

Penal Norms as Structural Correctives in International Investment Law

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Abstract

The article observes the role of criminal norms as structural corrective mechanisms in international investment law, marked by the questioning of the legitimacy of ISDS and the intensification of corporate responsibility requirements. It draws on recent case law and regulatory developments in the fight against corruption, money laundering, transnational fraud and violations of Environmental, Social and Governance (ESG) standards. Thus, criminal law norms, which until now functioned exclusively as external repressive instruments, have begun to manifest themselves as factors of rebalancing between investor protection and the public interests of states. Methodologically, the research combines doctrinal analysis, examination of arbitration practice, and evaluation of recent legislative trends. The results indicate the positive effect of criminal law in the structure of investment treaties, contributing to the consolidation of the clean investment standard, the limitation of abuse of rights and the strengthening of the coherence of the fragmented international legal order. The conclusion supports the need to explicitly establish criteria of criminal legality in the assessment of jurisdiction and substance in investment arbitration.

Keywords: criminal law, international investment law, Investor–State Dispute Settlement (ISDS), corporate criminal liability, investment legality, legal fragmentation, international public order.

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1. Introduction

The intersection between international investment law and criminal law has become a source of friction in recent years, with investors invoking treaty protections against state measures, and states invoke or exercise criminal law and public policy powers such as anti-corruption, anti-money laundering, confiscation, combating organised crime, and national security. Some investments or their chains of formation

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and operation may be affected by criminal illegality if we refer to corruption in obtaining licences and contracts, money laundering through trade in natural resources, document fraud or obstruction of justice. Recent literature on corruption allegations and illegality objections in the *Investor–State Dispute Settlement* (ISDS) deals with these issues mainly as procedural defences regarding jurisdiction/admissibility or as evidentiary issues such as the standard and burden of proof, red flags, etc.⁴

Therefore, this article presents readers with a more ambitious thesis, according to which criminal law rules can function as a corrective to the investment regime, not just as defensive exceptions. Corrective means a set of mechanisms that rebalance the ISDS architecture by: (i) conditioning access to protection as filters of legality and integrity, (ii) adapting remedies and amounts through contributory fault, cost shifting, or inadmissibility, (iii) strengthening the integrity of the procedure through codes of conduct, transparency rules and evidentiary due diligence, and (iv) prudently integrating the results of domestic or extraterritorial criminal enforcement without allowing state abuse through prosecutions as a pretext, which leads to lawfare.⁵

The empirical analysis is based on four decisions handed down in cases considered relevant in recent years, chosen for their criminal density:

1. *BSG Resources v. Guinea* (ICSID, 18 May 2022) relevant to corruption in obtaining mining rights; arbitral award: inadmissibility and reasonable certainty/intimate conviction standard of proof.⁶

2. *Kaloti v. Peru* (ICSID, 14 May 2024) in which the investor claims damages on the basis of money laundering investigations and preventive seizure, and the tribunal dismisses the case for lack of investment (no jurisdiction *ratione materiae*).⁷

3. *UAB Garsu Pasaulis v. Kyrgyz Republic* (UNCITRAL/PCA, 8 April 2024), concerning a defence of corruption related to a public procurement; the tribunal accepts the relevance of red flags, but notes the insufficiency of evidence to establish the bribery alleged against the investor.⁸

4. *Sanum Investments v. Laos* (ICSID ad hoc, 20 December 2024), a complex dispute involving allegations of corruption and obstruction of justice as grounds for inadmissibility and abuse of process, respectively, in which the tribunal rejects the objection of abuse of process and finds, on a separate count, expropriation without

⁴ Olivier Caprasse and Maxime Tecqmenne, 'The Evidence of Corruption in Investment Arbitration,' in *Journal of International Arbitration*, ed. Maxi Scherer 39, no. 4 (2022): 519–548, https://orbi.uliege.be/bitstream/2268/294921/2/OC_2022_JOIA_Evid.pdf (accessed 22 January 2026), paras. 526, 544.

⁵ Martin Jarrett, 'Introducing the Illegality-Curing Doctrine,' *ICSID Review – Foreign Investment Law Journal* 40, no. 1 (Winter 2025): 139–155, <https://doi.org/10.1093/icsidreview/siaf006>. See also Cristina Elena Popa Tache and Cătălin-Silviu Săraru, 'Lawfare, Between Its (Un)Limits and Transdisciplinarity,' *Precedente Revista Juridica* 23 (2023): 37–66, <https://doi.org/10.18046/prec.v23.5889>.

⁶ *BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, and BSG Resources (Guinea) Sàrl v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award, International Centre for Settlement of Investment Disputes (ICSID), [Award, ICSID, 18 May 2022], https://icsidfiles.worldbank.org/icsid/ICSID_BLOBS/OnlineAwards/C3765/DS17687_En.pdf.

⁷ *Kaloti Metals & Logistics, LLC v. Republic of Peru*, ICSID Case No. ARB/21/29, International Centre for Settlement of Investment Disputes (ICSID), [Award, ICSID, 14 May 2024], <https://www.italaw.com/sites/default/files/case-documents/italaw180987.pdf>.

⁸ *UAB 'Garsu Pasaulis' v. The Kyrgyz Republic*, UNCITRAL Arbitration (1976 Rules), [Award, UNCITRAL Arbitration, 8 April 2024], <https://www.italaw.com/sites/default/files/case-documents/italaw182552.pdf>.

compensation in violation of the treaty.⁹

For the dimension of extraterritorial criminal enforcement relevant to investors and for assessing the integrity of the investment, the article uses three official benchmarks: the coordinated Glencore resolution, the sanction in the United Kingdom, and the conviction of Lafarge in the first American corporate material support case (DOJ, 18 October 2022).¹⁰

It should be noted that in recent practice, criminal law operates in ISDS both through the filter channel relating to the legality of the investment, inadmissibility for corruption, and the police powers channel through the legitimacy of the state's criminal/administrative-criminal measures, as well as through the procedural integrity channel relating to abuse of process, obstruction, codes of conduct, etc.

Public policy recommendations are formulated for: (i) treaty drafters suggesting anti-corruption and due diligence clauses, (ii) courts and institutions regarding standardisation of red flags and evidence management, (iii) states to avoid opportunistic criminalisation of investment conflicts through due process guarantees and AML (Anti-Money Laundering) traceability, (iv) European AML architecture and consistency between beneficial ownership transparency and investment protection.¹¹

International investment law has historically been constructed as a regime of protection against the risks of arbitrary exercise of state power over foreign capital, in particular through standards such as fair and equitable treatment and protection against expropriation without compensation. Currently, systemic criticism focuses on the structural asymmetry caused by investor rights but limited obligations, the risk of a chilling effect on public policy, and the lack of legitimacy/integrity of procedures. An important part of the recent institutional response can be found in procedural and governance reforms such as the ICSID 2022 amendments, the UNCITRAL WGIII reform processes, codes of conduct.¹²

In this equation, the criminal component has a dual nature. On the one hand, criminal law protects economic public order in the sense that it combats corruption, money laundering, fraud in public procurement and organised crime, revealing the illicit roots of certain investments and thus challenging the legitimacy of treaty protection. On the other hand, however, criminal enforcement can become a tool of pressure used for investigations, seizures, licence revocations, confiscations that affect the investment and can trigger ISDS, putting the courts in the position of assessing whether the state acted *bona fide* within the framework of police powers or whether it masked an expropriation

⁹ *Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1, [Decision on Jurisdiction, Admissibility and Liability, ICSID, 20 December 2024], International Centre for Settlement of Investment Disputes (ICSID), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6307/DS20405_En.pdf.

¹⁰ U.S. Department of Justice, Office of Public Affairs, 'Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes,' press release no. 22-554, 24 May 2022, <https://www.justice.gov/archives/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>.

¹¹ Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (text with EEA relevance), OJ L, 19 June 2024, <https://eur-lex.europa.eu/eli/reg/2024/1624/oj/eng>.

¹² For example, International Centre for Settlement of Investment Disputes (ICSID), *ICSID Rules and Regulations (as amended effective 1 July 2022)* (Washington, DC: ICSID, 2022), <https://icsid.worldbank.org/resources/rules-amendments>.

or a treaty violation under the guise of criminal action.¹³

2. State of Research, Recent Literature and Some Observations

The research question is how can criminal law rules function not only as episodic defences, but as corrective mechanisms that strengthen the rule of law in the investment regime, without turning criminal law into a loophole for abuse or a pretext for impunity? In operational terms and to support the identification of the best legal avenues, the article answers three questions:

1. What legal functions do criminal law rules fulfil in recent ISDS practice, particularly in terms of jurisdiction/admissibility, merits, remedies, costs, and procedural integrity?

2. How does ISDS interact with domestic and extraterritorial criminal enforcement relevant to investors and the legitimacy of investment?

3. What set of mechanisms and safeguards can transform criminal law into a structural corrective rather than a factor of instability or moral hazard?

In recent literature, two approaches are dominant. The first concerns the proof of corruption and its procedural effects. Analysis of case law shows significant variations in the standard of proof and in the use of circumstantial evidence (*faisceau d'indices* / red flags), as well as tension between clear and convincing evidence and lower standards justified by the hidden nature of corruption¹⁴. In the same vein, empirical research on 91 cases (1992–2022) proposes a set of ‘red flags’ and links these indicators to an anti-corruption due diligence model that can influence the burden of proof and cost allocation in ISDS.¹⁵

The second direction deals with investor accountability and procedural infrastructure, analysing the conditioning of access to arbitration on investor conduct, the role of legality clauses, possibilities for reducing compensation for contributory negligence, and limitations on counterclaims by the state.¹⁶ A recent and relevant contribution to the articulation of criminal law as a corrective measure is the illegality-curing doctrine:¹⁷ the possibility that certain illegalities in the constitution of the investment may be cured through domestic proceedings, with implications for the jurisdiction of the tribunal and the balance between investor and state responsibility.

In terms of treaties, empirical analysis of anti-corruption clauses and legality clauses in investment agreements (1980–2023) suggests a pattern whereby many states include legality clauses that can exclude illicit investments, but avoid symmetrical anti-corruption clauses, which maintains an asymmetry of incentives.¹⁸

¹³ *Kaloti Metals v. Peru*, ICSID Case No. ARB/21/29, paras 95, 315.

¹⁴ Caprasse and Tecqmenne, ‘Evidence of Corruption,’ paras. 526, 544.

¹⁵ Yarik Kryvoi and Aleksander Godhe, ‘Enhancing Anti-Corruption via Investment Arbitration: From Red Flags to Due Diligence,’ *Journal of International Dispute Settlement* 16, no. 1 (March 2025): idae020, <https://doi.org/10.1093/jnlids/idae020>.

¹⁶ Martin Jarrett, Sergio Puig, and Steven Ratner, ‘Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals,’ *Journal of International Dispute Settlement* 14 (2023): 259–280, <https://doi.org/10.1093/jnlids/idab035>, 268–273.

¹⁷ Jarrett, ‘Illegality-Curing Doctrine,’ p. 140.

¹⁸ Nobumichi Teramura and Luke Nottage, ‘Corruption-Related Provisions in East and South Asian Investment Agreements: An Empirical Analysis,’ *Journal of International Economic Law* 28, no. 2 (June 2025): 157–183, <https://doi.org/10.1093/jiel/jgaf013>.

2.1. Theoretical Framework: From Criminal Defence to Structural Corrective Measures

For interested specialists, a conceptual shift is useful in the sense that we treat criminal law not as an external exception to investments, but as a normative infrastructure of transnational economic public order. In recent rulings, courts characterise the prohibition of corruption as an element of transnational public order and justify procedural sanctions such as inadmissibility based on this qualification.¹⁹

Corrective measures are understood to mean four sets of mechanisms:

a) Access corrective measures (*ex ante*/gateway) and conditioning investment protection on integrity through legality clauses, anti-corruption clauses, transparency of the beneficial owner, AML/CFT due diligence.

b) Evidentiary and procedural corrective measures (i.e. the process as a filter) through red flags, appropriately adapted burden of proof, cooperation with domestic authorities, evidentiary management in criminal cases, without violating the principles of adversarial proceedings.

c) Remedial corrective measures in the sense of deterrence, such as inadmissibility, cost shifting, reduction of damages for investor fault, recognition of police powers when criminal proceedings are *bona fide*.

d) Institutional integrity remedies, consisting of codes of conduct for ISDS arbitrators/judges and procedural reforms that increase confidence in impartiality and integrity.

The thesis of the article is that these corrective measures can be coherently articulated in a dual model in the sense that the investment must be worthy of protection (clean investment) and the state must be worthy of criminal deference (enforcement without arbitrariness). The practice from 2022 to 2024 presented in the case examples at the beginning of this article provides sufficient empirical material to show that tribunals are already operating in a somewhat fragmented manner on both axes.

2.2. Methodology

The methodology is mixed, appropriate for a doctrinal article in an international investment law journal, but informed by the sensitivity of business criminal law to evidence, fault and fair trial guarantees. In fact, this is the particularity that gives it scientific relevance and novelty. The analysis used a non-statistical qualitative method, based on the following variables: (1) type of criminal law invoked (corruption, AML, obstruction, related offences), (2) procedural position (jurisdiction, admissibility, merits, remedies), (3) standard of proof and type of evidence (direct vs. circumstantial/red flags), (4) legal consequences (inadmissibility, lack of jurisdiction, police powers deference, finding of treaty violation), (5) governance/integrity measures (costs, public order, codes of conduct).

The limitations of the analysis stem from the confidentiality of part of the ISDS practice in the field of corruption/money laundering recognised in recent literature; from the impossibility of quantitative generalisations from four cases; and from differences in treaties and procedural rules that reduce perfect comparability.

¹⁹ *BSG Resources v. Guinea*, ICSID Case No. ARB/14/22, para 1132.

3. Results

Comparative table prepared by the authors: ISDS and criminal enforcement with investment impact.

Comparative table: ISDS and criminal enforcement with investment impact					
Case/action	Year	Court/ Forum	Criminal election / criminal matter	Outcome (on criminal merits)	Relevance to thesis
<i>BSG Resources Limited v. Republic of Guinea</i>	2022	ICSID	Corruption (payments/influence to obtain mining rights); transnational public policy; evidentiary standard of "reasonable certainty/intimate conviction"	Investor claims declared inadmissible; costs mostly against the investor; tribunal adopts evidentiary standard below "clear and convincing" and justifies this by the covert nature of corruption	Paradigmatic example of access corrective in the sense that tainted investment loses protection; criminal law structurally reconfigures access to ISDS through inadmissibility
<i>UAB Garsu Pasaulis v. Kyrgyz Republic</i> (PCA Case No. 2020-59)	2024	UNCITRAL/ PCA	State defence: investments obtained through corruption; use of red flags; existence of guilty pleas by public officials in connection with the tender	The court accepts the relevance of red flags, but notes the insufficiency of evidence to establish the bribery alleged against the investor (and, implicitly, to activate the penalty of inadmissibility)	Shows the limits of criminal redress ; even with a domestic criminal context, linking the investor to corruption remains difficult to prove; requires safeguards against opportunistic use of charges
<i>Kaloti Metals Logistics LLC v. Republic of Peru</i>	2024	ICSID	Money laundering/illegal mining: investigations and preventive seizure of gold shipments; the state invokes criminal prerogative and the complexity of	The tribunal finds lack of jurisdiction <i>ratione materiae</i> (no investment in Peru); does not enter into the merits of the AML allegations; costs against claimant	Structural correction mechanism by defining investment : criminal law is the factual background, but the investment gateway stops litigation in

Case/action	Year	Court/ Forum	Criminal election / criminal matter	Outcome (on criminal merits)	Relevance to thesis
			AML		ISDS
<i>Sanum Investments Limited v. Lao PDR</i> (decision on jurisdiction/admissibility/liability)	2024	ICSID (ad hoc)	and obstruction of justice invoked as grounds for inadmissibility/abuse of process; disputes about the interaction of with criminal investigations and preclusive effects	Tribunal rejects abuse of process objection; addresses defence based on "obstruction of justice"; finds, on a separate head, expropriation without compensation in violation of the treaty	Example of procedural integrity corrective : criminal proceedings may tarnish claims, but do not automatically suspend control over the state; requires an architecture of safeguards and separation of claim heads
Coordinated resolution U.S. Department of Justice – Glencore	2022	DOJ (U.S.)	Foreign bribery (FCPA) and related schemes; extraterritorial application	Guilty plea and significant financial penalties; cooperation and remedies required	Shows that criminal law (e.g. FCPA) is an exogenous corrective to investment: criminal risk affects investor behaviour and clean hands assessment
EU AML Package (Reg. 2024/1624; Dir. 2024/1640; Reg. 2024/1620)	2024	European Union / EUR-Lex	Prevention of the use of the financial system for money laundering/terrorist financing; institutionalisation of AMLA; national FIU/reporting mechanisms	Strengthening due diligence, transparency and cooperation obligations	Penal/AML as preventive infrastructure : facilitates clean investment and proves risks for ISDS

Sources: the primary sources for the above lines are the judgments/decisions and official instruments cited in the text.

3.1. Types of Criminal Proceedings in Recent ISDS Practice

The analysis begins with criminal law as an access filter, namely inadmissibility

for corruption (BSG Resources v. Guinea).²⁰ In BSG Resources v. Guinea (2022), the tribunal explicitly formulates two ideas which, together, have a structural effect: (i) the prohibition of corruption is classified as international/transnational public policy, and tribunals have a responsibility not to assist investments obtained through corruption; (ii) the standard of proof should not be "raised" to levels close to domestic criminal law or beyond reasonable doubt, as corruption is, by its nature, difficult to prove; the tribunal adopts intimate conviction/reasonable certainty and explains this choice.²¹ The result is a procedural sanction whereby all claims deriving from mining rights obtained through corrupt practices are declared inadmissible, and the costs are largely transferred to the claimant²². From the perspective of a corrective measure, this type of ruling as a specific response shapes certain premises in the sense that it conveys that tainted investments do not become insurable through ISDS, even if the state is corrupt and even if the state's actions against the investment are contestable in the abstract.

With regard to criminal law as a defence, but with evidentiary limitations, we will refer to red flags and the investor's insufficient connection.²³ For Garsu Pasaulis v. Kyrgyz Republic (2024), the state's defence has a logic typical of this period, and it is held that the investment/contract was obtained through corruption, and the tribunal must either decline jurisdiction or declare the claims inadmissible in order to prevent the investor from benefiting from the proceeds of crime. The tribunal accepts in principle the usefulness of red flags as circumstantial evidence in corruption cases and admits that the lack of domestic criminal proceedings does not, as such, preclude an arbitral finding of corruption.²⁴

However, the court also notes an indispensable threshold that is reflected in linking the corrupt conduct to the investor. In the relevant passages, it points out that certain evidence invoked is not sufficient to establish that the investor undertook or accepted a bribe to officials in the context of the tender.²⁵ From a criminal law perspective, this corresponds to the intuition that the existence of a corrupt environment or even the conviction of officials is not equivalent to proving the subjective element and the causal link attributable to the investor, in the absence of sufficiently conclusive evidence of his involvement. The case presented is important for the thesis of the article precisely because of the resistance it shows in the sense that criminal law can only be corrective if it has the evidentiary safeguards to prevent the accusation from becoming an instrument of state impunity (corruption as insurance) or an instrument of procedural blackmail.²⁶

Moving forward, we will analyse when criminal law can serve as a backdrop for police powers and as a generator of litigation, but the investment filter stops the case. In

²⁰ Ibid, paras 1121, 1132.

²¹ Ibid, paras 490, 493, 494.

²² Ibid., para 1127: 'The Claimants have paid, through their contributions during the proceeding, 65.93% of the ICSID costs. In accordance with the cost allocation decided by the Tribunal in paragraph 1124 above (Claimants shall bear 80% of the ICSID costs), the Claimants must therefore pay a further 14.07% of the ICSID costs to the Respondent, i.e. USD 301,807.'

²³ Garsu Pasaulis v. Kyrgyz Republic, para. 202.

²⁴ Ibid., para. 201.

²⁵ Ibid., paras. 183, 187.

²⁶ Yarik Kryvoi and Aleksander Godhe, 'Enhancing Anti-Corruption via Investment Arbitration: From Red Flags to Due Diligence,' *Journal of International Dispute Settlement* 16, no. 1 (March 2025): idae020, <https://doi.org/10.1093/jnlids/idae020>.

Kaloti v. Peru (2024), the conflict is triggered by domestic measures related to combating illegal mining and money laundering. In fact, criminal investigations and proceedings targeted gold suppliers and transporters, with preventive measures (immobilisation/seizure) and explicit reference to money laundering.²⁷ The investor argues that the measures are excessive and affect its commercial interests, while the state invokes its sovereign prerogative to investigate crimes and the complexity of AML schemes.²⁸

The structural nature of this case does not stem from a finding of corruption, but rather from the manner in which the tribunal utilises one of the system's gateways, namely the definition of investment. The tribunal finds that the claimant has not demonstrated that it has an activity in Peru which, distinct from its operation in Miami, constitutes an investment within the meaning of the treaty; as a result, it upholds the objection of lack of jurisdiction *ratione materiae* and does not enter into an analysis of liability.²⁹ In the paradigm of structural remedies, this case shows that criminal law (AML/enforcement) can generate ISDS disputes, but not every economic impact in the vicinity of criminal law automatically becomes a protected investment. In a broader context, this function can be read as an anti-abuse measure against the transformation of ISDS into a mechanism for challenging any criminal intervention, but also as a warning that where there is real investment, the tribunal will have to manage more directly the tension between police powers and expropriation/breach of treaty.³⁰

With regard to criminal law as a matter of procedural integrity and preclusive effects without immunity for the state, we refer to the decision in Sanum v. Laos (2024). The case has a complex configuration, in which criminal law appears on two levels, both as a factual and normative basis in the state's argument regarding criminal enterprise, including reference to corruption and domestic criminal provisions, and as a basis for excluding claims on grounds of inadmissibility and abuse of process, invoking previous findings of corruption and obstruction of justice. From the perspective of remedies, two findings are relevant. In the first, the tribunal rejects the objection of abuse of process, implicitly emphasising that this doctrine cannot become a shield that would insulate the state from any treaty review in the case of repeated attacks on an investment.³¹ The second finding lies in the analysis of a specific issue concerning goods/property, where the tribunal concludes that there has been expropriation without compensation, in violation of Article 4 of the treaty.³² The above combination has important criminal-investment implications because, even when the investor is charged with serious conduct such as corruption or obstruction, the tribunal does not automatically abdicate its function of examining the state's measures. What becomes vital is how to separate and substantiate the consequences as inadmissibility, reduction of remedy, rejection on certain grounds, and maintenance of control over due process.

This appears to be a solution for the future institutional design of criminal remedies, namely to avoid both investor impunity and state impunity masked by criminal law.

²⁷ *Kaloti Metals v. Peru*, ICSID Case No. ARB/21/29, paras. 45, 50, 53, 61, 93.

²⁸ *Ibid.*, para. 62 et seq.

²⁹ *Ibid.*, paras 319–387.

³⁰ Martin Jarrett, 'Introducing the Illegality-Curing Doctrine,' *ICSID Review – Foreign Investment Law Journal* 40, no. 1 (Winter 2025): 139–155, <https://doi.org/10.1093/icsidreview/siaf006>.

³¹ *Sanum Investments v. Lao PDR*, ICSID Case No. ADHOC/17/1, para. 709.

³² *Ibid.*, paras. 458–463.

As a summary of the results, we present the three portals through which criminal law restructures ISDS, based on the four cases:

1. The jurisdiction and admissibility portal (clean investment) through which corruption can lead to inadmissibility, and tribunals justify evidentiary standards that make it possible to punish corruption even without direct evidence typical of domestic criminal law (BSG case).

2. The police powers and due process portal, which demonstrates how, in AML contexts, state measures such as investigation, seizure, etc. are placed within the logic of criminal prerogative, but access to ISDS may be blocked by the lack of an investment or, in other cases, will depend on the assessment of good faith and proportionality (Kaloti case).

3. The procedural integrity and preclusion portal, through which allegations of obstruction or fraud on the procedure can be used for inadmissibility and abuse of process, but tribunals may nevertheless refuse to transform these doctrines into immunity, retaining control over the state (Sanum case).

All these results converge with recent literature, pointing to red flags and due diligence as evidentiary tools, the probation of corruption and variation in standards, the procedural infrastructure of investor accountability, and models for managing illegality through internal processes.³³

4. Discussion and Conclusions

Treating criminal law as a structural corrective requires a change of perspective, because we are no longer asking whether the state can oppose corruption as a defence, but how we can design an investment regime in which economic integrity is incorporated and incentives for corruption and money laundering are reduced. In recent literature, this concern appears as a reaction to the asymmetry of the consequences of corruption, where, as a rule, if corruption is proven, *it kills* investor demand but does not create, in the same procedure, symmetrical responsibility for the state.³⁴

An appropriate corrective measure must be compatible with two values that are fundamental in criminal business law, namely preventive efficiency and deterrence, because illicit investments should not be covered by treaties, and secondly, there must be guarantees of legality and fair trial where neither the investor nor the state should be able to exploit the criminal law either through corruption or opportunistic criminalisation.

In BSG Resources, the tribunal explicitly justifies the more flexible standard by the hidden nature of corruption, but anchors it in a requirement of reasonable certainty. This formula is useful because it allows corrupt investments to be sanctioned, but also expresses a limit whereby mere suspicions are not taken into account. In Garsu Pasaulis, the court shows what happens when the investor's link to corruption does not meet the

³³ See generally Yueming Yan, 'References to International Anti-Corruption Conventions in International Investment Arbitration and International Investment Agreements,' in Régis Bismuth, Jan Dunin-Wasowicz, and Philip M. Nichols (eds.), *The Transnationalisation of Anti-Corruption Law*, (London: Routledge, 2021), <https://doi.org/10.4324/9781003174639>.

³⁴ For practical application, see Jorge Farinha and Oscar López-de-Foronda, 'The Impact of Corruption on Investment and Financing in the European Union: New Insights,' *The European Journal of Finance* 30, no. 4 (2024): 339–44, <https://doi.org/10.1080/1351847X.2023.2240846>.

evidentiary threshold, namely that the defence does not automatically appear as a means of exclusion.

4.1. Criminal Corrective Mechanisms: Proposed Model

We propose a four-layer model, consistent with the practice and reforms of recent years. The first is the access layer, consisting of legality clauses and adapted anti-corruption/AML obligations. Analysis of the treaties shows a prevalence of legality clauses, i.e. the investment must be made in accordance with the law, while anti-corruption clauses are rarer and often aspirational. The recommendation is a clause stating that the investment must be legal at the time of incorporation and throughout its lifetime, not just at the time of making, and that the investor must have and implement an anti-corruption/AML compliance programme proportionate to the risk, with progressive consequences, from cost shifting to reduction of compensation, up to inadmissibility in serious cases. We believe that this idea is in line with the trend in the literature to design procedural infrastructure for investor responsibility.

This first layer is naturally followed by the evidentiary layer consisting of red flags and due diligence as legal technology. Red flags have the advantage of translating the difficulty of proving corruption into a controllable method, and due diligence can function as circumstantial evidence of distance from corruption. At the same time, red flags can become dangerous if used as absolute presumptions. The lesson from BSG is that the court must explicitly indicate the standard and explain why it chooses it. The lesson from Garsu Pasaulis is that, in the absence of a sufficiently convincing link to the investor, red flags should not become a substitute for evidence.

The third layer is remedial, consisting of gradual and symmetrical sanctions. The maximum sanction, namely inadmissibility, seems more appropriate in cases of serious corruption related to the acquisition of the investment. But many penalised cases are more ambiguous if we look at AML violations in the supply chain, due diligence negligence, and regulatory violations without corrupt intent. Here, the corrective measure should use gradual remedies, starting with a reduction in compensation for the investor's fault; cost shifting; and the limitation of certain claims; up to inadmissibility only when there is reasonable certainty of corruption or determining fraud. This brings the investment regime closer to the logic of business criminal law, where sanctions are imposed according to severity and fault.

The final layer, institutional integrity, must be based on codes of conduct and governance. The adoption of the UNCITRAL Code of Conduct for Arbitrators in Investment Dispute Settlement is an example of an integrity mechanism that supports the ability of tribunals to address allegations of corruption without suspicion of bias or conflict.³⁵ At the same time, discussions on ISDS reform at the ICSID/UNCITRAL level are analysed in recent literature as processes with distinct but converging objectives in responding to criticisms of legitimacy.³⁶

³⁵ United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and Commentary* (adopted July 2023), <https://uncitral.un.org/en/codeofconduct>.

³⁶ Jean-Michel Marcoux, Andrea K Bjorklund, Elizabeth A Whitsitt, Lukas Vanhonnaeker, „Discourses of ISDS reform: a comparison of UNCITRAL Working Group III and ICSID processes”, *Journal of International Economic Law*, Volume 27, Issue 2 June 2024: 314–335, <https://doi.org/10.1093/jiel/jgae017>.

4.2. Limits and Safeguards: How to Avoid Criminal Law as a Pretext and Criminal Law as a Shield

A structural corrective must include safeguards against two main risks. The first is pretextual enforcement, when the state uses criminal investigations or seizures as a tool for disguised expropriation or political pressure. Cases such as *Kaloti* show that the discussion about criminal police and the duration of AML procedures is inevitable in ISDS. Even though in that case the tribunal stopped at the lack of investment, arguments regarding the complexity of money laundering and preventive measures are already in the file and may shape future litigation. The second risk is illegality as immunity, when the state takes advantage of corruption, including the corruption of its own officials, to nullify investor protection and avoid liability. We have shown in the previous sections how recent literature observes this imbalance and seeks instruments for symmetrical accountability.

Three guarantees are proposed:

a) An explicit and reasoned evidentiary threshold such as reasonable certainty and adversarial protection, so that courts must explain why they lower or do not lower the standard.

b) Separation of heads in the sense that, even if there is unlawful conduct in one segment, the state should not be immune from control in other segments, and here we presented the *Sanum* lesson where there was a rejection of abuse of process and a finding of expropriation.

c) Due process audit, because when the state invokes criminal law, the court must assess, without substituting the criminal court, whether the measures are bona fide, non-discriminatory and proportionate, this being an idea that resonates with police powers doctrines and standards of treatment. In the absence of jurisdiction, this assessment is not made, but in cases involving real investment, it becomes decisive.

From the above, it follows that in the global economy, investors operate under extraterritorial criminal risks such as foreign bribery, sanctions, or national security. From this perspective, the integration of compliance into the investment structure is achieved if the investor internalises the criminal risk, and then *due diligence* becomes part of the investment, not just compliance. The evidentiary and reputational effect in ISDS exists if official enforcement documents such as plea agreements and sentencing remarks function as strong evidence in investment disputes without eliminating the need for specific connection of conduct to the contested measure. This reduces the scope for investor moral hazard, and investments with illicit components tend to become more detectable and their cost increases.

4.3. Conclusions and Public Policy Recommendations

The main conclusion of the article is that criminal law rules go beyond the scope of a simple investment context and already operate as filters, justifications and integrity standards in ISDS, and recent practice shows that tribunals use criminal law in ways that affect the investment regime. Firstly, when drafting investment treaties and policies, it is recommended to introduce a risk-proportionate anti-corruption/AML due diligence obligation for investors, alongside extended legality clauses for the duration of the investment. To achieve this result, the consequences must be defined in a graduated

manner, i.e. costs, reduction of compensation or inadmissibility. It may be advisable for tribunals and arbitral institutions to adopt an explicit approach to the standard of proof in corruption cases and to use red flags as a method, not as a presumption, and choices such as reasonable certainty must be justified for predictability and enforceability. There must be coordination between host and home states in criminal enforcement so that it does not become pretextual. Where police powers are invoked, there must also be traceability, transparency and due process, as it is necessary to prosecute the public officials involved, otherwise the risk of corruption as insurance increases.

The EU and jurisdictions with robust AML mechanisms should use the AML 2024 package (or the latest update) as the infrastructure for clean investment, so transparency of the beneficial owner, reporting and institutional cooperation should be pursued, which can make it easier to prove or disprove illegality in investment disputes, reducing arbitrariness and increasing the consistency of decisions.

The implementation of the UNCITRAL Code for Arbitrators should be treated as part of the system's capacity to handle allegations of corruption and abuse, given that without procedural integrity, the sanctioning of illicit investments is questionable in terms of legitimacy. In summary, criminal law can only be corrective if it is designed along two axes simultaneously: both the exclusion of illegitimate investments and control over the state to prevent criminal abuse. Recent practice shows that both axes are already present, but in a fragmented manner.

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