Chapter 12
Corruption and Investment Arbitration in the Lao People's Democratic Republic: *Corruptio Incognito*

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Abstract In recent years, corruption has become prevalent in investment arbitration. This chapter closely examines the issue of corruption in the Lao People's Democratic Republic through the lens of two key investment-treaty arbitration decisions: *Lao Holdings N.V. v. Lao People's Democratic Republic* and *Sanum Investments Limited v. Lao People's Democratic Republic*. The decisions place a spotlight on how tribunals address allegations of fraud and corruption, and also the larger systemic issues which plague the Republic. The chapter thoroughly analyses the two decisions and discusses their implications on the conduct of arbitral proceedings. It is envisaged that these observations will provide a guide for practitioners navigating allegations of corruption in investment-treaty arbitration proceedings while contextualising the socio-political environment within which such grafting is perpetuated.

12.1 Introduction

In his Foreword to the United Nations Convention against Corruption, the late Kofi Annan aptly describes corruption as an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.[1]

Hwang and Lim (2012), at p. 4. 'Corruption' finds its root in the Latin word '*corruptus*' which means 'rotten' or 'decayed'. This aptly symbolises the breaking of confidence entrusted to agents and public officers that partake in such activities.

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Regrettably, foreign direct investment (FDI) in developing countries intersects too frequently or too closely with corruption.[2] While this evil may seem to present enormous benefits to unscrupulous foreign investors and locals, it inevitably causes incalculable loss to the host state's economy and society. The Lao People's Democratic Republic (Laos) is no exception. It is heavily reliant on FDI[3] but at the same time is known to have a high level of corruption.[4] In some instances, corruption may discourage FDI inflows and increase the costs of investment;[5] as such, Laos's critical priority must be to extinguish this dark side of foreign investment. In this context, investment-treaty arbitration plays an important role: it serves to expose corruption, sanction corrupt investors and highlight how the rule of international law is able to play a key role in curbing corrupt practices.

This chapter investigates corruption in Laos by focusing on the following bilateral investment treaty (BIT) arbitrations: *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (the ICSID Proceedings) and *Sanum Investments Limited (People's Republic of China) v. Lao People's Democratic Republic*—PCA Case No. 2013–13 (the PCA Proceedings). These proceedings are collectively referred to as the 'BIT Proceedings'.

Section 12.2 details the factual and procedural background of the BIT Proceedings. Section 12.3 discusses the implications of when bribery and corruption is alleged to have taken place. Section 12.4 discusses the laws applicable to allegations of bribery and corruption. Sections 12.5, 12.6 and 12.7 examine the often-discussed issue of standard of proof and good faith in the context of the Tribunals' assessment of the evidence. The pivotal issues underlying the BIT Proceedings are analysed in Sect. 12.8, which contains the authors' views on some key issues such as the obligation of host states to investigate corruption. In Sect. 12.9, the setting aside proceedings are examined and what they mean for allegations of bribery and corruption at the setting aside stage. The chapter concludes with Sect. 12.10.

12.2 Overview of the BIT Proceedings

12.2.1 Factual Background

The BIT Proceedings centred on the investments made in Laos by two American businessmen, Mr John Baldwin (Baldwin) and Mr Shawn Scott (Scott). The objective of these investments was to develop several gaming resorts including hotels, casinos and clubs in Laos. To facilitate the investment, they incorporated Lao Holdings N.V. ('LHNV') in the Netherlands, and its wholly owned subsidiary, Sanum Investments Limited ('Sanum'), in Macau. The businessmen partnered with a Laotian conglomerate, ST Group Co Ltd ('ST Group'), to pursue two casino projects—the Savan Vegas Hotel and the Paksong Vegas Casino. ST group was believed to be closely connected to leading politicians in the Laotian Government. The Savan Vegas Hotel was successfully established. The Paksong Vegas Casino was never built. As part of

Sanum's investment in Laos in or around 2007, approximately USD7.5 million was paid in tranches to ST Group.[6] Three years later, there was a falling out between LHNV and Sanum on the one hand, and ST Group on the other hand.[7]

The Claimants initially alleged treaty breaches such as, but not limited to, the imposition of an 80% tax by Laos on casino revenues, unfair and oppressive audits of Savan Vegas, expropriation of assets which belonged to the Claimants and premature termination of planned expansion of the resorts.

In relation to these alleged treaty breaches, LHNV initiated ICSID Proceedings on 14 August 2022 against Laos before the International Centre for Settlement of Investment Disputes (ICSID) under the 2003 Netherlands–Laos BIT[8] and the ICSID Additional Facility Rules. On that same day, Sanum initiated proceedings before the Permanent Court of Arbitration for breaches under the 1993 China–Laos BIT.[9] The two proceedings, while distinct, were jointly heard but were not consolidated.[10] In this chapter, LHNV and Sanum will be referred to as the 'Claimants' jointly and interchangeably.

Shortly before the joint evidentiary hearings, on 15 June 2014, the parties entered into a Settlement Deed to globally resolve the disputes. As a result, the BIT Proceedings were suspended. The Settlement Deed provided (amongst other matters) that the BIT Proceedings could be revived if Laos was in material breach of certain provisions of the Settlement Deed, and such breach was not remedied after being given notice. Further, Section 34 of the Settlement Deed[11] provided that if the arbitration was revived, neither party would be permitted to add new claims or evidence to the arbitration nor seek relief beyond what was already claimed in the BIT Proceedings.

12.2.2 Revived Proceedings and Allegations of Corruption

On 4 July 2014, the Claimants applied to the Tribunal to lift the suspension on the BIT Proceedings on the basis that Laos allegedly committed a material breach of the Settlement Deed.[12] This initial application was dismissed by the ICSID Tribunal on the merits on 10 June 2015.[13] On 26 April 2016, LHNV submitted a Second Material Breach Application.[14] And on 23 February 2017, Sanum filed a Second Material Breach Application before the PCA Tribunal.[15] Both of the Second Material Breach Applications were successful. On 15 December 2017, the Tribunals reinstated the BIT Proceedings.

In the reinstated BIT Proceedings, the Claimants no longer pursued certain expropriation and seizure claims.[16] Sanum, nonetheless, maintained the expropriation claim regarding the Thanaleng slot club, Paksan, Thakhet and the Paksong Vegas Hotel and Casino.[17] LHNV maintained this expropriation claim and also pursued the following treaty claims:[18]

(a) denial of fair and equitable treatment and prohibitions on impairment by unreasonable and discriminatory measures in respect of Savan Vegas, Thakhet, Paksan, Thanaleng Club, Ferry Terminal Club and Lao Bao Club;

(b) breach of contractual obligations regarding Savan Vegas and Paksong Hotel and Casino;
(c) national treatment obligation breaches regarding Savan Vegas, Lao Bao Club and Ferry Terminal Club;
(d) Most Favoured Nation claims regarding Savan Vegas, Thanaleng Club, Ferry Terminal Club and Lao Bao Club concerning full protection and security, most constant protection and security and access to justice.

In response, Laos contended that all claims should be entirely dismissed on the ground that the Claimants engaged in illegal conduct including bribery, embezzlement and money laundering at both the inception and operational phases of the investment.[19]

Laos alleged that the Claimants were involved in the following conduct at the investment's inception:[20]

(a) paying Laotian tax authorities a bribe of USD30,000 to obtain approvals for the original 2009 Flat Tax Agreement between Laos and Savan Vegas which the Claimants regarded as essential to their investment in their flagship Savan Vegas Hotel and Casino project; and
(b) paying government officials bribes to the value of USD25,000 to procure licenses necessary for the Savan Vegas Welcome Center and Slot Club.

On the operational front, the allegations of Laos concerned:[21]

(a) paying of USD875,000 to the Claimants' private sector consultant in Laos for bribing government officials to stop an Ernst & Young (E&Y) audit of Savan Vegas Hotel and Casino, so as to conceal the disclosure of illegal activities;
(b) witness tampering to prevent a key witness from testifying in the BIT Proceedings;
(c) paying bribes totalling USD21,000 in 2012 to Government officials to seek an extension of the 2009 Flat Tax Agreement;
(d) offering USD7 million in a bribe to the Laotian Prime Minister for approval of a licence to establish a casino in Vientiane;
(e) bribing the Governor of the Province of Champasak with a bribe of USD80,000 to approve a slot club at Chong Mek; and
(f) bribing Government officials with a total of USD106,000 to close the Paksan Slot Club as a way of pressurising ST Holdings to settle their differences.[22]

Laos also alleged that the Claimants paid USD120,000 to Cambodian officials to obtain various benefits such as licences and diplomatic passports. While the allegations relating to Cambodia were not considered further by the Tribunals, their allegations intended to demonstrate that the Claimants' principals are 'bad people', with a predisposition to rely on bribery and corruption to advance their financial interests.[23]

Awards in the reinstated proceedings were issued on 6 August 2019. Given the overlapping claims and parallel nature of the proceedings, the Awards were substantively similar. Both Tribunals dismissed the Claimants' claims on the merits. We now turn to discuss the parts of the Awards that were relevant to corruption.

12.3 Bribery and Corruption at the Time of Investment and Subsequent Performance

Laos argued that the Claimants were not legally entitled to maintain any of their claims in the proceeds as a matter of *ordre public international* and public policy.[24] It asserted that corruption is relevant to the initial investment—such that the Tribunal's jurisdiction must be denied—and also the investor's subsequent conduct in relation to the investment—such that it precludes a claimant's entitlement for relief under the BIT.[25]

The Claimants' position was that neither BIT contained an express provision authorising a tribunal to deny treaty protection on the basis that the investor had engaged in corruption.[26] Accordingly, they contended that a Tribunal would have to apply customary international law or general principles of international law, neither of which have a crystallised 'clean hands' doctrine to deny treaty protection.[27] The Claimants denied corruption, and also denied any causal connection between the acts of alleged corruption and their claims in the BIT Proceedings.[28] The Claimants highlighted that Laos 'failed to govern itself in a manner consistent with its international obligations, including due process and good faith, and the prosecution of bribe-takers as well as alleged bribe-givers'.[29]

The Tribunal considered that proof of corruption at *any* stage of the investment may be relevant depending on the circumstances and found that serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country … is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal.[30]

12.4 Applicable Laws

The Tribunals' starting position—and generally also the parties' positions—was that the BITs determined the applicable law.[31] In addition to the BITs, the Tribunals held the following other sources of law to also be applicable:

(a) *Treaty interpretation rules*: To the extent the BITs required interpretation, the Vienna Convention on the Law of Treaties' rules on treaty interpretation were held to apply.[32]
(b) *Domestic law of Laos*: While holding that domestic laws of Laos may be relevant, the Tribunals added that bribery and corruption were contrary to those laws.[33]
(c) *United Nations Convention Against Corruption* (UNCAC): Laos argued that the UNCAC constituted applicable 'international norms'.[34] In response, the Claimants contended that the UNCAC 'creates obligations only for the state Parties, to develop anti-corruption policies, practices and task forces [do] not bind or purport to bind the conduct of entities such as [the Claimants]'.[35] The Tribunals disagreed, concluding that the UNCAC, while applying to states rather

than private parties, embodies a principle of customary international law to root out corruption used to obtain or retain business or other undue advantage in relation to the conduct of international business.[36] According to the Tribunals, the Claimants were therefore under an obligation to meet the standards contained in the UNCAC.

(d) *Doctrine of clean hands*: As discussed further below (Sect. 12.8.4), Laos also relied on the doctrine of 'clean hands' to argue that the Claimants should be denied the assistance of investor–state arbitration given their misconduct. The Claimants replied that the legal basis for the Tribunals' decision must be customary international law, and as the doctrine of 'clean hands' is not a recognised rule of custom, it therefore cannot assist the Tribunals.[37] In addressing these arguments, the Tribunals refused to rely on a 'generalized doctrine of "clean hands"', although they remarked (as noted above) that 'serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country … is not without Treaty consequences', signalling that the Claimants' claims may be sanctioned for illicit conduct through the application of broader equitable principles, which disentitled them to treaty protection.[38]

12.5 Standard of Proof

The next issue determined by the Tribunals was the applicable standard of proof.[39]

Laos framed its argument on the standard of proof as an evidential one, focussing on the difficulty of proving bribery and corruption, particularly because parties are generally careful not to leave a paper trail or other evidence of illegal transactions.[40] In this context, Laos contended that to combat corruption effectively, proof must necessarily involve inferences drawn from circumstantial evidence.[41] The appropriate approach in these circumstances, asserted Laos, required the alleging party to identify 'red flags', which (when established) required the alleged perpetrators to provide an exculpatory explanation of otherwise suspicious conduct. An illustrative example is *Metal-Tech v. Uzbekistan*[42] where if the government provided evidence of substantial payments to a consultant, it would be probative of corruption if the consultant:[43]

(a) lacked experience in the sector;
(b) was not a resident of the country where the project was located;
(c) had no significant business presence or experience within the country;
(d) requested 'urgent' payments and/or unusually high commissions;
(e) requested payments be made in cash, be made in a third country, to a numbered bank account, or to some other person or entity than the one with whom the agreement was signed; and
(f) had a close personal/professional relationship to the government that could improperly influence decisions.

In contrast, the Claimants argued that the applicable standard of proof of corruption under international law is 'clear and convincing evidence', which must comprise 'substantial facts' rather than mere 'inferences'.[44] The Claimants' position, based on *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*,[45] was that this higher standard requires proof that goes beyond a balance of probabilities but falls short of a beyond reasonable doubt standard.[46]

Ultimately, the Tribunals held that the standard of proof for corruption requires 'clear and convincing evidence' that points clearly to corruption, although there need not be 'clear and convincing evidence' on every allegation of corruption.[47] The Tribunal's decision on this issue merits quotation in full:[48]

> The Tribunal acknowledges the difficulty of proving corruption as well as the importance of exposing corruption where it exists. In the nature of the offence, the person offering the bribe and the person accepting it will take care to cover their tracks. Nevertheless, given the seriousness of the charge, and the severity of the consequences to the individuals concerned, procedural fairness requires that there be proof rather than conjecture. The standard of 'probabilities' requires the trier of fact to stand back and make an overall assessment. The requirement of 'clear and convincing' evidence puts the focus more closely on the building blocks of the evidence to ensure a rigorous testing.
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> … In the Tribunal's view there need not be 'clear and convincing evidence' of every element of every allegation of corruption, but such 'clear and convincing evidence' as exists must point clearly to corruption. An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although of course proof beyond a reasonable doubt would be conclusive. This approach reflects the general proposition that the graver the charge, the more confidence there must be in the evidence relied on.

In addition to adopting the 'clear and convincing' standard of proof for corruption, the Tribunals made an important observation: aside from the criminal investigations of Baldwin and Scott, Laos had failed to investigate and prosecute *any* other persons (particularly government officials) who allegedly received bribes in relation to the specific allegations summarised above. The Tribunals' decision inferred that pursuing its own officials would not be detrimental to Laos's defence in the arbitration: '[c]onviction of its own officials would not estop the Government from pursuing the Claimants as bribe-givers.'[49] In concluding its assessment of Laos's failure to investigate and prosecute corruption (discussed further below in Sect. 12.8.2), the Tribunals drew a correlation between such failure and the Government's credibility when making corruption allegations.[50]

12.6 Tribunals' Assessment of Bribery Allegations

Given the practical difficulties of satisfying a tribunal that a standard of proof is met, this section discusses the evidence before the Tribunals in the BIT Proceedings and how such evidence was weighed and admitted (if at all). The authors consider it key

to examine how evidence of bribery and corruption is treated in arbitral proceedings, with some commentators considering the assessment of evidence to be more important than the applicable standard of proof.[51] The following bribe-related findings were made in the BIT Proceedings.

12.6.1 Alleged Bribes to Obtain the 2009 Flat Tax Agreement

Laos alleged that to obtain the 2009 Flat Tax Agreement, a bribe of USD30,000 was paid to senior government officials through the Claimants' intermediary or consultant, Madam Sengkeo.[52] In dismissing this argument, the Tribunals found Laos's position to be speculative and in finding the evidence to be unsatisfactory, observed as follows:[53]

> Madam Sengkeo was in the consulting business. Consultants are paid. While the Claimants never produced a 'consulting agreement' with Madam Sengkeo, the evidence is that it is not unusual for consultants to insist on a success fee as part of their remuneration. The effort to obtain a FTA was successful. It was likely worth millions of dollars to the Claimants in reduced taxes. In that context, payment of US $30,000 in 2009 is not a disproportionate 'success fee'. Moreover, no one was prosecuted in this affair …

The Tribunals' remarks support the view that it is not sufficient for allegations of bribery to be accompanied by mere circumstantial evidence. The Tribunals will assess the evidence holistically and ascertain whether all the circumstances point towards bribery. This view also underscores the importance of a host state investigating, and—if appropriate—prosecuting, principals involved in corrupt acts as it reflects the *bona fides* of the allegation (as will be discussed further below). This would be especially relevant where allegations of corruption and bribery are not raised contemporaneously, but after the start of arbitral proceedings, as was the case here.

12.6.2 Alleged Bribes to Extend the Flat Tax Agreement After Expiry of the Five-Year Term

Laos alleged that Bouker Noutharath—a retired hospital worker from the United States who had returned to live in Laos and had no experience as a consultant but who had contacts within the government—offered a bribe of USD21,000 to a government worker to extend the Flat Tax Agreement.[54] Noutharath cooperated with the Laos government and testified that he was sent USD21,000 to deliver it to a government official. However, he could not remember the name of that official.[55]

The Tribunals dismissed this argument for lack of 'clear and convincing evidence', holding that there were inconsistencies in Noutharath's evidence and that it was significant that he could remember nothing about (or was otherwise unwilling to identify) the government person to whom he said he handed USD21,000.[56] The

Tribunals also found that Laos's evidence did not establish that a bribe was offered even on a balance of probabilities. Laos's failure to prosecute the presumed recipient or anyone else was noted in reaching this conclusion.

12.6.3 Alleged Bribes to Shut Down the E&Y Audit of Savan Vegas and Pressure ST Holdings

During the arbitration, it was established that USD500,000 was sent by the Claimants to Vientiane, including USD300,000 cash in a backpack delivered to Madam Sengkeo, and that an identical amount of money was deposited into her bank account.[57] Laos alleged that USD270,000 was paid by Madam Sengkeo to government officials to stop the E&Y audit of Savan Vegas and that the bribe succeeded because E&Y indeed stopped the audit which prevented the exposure of the Claimants' illegal activities.[58] The Claimants' response was that Madam Sengkeo was a friend of Baldwin who urgently needed funds and that the USD300,000 was a loan to her.[59] They also contended that the government stopped the E&Y audit because its officials had concluded that E&Y had failed to find incriminating evidence.

The Tribunals found on the one hand that the Claimants' explanation of the payment to Madam Sengkeo was not credible and that if E&Y had failed to find incriminating evidence, the obvious instruction from the government would have been to keep digging and not to down tools. They further held that the Claimants had a powerful motive (e.g., they knew of 'financial skeletons' in the Savan Vegas books) to stop the audit. The Tribunals concluded that '*all in all*' the Claimants were able to get a senior Government official to stop the E&Y audit and that Madam Sengkeo paid USD270,000 (i.e. USD300,000 less a 10% commission) to that government person or persons. Despite this extremely serious finding, the Tribunals proceeded by stating that they were troubled by the government's lack of investigation into the potential bribe-takers, and that solid evidence was lacking. The Tribunal's assessment of the evidence is set out as follows:[60]

> That said, the Tribunal is troubled by the fact that the Government has apparently not identified any bribe-takers. The order to E&Y to stop the audit came as a surprise to E&Y and must have been issued by a senior Government source, otherwise the audit would have continued. The Respondent does not suggest that E&Y took the bribe but E&Y must know who gave its auditors the order to stop work. The evidentiary trail could then have been followed up the chain of command from the Government person who gave the order to identify the person who authorized the order, who could then have been required to provide the Government (and subsequently the Tribunal) with an explanation for the stop work order.
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> … The Respondent has not offered any explanation for this gap in the evidence. In the circumstances, while the evidence of Mr. Baldwin that Madam Sengkeo required the funds for her personal use is deeply unsatisfactory, so too is the Government's apparent failure even to attempt (so far as the evidence is concerned) to get to the bottom of the matter, not only potentially to punish the wrongdoers, but to provide solid evidence that a bribe was given and taken by Government official(s) to stop the E&Y audit. (Emphasis omitted.)

For these reasons, the Tribunal concluded that while on the balance of probabilities, Madam Sengkeo was used as a conduit to bribe government officials to stop the E&Y audit, Laos had not established this conclusion to the higher standard of 'clear and convincing evidence'. The Tribunals also concluded that on the lesser standard of balance of probabilities, Baldwin 'involved the Claimants in serious financial illegalities in respect of the halt of the E&Y audit'.[61]

12.6.4 Alleged Bribes to Shut Down the Thanaleng Slot Club

Tensions with Sanum's Laotian partner—ST Holdings—ran high when the latter refused to proceed with a joint venture in relation to a profitable slot club at Thanaleng. Baldwin, according to Laos, reacted by paying bribes to government officials through a 'consultant' Mr. Anousith Thepsimuong, to shut down the Thanaleng Slot Club as a pressure tactic to force ST Holdings to negotiate rather than continue with related litigation in the Laotian courts. Laos alleged that USD190,000 was deposited in Mr Anousith's account and a cash withdrawal of USD100,000 was made the next day. Baldwin testified that Anousith was paid to lobby the Laotian National Assembly.

The conclusions of the Tribunals were brief:[62]

> the payment to Mr. Anousith is deeply suspicious. There is no documentation of any consultancy. There is no explanation of the work for which almost $200,000 were paid to him and deposited in his personal bank account. The mandate to lobby the 'National Assembly' seems far-fetched. Moreover, despite the alleged payment of bribes, the Thanaleng Slot Club was not shut down. In the circumstances, the Tribunal is unable to find 'clear and convincing evidence' that a bribe was made or even offered through Mr. Anousith.

Again, the Tribunals did not stop there but went on to apply a lower balance of probabilities standard to find that it was more likely than not that a bribe was paid to an unidentified government official or officials in an unsuccessful effort to advance the Claimants' agenda in relation to the Thanaleng Slot Club.[63]

12.6.5 Alleged Bribe to Madam Sengkeo to Prevent Her from Testifying in the Proceedings

During the 2014 proceedings, Laos sought to have Madam Sengkeo testify by granting her immunity if she provided information and documents relating to bribes offered to Laos government officials. Also during those proceedings, Baldwin requested the Tribunals to allow him to make a USD575,000 'personal loan' to Madam Sengkeo. The Tribunals declined Baldwin's request given the importance and sensitivity of Madam Sengkeo's evidence in the case. In the June 2014 merits hearing in Singapore, Madam Sengkeo did not attend to testify for Laos.[64]

In the reinstated BIT Proceedings, Laos alleged that Baldwin, having been denied permission to arrange a loan to Madam Sengkeo, arranged for a third party to make a

USD575,000 'loan' to her, which was an inducement to keep her from testifying. The Tribunals found that the USD575,000 loan, on top of the USD300,000 loan previously extended, 'of which only USD15,000 were repaid bristles with "red flags"'.[65] The following passage of the Tribunal's finding on this allegation merits quoting *in extenso* because it helps to understand the approach by the Tribunal in its finding on bribery:

> Given Madam Sengkeo's central role in dealings between the Claimants and the Government over many years, her testimony would have shed crucial light on the legality or illegality of many of the disbursements at issue in the Respondent's allegations.
>
> Mr. John Baldwin testified:
>
> Q. So when **[Madam] Sengkeo withdrew US$80,000 in cash on July 20**, the day before you went to visit your good friend, the **Deputy Prime Minister**, what do you think she was going to do with those US dollars?
>
> A. It was [Madam] Sengkeo's money to do what she wanted. She represented to me that **she needed the loan to pay construction bills**. [Tribunals' emphasis.]
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> … It cannot be said that the bare payment of US $875,000 to Madam Sengkeo is 'clear and convincing evidence' of bribery. There is no evidence to contradict Mr. Baldwin's evidence of her need for funds. There are other possible explanations for their disbursement.
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> … On the whole, however, while the Tribunal is unable to find 'clear and convincing evidence' that the money was paid to Madam Sengkeo to bribe Government Ministers, the Tribunal is nevertheless satisfied on the lower standard of balance of probabilities that Mr. Baldwin and Madam Sengkeo were involved in channeling funds illicitly to Lao Government officials, and further that she was paid to secure her loyalty and to avoid her testifying on behalf of the Government, thereby obstructing justice.
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> … The coincidence of the timing of 'loans' of US $875,000 (less one repayment of US $15,000) to Madam Sengkeo and the Claimants' urgent need for Government intervention on its behalf at critical junctures of its business (the termination of the E&Y audit and the attempt to shut down the Thanaleng Slot Club), together with Madam Sengkeo's role as the Claimants' principal go-between with the Government, which Mr. Baldwin describes as a corrupt Government, compels an inference of Mr. Baldwin's unlawful conduct and through Mr. Baldwin, the culpability and bad faith of both LHNV and Sanum, on whose behalf he acted.
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> … The Government's failure to track down bribe-takers or to provide a convincing explanation of its efforts (even if on occasion unsuccessful) to do so, weighs against the Government's case, although the fact that the key witness, Madam Sengkeo, herself refused to cooperate made the Government's task more difficult.
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> … Possibly the Government prefers to spare itself some embarrassment by declining to put whatever it knows about 'bribe-takers' into the record of the Tribunal.
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> … Be that as it may be, the circumstances disclosed to the Tribunal do not rise to the level of 'clear and compelling evidence' of corruption.[66]

Apparent from the above quotation is the Tribunals' focus on two factors in arriving at the finding that corruption had not been proven: the conduct of the Claimants in the course of the investment, as well as the respondent state's actions in responding to such allegations.[67] Accordingly, Laos's failure to take steps to investigate bribe-takers within the government undoubtedly had a major negative consequence on its bribery allegations against the Claimants.

In their final conclusion on this allegation, the Tribunals noted that while the evidence was not 'clear and compelling' as to corruption, the evidence nonetheless

satisfied the lower standard of 'balance of probabilities', which was relevant to (and would have a significant impact on) determining the Claimants' good faith arguments.

12.6.6 Other Allegations of Bribery and Corruption

Further allegations of bribery and corruption were made, including allegations of bribes offered to the Prime Minister of Laos, a Governor of a Province and other bribes to government officials relating to the establishment and operation of a casino and slot clubs. Again, the Tribunals took a critical view of Laos's failure to investigate government bribe-takers:[68]

> The Claimants complain, rightly, that the Respondent's failure to offer any credible explanation for not pursuing the investigation of its own employees, or indeed even to attempt to identify the alleged bribe-takers, weighs against the credibility of these miscellaneous allegations.

The Tribunals added that none of these other allegations relating to bribery and corruption were supported by sufficient evidence to warrant further inquiry or comment.[69]

12.7 Good Faith

Ultimately, the Tribunals dismissed the Claimants' expropriation claims on their merits. In contrast, the Claimants' fair and equitable treatment claims appear to have been denied in large measure due to their bad faith conduct.

The ICSID Tribunal noted the particular acts of bad faith by Baldwin on the Claimants' behalf, including the following: misrepresentations made to the Government to obtain an investment agreement on the strength of a promise to make a USD25 million investment which the Claimants never intended to pursue; the likely making of illegal payments to Government officials to stop the E&Y audit; likely attempting to obstruct justice with payment to Madam Sengkeo to not testify in the proceedings; and attempting to mislead the Tribunals with a sham offer.[70] The ICSID Tribunal noted that Baldwin's evidence demonstrated bad faith exhibited by him and LHNV in manipulating the Laos government to advance their gambling initiatives, and manipulate the arbitration process itself.[71]

LHNV also alleged that Laos's audit proceeded in bad faith and constituted one of the wrongful acts orchestrated by it to assist ST Holdings in its ongoing dispute with LHNV, resulting in a breach of contractual and treaty obligations (including fair and equitable treatment standards), in respect of Savan Vegas.[72] The Tribunal found that LHNV failed to establish bad faith on Laos's part in pushing for an audit, in its capacity as a significant shareholder in Savan Vegas.[73] The government's conduct

was not found to be arbitrary, and there was no credible evidence suggesting that the E&Y audit was conducted in an unreasonable manner.[74]

The Tribunals dismissed the fair and equitable treatment claims as a result of the Claimants acting in bad faith:[75]

> serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country (such as criminality in defrauding the host Government in respect of an investment) is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of *fair and equitable treatment*, as well as their entitlement to relief of any kind from an international tribunal. (Emphasis added.)

Notwithstanding the finding by the Tribunals that there was no bribery and corruption proven to the standard of 'clear and convincing evidence', the Tribunals did find—as noted above—that on the 'balance of probabilities' standard that:

(a) The Claimants' 'consultant', Mr Bouker, had offered a bribe to a government official;[76]
(b) Mr Baldwin involved the Claimants in serious financial illegalities in respect of the cessation of the E&Y audit;[77]
(c) A bribe was paid to an unidentified government official or officials in an (unsuccessful) effort to advance the Claimants' agenda at the Thanaleng Slot Club;[78]
(d) Baldwin and Madam Sengkeo channelled funds illicitly to Lao government officials;[79] and
(e) Madam Sengkeo was paid to secure her loyalty and to avoid her testifying on behalf of Laos in the arbitration.[80]

Having found this conduct had taken place, but on a standard below that which was required to make a finding of bribery and corruption, the Tribunals relied on that conduct as evidentiary support for a finding that the Claimants had acted in bad faith:

> the evidence is clear that the Claimants dealt in bad faith with the Government from the initial signing of the Paksong Hotel and Casino PDA calling for a US $25 million hotel and casino to the financial irregularities in the operation of the Savan Vegas Hotel and Casino. … The bad faith continued further up to its recent efforts to deter Madam Sengkeo's appearance to testify at the merits proceeding and the sham MaxGaming offer to purchase Savan Vegas in April of 2015.[81]
>
> …
>
> The Tribunal listened carefully to the testimony of Mr. John Baldwin and found him to be an argumentative witness who preferred evasion to candour. Much of his testimony was simply not credible. He proceeded in bad faith from the outset in assuring the Government that he intended to invest US $25 million at the Paksong site, which by his own account was likely to be highly unprofitable.[82]
>
> Mr. Baldwin is the directing mind of both Claimant companies. His conduct throughout was to advance their corporate interests. His bad faith conduct is their conduct.[83]
>
> It is well established that the bad faith conduct of the investor is relevant to the grant of relief under an investment treaty.[84]

The Tribunals ended their section on bad faith by stressing 'the Tribunal wishes to leave in no doubt its conclusion that Mr. Baldwin and Sanum exhibited manifest bad faith in various efforts not only to manipulate the Government to advance their gambling initiatives but, in the instance of Madam Sengkeo, to manipulate the arbitration process itself.'[85] However, the Tribunals' decisions are silent as to what the precise consequences of this finding are. As noted above, it may be inferred that their bad faith finding indirectly led to the Tribunals denying any rights under the fair and equitable treatment provisions under the respective BITs.

12.8 Pivotal Issues and Wider Implications

We turn now to make some observations on the key issues and wider implications relating to corruption that arose from the BIT Proceedings.

12.8.1 Applicable Standard of Proof

Allegations of corruption present serious evidentiary issues for parties and tribunals alike. An initial difficulty arises from the silence of institutional rules as to the standard of proof. Absent party agreement, parties must include in their pleadings detailed arguments as to the applicable standard; and a decision on this issue must be made by the tribunal.

Some tribunals choose to apply the lower standard of 'balance of probabilities';[86] but more tribunals tend to follow the stricter requirement of 'clear and compelling evidence'.[87] As set out above, there were several instances in the BIT Proceedings where although the evidence was insufficient to prove the allegations of bribery and/or corruption on a 'clear and convincing' basis, it still satisfied the lower threshold of balance of probabilities. Such conclusions may reflect a practical approach: the Tribunals were first obliged to apply the higher standard (given it is adopted by the majority of tribunals) but in finding that this standard was too high to prove corruption on the facts, the Tribunals proceeded to make a determination on the same facts (but on a lower standard) that fell short of a corruption finding but still resulted in sanctioning extremely questionable investor conduct. It remains to be seen whether this two-pronged approach of the Tribunals (i.e., assessing the facts on both a 'clear and compelling' and a 'balance of probabilities' standard and then deploying case-specific consequences) will be adopted or whether future tribunals may simply apply a lesser standard for proof of corruption.[88]

An alternative approach to the standards of proof is manifest in *Metal-Tech*, where the tribunal did not endorse either the 'clear and convincing' standard or the 'more likely than not' standard for allegations of bribery. It instead examined whether corruption had been established with 'reasonable certainty'. Notably, the *Metal-Tech* tribunal took the view that the difficulty of establishing corruption made it

acceptable for corruption allegations to 'be shown through circumstantial evidence'[89] and that in this context recourse to 'red flags' was often needed.[90] Another (less used) variation on the standard of proof is based on the concept of an 'inner conviction'.[91] This standard is rooted in the inquisitorial model of certain European continental countries, where the tribunal must be subjectively persuaded that corruption exists.

In *Metal-Tech*, red flags related to consultancy arrangements entered into by the claimant were relied on by the tribunal to find that bribery under Uzbekistan's Criminal Code (the law of the host state in that case) had been proven. These red flags included the magnitude of the sums the consultants were paid, the lack of qualifications held by the consultants to provide lobbying services, the secrecy surrounding the contracts (at least one was a sham), the inability to produce meaningful contemporaneous documentation as to the services rendered by the consultants, and the significant connections that two of the consultants had with Uzbek government officials.[92] As indicated above, in the BIT Proceedings, Laos argued that the Tribunals should apply the *Metal-Tech* tribunal's 'red flag' approach to corruption.[93] This argument was not accepted by the Tribunals in the BIT Proceedings.

Had the *Metal-Tech* approach been accepted by the Tribunals, the chances of a finding of corruption would likely have increased given the circumstantial evidence or red flags that were proved on the 'balance of probabilities' (e.g., the offering of bribes or illicit channelling of funds to Laos government officials, financial illegalities relating to the cessation of the E&Y audit, and the payments to avoid Madam Sengkeo from testifying). In making their decisions, the Tribunals in the BIT Proceedings did not explicitly refer to *Metal-Tech.* Nonetheless, it is apparent that the *Metal-Tech* approach was not followed because the Tribunals applied a 'clear and convincing' standard of proof. According to the Tribunals, this higher standard was difficult to overcome especially because the factual matrix before them evidenced that Laos had failed to investigate who the recipients of the Claimants' bribes were. The inability to find corruption in the context of some damning evidence against the Claimants did not appear to cause too much concern for the Tribunals given the eventual outcome, that is, all the claims were dismissed on the merits, either for lack of proof of any BIT breach or because the Claimants serious financial misconduct (proved on the 'balance of probabilities') was incompatible with the Claimants' good faith obligations. The latter, reading between the lines of the awards, was considered by the Tribunals to have precluded the Claimants' entitlement to relief of any kind from an international tribunal.[94]

What is apparent is that the standard of proof has the potential to be a critical factor in how allegations of corruption influence the outcome of the case. This emphasises the pressing need to establish a universally consistent and acceptable standard of proof. Inconsistency on such an important issue undermines the legitimacy of the investment arbitration process. The need for a unified and coherent approach is real and urgent.

12.8.2 Obligations on Host States to Investigate Corruption

A major issue arising from the BIT Proceedings is the Tribunals' direct criticism of Laos's failure to investigate or prosecute persons who allegedly engaged in serious criminal activities other than Baldwin and Scott. The Tribunals noted that it was 'disturbing that no prosecutions have been brought against any persons alleged to have accepted bribes, nor has there been evidence of due diligence in any investigation. These omissions are relevant to the credibility of the Government's allegations'.[95] The Tribunals' decision is not unique. Almost 25 years prior to the BIT Proceedings, the *Wena Hotels Ltd. v. Arab Republic of Egypt*[96] tribunal partially rejected Egypt's bribery defence for failure to show that the implicated government official was investigated and prosecuted. More generally, tribunals and commentators have rooted this obligation on expectations of a sovereign state to genuinely investigate or prosecute alleged corruption within its territory, failing which the application of principles of estoppel, good faith and acquiescence may be applied to that state's detriment.[97]

While a respondent state's obligation to investigate may be justified on the basis that governments are well resourced and best placed to pursue such investigations, the degree to which this obligation can be practically complied with is a separate question. Further, assuming that a positive duty on a host state is established, the content of such a duty is difficult to articulate, especially when considering the variegated capacities of developing and developed countries.[98]

Conversely, if the investor is the party that makes corruption allegations against the host state,[99] it begs the question as to whether there is a duty on a host state to pursue such investigations simply on the basis of mere allegation, and if so, what the content of such obligation should be.

On these issues, we again see inconsistent practice in investment-treaty arbitrations. A comparison between the approaches taken in *Metal-Tech* and *Sanum* is illustrative. In *Metal-Tech*, in addition to accepting a lower threshold to prove corruption (e.g., by using circumstantial evidence and red flags), the tribunal did not calibrate its decision by taking into account the host state's failure to investigate red flags pointing to corruption of its government officials. The factual matrix in that case showed that the claimant had, for example, paid government officials to use their official positions to influence government support of the claimant's investment in Uzbekistan. The *Metal-Tech* tribunal found that this conduct breached the Uzbek Criminal Code and constituted corruption.[100] Despite this involvement in corruption on the part of government officials, the tribunal did not take this state-side conduct into account. A reason is given for this:[101]

> the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.

Based on this statement, a conscious decision appears to have been made by the tribunal not to include the conduct of government (in omitting to investigate its officials) in its assessment. If the *Sanum* approach is applied to the factual circumstances in *Metal-Tech*, it may be argued that the absence of any state-led investigation of corrupt government officials would have been relevant to assessing the credibility of Uzbekistan's allegations and, accordingly, this evidentiary blind spot may have led the tribunal to find that the totality of the evidence was insufficient to establish corruption (particularly on a 'clear and compelling' standard). On the one hand, omitting the conduct of the government in its assessment of the evidence may prove to be the 'safer' (or perhaps even the 'easier') option. On the other hand, this very omission increases the likelihood that the conduct of corrupt actors acting for or within governments will not be investigated. Whether this has any empirical correlation to increased attempts at corruption vis-à-vis foreign investors remains to be seen. However, it presents an uncomfortable image for investment arbitration which is expected to promote conditions in which a strong rule of law framework exists for foreign investors and host states alike.

Llamzon aptly notes that the 'prospect of corruption as litigation strategy, as a trump by host States to insulate themselves from otherwise legitimate obligations to investors, can be a genuine concern for the fairness of the system of international investment arbitration'.[102] It is thus a challenge to envisage how balance can be restored to ensure that the implementation of anti-corruption norms in investment arbitration holds both states and investors accountable.

Another divergent practice of tribunals in relation to the involvement of government officials in corruption is the allocation of costs. In *Sanum* and *LHNV*, despite the criticism of the tribunal that Laos did not investigate bribe-taking on the part of its officials, the Tribunals required the Claimants to pay all of the arbitration costs (including the fees of the PCA and the Tribunal) as well as all of Laos's legal costs. A very different outcome was reached in *Spentex v. Uzbekistan*.[103] The tribunal in that case decided that corruption had made the claims inadmissible. Nonetheless, the majority of the tribunal held that its decision was not 'in favour' of Uzbekistan because it was equally implicated in the corruption (by condoning the initial corruption and by failing to investigate the responsible parties). According to the majority, this situation could lead to an imbalance arising from the punishment of one side to the corruption (the investor) and the avoidance of liability by the other (the host state). To address this imbalance, the majority urged Uzbekistan to donate USD8 million to a United Nations anti-corruption project, failing which the tribunal would order Uzbekistan to pay the costs of the proceedings (including 75% of the claimant's costs; i.e., approximately USD12 million).

Although the approach in *Spentex* constitutes a novel approach to the allocation of costs, it illustrates yet again a considerable inconsistency in the manner in which tribunals treat the responsibility of host states when they fail to investigate their officials who have (or are alleged to have) engaged in corruption with a claimant investor.

12.8.3 Corruption Allegations and Host States with a Culture of Corruption

The prevalence of bribery and corruption has a chilling effect on the inflow of FDIs,[104] which Laos is heavily reliant on. This phenomenon is exacerbated by cumbersome procedural regulations, poor infrastructural support, unpredictable law enforcement and a discriminatory regulatory environment.[105] Economically, the Laos State Inspection Authority reported that the Laos government lost funding of approximately USD732 million from 2016 to 2020 for reasons of corruption, with such funds being pocketed by Laos state officials or misused for other state projects.[106] In the 2020 World Bank Ease of Doing Business report, Laos scored a low 50.8 out of 100, far short of the regional average of 63.3.[107] This counters certain economists' claims that transnational corruption is an 'efficient market-clearing mechanism' and does not necessarily disincentivise the attraction of FDI.[108]

Going below the surface, this culture of corruption is both the cause and effect of a systemic problem that has political implications as well. Trust in public institutions is undermined,[109] and parties are driven to prefer a delocalised justice system (which perhaps may benefit the arbitration community). A 2021 United States of America Department of State report highlighted the difficulties faced in attracting foreign investment:[110]

> neither the government's investment bureaucracy nor the commercial court system is well developed, although the former is improving and reforming. Investors have experienced government practices that deviate significantly from publicly available law and regulation. Some investors decry the courts' limited ability to handle commercial disputes and vulnerability to corruption. The Laos government has repeatedly underscored its commitment to increasing predictability in the investment environment, but in practice, with some exceptions in the creation and operation of SEZs, and investments by larger companies, foreign investors describe inconsistent application of law and regulation.

Predominantly, anti-corruption efforts in Laos have been externally spearheaded, with the United Nations agencies and other non-profit organisations taking a leading role. By September 2020, Laos completed two cycles of its UNCAC Review, covering *inter alia* criminalisation, law enforcement, prevention and asset recovery.[111] Training has also been conducted to strengthen capacity-building efforts of Laotian state agencies to conduct financial crime investigations.[112] While the Laotian government was criticised in the BIT Proceedings for not seriously investigating and prosecuting persons suspected of partaking in bribery and illegal conduct relating to the investments, there appears to have been some progress since then. From 2016 to 2020, 3690 Laotian officials were disciplined for corruption, with more than 2000 being expelled from the Lao People's Revolutionary Party (Laos is a one-party state).[113] Such statistics compel us to question how deep-rooted corrupt practices are and whether these figures are only the tip of the iceberg. The Ministry of Finance announced in December 2022 that the Ministry's administration system must digitise to combat corruption, as it would improve management, record-keeping, tax collection and regulate with whom businesses deal with.[114]

With much of Laos's anti-corruption efforts being externally managed, such plans for internal reform indicate a nascent change from within. These developments indicate the Laotian Government's serious commitment to bolster the anti-corruption movement both preventively and remedially. However, it would be premature to celebrate anti-corruption efforts so quickly. Many of the international guidelines and discussions on combatting bribery and corruption remain aspirational, with a majority of movements merely promoting monitoring, advocacy and community engagement.[115] Where BITs contain express provisions governing measures against corruption, such provisions are vaguely worded and are similarly aspirational, but may still provide some compulsion.[116] Faced with a history of political instability and a weak rule of law, a significant move up Transparency International's Corruption Perceptions Index[117] will be difficult to implement and sustain in the near future, more so since the public sector appears especially impacted by and complicit in such practices.

This brings us to the question of how to deal with allegations of corruption against an investor in a host state that has a significant culture of corruption. In *ECE Projektmanagement International GmbH v. Czech Republic* (*ECE Projektmanagement*),[118] the investor (the claimant) made allegations that the state (the respondent) sought a bribe. The investor did not adduce any direct or specific evidence but rather relied on the general prevalence of corruption in the Czech Republic. Unsurprisingly, the Tribunal refused to make a finding of corruption, noting that more relevant and probative evidence of the specific allegations was required.[119] Tribunals appear unwilling to accept claimant arguments that the entire political system in a host state is corrupt—the 'everyone knows' argument—and require more direct proof that underlies the alleged conduct.

ECE Projektmanagement illustrates a practical evidentiary problem faced when mounting allegations of corruption exists, in economies with a high rate of corruption, such as Laos, many are aware and may even know of corrupt practices, but none can prove it. For a tribunal to make a positive finding of such illegitimate conduct, mere insinuations are insufficient—and for good reason. The seriousness of quasi-criminal allegations, such as fraud, bribery, corruption and embezzlement, warrant that proof prevails over conjecture.[120]

Despite the conceptual and practical difficulties of proof, where allegations of corruption are involved, there may be merit in tribunals paying closer attention to proactively managing the early processes of evidence gathering, such as during the document disclosure phase. This process may be able to produce more relevant evidence, for example evidence as to what has been done to investigate any possibility of bribe-taking by the host state's officials. Also, having bribery and corruption issues in proceedings culminating in publicly available awards may give rise to a greater level of transparency, and perhaps a greater moral impetus for host states to weed out practices that encourage corruption.

12.8.4 Clean Hands Versus Bad Faith

On the doctrine of 'clean hands', the Tribunals cautioned that the '[i]ncorporation of such a general doctrine into investor-State law without careful boundaries would risk opening investment disputes to an open-ended, vague and ultimately unmanageable principle'.[121] The Tribunals found that Laos's allegations of bribery lacked sufficient 'clear and convincing evidence' to justify an affirmative finding of specific acts. However, the ICSID Tribunal went on to consider the probable existence of illicit payments to Madam Sengkeo and to Government officers under the general allegation of bad faith.[122] The Tribunal assessed the claimants' entire course of conduct and found the following factors to be relevant:[123]

(a) Probability of corruption in Claimants' orchestration of the termination of the E&Y audit;
(b) Manipulation of Government authorities to obtain a gambling licence without any intention of building the hotel and casino;
(c) Baldwin's testimony which confirmed the view that the Claimants were contemptuous of the commitments that came with the advantages of their Laotian investments; and
(d) Baldwin's attempt to compromise the integrity of the arbitration through inducing Madam Sengkeo to not testify in the proceedings.

In concluding that the Claimants' bad faith initiation of some investments and bad faith performance of other investment agreements 'provide added reasons to deny the Claimant LHNV the benefit of Treaty protection',[124] the Tribunal stopped short of making any positive and conclusive finding on corruption. While facts suggesting bad faith were assessed to be relevant, the Tribunal's assessment of the evidence presents more questions than clarifications: How does this factor of 'bad faith' on the investor's part measure against the stricter 'clean hands' doctrine? Is there a different evidential standard (e.g., the lower 'balance of probabilities' standard) applicable to establishing bad faith?

12.9 Setting Aside Proceedings

12.9.1 Introduction of Additional Evidence

Factual and legal issues relating to bribery and corruption featured even after the BIT Proceedings. In setting aside proceedings commenced in Singapore, a central issue was the introduction of the following additional evidence by Laos after the BIT Proceedings were revived:

(a) Two awards in related Singapore International Arbitration Centre arbitrations;
(b) Documentary evidence and sworn testimony relevant to Laos's defences to prove bribery and fraudulent conduct by the Claimants:[125]

(c) An accounting report by BDO Financial Services Limited, commissioned by Laos, which would be relevant to quantify Laos's embezzlement counterclaim. The counterclaim was eventually not pursued.

The factual background to the setting aside proceedings is as follows. Laos applied to introduce additional evidence in the arbitration in aid of its submission that the Claimants' bribery, corruption and illegal conduct would disentitle them to any relief in the BIT Proceedings, without relying on a standalone ground of bad faith as a substantive defence.[126] This application was filed in May 2018, close to four years after the allegations of bribery were first made in 2014.[127] In objecting to the application, the Claimants relied on the supposed 'mandatory language' of Section 34 of the Settlement Deed which had the effect of creating a 'frozen record' at the time the Settlement Deed was executed, such that the Tribunals had no discretion to admit the new evidence.[128] Laos justified its application to introduce fresh evidence as the tribunals maintained a residual discretion to admit such evidence notwithstanding Section 34, that there were compelling circumstances to do so, and that the Claimants' bribery, corruption, illegal and bad faith activities would result in a dismissal of the Claimants' claims in the BIT Proceedings.[129]

The Tribunals granted Laos's application in part, concluding that all relevant documents should be before the Tribunals to allow them 'to get to the bottom of the allegations', especially considering that the corruption issues 'are of over-riding importance to the rule of law and the integrity of the arbitration process'.[130] In allowing the application, the Tribunals justified their order on the basis that the record should remain 'frozen' according to Section 34 of the Settlement Deed, unless the Tribunals were satisfied that 'compelling circumstances' existed to admit fresh evidence. The Claimants soon thereafter submitted a request to introduce their own additional evidence and rebuttal evidence,[131] followed by a further application by Laos.[132] Both of these applications were to a large extent granted by the Tribunals.

After the Awards were published, the Claimants applied to set aside the Awards of the BIT Proceedings in Singapore (the seat of the BIT Proceedings), alleging broadly that:

(a) The Tribunals' findings relating to allegations raised regarding bribery and fraud, and separately in the case of the ICSID Proceeding, the findings in respect of certain expropriation claims that were unpleaded exceeded the scope of the parties' submission to arbitration (under Article 34(2)(a)(iii) of the Model Law);
(b) The arbitral procedure in the BIT Proceedings was not in accordance with the parties' express agreement under Section 34 of the Settlement Deed (under Article 34(2)(a)(iv) of the Model Law); and/or
(c) That the Claimants were not afforded a reasonable opportunity to be heard on determinations made in the BIT Proceedings (under Article 34(2)(a)(ii) of the Model Law and/or section 24(b) of the International Arbitration Act 1994).

Section 34 of the Settlement Deed provides:

> 34. In the event that the arbitration is revived pursuant to clause 32 above, neither [the Claimants] nor [Laos] shall […] be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings.

The setting aside applications were heard by the Singapore International Commercial Court (SICC) in the first instance and were dismissed entirely. First, on the issue of the scope of submission to arbitration, the SICC held that the BIT Tribunals' jurisdiction was derived from the terms of the Laos-Netherlands BIT and the Laos-PRC BIT, and the matters submitted to the Tribunals. The key issue was whether Section 34 operated in a manner to limit the scope of matters submitted to the awards such that (as the Claimants submitted) there was a limit on the allegations that could be made in the proceedings after they were revived, and no new claims, evidence or reliefs could be sought. In interpreting Section 34, the SICC held that the clause operates in a manner to 'preclude either party from making new claims or seeking new relief which were outside the scope of the claims and counterclaims already submitted to arbitration in the BIT Arbitrations'.[133] However, the SICC held that the Claimants' contention did not warrant a setting side on the basis of Article 34(2)(a)(iii) as the allegations in question were not 'new claims' or 'new relief' but formed part of Laos's existing defence of corruption, bribery, illegality and/or bad faith as further allegations in support of pre-existing defences. The SICC further held that the 'allegations relating to new evidence are procedural matters that do not engage Art 34(2)(a)(iii)'.[134] Further, the Claimants were precluded from seeking relief under Article 34(2)(a)(iii) of the Model Law as they waived their right to do so in failing to raise a jurisdictional obligation in relation to the applications to admit additional evidence, and in fact, proceeded to file their own application which was granted in large part.

On the alternative basis for challenging the scope of submission to arbitration viz. that the ICSID Tribunal made findings or rulings in respect of expropriation claims relating to Paksong Vegas, the Paksan Club and the Thakaek Club, which were not pleaded by parties in the ICSID Arbitration but only pursued by Sanum in the PCA Arbitration, Laos submitted that the issue of the Claimants' illegal and/or bad faith conduct relating to those investments was presented to the ICSID Tribunal and addressed by witnesses. The SICC noted that '[w]hilst the expropriation claims for the three projects were only made in the PCA Arbitration, it is evident that issues of illegality and bad faith relating to the three projects were raised in the ICSID Arbitration, both in the pleadings and in the evidence'.[135] The SICC, thus, held that 'issues of illegal and bad faith conduct relating to [the three projects] were matters raised in GOL's defence and formed part of the issues in the ICSID arbitration'.[136] The SICC rejected the ground and dismissed the Claimants' application to set aside the ICSID Award on the basis of Art 34(2)(a)(iii) of the Model Law. Critically, the parties had conferred jurisdiction on the Tribunals to interpret Section 34 in the event of a dispute, and thus the Tribunals' decision would not be a matter which a supervisory court could consider *de novo.*[137] As an alternative, the SICC found that it should not interfere with the Tribunals' findings of fact on questions of foreign law which are final and binding.[138] Assuming *arguendo* that the Tribunals were to reopen the findings as to their ability to admit additional evidence, the Tribunals retained a residual power to do so in exceptional circumstances (under Section 34 and general procedural powers) and that Section 34 did not consist of a blanket exclusion of all new evidence. The Claimants also contended that the BIT Tribunal's assessment of the merits of their treaty claims was made with substantial reliance on

Laos's new evidence raised in the Revived Proceedings or was tainted by the factual findings made by the Tribunal in relation to the same. The SICC concluded that there was no basis for this contention as the Tribunals made separate and independent findings regarding parties' conduct and the merits of the claims, as opposed to relying substantially on the new evidence and evidence such as witness testimony which in some instances was undisputed. Moreover, where a party seeks to advance evidence of corruption, the SICC was 'of the clear view that no agreement between the parties can prevent the arbitral tribunal from reviewing and, where appropriate, admitting that evidence. This is consistent with the commentaries ... and with the public duty which, we find, applies as much as to arbitrators as it does to judges. Otherwise, parties could enter into procedural agreements deliberately or unintentionally precluding evidence of corruption and arbitral tribunals might make awards supporting or enforcing that corruption'.[139] The SICC also noted that the Claimants' failure to raise a jurisdictional objection at the time of Laos's application to admit additional evidence was filed (and in fact, having filed their own application) constituted a waiver of making such a belated challenge.[140] In any event, even if the Tribunals breached an agreed procedure under Section 34 by admitting the additional evidence, no prejudice was established or suffered by the Claimants. The SICC concluded that the BIT Tribunals could not reasonably have arrived at a different overall result, even if the additional evidence admitted was considered. Even if the court were to determine the matter *de novo*, the SICC would have reached the same conclusion of the matters. Accordingly, for all of the above reasons, the SICC dismissed the Claimants' application to set aside the BIT Awards under Article 34(2)(a)(iv) of the Model Law based on their contention that the arbitral procedure was not in accordance with parties' agreement.

Insofar as the Claimants argued that the Tribunals' exclusion of certain further evidence would have reasonably made a difference to the outcome of the proceedings, the SICC found that the Tribunals would not have arrived at a different conclusion on the claimants' conduct in terms of illegality, corruption, bribery and/or fraud, even if the Tribunals could have arrived at a different conclusion on some of the specific factual findings.[141]

Finally, the SICC held that the claimants were afforded a reasonable opportunity to present their case. Notably, the claimants could not successfully advance this argument as they were:

(a) Aware of Laos's defences of illegality and bad faith;
(b) Put on notice as to the evidence (such as the BDO Report) which was relied upon in support of these arguments of illegality and bad faith; and
(c) Had extensive opportunities to ventilate their counter-arguments (including on the admissibility of certain reports, which, in any event, would not have made a difference to the outcome of the case).

The claimants proceeded to appeal to the Singapore Court of Appeal, which dismissed it. The two grounds of appeal were that:[142]

(a) The Tribunals wrongly accepted Laos's argument that mandatory prohibition in Section 34 of the Settlement Deed would be overridden or circumvented by a supposed 'inherent power'; and

(b) The Tribunals made several factual findings in breach of the rules of natural justice, in that the findings on bribery and fraud were made without the Tribunals being addressed on those issues.

On the first ground, the Court of Appeal remarked that the Court will defer to a tribunal's construction of an agreed procedure in an arbitral agreement that is open to interpretation, in line with its general approach of minimal curial intervention:[143]

> 102 As a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties where the construction is open on the text of the agreement. That is to say, even though there might be more than one construction and the court might think a construction other than that chosen by the tribunal is to be preferred, the court will accept the tribunal's construction. Where, however, a tribunal adopts and acts upon a construction of a term, providing for an agreed procedure, which is simply not open on any view of the text, then the tribunal cannot be said, on any view, to have adhered to the agreed procedure. It is open to the supervising court in such a case to determine the content of the agreed arbitral procedure.

The Court of Appeal held that the SICC did not err in its characterisation of the interpretive approach taken by the Tribunals which determined the scope and limits of Section 34 and that the construction of the text was left open for the Tribunals' interpretation.[144] The Tribunals found that the preclusive operation of Section 34 did not extend to entirely displacing their powers to receive new evidence.[145] In arriving at this construction, the Tribunals were guided by the text of Section 34 and the applicable arbitral rules. The Court of Appeal further remarked that the Tribunals were correct in adopting a construction of a discretionary reception of additional evidence in limited circumstances.[146]

On the Claimants' second ground of appeal, the Court of Appeal held that there was no breach of natural justice.[147] Laos clearly pleaded the defence of bad faith as a distinct ground for the denial of treaty relief. The claimants also had the opportunity to ventilate their position and advance arguments on the standard of proof required.[148]

We make the following observations from the setting aside proceedings. First, both the SICC and Court of Appeal judgments reiterate the pro-arbitration approach of Singapore courts, affording deference to decisions of tribunals on agreed arbitral procedure. That being said, the SICC's observations reveal that such agreement—while derived from party autonomy—is not absolute, especially in the context of bribery and corruption. The SICC noted that 'while the BIT Tribunals would normally give effect to the parties' agreement respecting evidentiary matters, the Tribunals retained a residual discretion to chart a different course "if compelling circumstances were shown to exist"'.[149] More directly, the SICC stated that '[w]here, therefore, a party seeks to put before an arbitral tribunal evidence of corruption, we are of the clear view that no agreement between the parties can prevent the arbitral tribunal from reviewing and, where appropriate, admitting that evidence'.[150] This endorses the public duty of investment treaty tribunals, and provides some implicit endorsement of the *sua sponte*[151] investigative powers of tribunals in cases where conduct of bribery and corruption is alleged and pleaded.[152]

Second, the Courts' deference towards the Tribunals' interpretations of Section 34 of the Settlement Deed supports the general proposition that a tribunal is a master

of its own procedure. These wide powers were derived from the Laos–Netherlands BIT, the Laos–PRC BIT, the ICSID Additional Facility Rules and the UNCITRAL Rules. All of these sources contain some form of the general proviso that the Tribunal shall determine its own procedure, unless parties have decided otherwise, including the admissibility, relevance, materiality and weight of the evidence offered. Such expansive provisions are a double-edged sword. On the one hand, it offers the tribunal wide-ranging powers to have parties present evidence that *may* be relevant to the issues at hand. On the other hand, given the seriousness of allegations of bribery and corruption, tribunals may be over-inclusive towards the admission of such evidence, to the point of compromising the efficiency of the arbitral process. The Claimants' applications to adduce evidence to rebut Laos's first application is also an illustrative example of the possibility of parties' utilising the flexible evidentiary rules to gain a seemingly strategic advantage.

12.10 Conclusion

It is axiomatic that corruption is internationally condemned. The myriad of both international and domestic legal rules and frameworks addressing corruption may create a perception that controls are in place for this evil to be well managed. This could not be further from the truth, especially for countries with unstable political and legal systems.

The BIT Proceedings demonstrate that, notwithstanding the culture of corruption in many countries, which is often silently acknowledged, proof is a thorny issue. Critically, it is difficult to satisfactorily prove allegations of corruption. Corrupt investors and officials will cover their tracks, often with sophisticated methods designed to escape detection, or withhold evidence that may implicate them. Finding proof of corruption is an inherently difficult task. Inconsistency in investment arbitration jurisprudence as to the approach to be taken to make a positive finding of bribery and corruption compounds this difficulty. The investment arbitration community needs to address this issue to eliminate (or at least minimise) the significant inconsistencies in legal approaches. Certain criticisms may need to be addressed through amendments to the text of investment treaties, or some form of soft law instrument. In other instances, action needs to be taken urgently—whether through civic engagement or governments. Or else, the perpetrators of corruption will continue their unscrupulous activities, which do not affect simply an investment in a host state but also undermine democracy, the rule of law, human rights, predictable markets and the overall quality of life that investment treaties are designed to support and improve.

As mentioned above, anti-corruption efforts have been largely aspirational thus far. At the same time, the importance of advocacy efforts and community engagement may be underrated. Emerging economies, such as Laos, will inevitably yield to such efforts in a bid to attract greater FDI. While these are long-term milestones to observe for Laos, the BIT Proceedings leave a public and significant mark on the Laotian government to actively remedy this culture of corruption.

Notes

1. Annan 2003, see Foreword.
2. Blundell-Wignall and Roulet 2017.
3. International Finance Corporation 2021, p. 2.
4. Transparency International n.d. The Corruption Perceptions Index has given Laos a score of 30 out of 100, and ranks it as 128 out of 180 countries in its 2021 corruption rankings.
5. Moustafa 2021. See also US Department of State 2021 Investment Climate Statements: Laos. See however, Llamzon 2014, p. 7.
6. Cited in *Lao Holdings N.V. v The Lao People's Democratic Republic* ICSID Case No. ARB(AF)/12/6 (Award dated 6 August 2019) (*LHNV* Award) at footnote 4; *Sanum Investments Limited v the Government of the Lao People's Democratic Republic* PCA Case No. 2013-13 (Award dated 6 August 2019) (*Sanum* Award) at footnote 4.
7. *LHNV* Award at [1]-[2]; *Sanum* Award at [1]-[2].
8. Signed on 16 May 2003, in force since 1 May 2005.
9. Signed on 31 January 1993, in force since 1 June 1993.
10. *LHNV* Award at [68]; *Sanum* Award at [66].
11. Section 34 of the Settlement Deed reads: '34. In the event that the arbitration is revived pursuant to clause 32 above, neither the Claimants nor Laos shall not be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings'.
12. *LHNV* Award at [26]; *Sanum* Award at [69].
13. *LHNV* Award at [26].
14. *LHNV* Award at [10].
15. The PCA proceedings were revived by a decision of the Singapore Court of Appeal dated 29 September 2016: see *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] 5 SLR 536; [2016] SGCA 57.
16. *LHNV* Award at [73]; *Sanum* Award at [71].
17. *Sanum* Award at [73].
18. *LHNV* Award at [75].
19. *LHNV* Award at [88]; *Sanum* Award at [90]; see also *Sanum* Award at [87] and *LHNV* Award at [89]: 'As the Tribunal understands it, the present submission of the Respondent to dismiss all claims on grounds of illegality is not an objection to the Tribunal's jurisdiction, but an affirmation of the Tribunal's jurisdiction to consider the claims on their merits which, the Government says, ought to be dismissed because of the Claimants' illegal conduct.'.
20. *LHNV* Award at [93]; *Sanum* Award at [91].
21. *LHNV* Award at [94]; *Sanum* Award at [92].
22. The following claims by Laos were subsequently abandoned: (i) paying unspecified amounts of bribes to Government officials stationed at Savan Vegas to turn a blind eye to unlawful gambling by Lao citizens; (ii) paying unspecified amounts of bribes to Thai border officials to facilitate Thai gamblers crossing into Laos to gamble and return unhindered with their winnings; and (iii) engaging in money laundering and embezzling funds from Savan Vegas using falsified loans: See *LHNV* Award at [94]; *Sanum* Award at [92].
23. *LHNV* Award at [95]; *Sanum* Award at [93].
24. *LHNV* Award at [98]; *Sanum* Award at [96].
25. *LHNV* Award at [98]–[99]; *Sanum* Award at [96]–[97].
26. *LHNV* Award at [102]; *Sanum* Award at [100].
27. *LHNV* Award at [102]; *Sanum* Award at [100].
28. *LHNV* Award at [103]; *Sanum* Award at [101].
29. *LHNV* Award at [103]; *Sanum* Award at [101].
30. *LHNV* Award at [104]; *Sanum* Award at [102].
31. *LHNV* Award at [82], [83], [87]; *Sanum* Award at [80], [81], [85].
32. *LHNV* Award at [87]; *Sanum* Award at [85].

33. *LHNV* Award at [87], [97]; *Sanum* Award at [85], [95].
34. *LHNV* Award at [82]; *Sanum* Award at [80].
35. *LHNV* Award at [83]; *Sanum* Award at [81].
36. *LHNV* Award at [105]; *Sanum* Award at [103], citing Article 16(1) of the UN Convention Against Corruption and Article 1(1) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
37. *LHNV* Award at [102]; *Sanum* Award at [100].
38. *LHNV* Award at [106]; *Sanum* Award at [104].
39. See generally Caprasse and Tecqmenne 2022.
40. *LHNV* Award at [107]; *Sanum* Award at [105].
41. *LHNV* Award at [107]; *Sanum* Award at [105].
42. *Metal-Tech Ltd. v. Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, 4 October 2013 (*Metal-Tech* Award) at [293].
43. *LHNV* Award at [105]; *Sanum* Award at [103].
44. *LHNV* Award at [108]; *Sanum* Award at [106], citing *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Award dated 22 June 2010) at [424].
45. *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* ICSID Case No ARB/05/15, (Award dated 1 June 2009) (*Waguih Elie v. Egypt* Award).
46. *Waguih Elie v Egypt* Award at [326].
47. *LHNV* Award at [110]; *Sanum* Award at [108].
48. *LHNV* Award at [109]-[110]; *Sanum* Award at [107]-[108].
49. *LHNV* Award at [110]; *Sanum* Award at [108].
50. *LHNV* Award at [111]; *Sanum* Award at [109].
51. Caprasse and Tecqmenne (2022), p. 543.
52. *LHNV* Award at [113]; *Sanum* Award at [111].
53. *LHNV* Award at [123]; *Sanum* Award at [122].
54. *LHNV* Award at [124]; *Sanum* Award at [123].
55. *LHNV* Award at [124]; *Sanum* Award at [123].
56. *LHNV* Award at [127]; *Sanum* Award at [126].
57. *LHNV* Award at [129]–[130]; *Sanum* Award at [128]–[129].
58. *LHNV* Award at [131], [133]; *Sanum* Award at [130], [132].
59. *LHNV* Award at [134]; *Sanum* Award at [133].
60. *LHNV* Award at [137]–[138]; *Sanum* Award at [136]–[137].
61. *LHNV* Award at [139]; *Sanum* Award at [138].
62. *LHNV* Award at [148]; *Sanum* Award at [147].
63. *LHNV* Award at [148]; *Sanum* Award at [147].
64. *LHNV* Award at [149]–[151]; *Sanum* Award at [148]–[150].
65. *LHNV* Award at [154]; *Sanum* Award at [153].
66. Nothing in the Awards appear to show that the Tribunals considered the 'clear and compelling evidence' standard was any different to 'clear and convincing evidence'. We assume for the purposes of this chapter that the Tribunals treated these two standards as one and the same. See Caprasse and Tecqmenne 2022, pp. 529, 533–541, 543.
67. See Chapter 7 in this volume.
68. *LHNV* Award at [170]; *Sanum* Award at [169].
69. *LHNV* Award at [171]; *Sanum* Award at [170].
70. *LHNV* Award at [238].
71. *LHNV* Award at [239].
72. *LHNV* Award at [260].
73. *LHNV* Award at [265].
74. *LHNV* Award at [265]–[269].
75. *LHNV* Award at [106]; *Sanum* Award at [104].
76. *LHNV* Award at [127]; *Sanum* Award at [126].
77. *LHNV* Award at [139]; *Sanum* Award at [138].

78. *LHNV* Award at [148]; *Sanum* Award at [147].
79. *LHNV* Award at [157]; *Sanum* Award at [156].
80. *LHNV* Award at [157]; *Sanum* Award at [156].
81. *LHNV* Award at [233]; *Sanum* Award at [171].
82. *LHNV* Award at [235]; *Sanum* Award at [173].
83. *LHNV* Award at [236]; *Sanum* Award at [174].
84. *LHNV* Award at [237]; *Sanum* Award at [175].
85. *LHNV* Award at [239]; *Sanum* Award at [177].
86. See Weeramantry and Packer (2023), citing *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 183 (endorsing the balance of probabilities standard, but stating that '*it will where necessary adopt a more nuanced approach and will decide in each discrete instance*' whether the allegation had '*been proved on the basis of the entire body of direct and indirect evidence before it*.'); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 244 (finding that the standard of proof was the 'balance of probabilities' but that a tribunal must '*tak[e] into account that more persuasive evidence is required for implausible facts*'); and *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 124 (not taking a position on the standard of proof but stating that it would approach the issues on the basis that the claimant had to show its assertions were '*more likely than not to be true'*).
87. See Weeramantry and Packer (2023), citing *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 492 (evidence must be 'clear and convincing'); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 479 ('*evidence must be clear and convincing*'); *Oostergetel v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 303 ('*Mere insinuations cannot meet the burden of proof [for allegations of corruption]*'); and *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009, paras 325–326 ('*The Tribunal accepts the Claimants' submission [of a standard of clear and convincing evidence]. It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof*'). See also *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014, para. 163 (evidence must be 'concrete and decisive').
88. Llamzon 2014; Caprasse and Tecqmenne 2022, p. 540.
89. *Metal-Tech* Award at [243]. This finding in *Metal-Tech* was endorsed by *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (with Reasons), 10 November 2017, paras. 304–306, which held that a finding of corruption gives rise to 'serious consequences' and therefore must be mased on 'solid evidence'.
90. *Metal-Tech* Award at [293].
91. See e.g. *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"),* ICSID Case No. ARB/10/18, Award, 25 February 2019.
92. *Metal-Tech* Award at [199]–[226].
93. *LHNV* Award at [107]; *Sanum* Award at [105]: summarising Laos's argument, 'if corruption is to be combatted effectively, it is necessary to rely on inferences from circumstantial evidence. A reasonable approach is to identify "red flags" which, if established, require the alleged perpetrators to provide an exculpatory explanation of otherwise suspicious conduct.').
94. *LHNV* Award at [106]; *Sanum* Award at [104].
95. *LHNV* Award at [112]; *Sanum* Award at [111].
96. *Wena Hotels Ltd. v. Arap Republic of Egypt* Case No. ARB/98/4 (Award dated 8 December 2000) at [116].
97. Reid and Zamour 2022, at III.B(i).

98. Chapter 15 in this volume notes that there are difficulties in investigating complex allegations of corruption, especially for developing economies. Tribunals may consider adopting a higher standard of proof, although this may mean lengthier arbitral proceedings.
99. For example in *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009, the claimant-investor alleged corruption against principals of the state. There, the investor alleged that public officers—purportedly on behalf of the Prime Minister—solicited or extorted bribes of USD2.5 million from investors to extend the investment agreement. EDF argued that all of the acts of certain government-controlled agencies of Romania were allegedly part of 'an orchestrated action to take the investor's investment in retaliation for his refusal to pay bribes' and were thus attributable to the state. The Tribunal found that a request for a bribe by a state agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy. See [221]–[237]. The Tribunal concluded that the claimant had not discharged its burden of proof with respect to its allegation of bribery solicitation by the state, and therefore no FET violation can be held by the Tribunal to be present as to the allegation that a bribe was solicited to extend the agreement.
100. See e.g., *Metal-Tech* Award at [325]–[326].
101. See e.g., *Metal-Tech* Award at [389].
102. Llamzon 2014, p. 12.
103. *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award, 27 December 2016. The Award has not been made public. Summaries of this award have been published in Djanic 2017 and Peterson and Djanic 2017.
104. Moustafa 2021; see also U.S. Department of State 2021. See however, Llamzon 2014, p. 7.
105. International Finance Corporation 2021.
106. Vongphachanh 2022a.
107. World Bank Group 2020, at p. 16.
108. Llamzon 2014, p. 25; see also e.g., Alesina and Weder 2002.
109. Pieth 2021 at p. 8.
110. US Department of State (2021) Investment Climate Statements: Laos.
111. UNODC Regional Office for Southeast Asia and the Pacific 2021.
112. UNODC Regional Office for Southeast Asia and the Pacific 2022.
113. Vongphachanh 2022a.
114. Vongphachanh 2022b.
115. See e.g., Transparency International and UNCAC Coalition (2014), *Using the UN Convention against Corruption to Advance Anti-corruption Efforts: A Guide.*
116. See e.g., Article 10 of the Japan–Lao People's Democratic Republic BIT (2008): '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'. If such a provision were present in the applicable investment treaties in the BIT Proceedings, the Tribunals could potentially have relied on the obligation to prevent and combat corruption to strengthen its view that Laos must bear some consequences for failing to investigate corruption by its officials.
117. https://www.transparency.org/en/countries/laos
118. *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic*, PCA Case No 2010–5, Award dated 19 September 2013 (*ECE Projektmanagement*).
119. *ECE Projektmanagement* at [4.879].
120. *LHNV Award* at [109]; *Sanum* Award at [107].
121. *LHNV* Award at [106]; *Sanum* Award at [104].
122. *LHNV* Award at [278].
123. *LHNV* Award at [279]–[280].
124. *LHNV* Award at [280].
125. *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228; [2021] SGHC(I) 10 (*LHNV* SICC (HC)) at [25]–[26].

126. *LHNV* SICC (HC) at [363].
127. *LHNV* SICC (HC) at [25].
128. *LHNV* SICC (HC) at [24], [54].
129. *LHNV* SICC (HC) at [58].
130. PCA Procedural Order 9; ICSID Procedural Order 11.
131. PCA Procedural Order 12; ICSID Procedural Order 14.
132. PCA Procedural Order 13; ICSID Procedural Order 15.
133. *LHNV* SICC (HC) at [68].
134. *LHNV* SICC (HC) at [71].
135. *LHNV* SICC (HC) at [104].
136. *LHNV* SICC (HC) at [104].
137. *LHNV* SICC (HC) at [130].
138. *LHNV* SICC (HC) at [142]–[143].
139. *LHNV* SICC (HC) at [153].
140. *LHNV* SICC (HC) at [73]–[77], [182]–[184], [200].
141. *LHNV* SICC (HC) at [205]–[234].
142. *LHNV* SICC (HC) at [93]–[94].
143. *Lao Holdings NV v. Government of the Lao People's Democratic Republic and another matter* [2023] 1 SLR 55; [2022] SGCA(I) 9 (*LHNV* SICC (CA)) at [102].
144. *LHNV* SICC (CA) at [112].
145. *LHNV* SICC (CA) at [111].
146. *LHNV* SICC (CA) at [139].
147. *LHNV* SICC (CA) at [158]–[159].
148. *LHNV* SICC (CA) at [156]–[160].
149. *LHNV* SICC (HC) at [126]–[130], [144].
150. *LHNV* SICC (HC) at [153].
151. On its own motion, or voluntarily.
152. See Hwang and Lim 2012, pp. 14–16.

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