have demonstrated that two problems may arise from the lack of coordination between anticorruption investigations and ICSID arbitration proceedings. First, anticorruption investigations may reveal arbitral decisions to be incorrect due to a lack of evidence regarding corruption in the formation of investment contracts. Second, the “corruption defense”—an emerging affirmative defense that allows host states to invoke corruption in the formation of investment contracts as an absolute bar to liability—creates a perverse incentive that encourages states to expropriate investors’ assets, or to renegotiate for burdensome new terms, following FCPA investigations.

This Note explores the characteristics of the corruption defense as applied by ICSID tribunals, including the evidentiary burden placed upon the host state to assert the defense. It then proposes a framework for FCPA-ICSID interaction designed to strengthen the defense and to further the goal of eradicating global corruption. It proposes using tools such as waiver and disgorgement, contract cure, and communication between FCPA enforcement authorities and ICSID tribunals to remedy the problems identified above.

INTRODUCTION

In 1996, Siemens AG (Siemens) won a \$1 billion concession for services related to the production of an Argentine national

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identification card.¹ The contract between Siemens and the Argentine government was governed by a bilateral investment treaty (BIT) between Germany and Argentina.² Not three years later, a number of factors—including skyrocketing sovereign debt and the pegging of the Argentine peso to the U.S. dollar—converged to cause the Argentine economy to contract rapidly.³ In an effort to keep the economy afloat, the legislature passed the “Economic-Financial Emergency Law” allowing the president to renegotiate or terminate any government contracts.⁴ The government halted parts of the identification card project and imposed new, nonnegotiable contract terms amidst rapid turnover of government officials.⁵ Siemens brought an arbitration claim against Argentina before the International Centre for Settlement of Investment Disputes (ICSID), alleging that the country’s actions constituted an expropriation of its investment.⁶ The ICSID tribunal found that Argentina’s actions over the course of the crisis constituted a “creeping” expropriation and a violation of the state’s duties of full protection and fair and equitable treatment of foreign investment.⁷ It ordered Argentina to compensate Siemens in the amount of \$217 million.⁸ The issue of corruption never arose during the proceedings, as there was no evidence to suggest that any such activity had taken place.

Shortly after the tribunal issued its award, however, “German prosecutors discovered Siemens had engaged in rather astonishing acts of systematic bribery around the world.”⁹ Siemens had procured

1. R. Zachary Torres-Fowler, Note, *Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration*, 52 VA. J. INT’L L. 995, 1027 (2012).

2. Siemens AG v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 78 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009). For a discussion of bilateral investment treaties, see *infra* Part I.A.

3. Peter Katel, *Argentina’s Crisis Explained*, TIME (Dec. 20, 2001), <http://content.time.com/time/world/article/0,8599,189393,00.html>.

4. *Siemens*, ICSID Case No. ARB/02/8, Award, ¶ 96.

5. *Id.* ¶¶ 91–97. In a take-it-or-leave-it deal, Argentina proposed halving both the duration of the contract and the number of identification cards to be issued and eliminating its obligation to stop issuing the old type of identification card. *Id.* ¶¶ 97, 112. Siemens did not accept the terms of the new proposal and Argentina ultimately terminated the contract pursuant to a decree issued under the Economic-Financial Emergency Law. *Id.* ¶ 97.

6. *Id.* ¶ 213. For a list of measures that Siemens alleged constituted expropriation of its investment, see *id.* ¶ 218.

7. *Id.* ¶¶ 262–65, 273, 308–09.

8. Torres-Fowler, *supra* note 1, at 1027.

9. *Id.*

the Argentine contract after paying \$105 million in bribes to Argentine officials over the course of a decade.¹⁰ Siemens pleaded guilty to violating the accounting provisions of the Foreign Corrupt Practices Act (FCPA),¹¹ and it subsequently waived the \$217 million award.¹² Its precise reasons for doing so remain unclear. As a result of its guilty plea, Siemens became the subject of the largest criminal penalty (\$450 million) and the largest disgorgement of profits (\$350 million) in FCPA history.¹³ Even today, its total settlement of \$800 million is double the amount of the third largest settlement in FCPA history.¹⁴

These events demonstrate that investment contracts procured through bribery or fraud may become the subject of an FCPA investigation as well as an ICSID dispute. Prosecutions under the FCPA have exploded in the past decade, as have investor-state suits before ICSID tribunals.¹⁵ Unfortunately, the regimes do not have a mechanism for communicating with one another. Siemens's waiver of the \$217 million ICSID award in its favor highlights just one problem that can emerge from a lack of communication between FCPA enforcement authorities and ICSID tribunals.

This Note seeks to address two problems arising from the lack of coordination between FCPA enforcement authorities and ICSID tribunals. First, as shown by *Siemens AG v. Argentine Republic*,¹⁶ anticorruption investigations may reveal arbitral decisions to be

10. *Id.*

11. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2012).

12. Luke Eric Peterson, *Siemens Waives Rights Under Arbitral Award Against Argentina; Company's Belated Corruption Confessions Had Led Argentina To Seek Revision of 2007 Ruling*, INVESTMENT ARB. REP., Sept. 2, 2009, § 10; Letter from Steven A. Tyrrell, Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, to Scott W. Muller and Angela T. Burgess, Davis Polk & Wardwell (Dec. 15, 2008), available at <http://www.justice.gov/opa/documents/siemens.pdf>; Richard L. Cassin, *Final Settlements for Siemens*, FCPA BLOG (Dec. 15, 2008, 7:22 PM), <http://www.fcpablog.com/blog/2008/12/16/final-settlements-for-siemens.html>.

13. Cassin, *supra* note 12; Richard L. Cassin, *Total Lands Third on the Top 10 Disgorgement List*, FCPA BLOG (May 31, 2013, 8:02 AM), <http://www.fcpablog.com/blog/2013/5/31/total-lands-third-on-the-top-10-disgorgement-list.html>.

14. Richard L. Cassin, *With Magyar in New Top Ten, It's 90% Non-U.S.*, FCPA BLOG (Dec. 29, 2011, 1:28 PM), <http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html>. In 2010, the U.K. company BAE Systems agreed to the third largest settlement, which included a \$400 million criminal fine. *Id.*

15. See *infra* notes 54–55, 58–61 and accompanying text.

16. *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), 14 ICSID Rep. 518 (2009).

incorrect due to a lack of evidence regarding corruption in the formation of investment contracts. Second, the corruption defense creates a perverse incentive that encourages states to expropriate investors' assets—or to renegotiate for burdensome new terms—following FCPA investigations.¹⁷ The implications of these problems are not merely jurisprudential, but can be measured in billions of dollars.

The relationship between the international investment regime and anticorruption efforts around the globe has been the subject of some recent scholarship,¹⁸ but little attention has been devoted to the lack of coordination between the two. In particular, little scholarly attention has been devoted to analyzing the contours of an emerging affirmative defense that allows host states to invoke corruption in the formation of investment contracts as an absolute bar to liability.¹⁹ Moreover, commentators analyzing the corruption defense have generally forgone a topical approach to the defense in favor of a case-by-case assessment.²⁰ This Note examines the components of the corruption defense as applied by tribunals. It then addresses the problem of inaccurate arbitral awards due to insufficient evidence of corruption, and it proposes a novel solution to the problem of perverse incentives for host states.

Part I of this Note traces the development and functions of the overlapping ICSID and FCPA regimes. Part II explores the elements of the emerging corruption defense as applied by ICSID tribunals, including the evidentiary burden placed upon the host state for asserting the defense. Because a strong corruption defense is essential to the worthy goal of eradicating global corruption, Part III of this Note proposes a framework for FCPA-ICSID interaction designed to strengthen the defense and further that goal. With the aim of promoting justice and transparency, Part III proposes using tools such

17. See *infra* Part III.

18. E.g., Rashna Bhojwani, Note, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66 (2012); Torres-Fowler, *supra* note 1.

19. For further discussion of the defense, see *infra* Part II.

20. See, e.g., Bhojwani, *supra* note 18, at 108–11 (advocating that FCPA enforcers should consider the totality of the case, including arbitration awards); Torres-Fowler, *supra* note 1, at 1034–37 (proposing taking into account factors on a case-by-case basis instead of “extensive reforms”). But see Jason Webb Yackee, Essay, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52 VA. J. INT'L L. 723, 736–42 (2012) (examining the principle of good faith and “in accordance” provisions).

as waiver and disgorgement, contract cure, and communication between FCPA enforcement authorities and ICSID tribunals to remedy the problems identified herein.

I. OVERLAPPING LEGAL REGIMES

The system of international investment arbitration is designed to resolve disputes between investors and host states, whereas domestic anticorruption laws such as the FCPA are designed to punish investors for their illicit conduct. When corruption occurs in the context of foreign direct investment, these two legal regimes frequently overlap. This Part provides an overview of each regime.

A. *ICSID Arbitration*

Investment arbitration allows private corporations investing in a country to sue that host state directly before an international tribunal, thus bypassing that country's domestic legal system.²¹ ICSID, established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States²² (the ICSID Convention) in 1965 as an arm of the World Bank, is a leading arbitral body that provides a framework for resolving investment disputes.²³ ICSID's principal goal is to "promot[e] international capital investment by allaying the common apprehension that investors seeking opportunities in the developing world lack[] effective legal protections against a foreign state."²⁴ ICSID has largely succeeded in allaying such concerns by providing a neutral forum for resolving investor-state disputes.²⁵ ICSID does not directly arbitrate disputes, but rather "provides the institutional and procedural framework" for independent tribunals constituted under its rules to

21. See *Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*, INT'L CENTRE FOR SETTLEMENT INVESTMENT DISPS. 1 (Jan. 20, 2013), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> ("Investor-State [arbitration] is a form of resolution of disputes between foreign investors and the State that hosts their investment [and that] allows foreign investors to initiate dispute settlement proceedings against a host State.").

22. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160.

23. Torres-Fowler, *supra* note 1, at 996.

24. *Id.*

25. *Id.*

do so.²⁶ Tribunals are typically composed of three arbitrators: one selected by each party and the third appointed by agreement of the parties or by the two other arbitrators.²⁷ Their decisions are not binding on future tribunals,²⁸ but the rationales they employ may be persuasive.²⁹ Notably, ICSID awards are not subject to appeal.³⁰

Though commercial arbitration proceedings are typically kept strictly confidential,³¹ ICSID has moved away from a model of strict confidentiality so as to develop a body of case law that may be persuasive to future tribunals.³² Pursuant to Article 48 of the ICSID

26. *ICSID Dispute Settlement Facilities*, INT'L CENTRE FOR SETTLEMENT INVESTMENT DISPS., https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities (last visited Jan. 3, 2014).

27. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 22, art. 37(2)(b), 17 U.S.T. at 1285, 575 U.N.T.S. at 184.

28. Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129, 131 (2007) (“[T]here exists no obligation of *stare decisis* in the context of investment treaty arbitration . . .”).

29. *See id.* at 129 (“[T]he awards and decisions reported in ICSID Reports, and elsewhere, are not binding on any future tribunals, but remain persuasive nonetheless.”). *See generally* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1021–44 (2006) (describing, in form and practice, the concept of precedent in investment arbitration).

30. *See* Tai-Heng Cheng, *The Role of Justice in Annulling Investor-State Arbitration Awards*, 31 BERKELEY J. INT'L L. 236, 251 (2013) (“Unlike a domestic court decision, which is subject to appeal by a higher court, an ICSID award is not open to appeal. It is only subject to rectification, interpretation, revision or annulment, which are all different in nature from appeals.”); *see also* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 22, arts. 50–52, 17 U.S.T. at 1289–90, 575 U.N.T.S. at 190–91 (providing limited redress for disputes relating to the meaning or scope of award, newly discovered material facts, or procedural errors); *id.* art. 53(1), 17 U.S.T. at 1291, 575 U.N.T.S. at 194 (noting that awards are binding on parties).

31. *See* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 447 (2010) (“[T]he precise number of cases and the specific nature of their decisions are difficult to determine because of the number of potential arbitral forums open to investor-state disputes and the varying degrees of confidentiality with which the forums cloak their operations.”); *id.* at 462 (“[T]he confidentiality which in varying degrees applies to investor-state dispute settlement . . . appears to be derived from the processes and culture of international commercial arbitration.”).

32. Andrew de Lotbinière McDougall & Ank Santens, *ICSID Amends Its Arbitration Rules*, WHITE & CASE 2 (Oct. 2006), http://www.whitecase.com/files/Publication/e6da84a5-e1a8-462a-89e3-147a369efdb8/Presentation/PublicationAttachment/232b4eb2-3248-48f9-aca5-16652b545fd8/article_Icsid_Amends_its_Arbitration_Rules.pdf; *see* CAMPBELL MCLACHLAN, LAURENCE SHORE & MATHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 1.34 (2007) (“In contrast to commercial arbitration, where the reporting of awards is often restricted or fragmentary, the practice in investment arbitration . . . has come to be that the majority of awards are made public.”).

Convention, both parties to an arbitration proceeding must consent for an award to be published.³³ Nevertheless, following amendments to the ICSID Convention and Rules in 2006, tribunals must now publish the legal reasoning behind their awards, subject to the Article 48 requirement of consent for publication of the full award.³⁴ This eschewal of strict confidentiality has allowed for the development of a body of case law regarding the effect of corruption on the validity of investment contracts.

To invoke ICSID jurisdiction, a claimant must satisfy three prerequisites set forth in Article 25 of the ICSID Convention.³⁵ First, the dispute must be between a state party to the ICSID Convention and a national (usually a corporation or other business entity) of another ICSID contracting state.³⁶ Second, the dispute must arise directly out of an investment.³⁷ Third, the parties must have consented in writing to ICSID arbitration.³⁸

Consent to ICSID arbitration is typically established in a BIT or in a multilateral treaty such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty.³⁹ The majority of ICSID claims are commenced pursuant to BITs,⁴⁰ which govern the

33. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 22, art. 48(5), 17 U.S.T. at 1288, 575 U.N.T.S. at 188.

34. Rule 48(4) of the ICSID Arbitration Rules reads: “The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.” INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, in ICSID CONVENTION, REGULATIONS AND RULES, at 122, Rule 48(4), ICSID/15 (Apr. 2006). Before 2006, Rule 48 provided only that “[t]he Centre may . . . include in its publications excerpts of the legal rules applied by the Tribunal.” Lotbinière & Santens, *supra* note 32, at 2 (emphasis omitted). In 2010, ICSID embarked on a project to obtain consent for publication from all parties to concluded cases to expand the public accessibility of ICSID jurisprudence. *Publication of ICSID Decisions and Awards with the Parties’ Consent*, INT’L CENTRE FOR SETTLEMENT INVESTMENT DISPS., <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement54> (last visited Jan. 3, 2014).

35. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 22, at art. 25(1), 17 U.S.T. at 1280, 575 U.N.T.S. at 175.

36. *Id.*

37. *Id.*

38. *Id.*

39. GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 25–26 (2007).

40. *Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*, *supra* note 21, at 2.

investment relationships between a state party and investors from the other state party.⁴¹ As bilateral agreements, these can be individually tailored to particular circumstances; therefore, their provisions may vary in wording and scope.⁴² Nevertheless, almost all BITs contain the same types of provisions.⁴³ In general, BITs confer rights and privileges upon the investor while imposing obligations on the host state—that is, the country receiving the investment.⁴⁴ Such obligations normally include a responsibility to refrain from unlawful expropriation of the investment,⁴⁵ as well as guarantees of fair and equitable treatment,⁴⁶ full protection and security,⁴⁷ prompt, adequate, and effective compensation,⁴⁸ national treatment,⁴⁹ and most-favored-nation treatment.⁵⁰ Furthermore, most BITs define the term “investment” and extend protection only to claims that satisfy that definition.⁵¹ Finally, nearly all BITs grant investors the right to have investment disputes resolved in binding international arbitration

41. See ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 41–49 (2009) (tracing the origin and development of BITs and noting that “[u]ntil 1968, BITs only provided for state-to-state dispute resolution . . . [and] that [apparently] the first BIT that expressly incorporates provisions for investor-state arbitration . . . is Indonesia-Netherlands (1968)”).

42. See ANDREAS KULICK, *GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW* 18 (James Crawford & John S. Bell eds., 2012) (noting “considerable differences in wording and scope of protection” among BITs).

43. See *id.* (“[T]he major issues addressed in different BITs are strikingly similar: almost all contain a definition of investors and investment, a number of investor rights – admission, fair and equitable treatment, full protection and security, prompt adequate and effective compensation, national treatment, most favored nation treatment – and the general consent to binding investment arbitration, i.e. ICSID or otherwise.”).

44. See KULICK, *supra* note 42, at 1 (“BITs mainly, and in a plethora of cases exclusively, deal with investor rights.”); NEWCOMBE & PARADELL, *supra* note 41, at 64 (“[International Investment Agreements] impose obligations on host states with respect to investments and investors; there are no corresponding international obligations imposed on foreign investors . . . or on the investors’ home state”); VAN HARTEN, *supra* note 39, at 40–41 (“[T]he capital-importing state assumes major liabilities to multinational firms without securing any legal advantage under the treaty for its own nationals. . . . [T]he effect is to regulate capital-importing states intensively without imposing binding obligations on home states or investors.”).

45. NEWCOMBE & PARADELL, *supra* note 41, at 334–35.

46. *Id.* at 233–35.

47. *Id.*

48. See *id.* at 18.

49. *Id.* at 146–50.

50. *Id.* at 192, 200–01.

51. See KULICK, *supra* note 42, at 18 (noting that a BIT’s scope of protection is tied to its definition of “investment”).

without having to first exhaust the remedies available in the domestic legal system of the host state.⁵² By providing general consent to dispute resolution under ICSID rules, BITs thus satisfy the consent requirement for ICSID jurisdiction.⁵³

The number of BITs in force has exploded over the past decade,⁵⁴ with more than 2,500 such treaties now concluded.⁵⁵ As the number of BITs has increased, so has the number of claims brought in ICSID arbitration. “From 1996 to 2005 ICSID registered 166 claims, compared to 35 claims in the previous three decades”⁵⁶ This number continues to grow rapidly, with thirty-nine new claims brought in 2012 alone, a 20 percent increase from the previous year.⁵⁷

B. The FCPA and Anticorruption Enforcement

The past decade has also seen a significant increase in the enforcement of anticorruption statutes such as the FCPA. When it was enacted in 1977,⁵⁸ the FCPA was the world’s first anticorruption statute.⁵⁹ Though enforcement was limited for the first two decades of

52. See Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT’L L. 301, 313 (2004) (“Historically, an alien investor was required to exhaust local remedies before its state could espouse a claim before an international tribunal. . . . Under BITs, these rules have either been eliminated or modified.”).

53. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 22, art. 25(1), 17 U.S.T. at 1280, 575 U.N.T.S. at 175; see VAN HARTEN, *supra* note 39, at 100 (describing general consent in investment treaties as “a blank cheque” for future arbitration).

54. VAN HARTEN, *supra* note 39, at 3.

55. NEWCOMBE & PARADELL, *supra* note 41, at 57.

56. VAN HARTEN, *supra* note 39, at 30.

57. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ANNUAL REPORT 2012, at 24–25 (2012), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2012_Eng.

58. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3 (2012)).

59. See Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 87 (2007) (“The FCPA was passed by the U.S. Congress in December 1977 [It] was the first [legislation] in the world to recognize and seek to curb the contribution of foreign firms.”); Lauren Ann Ross, Note, *Using Foreign Relations Law To Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 451–52 (2012) (“Instances of overseas commercial bribery surfaced in the wake of the Watergate scandal, spurring Congress to enact the world’s first anticorruption statute, the FCPA, in 1977.”).

the statute's life,⁶⁰ enforcement has since increased dramatically—particularly in the last ten years. From 2004 to 2009 alone, the number of new enforcement actions increased from as few as five to over forty.⁶¹ Criminal penalties in excess of \$20 million are now commonplace, and the largest settlements have exceeded \$100 million.⁶² Siemens's 2008 settlement totaling \$800 million is currently the largest on record.⁶³

The FCPA is composed of two parts: the antibribery provisions⁶⁴ and the accounting provisions.⁶⁵ The antibribery portion of the statute prohibits corporations, including their agents and employees, from making payments or giving gifts to foreign officials.⁶⁶ Specifically, it criminalizes “the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to” a foreign official.⁶⁷ In so doing, the FCPA takes a supply-side approach to punishing and preventing corruption—that is, it seeks to reduce the supply of bribes to foreign officials by punishing bribe-paying corporations—rather than attempting to reduce the demand for bribes by punishing bribe-taking officials.⁶⁸ It applies not only to domestic businesses,⁶⁹ but also to foreign and domestic issuers of securities listed on U.S. stock exchanges who commit violations outside the United States⁷⁰ and to foreign companies who commit acts in furtherance of a violation “while in the territory of the United

60. See Krever, *supra* note 59, at 93 (“In its first two decades, enforcement of the Act by the DOJ and SEC was, at best, sporadic, and limited to high profile investigations.”).

61. Ross, *supra* note 59, at 460; Richard L. Cassin, *2009 FCPA Enforcement Index*, FCPA BLOG (Dec. 31, 2009, 3:15 AM), <http://www.fcpablog.com/blog/2009/12/31/2009-fcpa-enforcement-index.html>.

62. Ross, *supra* note 59, at 460; Cassin, *supra* note 14.

63. Cassin, *supra* note 14. Interestingly, nine of the ten biggest penalties were levied against non-U.S. companies. *Id.*

64. 15 U.S.C. §§ 78dd-1 to -3 (2012).

65. *Id.* § 78m(b).

66. *Id.* §§ 78dd-1 to -3.

67. *Id.* §§ 78dd-1(a), -2(a), -3(a).

68. See David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 476–77 (2009) (noting that the FCPA's focus on supply-side actors of foreign bribery constituted the first effort in the world to criminalize large, multinational corporations for paying foreign officials).

69. 15 U.S.C. § 78dd-2.

70. *Id.* § 78dd-1; Ross, *supra* note 59, at 454.

States.”⁷¹ The extraterritorial reach of the statute gives enforcing authorities broad discretion, and uncertainty about the meaning of the statutory phrase “in the territory of the United States” may add to that discretion.⁷²

Among signatories to the Organisation for Economic Co-operation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention),⁷³ the United States leads the way in prosecutions for foreign bribery.⁷⁴ But the FCPA is not the world’s most stringent antibribery statute. The United Kingdom, for example, enacted a new antibribery regime in 2010, which entered into force in July 2011.⁷⁵ That statute is “substantially broader and stricter than the FCPA.”⁷⁶ Whereas the FCPA criminalizes only the payment of bribes to foreign officials,⁷⁷ the Bribery Act 2010 (U.K. Bribery Act) criminalizes the payment of bribes to foreign public officials,⁷⁸ as well

71. 15 U.S.C. § 78dd-3(a).

72. See Ross, *supra* note 59, at 464–65 (“Within the confines of the statute, it is not clear what it means to be ‘in the territory of the United States’ . . .”). The FCPA’s reach may even extend to such attenuated contacts as the transfer of money unintentionally through a U.S. bank account. *Id.* However, especially in the wake of *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2877–78 (2010), there is a strong presumption against extraterritorial application of U.S. laws (including the FCPA), particularly when the intended effects of the illegal activity are felt outside the United States. *Id.* at 2877–83; Ross, *supra* note 59, at 472–73.

73. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998).

74. See FRITZ HEIMANN AND GILLIAN DELL, TRANSPARENCY INT’L, EXPORTING CORRUPTION? COUNTRY ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION PROGRESS REPORT 2012, at 6 (2012), available at http://files.transparency.org/content/download/510/2109/file/2012_ExportingCorruption_OECDProgress_EN.pdf (“Another positive development is the substantial increase in the number of cases brought in the countries in the Active Enforcement category. The US leads with 275 cases, an increase of 48 since last year . . .”). A 2012 report by Transparency International covering thirty-seven of the thirty-nine signatories to the OECD Convention classified seven countries as “active” enforcers of the Convention’s provisions and twelve countries as “moderate” enforcers. *Id.*

75. *Id.* at 36–37.

76. Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT’L L. 1, 17 (2012); see Sharifa G. Hunter, *A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business*, 18 ILSA J. INT’L & COMP. L. 89, 109 (2011) (comparing and contrasting the antibribery provisions of the FCPA and the U.K. Bribery Act). According to Professor Hunter, the actual impact of the U.K. Bribery Act will depend on the “prosecutory appetite” of the U.K. Serious Fraud Office. *Id.*

77. 15 U.S.C. §§ 78dd-1 to -3 (2012); Hunter, *supra* note 76, at 96–97.

78. Bribery Act, 2010, c. 23, § 6 (U.K.); Spahn, *supra* note 76, at 17 n.73.

as to private individuals.⁷⁹ Unlike the FCPA, it also criminalizes the receipt of bribes.⁸⁰ The FCPA provides an exception for facilitation payments intended “to expedite or to secure the performance of a routine governmental action,”⁸¹ whereas the U.K. Bribery Act provides no such exception.⁸² It does, however, provide an affirmative defense through which a corporation may avoid liability for failure to prevent bribery by demonstrating that it had “adequate procedures” in place to prevent bribery.⁸³ The FCPA provides no such compliance defense.⁸⁴

The burden of FCPA enforcement is jointly carried by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).⁸⁵ The DOJ investigates and prosecutes criminal charges, and the SEC brings civil suits against violators.⁸⁶ Historically, the SEC focused primarily on violations of the accounting provisions, but it is now becoming more active in enforcing the bribery provisions.⁸⁷ Today, the two agencies “work together to bring parallel criminal and civil [actions] against [violators].”⁸⁸ The Federal Bureau of Investigation (FBI) has also recently begun to play a significant role in investigating FCPA violations.⁸⁹

79. Bribery Act § 1; Hunter, *supra* note 76, at 97–98; Spahn, *supra* note 76, at 17 n.73.

80. Bribery Act § 2; Hunter, *supra* note 76, at 95–96; Spahn, *supra* note 76, at 17 n.73.

81. 15 U.S.C. § 78dd-1(b); *see* Hunter, *supra* note 76, at 99 (“Routine governmental action refers to general bureaucratic tasks that foreign officials ordinarily perform. Notably, the FCPA’s definition of a facilitation payment expressly excludes any foreign official’s decision to award new business to, or continued business with, any particular party.” (footnote omitted)).

82. Hunter, *supra* note 76, at 100; Henry W. Asbill et al., *DOJ/SEC’s Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis*, JONES DAY (Dec. 2012), http://www.jonesday.com/DOJ_SEC_Resource_Guide_to_FCPA/?RSS=true.

83. Bribery Act § 7(2). *See generally* Peter Alldridge, *The U.K. Bribery Act: “The Caffeinated Younger Sibling of the FCPA,”* 73 OHIO ST. L.J. 1181, 1202–10 (2012) (analyzing the adequate-procedures defense).

84. Hunter, *supra* note 76, at 106; Asbill et al., *supra* note 82.

85. Weiss, *supra* note 68, at 478.

86. *Id.*

87. *Id.*

88. *Id.*

89. Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 779–80 (2011); Ross, *supra* note 59, at 461. A 2011 FBI sting operation led to the arrest of twenty-two individuals for FCPA violations. Press Release, U.S. Dep’t of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* <http://www.fbi.gov/washingtondc/press-releases/2010/wfo011910.htm>. The FBI was reportedly engaged in at least six undercover FCPA investigations in 2011. McSorley, *supra*, at 779–80.

Penalties for FCPA violations may include criminal fines as well as disgorgement of profits.⁹⁰ Disgorgement, an equitable remedy designed to prevent unjust enrichment,⁹¹ is relatively new to the FCPA context. The SEC imported the penalty into the context of FCPA enforcement only after the passage of the Sarbanes-Oxley Act of 2002.⁹² In applying the remedy as a punishment for FCPA violators, the SEC distinguishes between legally and illegally obtained profits.⁹³ Once a causal link is established between an illicit act and profits stemming from that act, the SEC can require the violator to forfeit, with interest, the approximate amount earned from the unlawful activity unless the company can show a break in the causal chain.⁹⁴

Given the potential harshness of such a penalty, the FCPA authorizes the U.S. Attorney General to issue informal advisory opinions to corporations that inquire about the implications of potential violations.⁹⁵ An approving advisory opinion creates a rebuttable presumption that a corporation's actions do not violate the FCPA.⁹⁶ Advisory opinions can be disseminated to the public, but they are not binding and do not create precedent.⁹⁷ In November 2012, the DOJ and SEC jointly released a 120-page guide outlining the agencies' "approach and priorities" to enforcing the FCPA.⁹⁸

The DOJ's enforcement of the FCPA relies primarily on out-of-court settlement agreements called non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs).⁹⁹ As enforcement has expanded, so has the DOJ's use of these

90. Weiss, *supra* note 68, at 478.

91. Marc Alain Bohn, *What Exactly Is Disgorgement?*, FCPA BLOG (Mar. 17, 2011, 7:10 AM), <http://www.fcablog.com/blog/2011/3/17/what-exactly-is-disgorgement.html>.

92. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); Weiss, *supra* note 68, at 474.

93. Bohn, *supra* note 91. Illegally obtained profits are those obtained through a violation of the FCPA.

94. *Id.*

95. 15 U.S.C. §§ 78dd-1(e), -2(f) (2012); Allen R. Brooks, Note, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 147 (2010).

96. Brooks, *supra* note 95, at 147.

97. *Id.*

98. Lanny A. Breuer & Robert S. Khuzami, *Foreword* to CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at www.justice.gov/criminal/fraud/fcpa/guide.pdf.

99. Brooks, *supra* note 95, at 156.

agreements,¹⁰⁰ which are intended to resolve criminal cases without a trial.¹⁰¹ Though they may benefit corporations in the short term,¹⁰² out-of-court settlements do not create precedent and therefore offer little guidance for corporations.¹⁰³ As a result, some commentators have criticized prosecution agreements for hindering the development of a body of law relating to FCPA prosecution.¹⁰⁴

NPAs are similar to DPAs in most respects. The two types of agreements typically contain a number of standard requirements, such as cooperation,¹⁰⁵ admission of conduct,¹⁰⁶ monetary penalties,¹⁰⁷ business reforms,¹⁰⁸ independent monitors,¹⁰⁹ and miscellaneous

100. *Id.* at 138. From 1993 to 2002, the DOJ entered into sixteen prosecution agreements. *Id.* at 149. Since 2002, that number has increased dramatically, peaking in 2007 and again in 2010 with thirty-nine agreements filed in each of those years. Joseph Warin, *2013 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 24, 2013, 9:20 AM), <http://blogs.law.harvard.edu/corpgov/2013/07/24/2013-mid-year-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements>. Thirty-seven agreements were filed in 2012. *Id.*

101. Brooks, *supra* note 95, at 139.

102. *Id.* at 157–58.

103. *Id.* at 155–56. The DOJ initially set forth guidelines regarding its approach to DPAs in 1997 in the U.S. Attorneys' Manual. *Id.* at 148. The DOJ's use of NPAs and DPAs in FCPA enforcement has since been guided by a series of four memoranda promulgated between 1999 and 2008 by then–Deputy Attorneys General Eric Holder, Larry Thompson, Paul McNulty, and Mark Filip. *See id.* at 147–53 (explaining the history and modern use of NPAs and DPAs).

104. *See, e.g., id.* at 155–56 (“The DOJ's use of DPAs and NPAs directly affects the development of case law under the FCPA because relevant precedent cannot develop from settling disputes outside the courtroom. . . . This enforcement policy increases market costs and inefficiencies.”).

105. Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1439–40 (2007). “Before the Filip Memo, prosecutors often pressured the defendant corporation to turn over documents and data, make witnesses available, and waive its attorney-client privilege in order to obtain a DPA or an NPA.” Brooks, *supra* note 95, at 153–54. The agreements may also include waivers of any relevant statutes of limitations, meaning that the charges may remain open for a long period of time. *Id.* at 154.

106. Paulsen, *supra* note 105, at 1440–41. Detailed admissions to criminal charges usually result in the award of heavy penalties in civil suits. *Id.* at 1441. “The fact that corporations typically agree to these admissions—despite the consequences in civil suits—underscores the degree to which corporations desire to avoid criminal indictment and/or conviction.” *Id.*

107. *Id.* at 1441–42. These often include criminal penalties, civil penalties—such as disgorgement—and civil settlements to third parties. *Id.* at 1441.

108. *Id.* at 1442. These may include personnel changes and hiring of new management and board members. *Id.* They may also include changes and improvements to compliance programs, such as “amended financial controls, hotlines for whistleblowers, training programs to underscore legal behavior, new personnel hiring policies, and ethics officers.” *Id.*

109. *Id.* at 1443.

penalties.¹¹⁰ There is one important difference, however. In the NPA context, prosecutors forgo the filing of charging instruments, subject to the corporation's fulfillment of the terms of the agreement, whereas, in the DPA context, prosecutors file an indictment and agree to dismiss the charges after the terms of the DPA are satisfied.¹¹¹ This difference is significant partly because in some cases an indictment alone can trigger penalties for corporations.¹¹² It also means that an NPA may send a less harsh message than does a DPA, though the conditions attached to them can be equally severe. Regardless, prosecution agreements appear to be firmly entrenched as a primary mechanism for FCPA enforcement. As such, any proposal for change in the application of the FCPA must incorporate them.

II. THE CORRUPTION DEFENSE

Had the Argentine government been aware of Siemens's corrupt conduct, it might have invoked that conduct as an absolute bar to its own liability. The corruption defense allows host states to invoke corruption in the formation of a contract as a reason to consider the contract void, thereby precluding any claims by the investor that may arise from the contract.¹¹³ It is an affirmative defense resembling the common-law defense of unclean hands, which bars a claimant from recovery if he is guilty of some injustice concerning the very matter for which he seeks relief.¹¹⁴ The issue at the heart of the defense is whether a tribunal should enforce an investment contract that has been tainted by corruption.

The roots of the corruption defense lie in a 1963 award issued by Judge Gunnar Lagergren in an International Chamber of Commerce (ICC) arbitration.¹¹⁵ Judge Lagergren's award in ICC Case No. 1110¹¹⁶

110. *Id.*

111. *Id.* at 1438.

112. Weiss, *supra* note 68, at 512.

113. See Torres-Fowler, *supra* note 1, at 999 (“[T]he ‘corruption defense’ . . . allows tribunals to void an underlying contract if procured through an act of corruption or bribery.”).

114. Yackee, *supra* note 20, at 729.

115. *Id.* at 727–29; see Torres-Fowler, *supra* note 1, at 1010 (“ICC Case No. 1110 (1963) marks the first reported international arbitral award specifically addressing claims of corruption.”).

116. Case No. 1110 of 1963, 21 Y.B. Comm. Arb. 47 (ICC Int'l Ct. Arb.). The original text of Judge Lagergren's award is reprinted in J. Gillis Wetter, *Issues of Corruption Before*

was the first reported international arbitral award to directly address the issue of corruption.¹¹⁷ There, a “politically connected Argentine engineer”¹¹⁸ sued the respondent, a British company, for breach of a contract to sell electrical equipment for power plants to the Peronista government of Argentina.¹¹⁹ Eight years after the initial agreement, the claimant had been unable “to make any sales whatsoever,”¹²⁰ and so the respondent retained another agent for a fee of £1 million.¹²¹ The next year, the claimant surprisingly sold approximately £27 million worth of equipment to the new Argentine government, but the respondent corporation was unwilling to pay his commission, instead paying his replacement nearly £1 million.¹²²

The parties to the arbitration freely admitted that the contract was meant to take advantage of the claimant’s influence, yet they agreed to submit their dispute to arbitration nonetheless.¹²³ In fact, the respondent company conceded that its only reason for retaining the claimant was “the quite remarkable degree of influence which he had with the political appointees of the Peronista Government.”¹²⁴ It became evident, however, that the contract actually envisioned the

International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110, 10 ARB. INT’L 277 (1994).

117. See Wetter, *supra* note 116.

118. Torres-Fowler, *supra* note 1, at 1010.

119. Wetter, *supra* note 116, at 285. The names of both parties were redacted from the award. See *id.* at 282 (replacing the claimant’s and the respondent’s names with “X” and “Y,” respectively). For several years following the 1950 agreement the claimant failed to make any sales. Torres-Fowler, *supra* note 1, at 1011. In 1955, just months before the coup that ousted the Peronista government, the claimant fled Argentina for Germany, where he remained until July 1958, several months after a new round of elections. Wetter, *supra* note 116, at 285; see Morris A. Horowitz, *The Legacy of Juan Peron*, CHALLENGE, Oct. 1963, at 27, 27, 29. He claimed to have left for Germany because of “serious medical reasons, remaining immobilized there until July 1958.” Wetter, *supra* note 116, at 285.

120. Torres-Fowler, *supra* note 1, at 1011.

121. Wetter, *supra* note 116, at 289.

122. *Id.* at 285, 289.

123. See Torres-Fowler, *supra* note 1, at 1010 (“[N]either party actually argued the agency contract was necessarily illicit or corrupt.”). Here, the contract giving rise to the dispute had a corrupt activity as its direct object: the bribing of public officials. *Id.* This type of contract is commonly known as an “intermediary agreement.” The claimant was an intermediary being paid to bribe officials to obtain a public contract for the respondent corporation. Many investment disputes deal with another type of corruption, which occurs not as the object of the contract but in its procurement. See *infra* Part II.A.3.

124. Wetter, *supra* note 116, at 288.

payment of bribes to government officials.¹²⁵ The parties asked Judge Lagergren to disregard the corrupt object of the contract and to render an award nonetheless.

Judge Lagergren refused to do so.¹²⁶ Despite the parties' agreement to disregard corruption, as well as evidence that corruption was unavoidable in Argentina, he raised the issue of jurisdiction *sua sponte*. He declined to exercise jurisdiction over the dispute, reasoning that international public policy and *bonos mores* rendered the contract "invalid or at least unenforceable."¹²⁷ Bribery, he declared,

is an international evil; it is contrary to good morals and to an international public policy common to the community of nations. . . . Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice . . . in settling their disputes.¹²⁸

The lasting impact of Judge Lagergren's opinion is that it looked beyond national laws, enunciating "a general principle of law"¹²⁹ that corrupt contracts are void or unenforceable as contrary to *international* public policy.¹³⁰ The notion that bribery is contrary to international public policy has since developed into an important part of arbitral jurisprudence in the context of international investment.¹³¹ In recent years, ICSID tribunals have built upon the framework established by Judge Lagergren.¹³² Confronting similar questions,

125. The claimant was to receive a commission of 10 percent of all sales. *Id.* at 285. Of that commission, "2 per cent [was] for [the claimant] and 8 per cent [was] for 'Peron and his boys.'" *Id.* at 290.

126. Case No. 1110 of 1963, 21 Y.B. Comm. Arb. at 52, ¶ 23.

127. *See id.* at 51, ¶ 16 ("[I]t cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.").

128. *Id.* at 52, ¶¶ 20, 23.

129. *Id.* at 51, ¶ 16.

130. *Id.* at 52, ¶ 23; Wetter, *supra* note 117, at 278.

131. *See, e.g.*, World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006), 46 I.L.M. 339 (2007) ("[T]his 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 . . .").

132. *See* Yackee, *supra* note 20, at 727–34 (discussing the origins of the corruption defense and its current status).

several tribunals have affirmed his premise that corrupt contracts are void as contrary to international public policy.¹³³

Four questions are relevant to understanding the features of the developing defense. First, what is the nature of the wrongful conduct? Second, what law is applied by the tribunal? Third, what evidentiary burden is borne by the parties? And fourth, what is the appropriate remedy?¹³⁴ These inquiries are relevant not only to the calculus of host states seeking to assert the defense. Because some conduct that may give rise to a successful corruption defense may also give rise to an FCPA investigation, they are also relevant to crafting just solutions to the problems created by FCPA-ICSID overlap.

A. *Nature of the Wrongful Conduct*

The first inquiry regards the nature of the wrongful conduct. Several distinctions may be made between different types of corrupt conduct. First, corruption may be either unilateral or mutual. Second, corruption may be “hard” or “soft.” Third, corruption may be found either in the object of a contract or in its procurement.

1. *Unilateral or Multilateral.* Unilateral corruption involves misconduct on the part of only one party.¹³⁵ More often than not, this has meant fraud on the part of the investor.¹³⁶ Multiple tribunals have allowed the respondent–host state to assert the corruption defense in response to unilateral corruption.¹³⁷ In contrast, mutual corruption occurs when both parties are complicit in the misconduct. Bribery is a

133. *Inceysa Vallisoletana, S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award, ¶ 252 (Aug. 2, 2006), http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf; *World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶ 157.

134. This formulation of the defense’s contours is based on this author’s synthesis of the existing case law and scholarship.

135. KULICK, *supra* note 42, at 328.

136. *See, e.g., Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶ 5 (Aug. 16, 2007), <http://italaw.com/documents/FraportAward.pdf>; *Inceysa Vallisoletana*, ICSID Case No. ARB/03/26, Award, ¶ 3; *see also* KULICK, *supra* note 42, at 328 (observing that two of three cases involving unilateral corruption scrutinized conduct by the investor).

137. *See, e.g., Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, ¶ 345; *Inceysa Vallisoletana*, ICSID Case No. ARB/03/26, Award, ¶ 154.

prime example because it entails one party making an illicit payment (“active” bribery) and the other accepting it (“passive” bribery).¹³⁸

Whereas unilateral corruption has given rise to a successful corruption defense on more than one occasion, only once has mutual corruption been invoked as grounds for a successful corruption defense.¹³⁹ In *World Duty Free Co. v. Republic of Kenya*,¹⁴⁰ the respondent–host state succeeded in asserting the corruption defense after the claimant made a cash payment of \$2 million to the Kenyan president’s reelection fund.¹⁴¹ Whether a state can assert the defense for mutual corruption may depend on whether the conduct of the state official can be attributed to the state itself. Notably, the *World Duty Free* tribunal did not impute the president’s actions to the state,¹⁴² however, it is unclear whether future tribunals will invoke misconduct by government officials as grounds for rejecting the defense. If a tribunal did attribute an official’s conduct to the state, it could conceivably invoke either the common-law rule of estoppel or the doctrine of contributory fault to prevent the state from asserting the defense.¹⁴³

Some commentators have called for tribunals to apply a rule of comparative fault, under which a state could invoke the corruption defense, but only to the extent that it is free of guilt.¹⁴⁴ The state would still be responsible for compensating the investor for a percentage of its claim corresponding to the percentage of fault attributable to the state.¹⁴⁵ For example, a state in which high-level

138. See KULICK, *supra* note 42, at 328 (discussing unilateral and multilateral conduct as they relate to each party’s role in the corruption).

139. *World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶ 157. As this Note was going to print, an ICSID tribunal in the matter of *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), <http://italaw.com/sites/default/files/case-documents/italaw3012.pdf>, rendered an award barring an Israeli company’s claims as a result of bribery. *Id.* ¶ 389. The tribunal found that the claimant made corrupt payments to an Uzbek official and to the brother of Uzbekistan’s prime minister. *Id.* ¶¶ 325, 351. The tribunal ultimately concluded that it lacked jurisdiction over the claims because the claimant’s investment was not made in accordance with Uzbek law as required by Article 1(1) of the Israel-Uzbekistan BIT. *Id.* ¶¶ 372–74, 389.

140. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), 46 I.L.M. 339 (2007).

141. *Id.* ¶¶ 66, 157.

142. *Id.* ¶ 185.

143. KULICK, *supra* note 42, at 322–25.

144. Torres-Fowler, *supra* note 1, at 1029–30.

145. *Id.*

officials regularly extort bribes might be responsible for 75 percent of the investor's claim, whereas an investor who seeks out and bribes a low-level official might only be able to recover 25 percent of its claim. Nevertheless, considering the paucity of case law and the fact that *World Duty Free* is not binding on future tribunals, it is unclear what effect misconduct by government officials will have on a state's ability to assert the defense.

2. *Hard or Soft.* Second, corruption may be either "hard" or "soft." Hard corruption is the offer or promise of an undue advantage to a public official to gain an improper advantage.¹⁴⁶ It may be done directly or through an intermediary.¹⁴⁷ It entails "an intentional act pursued with the purpose of influencing a public official in the performance of his or her official duties, which in turn is directed at gaining an undue business advantage."¹⁴⁸ The "soft" form of corruption, or "influence peddling," is essentially an attenuated form of hard corruption. It entails the offer or promise of an undue advantage to a person who claims to be able to exert an undue influence on a public official.¹⁴⁹ Influence peddling by definition involves an intermediary, but in contrast to hard corruption, the intermediary need not actually pay a bribe. Moreover, a corporation engaging in influence peddling need not intend to influence specific conduct on the part of the public official. The OECD Convention does not require states to criminalize influence peddling, and the FCPA does not explicitly do so, given that it requires a payment to be given in exchange for something—in other words, there must be a "quid pro quo."¹⁵⁰ Whereas a number of ICSID tribunals have upheld

146. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 73, art. 1(1), 37 I.L.M. at 4; KULICK, *supra* note 42, at 309.

147. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 73, art. 1(1), 37 I.L.M. at 4; KULICK, *supra* note 42, at 309. ICC Case No. 1110 involved such an intermediary agreement, with a portion of the intermediary's commission to be paid to government officials. Case No. 1110 of 1963, 21 Y.B. Comm. Arb. 47, 48 (ICC Int'l Ct. Arb.).

148. KULICK, *supra* note 42, at 309.

149. Hilmar Raeschke-Kessler & Dorothee Gottwald, *Corruption in Foreign Investment—Contracts and Dispute Settlement Between Investors, States, and Agents*, 9 J. WORLD INVESTMENT & TRADE 5, 7 (2008).

150. See McSorley, *supra* note 89, at 762–63 ("There must be some quid pro quo element: the illegal payment must be understood to be given in exchange for unlawful government action, although completion of the desired action is not required.").

the corruption defense in cases of hard corruption,¹⁵¹ no tribunal has allowed a state to invoke the defense for “mere” influence peddling, and history suggests that future tribunals will also hesitate to do so.¹⁵²

3. *Object or Procurement.* Third, corruption may be found in a contract’s object or in its procurement.¹⁵³ Both give rise to a successful corruption defense. An intermediary agreement for the bribery of a public official is the prototypical example of a contract with a corrupt object. Because the consideration (bribery) offered by one party is an illegal act, the contract is legally unenforceable.¹⁵⁴ Such a contract is equivalent to a contract for murder¹⁵⁵—in the event of breach, a tribunal will not force either party to make good on its obligation to commit bribery. Most ICSID jurisprudence, however, deals with corruption in the procurement of a contract. When a corporation commits fraud or bribery to win a public concession, for example, tribunals have generally permitted states to invoke the corruption defense, even if the contract itself is free from defects.¹⁵⁶

The proposal set forth in Part III of this Note focuses on conduct that both violates the FCPA and may give rise to a corruption defense by host states—in particular, bribery that occurs in the procurement

151. *E.g.*, *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶¶ 401–06 (Aug. 16, 2007), <http://italaw.com/documents/FraportAward.pdf>; *Inceysa Vallisoletana, S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award, ¶¶ 250–52 (Aug. 2, 2006), http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 321 (Aug. 27, 2008), <http://italaw.com/documents/PlamaBulgariaAward.pdf>; *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

152. *See Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶¶ 111–12, 132 (Dec. 8, 2000), 41 I.L.M. 896 (2002) (refusing to allow Egypt to invoke corruption as a defense after the claimant made a number of suspicious payments to an intermediary without evidence that the intermediary used that money to bribe officials of the host state).

153. When corruption is found in the object of a contract, “the performance that the ‘buyer’ seeks from the ‘seller’ is itself an illegal, immoral, or otherwise disapproved act.” Yackee, *supra* note 20, at 729. When corruption is found in the procurement of a contract, “the core contractual object [may be] facially unobjectionable, yet the state alleges that this relationship was attained through the investor’s involvement in a secondary, corrupt scheme.” *Id.*

154. *E.g.*, Case No. 1110 of 1963, 21 Y.B. Comm. Arb. 47, 52, ¶ 23 (ICC Int’l Ct. Arb.).

155. Yackee, *supra* note 20, at 729.

156. *E.g.*, *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, ¶¶ 401–06; *Inceysa Vallisoletana*, ICSID Case No. ARB/03/26, Award, ¶¶ 250–52; *Plama Consortium Ltd.*, ICSID Case No. ARB/03/24, Award, ¶ 321; *World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶ 157.

of investment contracts. Although an understanding of the corruption defense would not be complete without examining how tribunals have treated unilateral corruption, fraud alone does not constitute a violation of the FCPA. Moreover, the FCPA does not forbid influence peddling because it does not entail the passing of bribes to public officials. Finally, although the FCPA does not distinguish between corruptly procured contracts and those with a corrupt object, the corruption defense is rarely asserted in response to contracts with a corrupt object. Therefore, corruptly procured contracts are most relevant to this Note's analysis.

B. Law Applied by the Tribunal

When states have succeeded in asserting the corruption defense, the rationale of tribunals has varied. Tribunals have relied on three principal legal justifications for recognizing the corruption defense: the concept of international (or transnational) public policy, the requirement that an investment be made in "accordance with laws," and the obligation of the parties to act in good faith.

1. *International Public Policy.* First, it is relatively well-settled in ICSID jurisprudence that corruption is contrary to international public policy. Tribunals have built upon the reasoning of Judge Lagergren in ICC Case No. 1110, invoking both bribery and fraud as grounds for voiding the underlying contract as contrary to international public policy.¹⁵⁷ The international public policy of a state consists of three elements: "fundamental principles, pertaining to justice or morality, that the state wishes to protect even when it is not directly concerned"; *lois de police*, the "rules designed to serve the essential political, social, or economic interests of the State"; and international obligations owed by a state toward other states or international organizations.¹⁵⁸ International public policy is not a supranational principle, but merely signifies "domestic public policy applied to foreign awards."¹⁵⁹ As such, its content and application may vary from state to state.¹⁶⁰

157. *Inceysa Vallisoletana*, ICSID Case No. ARB/03/26, Award, ¶ 252; *World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶ 157.

158. Pierre Mayer & Audley Sheppard, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 249, 255 (2003).

159. *World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶ 138.

160. *Id.*

The tribunal in *Inceysa Vallisoletana v. Republic of El Salvador*¹⁶¹ invoked international public policy as a subsidiary justification for allowing the respondent–host state to assert the corruption defense to escape liability for breach of an investment contract.¹⁶² There, the claimant submitted falsified information as part of its bid for a public concession in violation of Salvadoran law.¹⁶³ The tribunal ultimately held that granting the claimant treaty protection for a contract procured by fraud would violate international public policy.¹⁶⁴ According to the tribunal, international public policy consists of the “fundamental principles that constitute the very essence of the State.”¹⁶⁵ One such principle is the notion of respect for the law.¹⁶⁶ To recognize the existence of rights arising from illegal acts would violate the principle of respect for the law, and therefore the tribunal would violate international public policy if it allowed the claim to go forward.

Though it dealt with bribery as opposed to fraud, the *World Duty Free* tribunal went a step farther than the *Inceysa* tribunal. It held bribery to be “contrary to the international public policy of most, if not all, States” and therefore contrary to *transnational* public policy.¹⁶⁷ Transnational public policy is more restricted in scope than international public policy, but universal in application.¹⁶⁸ It “compris[es] fundamental rules of natural law, principles of universal justice, *jus cogens* [norms of] . . . international law, and the general

161. *Inceysa Vallisoletana, S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf.

162. *Id.* ¶ 245.

163. *Id.* ¶ 251.

164. *Id.* ¶ 252.

165. *Id.* ¶ 245.

166. The tribunal noted that the inclusion of provisions in the BIT stating that investments must be made “in accordance with law” is a “clear manifestation” of international public policy. *Id.* ¶ 246. Such provisions are discussed in Part II.B.2.

167. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

168. Int’l Law Ass’n, Comm. on Int’l Commercial Arbitration, London Conference, 2000, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* 6–7 (2000), available at <http://www.ila-hq.org/download.cfm/docid/E723662E-053C-415A-A4C7822577AE6B4F>. Transnational public policy reflects “an international consensus as to universal standards and accepted norms of conduct that must always apply . . .” *Id.* at 2–3. It “compris[es] fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as ‘civilised nations.’” *Id.* at 6–7.

principles of morality accepted by . . . ‘civilized nations.’”¹⁶⁹ In *World Duty Free*, a \$2 million cash bribe paid to the Kenyan president to obtain an investment contract rendered the contract voidable at respondent Kenya’s option.¹⁷⁰ The tribunal verified the existence of an objective norm of transnational public policy against bribery by making reference to international conventions, comparative law, and arbitral awards.¹⁷¹ It then reasoned that there was nothing inherently wrong with the contract itself, but that the fact that it was procured by bribery allowed the state “the opportunity to relieve [it]self from its burdens.”¹⁷² Kenya’s defense therefore allowed it to treat the contract as if it were rescinded. In administering the defense, the tribunal called upon the maxim *restitutio in integrum*, which dictated that the bribe could not be returned to the claimant.¹⁷³

2. *Accordance with Laws.* A second justification invoked by ICSID tribunals for granting the corruption defense rests upon treaty provisions stating that investments must be made in accordance with laws. ICSID jurisdiction is premised upon the existence of a dispute arising directly out of an investment.¹⁷⁴ Additionally, the parties to a dispute must consent to jurisdiction.¹⁷⁵ Nearly all BITs, which provide for general consent by both states to arbitrate disputes, contain a definition of the term “investment.”¹⁷⁶ This definition typically includes a requirement that an investment be made in accordance with the laws of one or both contracting states. For example, the provision at issue in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*¹⁷⁷ defines a covered

169. *Id.*

170. *World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶¶ 130, 164, 188.

171. *Id.* ¶¶ 141–57.

172. *Id.* ¶ 164.

173. *Id.* ¶ 164, 186.

174. U.N. Conference on Trade and Dev., *Dispute Settlement: International Centre for Settlement of Investment Disputes*, Module 2.5: Requirements Ratione Materiae, at 5, UNCTAD/EDM/Misc.232/Add.4 (2003).

175. *Id.* at 1.

176. *See supra* note 51 and accompanying text.

177. *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶ 281 (Aug. 16, 2007), <http://italaw.com/documents/FraportAward.pdf>. Claimant Fraport obtained annulment of the award in 2010 and subsequently filed a new claim before ICSID. Jarrod Hepburn, *Fraport Files New Claim at ICSID over Expropriation of Airport Terminal Project; Annulment Committee Ruling Paved Way for New Hearing by Finding Breach of Investor’s Right To Be Heard*, INVESTMENT ARB. REP. (Mar. 31, 2011),

investment as “any kind of asset accepted in accordance with the respective laws and regulations of either [c]ontracting [s]tate.”¹⁷⁸ An investment not made in accordance with the applicable laws does not qualify as an “investment” for purposes of the BIT, and it therefore does not qualify for the protections granted by the treaty, including the host state’s advance consent to arbitration. Thus, tribunals have invoked the failure of prospective investments to comply with BIT “in accordance” provisions as grounds for declining jurisdiction, thereby precluding claimants’ chances to recover.

At least three uncertainties arise in interpreting and applying “in accordance” provisions. First, with which laws and regulations must an investor comply, and what constitutes “in accordance”? Must a prospective investor conduct a full legal-compliance audit for every investment, ensuring that it “compl[ies] with each and every provision of domestic law”?¹⁷⁹ This could become an “Achilles Heel of investment arbitration” if a trivial violation of any law could give rise to a successful defense.¹⁸⁰ The *Inceysa* tribunal held that the claimant’s investment must comply with “generally recognized rules and principles of International Law”¹⁸¹ and “universal standards and rules of conduct,”¹⁸² as had been specified in the underlying investment contract. The tribunal concluded that these principles incorporated the notion of good faith.¹⁸³ The *Inceysa* and *Fraport* tribunals both held that unilateral fraud by investors caused the investments in question to violate “in accordance” provisions,¹⁸⁴ though the *Fraport* dissent suggested that a minor violation of an anticorruption law, such

http://www.iareporter.com/articles/20110331_7. The award was annulled pursuant to Article 52(1)(d) of the ICSID Convention for the tribunal’s serious departure from a fundamental rule of procedure by denying Fraport the right to be heard. *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶¶ 218–47 (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf>. Nevertheless, the award’s annulment does not alter the significance of the tribunal’s reasoning with regard to the corruption defense.

178. *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, ¶ 281 (emphasis omitted).

179. *Id.* ¶ 304.

180. *Id.* § 37 (Cremades, Arb., dissenting).

181. *Inceysa Vallisoletana, S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award, ¶ 224 (Aug. 2, 2006), http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf.

182. *Id.* ¶ 227.

183. *Id.* ¶ 230.

184. *Inceysa Vallisoletana*, ICSID Case No. ARB/03/26, Award, ¶ 239; *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, ¶ 401.

as a grease payment intended to speed up a routine transaction, might not run afoul of those same provisions.¹⁸⁵ Likewise, the *Inceysa* tribunal suggested that to bar a claim, an investment must be “made in *significant* contravention” of the applicable law, “such as through gross misrepresentation or fraud in a government tender process.”¹⁸⁶

A second uncertainty lies in determining whether “in accordance” provisions impose a continuous duty upon the investor to monitor the compliance of an investment, or whether such provisions extend only to the initiation of the investment. The *Fraport* tribunal suggested that “in accordance” provisions apply only to the initiation of an investment, and that subsequent violations of the host state’s law “might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.”¹⁸⁷

A final uncertainty concerns the existence of mitigating factors that might excuse violations of the applicable law. The *Fraport* tribunal hypothesized that an investor who breaks the law might still be allowed to bring a claim if one of several factors is present.¹⁸⁸ Such factors include a good-faith mistake by the investor regarding an unclear host-state law, reliance on incorrect legal advice, or a violation “not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability.”¹⁸⁹ Moreover, an investor could potentially assert an affirmative defense of estoppel to block the corruption defense if the host state endorsed the investment while “knowingly overlook[ing]” conduct not in accordance with its laws.¹⁹⁰ No tribunal has yet invoked estoppel or any of the above mitigating factors in response to the corruption defense, so for now they remain mere hypotheticals.

185. *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, § 37 (Cremades, Arb., dissenting).

186. *Inceysa Vallisoletana*, ICSID Case No. ARB/03/26, Award, ¶ 202 (emphasis added).

187. *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, ¶ 345.

188. *See id.* ¶ 396 (listing several arguments in favor of a liberal policy of granting jurisdiction to investors’ claims).

189. *Id.*

190. *Id.* ¶ 346. The tribunal in *World Duty Free* was unwilling to impute knowledge or responsibility to the respondent state based on the actions of its president. The tribunal considered and rejected the claimant’s estoppel claim. *Id.* ¶ 183. If future tribunals follow this trend, estoppel may prove near impossible to assert. Yackee, *supra* note 20, at 741–42.

3. *Good Faith*. Third, ICSID tribunals have imputed a duty of good faith to the parties and granted the corruption defense as a result of the claimant's violation of that duty. Two ICSID tribunals have held fraud by an investor to constitute a violation of the duty of good faith. These cases indicate that the duty includes an obligation to provide information to the host state, at least in the initiation of an investment. Furthermore, applicable domestic and international law may incorporate the duty, meaning that a breach of good faith can also constitute a violation of "in accordance" provisions.

The *Inceysa* tribunal held that the investor's submission of false information in connection with a public concession constituted a breach of good faith.¹⁹¹ It defined good faith as the "absence of deceit and artifice *during the negotiation and execution* of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties."¹⁹² The investor's failure to act in such a fashion undermined the consent of the host state to ICSID jurisdiction.¹⁹³ Moreover, the breach of good faith meant its investment was *not* made in accordance with the host state's laws, which apparently incorporated the duty.¹⁹⁴

*Plama Consortium Ltd. v. Bulgaria*¹⁹⁵ arose not under a BIT but under the multilateral Energy Charter Treaty,¹⁹⁶ which does not contain an "in accordance" provision. The tribunal concluded that misrepresentation by the investor of its true ownership constituted "deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery."¹⁹⁷ The tribunal imputed an obligation of good faith to Plama under both domestic¹⁹⁸ and

191. *Inceysa Vallisoletana*, ICSID Case No. ARB/03/26, Award, ¶ 239.

192. *Id.* ¶ 231 (emphasis added).

193. *Id.* ¶¶ 237–38.

194. *Id.* ¶¶ 238–39.

195. *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), <http://italaw.com/documents/PlamaBulgariaAward.pdf>.

196. Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95; see *Plama Consortium Ltd.*, ICSID Case No. ARB/03/24, Award, ¶ 1.

197. *Plama Consortium Ltd.*, ICSID Case No. ARB/03/24, Award, ¶ 135.

198. *Id.* ¶¶ 136, 144. As translated by Professor Metody Markov, who served as an expert in the *Plama* arbitration, Article 12 of Bulgaria's Obligations and Contracts Acts (OCA) states

international law.¹⁹⁹ It held the principle of good faith to encompass an “obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment,” especially “when the information is necessary for obtaining the State’s approval of the investment.”²⁰⁰

In sum, three principal legal justifications have supported the corruption defense: the concept of international (or transnational) public policy, the requirement that an investment be made in “accordance with laws,” and the obligation of the parties to act in good faith. The *Inceysa* tribunal seems to have incorporated notions of good faith and international public policy into the requirement that an investment be made in accordance with laws, but other case law suggests that these are indeed separate justifications that tribunals may invoke in the absence of an “in accordance” provision.

C. Evidentiary Burden

Although there is some uncertainty surrounding the details of the three rationales that have emerged in support of the corruption defense, ICSID jurisprudence is even murkier with regard to the evidentiary burden that each party should bear. At least one tribunal has applied a “clear and convincing evidence” standard,²⁰¹ but others have failed to define a precise standard.²⁰² It is unclear what standard, if any, will emerge as the rule among future tribunals. Tribunals have been reluctant to inquire deeply into allegations of corruption when further evidence may be available. When there have been ongoing domestic investigations into improper conduct, tribunals have not waited for the outcome of these investigations.²⁰³ For example, the *Fraport* tribunal refused a request by the respondent–host state for a stay of proceedings pending the outcome of investigations into the

that “parties must negotiate and enter contracts in good faith.” *Id.* ¶ 136. Articles 27 and 29 of the OCA provide that contracts induced by fraud are subject to invalidation. *Id.*

199. *Id.* ¶ 144.

200. *Id.*

201. *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, ¶ 326 (June 1, 2009), http://italaw.com/sites/default/files/case-documents/ita0786_0.pdf.

202. *See infra* Part II.C.2.

203. *E.g.*, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 56 (July 14, 2006), 14 ICSID Rep. 374 (2009); *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶¶ 5, 27 (Aug. 16, 2007), <http://italaw.com/documents/FraportAward.pdf>.

claimant's allegedly corrupt conduct.²⁰⁴ Notably, most of the limited ICSID jurisprudence on the standard of proof has arisen from cases of fraud, as opposed to bribery.²⁰⁵

1. *Clear and Convincing Evidence.* The tribunal in *Siag v. Egypt*²⁰⁶ applied “the American standard of “clear and convincing evidence,” which lies “somewhere between the traditional civil standard of ‘preponderance of the evidence’ (otherwise known as the ‘balance of probabilities’), and the criminal standard of ‘beyond reasonable doubt.’”²⁰⁷ The tribunal reasoned this was appropriate both because the claimant had adduced a great deal of prima facie evidence that he had not committed fraud and because serious allegations, such as fraud, demand a high standard of proof.²⁰⁸

2. *Undefined Standard.* Other tribunals have held that the evidence adduced by the respondent–host state has not been sufficient to support the corruption defense, but they have failed to define the precise burden that should be applied.²⁰⁹ They do agree,

204. *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, ¶ 47 (quoting *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Procedural Order No. 21, ¶ 17 (Jan. 6, 2006)).

205. In *World Duty Free* (the only case to grant the corruption defense for bribery), the claimant freely admitted to paying a bribe, so the tribunal had no chance to consider the appropriate standard of proof. See *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 130 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

206. *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), http://italaw.com/sites/default/files/case-documents/ita0786_0.pdf.

207. *Id.* ¶ 325.

208. *Id.* ¶¶ 324–26.

209. Florian Haugeneder & Christoph Liebscher, *Corruption and Investment Arbitration: Substantive Standards and Proof*, in AUSTRIAN ARBITRATION YEARBOOK 2009, at 539, 549–50 (Christian Klausegger et al. eds., 2009). In *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), 41 I.L.M. 896 (2002), the claimant made a number of suspiciously timed payments, totaling £52,000, to its agent in the host state. *Id.* ¶ 71. Ultimately, the mere presence of suspicious payments to an intermediary was not enough to establish fraud, but the tribunal was unwilling to draw a precise line: “[T]he delicate problem[] remains for an arbitral tribunal ‘to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal commissions.’” *Id.* ¶ 111 (quoting Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 277 (Pieter Standers, ed., 1987)). Future tribunals may, however, be satisfied by evidence that the intermediary used that money to bribe officials of the host state. The tribunal in *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (Dec. 19, 2008), 48 I.L.M. 496 (2009), held that the burden of proof is high for allegations of bribery, and that

however, that the burden is high: “An accusation of bribery requires the most rigorous level of proof.”²¹⁰ One dissenting arbitrator argued for a lower standard of proof allowing tribunals discretion to make inferences based on “concordant circumstantial evidence,” but no tribunal has applied this standard.²¹¹

D. Remedies

A final question about the corruption defense concerns the remedies it affords. When a state succeeds in asserting the corruption defense, what form does the remedy granted by the tribunal take? Here, as elsewhere, the reasoning of tribunals has varied, and the precise remedy depends upon both the source of ICSID jurisdiction and the law applied by the tribunal. First, when an investor’s violation of a treaty-based “in accordance” provision gives rise to the defense, the remedy has been jurisdictional in nature.²¹² Because the investor’s activity does not qualify as an “investment” under the BIT (or other treaty), it cannot enjoy the protections granted by that document. The state’s general consent to ICSID arbitration is one such protection that the investor loses as a result of its corrupt conduct. Without the consent of both parties, ICSID cannot exercise jurisdiction over the dispute.²¹³

Second, even when an investment treaty does not contain an express “in accordance” provision, a tribunal may impute such a requirement to the treaty’s substantive protections. Corrupt conduct may thus cause an investor to lose the substantive protections of the

“uncorroborated statements” and ongoing domestic criminal investigations do not satisfy that burden. *Id.* ¶¶ 172–75.

210. *TSA Spectrum*, ICSID Case No. ARB/05/5, Award, ¶ 172; *see also* Douglas Thomson, *How To Deal with Corruption Allegations*, GLOBAL ARB. REV. (Nov. 15, 2013), <http://globalarbitrationreview.com/news/article/32055/how-deal-corruption-allegations> (“[A]llegations of corruption must be proved to a very high probability . . .”).

211. *Siag*, ICSID Case No. ARB/05/15, Award, Dissenting Opinion of Professor Francisco Orrego Vicuña at 4 (quoting ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 93–94 (2004)).

212. *See* *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶ 404 (Aug. 16, 2007), <http://italaw.com/documents/FraportAward.pdf> (holding that the tribunal lacked jurisdiction over the dispute); *Inceysa Vallisoletana, S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award, ¶¶ 335–36 (Aug. 2, 2006), http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf (same).

213. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, *supra* note 22, art. 25(1), 17 U.S.T. at 1280, 575 U.N.T.S. at 175; *see supra* note 38 and accompanying text.

treaty. The tribunal retains jurisdiction, but the investor's claim loses on the merits because it has no rights to invoke under the treaty.²¹⁴

Finally, a tribunal may exercise jurisdiction over the dispute and hold that the investor's corrupt conduct has rendered the contract voidable at the respondent-host state's option. This was the conclusion reached by the tribunal in *World Duty Free*, in which ICSID's jurisdiction was premised not upon a treaty but upon consent given in the investment contract.²¹⁵ Importantly, the contract was not void *ab initio*; the respondent-host state was required to act to set it aside.²¹⁶ The remedy was *restitutio in integrum*, which entailed returning the parties to their original positions, but did not include returning the bribe to the bribe payer.²¹⁷

This Part has traced the contours of the corruption defense as it has been applied by ICSID tribunals. It has focused on four principal inquiries. First, what is the nature of the wrongful conduct? Second, what law is applied by the tribunal? Third, what evidentiary burden is borne by the parties? And fourth, what is the appropriate remedy? These inquiries reveal that though the defense is in flux, it has certain characteristic elements that appear to be relatively static.

III. A PROPOSED FRAMEWORK FOR FCPA-ICSID INTERACTION

This Part seeks to reconcile the divergent goals of the international investment arbitration regime and the anticorruption regime. The following framework aims to prevent corruption while encouraging investment. It seeks to achieve this goal by promoting justice and transparency in situations in which the regimes intersect. This Part proposes that, in keeping with the current supply-side approach of the anticorruption regime, investors should be punished for their corrupt behavior. At the same time, FCPA enforcement authorities and ICSID tribunals should endeavor to ensure that neither the investor nor the host state reaps the rewards of its own corrupt behavior.

214. *See* *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Award, ¶¶ 97–98 (Aug. 27, 2008), <http://italaw.com/documents/PlamaBulgariaAward.pdf>.

215. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 6 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

216. *Id.* ¶¶ 164, 183.

217. *Id.* ¶¶ 164, 186.

A robust corruption defense in ICSID arbitration proceedings is an essential part of global efforts to stem the tide of corruption, especially in developing, capital-importing states. The common-law doctrine of unclean hands dictates that a claimant should not be permitted to enforce contracts procured by corrupt means,²¹⁸ and ICSID tribunals have correctly followed similar logic in denying recovery to corrupt investors.²¹⁹ Yet an FCPA investigation into an investor's conduct only compounds the uncertainty created by the complexity of the defense and the lack of consistency among tribunals in applying it. At the root of the problem is a lack of coordination between the two overlapping regimes. Because no framework exists to govern communication between ICSID tribunals and domestic anticorruption authorities, two distinct problems may emerge when the corruption defense interacts with an FCPA investigation.

First, ICSID arbitration may completely overlook covert corruption. The ICSID dispute-settlement system (in which investors are the claimants, states are the respondents, and monetary damages are the principal remedy) is not designed to ferret out covert corruption in the foreign-investment context, which is likely to be far more common than the open bribery seen in *World Duty Free*.²²⁰ The authorities tasked with investigating and enforcing domestic anticorruption statutes, such as the FCPA, are likely to be much more adept at rooting out corruption. Indeed, by uncovering evidence of covert corruption unknown to a prior ICSID tribunal, an FCPA

218. See Yackee, *supra* note 20, at 729 n.35 (“[U]nclean hands . . . ‘clos[es] the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.’” (quoting *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 876–77 (9th Cir. 2000))).

219. See *supra* Part II.B.

220. See Andreas Kulick & Carsten Wendler, *A Corrupt Way To Handle Corruption?: Thoughts on the Recent ICSID Case Law on Corruption*, 37 LEGAL ISSUES ECON. INTEGRATION 61, 83 (2010) (“Needless to say, tribunals lack sufficient instruments and equipment to pursue criminal investigations”); cf. Gary Born, *Bribery and an Arbitrator’s Task*, KLUWER ARB. BLOG (Oct. 11, 2011), <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator’s-task> (“Traditionally, arbitration was not perceived as an appropriate venue for adjudicating claims of bribery or corruption. The resistance to recognizing the arbitrability of bribery claims was based on a limited view of the tribunal’s jurisdiction, and included concerns about the tribunal’s restricted power to compel the production of evidence—particularly as compared with that of regulatory authorities that have traditionally investigated and prosecuted crimes of bribery—and the tribunal’s lack of authority to impose criminal penalties.”). *But see* Kulick & Wendler, *supra*, at 83. (“[H]owever, [tribunals] have enough leeway and leverage to find a fair and just result to the dispute.”).

investigation may reveal that the result reached by the tribunal was incorrect. Given the lack of an appeals process in ICSID arbitration,²²¹ it is unclear what recourse a respondent–host state might have in such circumstances.

Second, the outcome of an FCPA investigation (a conviction, civil judgment, or prosecution agreement) may give host states an incentive to expropriate an investor’s assets.²²² Depending on how much information is made public, a state could use the evidence of corruption uncovered by the investigation to invoke the corruption defense and thereby escape liability for expropriation. Awareness of this protection could embolden states to expropriate assets when they otherwise might not do so. This incentive is fueled in part by the award in *World Duty Free*, which did not impute to Kenya the culpable actions of the country’s own president.²²³ By recognizing the corruption defense for states whose officials solicit bribes, future ICSID tribunals would essentially permit corrupt host states to reap the rewards of their own misconduct.

As made clear by *Siemens* and *Fraport*, the temporal relationship between FCPA and ICSID proceedings may affect what problems arise due to the regimes’ overlap.²²⁴ This Part divides this relationship into three distinct situations. First, ICSID arbitration may precede an FCPA investigation. In this case the danger of an incorrect ICSID award, such as in *Siemens*, is particularly acute. Second, an FCPA investigation may precede conduct giving rise to an ICSID claim. This scenario creates an incentive for host states to expropriate. Third, an FCPA investigation and ICSID proceedings may take place simultaneously, potentially giving rise to both dangers.

221. See *supra* note 30 and accompanying text.

222. See Torres-Fowler, *supra* note 1, at 998–1000 (noting that antibribery investigations and enforcement actions facilitate the use of the corruption defense by host states in arbitration actions against investors, which consequently allows the host state to emerge from arbitration in a net-positive position).

223. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 185 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

224. Cf. Bhojwani, *supra* note 18, at 89–90 (noting that disclosure of an FCPA violation may occur either before or after breach of contract by a “foreign contracting party” and identifying problems that may arise in each scenario).

A. *ICSID First: Ensure Just Results Through Waiver and Disgorgement or by “Offsetting” ICSID Awards*

As *Siemens* demonstrated, when an arbitral award is issued before the commencement of an FCPA investigation, ICSID tribunals can come to incorrect conclusions because of a failure to uncover evidence of covert corruption.²²⁵ To protect against such incorrect results, FCPA enforcement authorities should require corporations to waive their ICSID claims as a condition of prosecution agreements.²²⁶ If an award has already been rendered and paid, the authorities should require the corporation to disgorge the award.²²⁷ Alternatively, the DOJ and SEC might consider offsetting FCPA penalties by the amount of a successful ICSID claim, but such a strategy suffers from several flaws.²²⁸

1. *Waiver/Disgorgement.* Following its FCPA settlement in 2008, Siemens waived its right to the \$217 million award that it had won against Argentina.²²⁹ It is unclear, however, precisely why it did so. If Siemens decided independently to waive the award, that choice demonstrates just how much companies value their public image and how far they are willing to go to avoid reputational harm. If the waiver came as a condition of its FCPA settlement, then that may point to the DOJ’s willingness to make this a normal condition of plea and prosecution agreements.

Regardless of whether Siemens waived the award of its own volition or whether it was forced to do so pursuant to its FCPA settlement, its forfeiture of the award appears to be a normatively desirable result. If the tribunal had been aware of all the facts, it almost certainly would have recognized a corruption defense in favor of Argentina.²³⁰ Alternatively, had the FCPA investigation never occurred, Siemens would have succeeded in reaping the benefits of its own corrupt conduct by exploiting the dispute-resolution provisions of a treaty the protections of which it was not entitled to enjoy.

225. *See supra* Part III.

226. *See infra* Part III.A.1.

227. *See infra* Part III.A.1.

228. *See infra* Part III.A.2.

229. Peterson, *supra* note 12.

230. In the one instance in which a claimant freely admitted to bribery, the tribunal recognized the defense. *See supra* note 205. For an explanation of the various rationales for recognizing the defense, see *supra* Part II.B.

Accordingly, to ensure correct outcomes in the future, the DOJ and SEC should require investors to waive their rights to ICSID awards (or to disgorge awards already paid) as a condition of prosecution agreements. In conformity with the maxim *restitutio in integrum*, the claimant's waiver of an award restores the parties to the positions they would have enjoyed had the respondent–host state succeeded in asserting the corruption defense.²³¹ The DOJ and SEC should not object to implementing such a requirement, as it would aid the FCPA's ultimate goal of fighting corruption.

When a respondent–host state has already paid an award, the funds might be used in a number of ways. The disgorged award could be forfeited to the investigating country's government, used to implement changes to reporting and bookkeeping practices within the claimant corporation, or placed into an anticorruption fund to support anticorruption efforts in the host state. The best solution might incorporate several of these elements, based on the prosecuting authorities' best judgment in the individual situation. Alternatively, the investor could return the funds to the host state, but doing so would achieve the same result as if the tribunal had recognized the host state's corruption defense. This would essentially permit the state to reap the benefits of its corrupt conduct. By using its discretion to tailor the remedy to the particular situation, the DOJ can help achieve the most just result in the given circumstances.²³²

2. *Offsetting.* One commentator has proposed that FCPA penalties be offset by the amount an investor loses in arbitration.²³³ This proposal entails reducing the violator's FCPA penalty by the amount of its failed ICSID claim in the event that the host state invokes the corruption defense. The proposal is attractive because it seeks to temper the price paid by corrupt investors so that the combined effect of the FCPA and the corruption defense do not act as a deterrent to foreign direct investment. It could, however, potentially undermine the FCPA's supply-side approach to

231. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 164, 186 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

232. Increasing the DOJ's discretion to enforce the FCPA may not always be viewed favorably, but a discussion of the normative value of increased DOJ discretion is beyond the scope of this Note. The DOJ's discretion could always be corralled by legislative enactment or by an official memorandum setting new guidelines for FCPA enforcement.

233. *E.g.* Bhojwani, *supra* note 18, at 111.

corruption. Both parties to mutual corruption are culpable, and capitulating to investors could do more harm than good by weakening the appearance of certainty attached to FCPA sanctions.

The argument in favor of offsetting rests on an assumption that criminal penalties and settlements for FCPA violations are fundamentally the same as the loss of investment assets due to expropriation. This is not the case. A tribunal's recognition of the corruption defense is not a monetary penalty against the investor, albeit the defense may have significant monetary consequences. Rather, the investor forfeits the protection it once enjoyed under an investment treaty. Even then, the investor would not be completely without recourse, as it would still have access to the domestic courts of the host country. This return to the pre-BIT status quo may not be an appealing option (especially in a country where corruption is prevalent), but it reinforces the FCPA's supply-side approach by acting as a further deterrent to engaging in corrupt activity.

Offsetting penalties might create an incentive for companies to actively overstate their claims (even more so than they might already). What if the amount of the investor's claim is greater than the FCPA penalty that would be assessed? If the entire claim were offset, a company's only punishment would be the expropriation of their investment, with no FCPA fine at all. When the investor pleads guilty to violations, this arrangement would at least undermine the punitive value of FCPA sanctions. The same holds true when the investor signs a prosecution agreement. Though these mechanisms allow investors to avoid a criminal conviction, they do still hold some punitive value.

B. FCPA First: Counteract the Incentive To Expropriate by Mandating an Opportunity for Cure or by Concealing Enforcement Actions

When an FCPA investigation reveals that an investor has corruptly procured an investment contract, the corruption defense creates a perverse incentive for the host state to expropriate the investor's assets by offering the state immunity from claims.²³⁴ Host states might also attempt to renegotiate the investment contract to

234. See *supra* notes 222–23 and accompanying text.

insert burdensome new terms, secure in the knowledge that they are protected by the corruption defense.²³⁵

Because the SEC and DOJ generally bear different burdens of proof, however, host states may have different incentives depending on which agency pursues the action. The SEC need only prove corruption by a preponderance of the evidence in a civil suit,²³⁶ whereas the DOJ must prove guilt beyond a reasonable doubt in a criminal prosecution.²³⁷ Although it is unclear what standard of proof an ICSID tribunal would apply, the standard would likely be high. A tribunal may or may not follow the *Siag* tribunal's lead and apply a "clear and convincing evidence" standard.²³⁸ A criminal conviction for bribery or a DPA containing an admission of guilt might be convincing or at least highly persuasive to a tribunal, whereas a civil judgment under a lesser standard of proof will likely carry less weight. This raises the possibility that a prior criminal conviction will provide a host state with greater incentive to expropriate, whereas a civil judgment will render it less confident in its ability to mount a successful corruption defense. Regardless of the standard, evidence uncovered in the course of FCPA investigations may tempt unscrupulous host states to try their luck, knowing that the worst-case scenario entails reimbursing the investor for the expropriated assets.

235. See Bhojwani, *supra* note 18, at 106 ("The settlement may enable the foreign contracting party to breach the contract, renegotiate its terms, threaten to reopen proceedings, or present the FCPA violation as evidence for an arbitral tribunal considering a breach of contract claim."). Because a voidable contract (as opposed to a contract void *ab initio*) remains valid unless the state takes action to set it aside, states may have an incentive to renegotiate contracts following FCPA settlements. A state could use the threat of expropriation to strong-arm investors into providing additional consideration or accepting burdensome new terms. Investors who refuse to accept those terms might face expropriation of their investments with little chance for recourse. In such a scenario, it might be prudent for the U.S. government to put diplomatic pressure on the host country to accept reasonable terms. If the ICSID award came first, the renegotiation might include return of the award in whole or in part, depending on the DOJ's assessment of the culpability of the state. This situation illustrates the utility of a BIT provision requiring a state to accept compensation for actual harm resulting from the corruption. See *infra* Part III.B.2.

236. McSorley, *supra* note 89, at 754 n.30.

237. See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 877 (2007) ("In criminal law . . . [a] corporate defendant has the right to a grand jury, to a jury trial, to be found guilty beyond a reasonable doubt, and to protection under the Double Jeopardy Clause.").

238. See *supra* Part II.C.

1. *Opportunity for Cure.* One potential solution would be to mandate an opportunity for the investor to cure its breach of the investment contract. The United States could easily amend its Model BIT²³⁹ to include a provision stating that, when bribery would otherwise render a contract voidable or unenforceable, the host state relinquishes any claim to the corruption defense upon payment of damages to the host state for all actual harm incurred as a result of the corruption. These damages could be assessed in conjunction with any criminal fines or disgorgement penalties.²⁴⁰ Compliance with this requirement could become a standard provision of prosecution agreements, and the details of such compliance would most likely need to be outlined in an official DOJ memo updating the FCPA enforcement guidelines. Although amending existing BITs to include cure provisions would likely be more difficult, the United States could also apply diplomatic pressure on host states to gain their acquiescence. Alternatively, individual investors could negotiate cure provisions into their investment contracts.

The main advantage of such provisions is that they would negate host states' incentive to expropriate following an FCPA violation, ensuring both that investors retain access to a neutral forum for protecting their assets and that unscrupulous host states do not benefit from their own wrongdoing. However, investors would have to cooperate with anticorruption authorities to benefit from cure provisions. Otherwise, they would remain vulnerable to expropriation by host states. This would act as a strong incentive to ensure full cooperation with FCPA investigations.

2. *Conceal FCPA Enforcement Actions.* Another potential solution, albeit a less desirable one, is to keep FCPA enforcement actions secret. The DOJ could refuse to share any evidence with an ICSID tribunal when the expropriation occurs after the FCPA settlement (as long as the company is still on good behavior). It could

239. As its name suggests, the Model BIT is a model text used as the basis for negotiating new BITs. See *Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T ST., <http://www.state.gov/e/eb/ift/bit/index.htm> (last visited Jan. 3, 2014). The State Department and the U.S. Trade Representative, working in conjunction with other agencies, most recently updated the Model BIT in 2012. *Id.*

240. In practice, actual injury resulting from bribery might be difficult to assess. In the event that no actual damages can be calculated, a cure provision could, for example, provide for the payment of nominal damages or a contribution to an anticorruption fund in the host state.

then retain the threat of publicizing such evidence as leverage to ensure the investor's full cooperation and future FCPA compliance. Alternatively, it could include a clause in the prosecution agreement stating that the settlement is neither an admission nor a judicial determination of guilt.

In keeping with the principle of *restitutio in integrum* and the doctrine of unclean hands,²⁴¹ prosecution-agreement signatories should be required to agree not to bring an ICSID claim against the host state for any expropriation that has already occurred. Because the investor engaged in corrupt activity, it should not be permitted to invoke the protections of a BIT for claims arising from that activity. International public policy, good faith, and any applicable "in accordance" provisions instruct that the investor must forfeit the treaty's protections.²⁴² The DOJ could give teeth to this obligation by threatening to release evidence to the arbitral tribunal in the event that the investor does bring a claim. Although such an approach might prevent host states from utilizing FCPA enforcement actions as signals to expropriate, it would introduce further opacity into the application of the FCPA, and for that reason might not be desirable.

C. Simultaneous Proceedings: Ensure Correct Arbitral Awards by Encouraging Investors To Stay ICSID Claims Pending the Results of FCPA Investigations

A third scenario encompasses situations in which FCPA investigations and arbitral proceedings take place simultaneously. *Fraport* serves as an example of such a case in which documents from a corruption investigation could have been extremely useful to an ICSID tribunal in deciding the outcome of arbitration proceedings, but were not handed over. In *Fraport*, the Philippines requested a stay of the proceedings pending the outcome of corruption investigations.²⁴³ The Philippines ultimately prevailed because *Fraport's* investment was not made in accordance with Philippine law, but information uncovered in a corruption investigation could have

241. See *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 164, 186 (Oct. 4, 2006), 46 I.L.M. 339 (2007).

242. See *supra* Part II.B.

243. *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶ 47 (Aug. 16, 2007), <http://italaw.com/documents/FraportAward.pdf>. The tribunal did not grant the request. *Id.* (quoting *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Procedural Order No. 21, ¶ 17 (Jan. 6, 2006)).

given it another avenue to victory. This situation underscores one advantage of the FCPA over ICSID proceedings: although ICSID tribunals do have the legal power to compel production of documents, that power is different from the *investigatory* power vested in the DOJ, SEC, and FBI under the FCPA.

It should be an uncontroversial assertion that the FBI is capable of uncovering evidence that may escape an arbitral tribunal's notice entirely. So as to benefit from the investigative resources of the bodies tasked with FCPA enforcement, ICSID tribunals should make it their policy to ask for—and the DOJ should be prepared to make—recommendations about whether to stay proceedings pending an FCPA outcome. At the same time, the DOJ should encourage claimants to stay their arbitration claims. This would permit domestic anticorruption authorities—in the United States and elsewhere—to conduct a full investigation, the results of which could inform the outcome of the ICSID claim. ICSID proceedings could resume following the conclusion of the FCPA investigation. In this way, a tribunal could conceivably enlist any number of domestic anticorruption authorities as “detectives” to ensure that an award is rendered based on accurate and complete facts. Those authorities should gladly lend their assistance because ICSID awards based on correct information will reward honest investors while punishing corrupt ones.²⁴⁴

Notably, the *Fraport* tribunal's refusal to grant a stay, as requested by the Philippines, indicates that future tribunals may be reluctant to grant stays requested by respondent–host states.²⁴⁵ However, tribunals should be more willing to grant a stay requested by the claimant because the claimant could ultimately decide to drop its claim anyway. In the wake of *Siemens*, they should be especially eager to collect as much information as possible so as to assure they reach correct decisions.

FCPA enforcement authorities may take different steps depending on the outcome of the investigation. When an FCPA investigation uncovers no evidence of corruption, the DOJ, for

244. Such fact-finding could potentially be a costly endeavor. Any costs arising from expediting an investigation or producing evidence to a tribunal could be borne by the parties to the ICSID dispute.

245. See *Fraport AG Frankfurt Airport Servs. Worldwide*, ICSID Case No. ARB/03/25, Award, ¶ 47 (explaining the tribunal's denial of the stay request and its perception that the record was sufficient).

example, could recommend to the tribunal that nothing was found. Moreover, it could leverage such a recommendation of innocence to obtain cooperation from investors, conditioning a favorable report on the investor's full cooperation. When an investigation does uncover evidence of corruption, the DOJ may understandably hesitate to share that evidence with a tribunal. Instead, the DOJ could require the investor to drop its arbitration claim as part of a prosecution agreement, thereby achieving a just outcome and rightly depriving the investor of BIT protection. If *Siemens* is any guide, investors will almost certainly comply out of fear of the reputational harm that can accompany a criminal conviction.²⁴⁶

CONCLUSION

As the number of FCPA enforcement actions and ICSID arbitration claims has exploded in recent years, interplay between the two regimes has become more frequent. However, the lack of coordination between the two regimes creates problems for the normative effectiveness of each. This Note has outlined the rough contours of the emerging corruption defense as applied by ICSID tribunals, including the evidentiary burden placed upon the host state for asserting the defense. It has also addressed two significant problems that have manifested in recent ICSID cases. First, as *Siemens* demonstrated, incorrect arbitral decisions can result from a lack of evidence of corruption in the formation of investment contracts. Second, the corruption defense creates a perverse incentive for states to expropriate investors' assets following FCPA investigations. This Note has proposed a framework for FCPA-ICSID interaction designed to solve these problems by strengthening the corruption defense and promoting justice and transparency.

To ensure that investors do not reap the rewards of their own corrupt conduct, when an ICSID award in favor of the investor precedes an FCPA investigation, FCPA enforcement authorities should require the investor to waive or disgorge the award. Likewise, to avoid harmful opportunism by host states, when an FCPA settlement precedes ICSID arbitration, the investor should be allowed to cure the contract by reimbursing the host state for any

246. See Weiss, *supra* note 68, at 511–12 (noting the harsh impact of reputational damage stemming from a criminal conviction).

actual harm resulting from the corruption. Finally, to ensure that ICSID awards are based on the best possible evidence, when ICSID and FCPA proceedings are simultaneous, the domestic enforcement authorities should encourage the investor to stay its arbitration claim pending the outcome of the FCPA investigation. The DOJ and SEC should be prepared to make recommendations to the arbitral tribunal about whether a stay would be advisable. In the end, the mechanisms outlined herein will contribute to the eradication of corruption and the achievement of just results in investment-arbitration claims and will help to resolve some of the glaring uncertainties posed by the lack of coordination between ICSID proceedings and FCPA enforcement actions.