

# Journal of Economics Library

econsciences.com

Volume 12

June 2025

Issue 2

## *Corruption and Illegality in Asian Investment Arbitration.*

By Nobumichi Teramura, Luke Nottage,  
and Bruno Jetin (Eds). Springer 2024

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**Abstract.** This edited volume addresses the intersection of anti-corruption norms and international investment law, focusing specifically on how Asian jurisdictions and tribunals handle cases involving investor corruption and illegality. The book argues that, despite the increasing prominence of anti-corruption frameworks, a consistent regional approach to dealing with serious investor misconduct in Investor-State Dispute Settlement (ISDS) remains elusive, prompting this first-ever collection on the topic. Divided into three parts, the volume first provides an economic context, exploring the complex and often debated impact of corruption on Foreign Direct Investment (FDI) and economic growth in Asia. It then transitions to general legal issues, examining critical questions concerning the appropriate standard of proof for corruption claims, the impact of illegality on a tribunal's jurisdiction or the merits of a claim, and the emergence of host-state counter-claims. The final section offers in-depth country reports on major Asian economies—including China, India, Indonesia, Japan, South Korea, and key Southeast Asian nations—to map the diversity of legal frameworks and arbitral experiences. Ultimately, the book proposes a roadmap for fostering a more harmonized and Asian-centric approach to address corruption and illegality in future investment agreements and arbitrations.

**Keywords.** Investment Arbitration; Investor-State Dispute Settlement (ISDS); Transnational Corruption; Foreign Direct Investment (FDI); International Investment Agreements (IIA).

**JEL.** K42; F21; D73; K33; F50.

## Book Review

**C**orruption and Illegality in Asian Investment Arbitration, edited by Nobumichi Teramura, Luke Nottage, and Bruno Jetin, is a timely and academically rigorous collection that addresses one of the most fraught and systemically challenging issues facing international investment law: how to handle serious investor misconduct, particularly corruption, within the framework of Investor-State Dispute Settlement (ISDS). Positioned within the Asia in Transition series, the book distinguishes itself by focusing specifically on Asia, a region characterized by rapid economic growth, varied institutional quality, increasing involvement in ISDS, and a unique set of normative priorities.

The editors posit that despite a growing global consensus against transnational corruption, the literature has scarcely explored the specific perspectives and practices of Asian countries in this field. This gap is critical, as Asia has not only been a major destination for Foreign Direct Investment (FDI) but also a locus for significant arbitration cases involving corruption allegations. The volume, therefore, sets out to achieve the central objective of mapping Asian approaches toward corruption and illegality in international investment arbitration, drawing on both legal and economic perspectives. The

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book's comprehensive structure, encompassing economic context, general legal principles, and detailed country reports, makes it an indispensable resource for academics, practitioners, and policymakers navigating this complex intersection of law, policy, and economics.

## **II. Part I: The Economic Context of Corruption and Investment**

The book opens with an essential foundation, shifting the focus from purely legal analysis to the complex economic relationship between corruption and foreign investment. Part I, featuring contributions by Ahmed M. Khalid, Bruno Jetin, Jamel Saadaoui, and Haingo Ratiarison, revisits the long-standing debate on whether corruption acts as a "grabbing hand" that hinders FDI and growth or a "helping hand" that facilitates transactions in dysfunctional bureaucratic environments.

Khalid's analysis scrutinizes the empirical evidence, concluding that high levels of corruption generally discourage FDI, corroborating the intuitive "grabbing hand" argument. However, the economic reality in various Asian jurisdictions suggests a more nuanced, non-monolithic picture. Jetin, Saadaoui, and Ratiarison's work, for instance, focuses on the regional level of ASEAN+5 countries and finds that, counter-intuitively, corruption may sometimes act as a "helping hand" in certain member states. This finding invites necessary and close scrutiny into how the rule of law operates in practice, and how interactions with public and private senior officers can be critical determinants of the success of an investment.

The inclusion of this economic dimension is one of the book's major strengths. It correctly grounds the legal debate in practical realities: if corruption is merely a cost of doing business (a "helping hand"), tribunals may be tempted to be more lenient; if it is a corrosive, systemic impediment to legitimate trade (a "grabbing hand"), the response must be absolute rejection, potentially leading to jurisdictional dismissal. By establishing this mixed economic reality, the editors effectively set the stage for the complexity of the legal questions that follow.

## **III. Part II: General Legal Issues in International Arbitration**

Part II of the book addresses the core legal and procedural dilemmas that arise when host states raise corruption allegations against foreign investors.

### **A. Jurisdictional Challenges and the Standard of Proof**

The Foreword by Dr. Amokura Kawharu and several subsequent chapters delve into the critical decision point for arbitral tribunals: should a finding of corruption lead to the simple denial of jurisdiction (a "get out of jail free card" for the host state), or should it only impact the merits or the damages awarded?

A significant discussion centres on the necessary standard of proof for corruption. Since direct evidence of bribery is rare, arbitral tribunals are often forced to rely on circumstantial evidence. The book discusses the trend towards requiring a higher standard, such as "clear and convincing evidence", as seen in some recent awards. Chapters by Michael Hwang and Aloysius Chang, and others, explore whether this standard should be codified in international investment agreements (IIAs) or left to the evolving discretion of arbitrators. The general consensus, reflecting traditional arbitration

practice, seems to lean against excessive codification of evidentiary rules, preferring to trust the convergence of arbitral decisions.

Anselmo Reyes and Till Haechler, in their chapter, provide an important Asian perspective on the enforcement of anti-corruption laws. They and other contributors consider how tribunals can apply the principle *Ex turpi causa non oritur actio* (no right of action arises from a disgraceful cause), and whether this principle of non-admissibility should be treated as a jurisdictional issue or one related to the merits of the claim—a distinction that remains intensely debated in ISDS.

#### B. Systemic Corruption and Host-State Counter-Claims

Martin Jarrett's contribution raises the crucial issue of systemic corruption, arguing for rebalancing the asymmetries inherent in ISDS. When corruption is endemic, the failure of an investment is often a product of mutual illegality rather than purely a host-state treaty violation. Jarrett suggests that a systemic corruption exception could be considered to ensure fairness, challenging the traditional investor-centric nature of ISDS.

Furthermore, the volume addresses the prospects of host-state counter-claims where the state itself is not liable for corruption. As investment treaties increasingly become two-way streets, allowing states to sue investors for misconduct, the book explores how Asian states can leverage these counter-claims to recover damages or costs associated with the investor's illegality, moving beyond a simple denial of the investor's primary claim.

### IV. Part III: Country Reports—Mapping the Asian Divergence

The extensive final part, comprising eight detailed country reports, is the heart of the book's Asian-focused contribution. It demonstrates the sheer diversity of approaches across the region, making the search for a harmonized model challenging but necessary.

#### A. Major Economies: China, India, and Japan

The reports on the major regional economies reveal distinct patterns:

- China and Hong Kong (Vivienne Bath and Tianqi Gu): The chapter details the complex legal landscape where anti-corruption campaigns (like those under the CCP's CCDI) interact with the Foreign Investment Law (FIL) and the growing number of investment treaties. The analysis emphasizes the challenges of transparency and the reliance on domestic law, which may not always align with international arbitral expectations.
- India (Prabhash Ranjan): India's experience is vital given its high ISDS activity. The report focuses on the intersection of investment arbitration with India's robust, albeit often politicized, domestic anti-corruption institutions (like the CBI and CAG). The discussion centers on how corruption has been dealt with in specific arbitration claims and the implications for India's evolving Model Bilateral Investment Treaty (BIT).
- Japan (Luke Nottage and Nobumichi Teramura): Japan, traditionally a capital exporter, demonstrates a lower domestic tolerance for corruption. The chapter highlights how Japan's investment treaties, since around 2007, have increasingly included provisions urging host states to implement anti-corruption measures. This practice primarily

## Journal of Economics Library

serves Japan's outbound investors by ensuring a less corrupt environment for their investments abroad.

### B. Southeast Asian Jurisdictions

The book provides excellent coverage of Southeast Asian states, many of which are major FDI destinations but also face high corruption levels:

- Indonesia (Simon Butt, Antony Crockett, and Tim Lindsey): Indonesia presents a compelling case study given the high visibility of its anti-corruption body, the KPK. The chapter explores how Indonesia's dynamic legal and political environment influences its engagement with ISDS cases involving illegality.
- The Philippines (Thomas Elliot A. Mondez and Jocelyn P. Cruz) and Thailand (Sirilaksana Khoman, Luke Nottage, and Sakda Thanitcul): These reports examine how corruption is handled within a context of specific domestic anti-corruption laws, investment treaties (such as the JPEPA), and the role of domestic courts and agencies.
- Laos (Romesh Weeramantry and Uma Sharma): This report focuses on the challenges of "Corruptio Incognito"—where corruption is pervasive but difficult to prove in arbitration—which is highly relevant for smaller, developing economies.

These country reports collectively illustrate that while all Asian countries have ratified the UN Convention Against Corruption (UNCAC), their domestic application, arbitral exposure, and treaty policy regarding corruption vary significantly, leading to the "Asian divergence."

## V. Conclusion: Towards a Harmonized Asian Approach

The book concludes with a synthesizing chapter by the editors, Nobumichi Teramura, Luke Nottage, and Bruno Jetin, which returns to the central theme: the need for a "More Harmonised Asian Approach to Corruption and Illegality in Investment Arbitration".

The authors acknowledge that a uniform approach has not yet been established. They observe that while some individual jurisdictions have started addressing corruption through treaty redrafting or disputes, the current landscape is fragmented. The final chapter, therefore, proposes a forward-looking roadmap for regional harmonization:

1. Establish a Regional Forum: The creation of a dedicated forum for Asian jurisdictions to discuss and develop shared best practices concerning serious investor misconduct in FDI.
2. Model Treaty Provision: The development of an explicit, harmonized model treaty provision on corruption and illegality for inclusion in future Asian IIAs.
3. Judicial and Arbitral Cooperation: Mechanisms to enhance cooperation and information sharing between domestic anti-corruption agencies, local courts, and international arbitral institutions.

In conclusion, *Corruption and Illegality in Asian Investment Arbitration* is a landmark publication. It successfully moves beyond the generalized Western-centric ISDS debate to offer a granular, policy-relevant examination of a critical legal and economic challenge within the world's most dynamic region. By integrating economic analysis with detailed legal and jurisdictional reports, the editors have not only filled a significant gap in the literature but also provided a substantive blueprint for a more coherent and ethically robust

S. Carson, JEL, 12(2), 2025. pp.111-115

future for Asian investment treaty practice. The book's lasting value lies in its candid portrayal of the "Asian divergence" and its persuasive argument that regional coordination is the most sensible simple solution to the complex, systemic problem of corruption in investment governance.



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