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Remedies for victims: Discourse on the roles and norms of corruption claims in transnational investment arbitration proceedings

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Abstract: Although various international forums, including in The Conference of the States Parties (COSP) United Nations Convention Against Corruption (UNCAC) in 2016, have advocated for initiatives to address transnational corruption, remedies for its victims remain an unaddressed gap in the enforcement of foreign bribery offenses. In this scenario, World Duty-Free Company Limited v. Republic of Kenya demonstrates an alternative strategy to nullify the investment protection agreement. This is due to instances where the investment process is tainted by bribery, thereby protecting the victim country from unfair business practices and encouraging private actors to comply with ethical standards when conducting business activities. However, the norms used to justify the decision pose a significant obstacle, as corruption regulation varies across different investment treaties. These norms directly influence how corruption issues are addressed in arbitration proceedings. This paper will elaborate on the roles of arbitration as an alternative remedy for transnational corruption in victim countries and examine the potential norms that available to arbitrators from the perspective of societal constitutionalism theory.
Keywords: Foreign Bribery, Arbitration, Remedy

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Introduction

Remedies for the victim country have not been a priority in the enforcement of transnational corruption. Discourse on the remedy mechanism for the victims is dominated by criminal law approaches, including recognizing victims in the Deferred Prosecution Agreement (DPA) proceedings for foreign bribery cases (Messick, 2016). In this situation, alternative remedies through non-penal mechanisms to remedy the impact of corruption have the potential to develop. One of the options in this process entails using the transnational investment arbitration procedures to recognize corruption claims to nullify state protection in cases where corrupt activity during the investment process can compromise the contract.

In Indonesia, corruption claims in transnational arbitration prevailed after the Attorney General's Office investigated the contract between Indonesia and Navayo (Yuantisya & Amirullah, 2022). This enforcement process was conducted following the International Chambers of Commerce (ICC) Singapore decision that awarded Navayo US$ 20,901,209 over a canceled satellite project by Indonesia (Navayo and MEHIB v. Indonesia, 2021). After the decision, the Attorney General's Office opened a corruption investigation related to the contract (Yuantisya & Amirullah, 2022). Some experts believed this action was a part of Indonesia's strategy to eschew liability for the ICC's decision (Luxiana, 2022). This phenomenon encouraged public discussion on how corruption claims can potentially be used to protect a country from liability due to tainted business contracts.

Corruption claims in transnational arbitration proceedings, utilized by the state as a defense strategy to avoid liability due to corrupt activity, can be traced back to the case of World Duty-Free Company Limited v. Republic of Kenya in 2016 (Davis, 2017; ICSID Case No ARB/00/7, 2006). The case earned landmark status when a panel of arbitrators established a protection clause in the investment treaty, making it inapplicable in the International Centre for Settlement

of Investment Disputes (ICSID) proceedings due to violation of anti-corruption law. This decision was based on international norm standards when World Duty-Free bribed Kenya's public officials during the investment process (Halpern, 2016).

Discourse happened at the implementation level. Taking into account established norms, the arbitrator faced a dilemma justifying the consideration of the corruption issue during proceedings, as the primary issue in the investment arbitration process is the liability of parties define by the investment treaty. The issue lies in the fact that not all bilateral investment treaties (BITs) specifically regulate the impact on parties when corrupt activity occurs during the implementation of an investment treaty (Yan, 2020). Moreover, the interpretation of corruption has also become an issue due to the differences between states in defining the scope of corruption. For example, offenses in Article 2 of Indonesia's Anti-Corruption Law are not commonly recognized as corruption in other countries. This discrepancy could become an issue when the definition of corruption differs between the country of the investor and the country receiving the investment.

Various institutions have attempted to rectify these obstacles. For instance, the Basel Institute on Governance in Switzerland released a toolkit for arbitrators as a reference to handle corruption claims during arbitration proceedings (Pieth & Betz, 2019). The primary issue with this toolkit is the referencing of norms as a legitimate basis for examining corruption issues.

In line with Societal Constitutionalism legal theory, this paper will elaborate on an important dimension of corruption claims in investment arbitration proceedings, where there is a variation in the norms of transnational investment arbitration. This research uses Doctrinal Legal Study (DLS) to expand upon three pivotal norms-related issues. The first part of this paper describes the polycentric legal order phenomenon in transnational law interaction as a tool for analyzing potential norms in arbitration processes. Using relevant Societal Constitutionalism legal theory defined by Gunther Teubner, this paper will scrutinize the uncentralized development of norms by states and non-state entities (Golia & Teubner, 2021; Teubner, 2009, 2012). The second part of this paper investigates the relationship between investment arbitration and corruption claims to build understanding around the context of the issue. The third part discusses a variety of norms as a legal base for arbitrators to handle issues while explaining several potential scenarios based on how the investment treaty regulates the corruption clause. The final part of this paper will conclude this study and provide recommendations for future research.

Methods

The research method in this qualitative research is a *Doctrinal Legal Study* (DLS) (Bhat, 2019) to address on two primary issues. As resources, this paper will use regulations and laws at the national, regional, and international levels, as well as international arbitration decision.

In the first issue, this paper investigates criminal law approaches related to corruption in the investment and business sectors. The research will be conducted by studying the interaction between anti-corruption law and enforcement approaches implemented by various countries. Furthermore, utilizing the Societal Constitualism theoretical perspective (Teubner, 2012), this study will investigate the potential development of legal orders by non-state actors. This will involve analyzing real-world examples such as business agreements and investments to dispute resolution mechanisms. With this approach, an analysis will be conducted on the relevance of transnational arbitration as an alternative remedy for corruption victims, particularly victim countries.

Addressing the second issue regarding normative foundations, the researchers will use the International Investment Agreements Navigator (IIA Navigator) search tool to elucidate relevant norms in Investment Treaties as examples of relevant clauses. Furthermore, relevant awards and doctrines will be utilized to illustrate the alternative normative references of arbitrators when addressing the second issue. As a limitation, the author will focus on investment arbitration decisions due to the application of trade law with investments having significant differences; thus, focusing on the discussion becomes crucial to determining the applicable law.

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Result and Discussion

Transnational Arbitration and Transnational Corruption Victims Remedy

Corruption claims in investment arbitration processes are progressively emerging alongside increasing recognition of anti-corruption issues globally. Collaborations among private actors, including business entities, with wide-ranging approaches ranging from voluntary business standards to collective actions among the business community, have made anti-corruption inseparable from the value of transnational business activities. States are no longer the sole actors in manifesting anti-corruption values. In many cases, states, acting not only as regulators but also as parties and even victims, utilize transnational arbitration forums to seek remedies for bribery by private foreign entities toward their officials.

Multilayer Enforcement and Private Enforcement

Since Sweden and the United States enacted foreign bribery offenses in the 1970s in response to public pressure on U.S. Congress, there has been a radical improvement in global corruption eradication efforts and strategies (Davis, 2019). This was in response to the rampant corruption within U.S. companies conducting business in various countries outside their territorial jurisdiction. These instances involved not only officials from developing countries but also developed countries such as Japan, Italy, and the Netherlands (Davis, 2019).

The approach to foreign bribery offenses by targeting offenders operating beyond the country's territorial jurisdiction is the beginning of a new era of corruption eradication enforcement. Customarily, bribery offenses are prosecuted based on the territoriality principle, stating that enforcement agencies from the country where the crime occurred are authorized to enforce the bribery laws. For example, based on the Corruption Law in Indonesia, culprits who commit bribery within Indonesian territory will be investigated by Indonesian Enforcement Agencies and prosecuted in Indonesian courts. In the case of foreign bribery, the authorities of the offender's home country prosecute bribery offenses outside its territory. Using the Active Personality (Nationality) Principle approach, the authorities could prosecute a business entity when it engages in bribery in another country (Funk & Boutros, 2019). For example, if a U.S. company engages in bribery in Indonesia, it can be prosecuted by the U.S. Department of Justice.

Foreign bribery offenses have significantly evolved since they were first enforced by Sweden and the United States (Davis, 2019). According to data from Transparency International, 84% of exporting countries in 2020 and 74% of countries engaging in Foreign Direct Investment (FDI) in 2022 have incorporated foreign bribery into their legislation. 28.7% of these exporting countries actively enforce these provisions, including the United States, Germany, Switzerland, Norway, and the United Kingdom (Transparency International, 2021, 2023).

One of the advantages of a foreign bribery regime is the severe sanctions. In the United States, according to data compiled by the Foreign Corrupt Practice Act (FCPA) Clearing House at Stanford Law School, sanctions have been imposed on corporations engaging in transnational bribery to foreign entities, with an average value of US$ 154 million (Stanford FCPA Clearinghouse, 2023). In the case of Rolls Royce in the UK, nearly IDR 10 trillion in sanctions was imposed on the company as a penalty for the implementation of a Deferred Prosecution Agreement (DPA) regarding bribery in Nigeria, Indonesia, Russia, Thailand, India, China, and Malaysia (Serious Fraud Office v. Rolls-Royce Plc and Rolls-Royce Energy Systems Inc, Case No: U20170036).

In these scenarios, multilayer enforcement has prevailed when two different authorities could handle a bribery offense. For example, corruption occurring in Indonesia involving a British company could potentially be investigated by both Indonesian and British authorities. In such a case, the Corruption Eradication Commission (KPK) has the authority to investigate the case based on the Indonesian Anti-Corruption Act, relying on the territorial principle because the crime occurred within Indonesian territory. Meanwhile, the Serious Fraud Office (SFO) has a legal base to investigate bribery, referring to the United Kingdom Bribery Act (Bribery Act 2010), utilizing a foreign bribery approach grounded in the active personality principle. This is because the perpetrator of the crime has its parent company in the UK. Therefore, when corruption occurs outside the UK's territory, it can still be handled by British authorities.

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In the Societal Constitutionalism legal theory approach, the formation and implementation of laws are not confined to the state alone. Private entities also contribute to developing norms and ensuring the implementation of these laws. Therefore, a point of view beyond criminal enforcement is needed to analyze the interplay between laws. To avoid steep penalties, various private actors are voluntarily beginning to consider anti-corruption issues in business and investment relations. This approach is accomplished by establishing minimum standards in business relations in the supply chain and contracts under Corporate Social Responsibility, also known as CSR 2.0 at the strategic level, according to Visser (2014). This has led to the increasing prevalence of anti-corruption clauses in the contract and the growth of collective anti-corruption actions. The United Nations Global Compact is an example of an initiative incorporating anti-corruption issues as a standard for its members (UNGC, 2000). This approach considers the strategic role of the private sector in the legal subject interactions within society (Ruggie, 2018). In the investment process, investment treaties are initiated to recognize anti-corruption issues in their clauses to protect victim countries in interactions with the private sector. Moreover, during the implementation process, when a dispute occurs, the non-penal mechanism will be used to ensure that anti-corruption clauses are applied and complied with by litigating in civil court to transnational arbitration (Teubner, 2012).

Function of Investment Arbitration to Remedy Transnational Corruption Victims

Investment arbitration is formed as an alternative for resolving investment disputes between state and business entities engaging in investment activities within that country (Egger & Merlo, 2012). In this context, disputes may arise from claims of losses incurred due to policy changes or the failure of one party to fulfill obligations. Investment arbitration serves to ensure legal certainty for investors and business entities engaged in investment activities outside the country's available court mechanisms. Through this mechanism, political risks arising from policy changes can be avoided, especially considering the tendency of domestic courts to favor the state (Guzman, 1997). Furthermore, from an investor's perspective, the arbitration process is more practical and efficient in achieving legal certainty (Vandevelde, 2005, 2009).

Parties have an option based on treaties to choose ad hoc or permanent investment arbitration. Ad hoc arbitration is established based on the parties' choice of law as specified in the agreed provisions of the investment treaties. Meanwhile, there are more permanent institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), established under the auspices of the World Bank, to resolve investment disputes between countries and investing entities (Bungenberg & Reinisch, 2020). The commitment to these mechanisms can be based on the dispute resolution provisions in the investment treaty or the voluntary willingness of both parties to select a dispute resolution mechanism when a dispute arises.

Investment arbitration has faced criticism, particularly regarding how the institution ensures a balance between investor protection and public interests. The investor-oriented objective of investment arbitration sometimes sidelines public interests, especially concerning environmental issues, labor protection, and human rights (Barrera, 2019). For instance, in the case of Vattenfall v Germany, the protection of the foreign company's investment interests outweighed Germany's sovereignty to formulate environmental policies, leading the German government to compensate the company for policies perceived as favoring environmental protection (Dietz et al., 2019). Another example is the case of Bilcon v Canada, where the company succeeded in challenging Canada's environmental obligations (Dietz et al., 2019). These criticisms have prompted countries, like the European Union, to establish more permanent investment dispute resolution institutions to accommodate public interests. For example, The Multilateral Investment Court (MIC) and The Multilateral Investment Appeal Court (MIAC) (Bungenberg & Reinisch, 2020) are being developed as examples of this type of investment dispute settlement system. By developing more permanent institutions, arbitrators will be more independent in considering public interests, as the financial interests are reduced during case proceedings.

The acknowledgment of corruption claims in transnational arbitration processes serves as a positive momentum in the middle of criticisms of the existence of transnational investment arbitration mechanisms. The inclusion of anti-corruption values in decision-making processes

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signifies that arbitration is starting to recognize the dimension of public interest in its rulings. However, some perceive that anti-corruption values are essentially part of efforts oriented towards investment interests. This aligns with the evolving business landscape that acknowledges anti-corruption issues as essential values in investment and business operations, as discussed in the preceding sub-section, to ensure fair competition (Manea, 2015). On the other hand, anti-corruption values have already become *boni mores* or ethical and moral principles recognized in international legal practice (Brekoulakis, 2020).

The interplay between the function of investment arbitration and the value of anti-corruption has become an alternative for remedying victims of transnational corruption. This function can be observed from both private and public dimensions.

From the private dimension, investment arbitration serves as an alternative dispute resolution mechanism within business relationships, aiming to mediate the rights of parties due to unfulfilled commitments or losses resulting from unlawful actions (Kaufmann-Kohler & Rigozzi, 2015). This means that investment arbitration should ensure that there are no unlawful actions when parties develop or implement the agreement based on the Bilateral Investment Treaty (BIT), including fraud and bribery.

The presence of a fair process in negotiating and how investment-related projects are obtained become crucial keys in representing legal certainty in investment. When one party offers a bribe to the representative of another party, fairness is not achieved because the representation of the company will have another interest and depend on the opposing party in the decision-making process (Lessig, 2015). During the implementation phase, corrupt actions encourage biased behavior of public officials to favor the interest of bribers, resulting in unfair relationships. Argentina's case could be an example of this when the government is facing an economic crisis that requires implementing economic rescue package policies. For investors, however, these policies influenced business conditions, leading to Argentina paying compensation because the policies changed the investment landscape based on the Investation Arbitration Award (Barrera, 2019). After this process, the investment process was tainted by corrupt activity influencing the decision-making process, which had consequences and led to unfair conditions for Argentina's position (IISD, 2018).

When discussing fairness in negotiation, the focus is not on the capacity of the negotiator to secure advantages for their party. A negotiator's weakness should not become a reason for invalidating an agreement (Briggs, 2019). However, when an agreement is intentionally made to weaken one party by persuading the representative of the opposing party through bribery, this becomes an issue. In other circumstances, after the investment agreement is made, the business contract acquisition process is conducted unfairly, leading to unfair favoritism towards certain parties. This is consistent with research conducted by the United Nations Office on Drugs and Crime (UNODC), which elaborates on the effects of corruption, ranging from unfair competition, inflated business costs, and societal impacts on society (UNODC, 2017).

By nullifying investment protection when any corrupt activity occurs in the investment arbitration process, fairness in business and investment relations will be achieved (Davis, 2017). This approach restores the rights of the aggrieved party due to corruption by annulling certain obligations that should have been fulfilled under normal conditions.

Another perspective is public law. Addressing corruption claims in investment arbitration becomes an alternative remedy and even complements the existing remedial mechanisms in the criminal law regime. In criminal law, the recovery of damages from crimes is carried out through restitution mechanisms. For example, compensation for the Cook Islands Government was provided in the DPA Mechanism under the Foreign Corrupt Practice Act (FCPA), where Cook Islands officials were bribed by a US-based company (Messick, 2016). In Indonesia, restitution mechanisms are one of the methods alongside civil lawsuit mechanisms and the quasi-civil and criminal known for recovering remedies (Akbari et al., 2021).

Corruption claims in investment arbitration processes do not intend to replace existing criminal proceedings to remedy victims in multilayered enforcement processes. The prosecution process for corrupt acts in the global system cannot be replaced or invalidated by civil mechanisms. The deferred prosecution agreement (DPA) approach, although conducted through negotiated agreements with corporate defendants, is still related to criminal law enforcement mechanisms,

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and most experts still consider it part of criminal law enforcement. This means that investment arbitration mechanisms should be a complement to the existing criminal law system that, in many cases, does not address the interests of victims or impacted parties.

This mechanism is also used so a perpetrator cannot escape criminal liability. This mechanism could be used in parallel when conducting criminal enforcement or as an alternative in case law enforcement chooses not to investigate the case to seek remedy for victims. In practice, even some high-profile cases have not achieved remedies for the victim. For instance, in the approval of the Deferred Prosecution Agreement (DPA) in the case of Serious Fraud Office v. Rolls-Royce Plc and Rolls-Royce Energy Systems Inc, Case No: U20170036, no remedy is specified for Indonesia. This is despite the sanctions imposed in that case amounting to 10 trillion rupiahs, and almost 20% of these sanctions are based on criminal acts committed in Indonesia.

The approach of Transnational Arbitration as a remedial mechanism also has its advantages. First, the process is not conducted through criminal mechanisms, so the level of burden of proof is not the same as in criminal law enforcement processes. This approach gives the arbitrator no obligation to set standards of evidence like criminal law that need a long-term investigation process and can target various parties more broadly. Additionally, the process is for recovery impact, albeit limited to economic aspects, so it is not focused on law enforcement. This allows victims to receive their compensation oriented towards remediation when corruption occurs. Lastly, the process is faster and more efficient, allowing victims to receive compensation quickly.

Justifying the Norms for Corruption Claim in Proceeding

When considering an order in the investment arbitration proceedings, arbitrators should have the justification of norms based on treaties or other sources of laws. However, for corruption claims, this becomes an issue because arbitrators must provide solid relations between investment and anti-corruption issues. Therefore, in this section, we will discuss the various norms that serve as justifications for arbitrators in deciding corruption claims in international arbitration processes.

Variety Source of Norms

Investment Treaty

An investment treaty is an agreement between countries as a "rule of the game" to regulate investors and recipient countries in investment activities. These provisions are chosen to protect investors from significant political changes that influence investment conditions. The pattern of the Bilateral Investment Treaty (BIT) emerged since the development of cases, such as Germany with Pakistan and Dominica and also the nationalization of foreign assets by socialist countries (Vandevelde, 2005). The BIT is a primary legal base for investment arbitration. In another scenario, parties could still use investment arbitration when any voluntary agreement is reached, even though there is no dispute clause for the use of investment arbitration in the BIT (Brekoulakis, 2020).

Currently, there is a tendency to include clauses related to public interests, such as environmental protection and anti-corruption, in investment treaties (Man, 2019). Based on this research, the inclusion of anti-corruption clauses in treaties could be used in three scenarios. In the first scenario, the clause serves as the preamble of the agreement and becomes a principle in the implementation of the treaty. For example, the agreement between the Government of South Korea and Cambodia (Cambodia-Republic of Korea FTA, 2021) concerning free trade areas mentions "...to promote transparency and combat corruption" in its provisions. In the second type of clause, there is a specific clause on anti-corruption in the investment treaty to encourage each party to prevent corruption comprehensively. As an example, Article 9 of the *Treaty between Japan and Georgia on the Liberalisation, Promotion, and Protection of Investment (Japan-Georgia BIT 2021)*:

> *"Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations."*

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Although this clause specifically regulates corruption, sanctions for the parties if any violation has not been regulated in detail.

The third type is the most comprehensive scenario to regulate corruption conditions in investment because it not only mentions conditions but also regulates consequences for parties. For instance, *Chapter 17: Investment – Text of the 2023 Canada - Ukraine Free Trade Agreement*:

> *"..For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process."*

A specific clause makes the protection of investment void for investors if any corrupt activity has been regulated in this clause. Anti-corruption and fair business have become core values in the investment process based on this treaty.

These three approaches have different consequences at the implementation level. In the third scenario, the arbitrator can easily annul protection because the impact on investors is clear. An arbitrator should use a more creative way to interpret the clause when implementing the first and second scenarios. In the first scenario, anti-corruption becomes a reference value for whole clauses in the treaty even though the arbitrator should search for justification to make a solid connection between the preamble and substance in every clause. The second is clearer because it requires parties to develop measurements to prevent corrupt activities so the arbitrator can refer to other relevant regulations or policies in the decision. The arbitrator could explain that this becomes part of the primary intention of the parties, so every behavior that contradicts this clause will be an obstacle to achieving the ultimate purpose of investment, including protection.

Choice of Laws and Public International Law

There are conditions where investment agreements do not specifically regulate anti-corruption provisions. In this scenario, references to norms must be searched from international and even national legal references. There are several methods to use in this approach.

The first approach refers to the national and international legal references chosen at the time the investment treaty was signed. In some legal principles, parties have the freedom to choose the applicable law in governing disputes, known as the choice of law principle (Girsberger et al., 2021). It is not uncommon in this process for the law of one or even both countries involved to be referenced. For example, suppose an investment or business agreement agrees to use English law. In that case, the arbitrator can refer to the doctrine of *Ex turpi causa non oritur action,* applicable in English law. Through this doctrine, the arbitrator has a basis not to enforce contracts influenced by illegal actions, such as corruption (Davis, 2017; Manea, 2015).

In its implementation, this principle must also be carefully understood due to two different conditions that result in different consequences. In the first condition, there is a situation where the agreement's object of performance is illegal. In the second condition, however, the object of performance of the agreement is legal, but the process of obtaining and making the agreement is influenced by illegal actions. An example of an agreement with an invalid object of performance can be seen in cases where there is an agreement between a government official and a private entity, with the object of the agreement being the payment of bribery money when the official successfully facilitates investment from the private sector. The private sector will pay the bribe if the official can provide a project, knowing it will benefit the official. The second condition occurs when a person enters into a sales agreement with a private entity, but one of the representation parties is bribed in the transaction process. In the second condition, the object of the agreement is a lawful clause because the agreement is made on a lawful sale, but the negotiation process is tainted by corruption. In the first approach, the agreement becomes legally void, whereas in the second type, the agreement can be annulled (Davis, 2017). The difference lies in the first clause, where the agreement is automatically void because its object is not lawful. Whereas, in the condition where it can be annulled, it depends on the stance of one of the parties, especially the impacted party. It is up to them to request the cancellation of the agreement due to corruption intervention because the object of the agreement is lawful, but there are actions from the opposing party to influence its representation in an unhealthy manner.

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Although the choice of laws approach cannot be fully applied to investment law due to differences in international public law, parties can still refer to international provisions such as the UNIDROIT Principles of International Commercial Law. If they do, arbitrators can refer to Article 2.2.7 of the UNIDROIT Principles, which grants the right to hold relevant actors liable for conflicts of interest that could be influenced by bribery.

The second approach is to use international law and international public policy standards. In this approach, arbitrators are expected to base their decisions on norms that are generally accepted in international public law. For example, Arbitrator Gunnar Lagergren once produced a landmark case based on international public law and boni mores (ICC Award No. 1110 of 1963 by Gunnar Lagergren, 1994).

> *"Finally, it 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 (cf. Oscanyan v. Winchester Arm. Co., cited above). This principle is especially apt for use before international arbitration tribunals that lack a 'law of the forum' in the ordinary sense of the term."*

This approach requires the arbitrator to investigate the argumentation to international law standards and *boni mores* as a justification in the condition when the treaty has not been regulated specifically on the anti-corruption issues.

B.2. What is Corruption?

After elaborating on a variety of alternatives the arbitrator can utilize, the next issue is the definition of corruption. Every country has developed its own anti-corruption laws beyond bribery, creating a dilemma for the arbitrator in handling corruption claims.

Active and passive bribery are universal definitions of corruption (Feldis et al., 2019). All anti-corruption laws have regulated these types of offenses with variations in who is the recipient, from the criminalization of foreign bribery to bribery without involving public official or commercial bribery.

Significant differences occur in offenses not recognized internationally, including trading in influence and illicit enrichment that is not regulated by all countries but is recognized in the UNCAC (Dornbierer, 2021). In Indonesia, Articles 2 and 3 of the Eradication Corruption Law "address unlawful actions or abuse of power and authority to enrich individuals or corporations, leading to economic losses to the state. These forms of corruption are not globally recognized as a type of corruption.

Based on these conditions, the arbitrator should consider the claim that is proposed by an impacted party. For domestic bribery, including active and passive, the arbitrator does not have significant issues due to parties in the BIT recognizing the scope of corruption because bribery has been used in all anti-corruption laws internationally. This means that whether using BIT norms, national law, international law, boni mores, or international public policy, bribery will fall within the definition of corruption. For example, in the case of World Duty-Free Company Limited v. Republic of Kenya in 2006, the arbitrator found it easier to use the bribery of the President of Kenya as a basis for annulling the investment protection granted to corporations doing business in Kenya.

Another issue is when an arbitrator faces corruption claims that have not been recognized globally as corruption, like Articles 2 and 3 of the Indonesia Eradication Corruption Act 31/1999 requiring the arbitrator to consider a choice of laws approach. An arbitrator should investigate the law that will be chosen by parties in arbitration proceedings based on the BIT that influences the scope of corruption covered by the country. For example, when both parties choose to use the scope of corruption based on Indonesian Laws, Articles 2 and 3 could be used. This is why it is pivotal to choose which law defines corruption.

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Conclusion

Transnational arbitration could be an alternative remedy for victims, especially for victim countries, as a complementary strategy to restitution processes in criminal procedure. This approach is based on a situation where a country can protect itself from unfair business practices due to corrupt activities. This approach has added value because corruption does not have to be proven through criminal enforcement proceedings. Additionally, the country can receive the remediation process when the corrupt actions of investors and state agents cause damage. For private entities, this approach also provides an approach related to economic motives by creating incentives and disincentives for some behavior.

The issue arises when finding norms as justifications for arbitrators to decide on a claim. In this condition, there are a variety of norms that can be used. The ideal condition is the first option when anti-corruption clauses have been specifically regulated in the Bilateral Investment Treaty (BIT), although different regulations in formulation require arbitrators to build logical interpretations and considerations in constructing arguments. This is because there are specific and detailed regulations, and some are only mentioned in the considerations.

Another option is using the choice of laws when the investment treaty does not clearly regulate the anti-corruption clause. In this approach, the arbitrator needs to explore the law chosen by the parties to see if it regulates the illegality of corruption so that it can be used as a basis to discuss unlawful action. Thirdly, the arbitrator can also refer to boni mores and international public policy as reference values used in international law.

In addition to norms, defining corruption becomes an issue. For domestic bribery, this could be easier to refer to the decision due to there being no differences in defining this type of corruption. It is different when corruption claims refer to domestic law that has not been recognized globally as part of corruption. In this approach, the arbitrator must refer to the normative basis based on the legal reference chosen by the parties.

This research has not covered the mechanism of proving corruption, which is also an important issue. However, explanations regarding normative bases and the definition of corruption serve as entry points for further research on the mechanism of proving corruption in international arbitration processes.

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